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***435 AN INTERNET-BASED MENTAL DISABILITY LAW PROGRAM: IMPLICATIONS FOR
SOCIAL CHANGE IN NATIONS WITH DEVELOPING ECONOMIES**

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INTRODUCTION

The past thirty-five years have witnessed a revolution in U.S. mental disability law. This revolution is one that largely constitutionalized virtually every aspect of the involuntary civil commitment and release process, as well as most pressure points in the course of institutionalization (the right to treatment, the right to refuse treatment, the right to the least restrictive alternative course of treatment). It saw the first broad-based federal civil rights statutes enacted on behalf of persons with mental disabilities, [\[FN1\]](#) and the creation of a patients' bar to provide legal representation *436 to such persons. [\[FN2\]](#) Paradoxically, this revolution also saw a ferocious backlash against forensic patients, especially, but not solely, persons found not guilty by reason of insanity. [\[FN3\]](#) It also saw a widening of the net that, by blurring the boundaries of civil and criminal mental disability law, has increased the categories of persons subject to the involuntary civil commitment power to now include those charged with certain sexually violent offenses and persons subject to "assisted outpatient commitment." [\[FN4\]](#) The revolution continues today, and there is no reason *437 to expect any abatement in case law, statutory amendments, or advocacy initiatives in the coming years.

But it is a revolution that has largely been a U.S. movement. Although there have been important developments in other nations--in both common and civil law countries [\[FN5\]](#)--by and large, this has been a U.S. revolution. For a variety of economic, social, and legal reasons, few nations with developing economies have replicated this revolution. [\[FN6\]](#)

Human rights activists and mental health advocates, however, have recently begun to expand their work to investigate conditions in other nations and to seek to make basic, systemic changes in the ways that persons with mental disabilities are treated. [\[FN7\]](#) Much of this rapidly-evolving international mental disability law is based on the principles first articulated in the U.S. constitutional decisions, [\[FN8\]](#) which are set out in documents such as the U.N.'s Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care ("MI Principles"). [\[FN9\]](#)

It has been difficult to bring this education and information *438 in economic, efficient, comprehensive, and meaningful ways to nations with developing economies. [\[FN10\]](#) The new technological revolution, [\[FN11\]](#) however,

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has brought with it the tremendous potential, barely explored as yet, of using the Internet as a teaching tool. What is known is that, in a virtual classroom, interaction and cross-fertilization of ideas are nurtured and encouraged; and teaching and learning are accomplished across all geographic, political, and economic barriers. [\[FN12\]](#)

Through the technology of Internet-based education, the author has created a program of on-line mental disability law courses for attorneys, activists, advocates, important stakeholder groups (consisting of consumers and users of psychiatric services, sometimes referred to as "survivor groups"), mental health professionals, and governmental officials in such nations. [\[FN13\]](#) The object of these courses is to teach participants the bases of U.S. constitutional mental disability law (principles that form the basis of international human rights law in this area), and to encourage the creation and expansion of grass-roots advocacy movements that optimally may lead to lasting, progressive change in this area. [\[FN14\]](#) This is especially timely in light of recent *439 research demonstrating how the Internet has already become an important provider of advocacy services and advocacy information to many persons with disabilities, [\[FN15\]](#) and how inaccessible most current websites are to many persons with disabilities. [\[FN16\]](#)

First, this Article briefly discusses the use of distance learning in a law school environment, and considers the special implications of distance learning for persons with disabilities. It then explains the structure and rationale of these courses, reports on a course section taught in Nicaragua in the Fall-Winter of 2002, and considers plans to replicate the Nicaraguan experience throughout other nations with developing economies in Africa, Asia, Central America, and Central and Eastern Europe. Finally, this Article assesses the potential impact of such a course on developing-economy nations.

I. DISTANCE LEARNING IN LAW SCHOOLS

Distance learning is generally defined as "communication which connects instructors and students who are separated by geography and, often, by time," or as "the electronic connection of multiple classrooms." [\[FN17\]](#) There are many different ways through which law schools and universities have adopted distance learning models: "[P]artnerships between public or private sector universities and for-profit corporations to market distance learning; for-profit subsidiaries, wholly-owned by a public or private nonprofit university; for-profit subsidiaries of a public or private nonprofit university, funded by venture capital; and for-profit distance learning institutions created and owned by a *440 for-profit corporation." [\[FN18\]](#) Professor Henry Perritt has articulated the challenge of creating such educational models in this way:

United States law schools have an important role to play in connection with these revolutionary phenomena. They can and should support electronic publishing and virtual library initiatives by public institutions. They must continue to perform their functions of generating intellectual and human capital in the form of scholarship and well-educated graduates, taking into account the new substantive legal issues presented by the Internet. It is increasingly clear that the Internet provides a new set of educational tools--tools for "distance learning." More schools must begin to understand how these tools can be used to improve the quality of their teaching. [\[FN19\]](#)

Distance learning courses enable students to share different perspectives, and provide a new environment for teaching law students to collaborate with other types of professionals, [\[FN20\]](#) a characteristic increasingly essential to the effective practice of law. [\[FN21\]](#) Distance learning--the use of computers, telecommunications, and digital networking to permit learning outside the boundaries of the classroom--"holds the potential to expand the availability of cross-listed courses by reducing these barriers . . . [and] can provide professors of cross-listed courses with pedagogical tools for enhancing interdisciplinary communication and collaboration, and circumventing some of the problems inherent in teaching students from different disciplines." [\[FN22\]](#)

*441 In the law school setting, distance learning allows students from all over the world to attend a distant law school without the trouble and expense of leaving home. [\[FN23\]](#) In response to technological developments and the "inevitability" of change, [\[FN24\]](#) the American Bar Association ("ABA") has amended its law school standards to allow distance learning as part of the law school curriculum. Under Standard 306 ("Distance Education"):

(a) A law school may offer credit toward the J.D. degree for study offered through distance education consistent with the provisions of this Standard and Interpretations of this Standard. Such credit shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school's regular curriculum approval process.

(b) Distance education is an educational process characterized by the separation, in time or place, between instructor

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and student. It includes courses offered principally by means of:

- (1) technological transmission, including Internet, open broadcast, closed circuit, cable, microwave, or satellite transmission;
- (2) audio or computer conferencing;
- (3) video cassettes or discs; or
- (4) correspondence. . . . [\[FN25\]](#)

Self-evidently, distance learning has great implications for international legal education as well as for domestic legal education. A report in the Fletcher Forum of World Affairs concluded: "[T]here is no doubt that ICTs [Information and Communication Technologies], if properly adopted and implemented, can bring economic and cultural opportunities to developing countries. Education facilities may be greatly improved through distance *442 learning and Internet access." [\[FN26\]](#)

II. THE SPECIAL IMPLICATIONS OF DISTANCE LEARNING EDUCATION FOR PERSONS WITH DISABILITIES

One of the specific challenges in creating a distance learning pedagogy in mental disability law is the need to provide a program that can also be meaningfully accessed by persons with disabilities. [\[FN27\]](#) For example, a recent study by the U.K.-based Disability Rights Commission showed that eighty-one percent of British websites are inaccessible to persons with disabilities. [\[FN28\]](#) Scholars have started to explore how the Internet can provide individuals with disabilities the tools to enable them to live independently, [\[FN29\]](#) and "to gain greater independence and social integration," [\[FN30\]](#) and have thus begun to call for a coordinated study to examine the extent to which Internet sites are accessible to persons with disabilities. [\[FN31\]](#) A study of 200 websites affiliated with centers for independent living concluded:

Accessible technology for persons with disabilities has the potential to enhance independence in life. Its future development holds promise for a wide range of persons with disabilities. . . . The commitment to digital equality as a civil right must be founded in policy that incorporates accessibility and universal design in public and private programs providing *443 technological access to all. [\[FN32\]](#)

At least one new project --Technology for Independence: A Community-Based Resource Center--has been launched with the expressed purpose of "increas[ing] the capacity of community and consumer-directed disability organizations to design, implement, and disseminate research that promotes access to and use of [assisted technology] for independence." [\[FN33\]](#) Another project, the Tech-Dis Technology for Disabilities Information Service, has articulated as its mission "enhancing access for those with. . . disabilities; to learning and teaching, research and administration across higher and further education through the use of information and communication technologies." [\[FN34\]](#) Recently, web designers have begun to understand the importance of making web-sites accessible. [\[FN35\]](#) More specifically on point, legal research search engines have begun to address the needs of persons with physical disabilities through the use of screen readers or screen-enlarging programs to best attempt to 'level the field' via adaptive technology." [\[FN36\]](#) And there has been significant litigation on such questions as whether Internet chat rooms are places of public accommodation for the purposes of the Americans with Disabilities Act ("ADA"). [\[FN37\]](#) In that context, Peter Blanck and his co-authors argue that "[e]xamination of the application of the ADA *444 to Internet services and sites is needed, not only for persons with disabilities, but for all underrepresented individuals in society--the poor and isolated, and the vulnerable." [\[FN38\]](#)

Persons with disabilities are one of the multiple target groups of the courses that are the subject of this Article. [\[FN39\]](#) It is essential that this venture--and other similar ones--have the capacity to reach those persons who are the subject of the statutes, case law and regulations in question, [\[FN40\]](#) no matter where they might be located. [\[FN41\]](#)

III. THE INTERNET COURSES

The first Internet-based courses on mental disability law attempted to disseminate the core universal principles of mental disability law to the full range of activists, advocates, professionals, and stakeholders described above. [\[FN42\]](#) For example, the first *445 course, Survey of Mental Disability Law ("SMDL") includes these components:

- fourteen hours of DVDs;
- a notebook of readings, cases, and materials to supplement the casebook [\[FN43\]](#) and book of readings; [\[FN44\]](#)
- weekly reading assignments with focus questions;
- one or two written assignments;
- on-going, threaded, on-line message boards;
- a weekly, moderated on-line chat room; [\[FN45\]](#) and
- two live, two-day-long seminars, one approximately one month after the course begins, and one at the course conclusion. [\[FN46\]](#)

Courses are also offered via partnerships, both domestically [\[FN47\]](#) and internationally. [\[FN48\]](#) In addition to the pedagogical *446 goals, there are social goals as well for the international sections of the course:

- to establish new partnerships with additional activist groups in the nations in which the course is offered; [\[FN49\]](#)
- to provide participants with a firm grounding in all key aspects of mental disability law in the context of the State's specific (civil law) legal system; [\[FN50\]](#)
- to offer participants the opportunity to learn how to resolve the dichotomy between the law on the books and the law in action, similarly in the specific context of the State in which the course is being offered; and,
- to enable participants to interact in a collaborative way to search for solutions to problems unique to that State. [\[FN51\]](#)

Each of these goals is addressed separately.

A. Establishment of Partnerships

The author worked extensively with mental disability rights activist groups on trips to Central and Eastern Europe, and to Japan, and, as previously noted, led international sections of program courses in Japan. Under the auspices of Mental Disability Rights International ("MDRI"), he presented workshops and advocacy training in Hungary, Estonia, Latvia, Uruguay, and Bulgaria, and similar programs in Poland, Costa Rica, Guatemala, and the Czech Republic. [\[FN52\]](#) He also lectured in Nicaragua at La Universidad Nacional Autónoma de Nicaragua, Leon ("UNAN-Leon") on a variety of criminal law and procedure topics. Subsequently, *447 he worked with lawyers and activists in Taiwan in an effort to create a Pan-Asian mental health advocacy network to be built on the framework of the online courses.

He worked with officials of the Pan-American Health Organization and activists in such groups as the Nicaraguan Association for Community Integration ("ASNIC") and Inclusion-Interamericana [\[FN53\]](#) to create a section of the Internet course in Nicaragua. It was essential that such stakeholders be part of any course to be offered if the program were to have true legitimacy.

B. Provision of Firm-Grounding

In every State, there is a remarkable overlap between the body of decisions that define U.S. constitutional mental disability law and the body of international human rights standards that mandate humane treatment of persons with mental disabilities. [\[FN54\]](#) Internationally, there is a shameful history of human rights abuses in psychiatric institutions: the provision of services in a segregated setting that cuts people off from society, often for life; the arbitrary detention from society that takes place when people are committed to institutions without due process; the denial of people's ability to make choices about their lives when they are put under plenary guardianship; the denial of

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appropriate medical care or basic hygiene in psychiatric facilities; the practice of subjecting people to powerful and dangerous psychotropic medications without adequate standards; and the lack of human rights oversight and enforcement mechanisms to protect against the broad range of abuses in institutions. [\[FN55\]](#)

The MI Principles can be used as a guide to the interpretation of international human rights covenants as they apply to people with mental disabilities. In the case of *Victor Rosario Congo v. Ecuador*, for example, the Inter-American Commission on Human Rights found:

[T]he Commission considers that in the present case the guarantees established [under Article five] of the American *448 Convention must be interpreted in light of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. These principles were adopted by the United Nations General Assembly as a guide to the interpretation in matters of protection of human rights of persons with mental disabilities, which this body regards as a particularly vulnerable group. [\[FN56\]](#)

The case continued:

The UN Principles for the Protection of Persons with Mental Illness are regarded as the most complete standards for protection of the rights of persons with mental disability at the international level. These Principles serve as a guide to States in the design and/or reform of mental health systems and are of utmost utility in evaluating the practices of existing systems. Mental Health Principle 23 establishes that each State must adopt the legislative, judicial, administrative, educational, and other measures that may be necessary to implement them. [\[FN57\]](#)

These principles are also standards of assessment that make meaningful international human rights monitoring by non-governmental organizations ("NGOs") more possible. [\[FN58\]](#)

Besides teaching participants the basics of all the major components of mental disability law--of civil/constitutional mental disability law, institutional mental disability law, and forensic mental disability law--the course illuminates the parallels with international human rights in such a way that participants will be able to most effectively integrate the substance of that law into the practice of mental disability law and in the nations in question.

*449 C. The Law on the Books / Law in Action Dichotomy

There is an inconsistency that has plagued U.S. mental disability law since it began: cases decided by the U.S. Supreme Court level are not followed by the states. The Supreme Court articulates sophisticated doctrine, for example, by mandating dangerousness as a prerequisite for any involuntary civil commitment finding, yet state trial courts ignore that doctrine. [\[FN59\]](#) The Supreme Court issues elaborate guidelines to be used in cases of criminal defendants who will likely never regain their competence to stand trial, yet, nearly thirty years later, half the states ignore these standards. [\[FN60\]](#) This gap is a reflection of the level of pretextuality that permeates U.S. mental disability law. That is:

[T]hat courts 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." 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. . . . [\[FN61\]](#)

As a result of this pretextuality, the law on the books is often little more than an illusion, and "successful" cases brought on behalf of persons with mental disabilities are often little more than "paper victories." [\[FN62\]](#)

Residents of nations with developing economies in Central and South America are no strangers to pretextuality in many *450 other areas of the law and of society. [\[FN63\]](#) One of the aims of this course is to help participants identify the pretexts endemic to mental disability law, and to develop strategies for dealing with these pretexts in their work. For example, an analysis of the European Commission on Human Rights [\[FN64\]](#) concluded that it has interpreted the European Convention on Human Rights "very restrictively in psychiatric cases." [\[FN65\]](#) The cases included in this analysis, which characterize the handcuffing of patients as "therapeutically necessary," [\[FN66\]](#) or sanction the use of seclusion for "disciplinary" purposes, [\[FN67\]](#) certainly bespeak pretextuality. It is essential that such pretextuality be identified and answered, [\[FN68\]](#) and the SMDL course focuses specifically on this issue. [\[FN69\]](#)

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D. Interactive Collaboration

Many of the problems faced in nations with developing economies are regional problems, ones that flow from decades of totalitarian regimes and/or military dictatorships. [\[FN70\]](#) Currently-existing advocacy programs are often modest, and operate on shoestring budgets. An interactive program such as the one described here offers participants an excellent opportunity for ongoing, robust interaction in a supportive environment. [\[FN71\]](#)

*451 One of the features of the course is permanent message boards on the course website. Each week, the instructor begins a new threaded message, discussing that week's readings. All participants are encouraged to join in and to discuss the reading and the videotapes prior to the chatroom session. Chatroom conversations from earlier sections are logged in a special online library, and may be referred to both by students and by professors as a means of enriching the dialogue and discourse. [\[FN72\]](#) Each week in the chatroom, the students and the adjunct professor discuss the readings, focusing on a few of the more critical issues raised in the cases and materials. The conversation is free-wheeling, but always respectful, and new ideas circulate with dizzying speed. After the chatroom sessions, flurries of emails, both to the entire group and to individuals, explore in greater depth some of the ideas pursued in the chatroom. The written assignments build on the readings, the tape viewings, the message boards, and the chatrooms. The course culminates with in-person seminars. [\[FN73\]](#)

IV. THE NICARAGUAN COURSE [\[FN74\]](#)

The author and Professor Henry Dlugacz, a social worker *452 and attorney who has worked extensively to monitor conditions in forensic mental health and correctional institutions, offered the course in Nicaragua in the Fall 2002 semester. [\[FN75\]](#) The instructors traveled to Managua in October and December 2002 to conduct two, two-day seminars with section participants. [\[FN76\]](#) These seminars served multiple purposes: to explain to the participants the critical differences between common law and civil law legal systems; to work with section members more intensively on legal issues in the course that were felt to be the most important to Nicaraguan participants; and to begin working with section members on post-course activities: the publication of a white paper that provides a full overview of the state of mental health care in the State, [\[FN77\]](#) the planning of a national mental health law conference, and the creation of a regional mental health advocacy network. [\[FN78\]](#)

Although the course was officially over in December 2002, the instructors continue to work with section members on this set of post-course activities, and have returned to Nicaragua for meetings with both section members and other activists. For example, the author has since presented a magisterial lecture at a joint meeting of the Seventeenth Central American Congress on Psychiatry, the Fifth Nicaraguan Congress on Psychiatry, the First Regional Symposium on Biological Psychiatry, and the First Regional Symposium on Addictions, attended by many members of *453 the section, and then participated in a panel discussion at the same meeting along with two section members. Such ongoing involvement in the mental disability law system of Nicaragua further increases the likelihood of meaningful social change.

V. FUTURE SECTION ITERATIONS

There are efforts to expand this course to new populations in both Nicaragua and other nations with developing economies in Central America. The instructors have met with the Presiding Justice of the Supreme Court of Nicaragua and with the Director of the Nicaraguan Judicial College to discuss the possibility of offering judicial training to all Nicaraguan judges via the Internet-based course, and have since begun negotiations with other judicial officials to offer the course to the judiciaries of all nations in Central America. In addition, the instructors hope to offer a section of the course in Guatemala, Costa Rica, and elsewhere in the Caribbean/Central American region.

In these ways, the instructors seek to reach activists and advocates in other Central American nations with developing economies, and the judges who must ultimately rule on questions of law that affect persons with mental disabilities. It is clear that each State in the region will present different challenges and will offer different structures for both the delivery of mental health services and for the legal regulation of such services. It is hoped, however, that by modifying the syllabi and seminar presentations, the instructors can take these differences into account and present material that is most important and appropriate to the needs of participants from each nation.

VI. THE ULTIMATE POTENTIAL IMPACT OF SUCH A COURSE ON DEVELOPING-ECONOMY NATIONS

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There has been remarkably little attention paid to mental disability law in nations with developing economies, notwithstanding the fact that studies that have been done unanimously excoriate the quality of institutional care, the lack of community alternatives, the absence of legal advocacy, and the widespread extent of judicial apathy. [\[FN79\]](#) There has been numerically meager, *454 but substantively strong scholarship focusing on these issues in these nations. [\[FN80\]](#) In recent years, scholars and social critics in nations with developing economies have begun to write about the need for expanded distance learning programs in such nations, and how such programs can be an effective force for social change. [\[FN81\]](#) It is hoped that, through the use of the Internet and distance learning technologies, this social change may potentially come about. The author's experience in Nicaragua suggests that this is, indeed, a reasonable goal.

CONCLUSION

The Internet has the capacity to transform and invigorate legal education through the use of distance learning methodologies. The first Internet-based mental disability law course, offered domestically in 2000, has now expanded to include international sections, such as the one in Nicaragua in the Fall 2002 semester. Building on the course's pedagogy, the instructors continued to work with local activists in Nicaragua after the course formally concluded. The instructors are also actively seeking to offer the course both to other important parties in Nicaragua (the judiciary) and to groups in other Central American nations. It is hoped that this model will be successfully replicated in these nations and elsewhere.

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[\[FN1\]](#). See, e.g., [Bd. of Trs. of the Univ. of Ala. v. Garrett](#), 531 U.S. 356 (2001) (Eleventh Amendment barred suits for monetary damages because its authorization in Title I exceeded Congress's power); [Sutton v. United Air Lines](#), 527 U.S. 471 (1999) (persons whose medical or physical impairments are corrected by medication or other methods do not have a "disability" under the [ADA](#)); [Olmstead v. L.C.](#), 527 U.S. 581 (1999) (under Title II of ADA nations are required to provide willing persons with mental disabilities community-based treatment when resources are available); [Kansas v. Hendricks](#), 521 U.S. 346 (1997) (statute is constitutional even though additional confinement follows prison time); [Godinez v. Moran](#), 509 U.S. 389 (1993) (defendant who waives right to counsel need not be more competent than a defendant who does not); [Heller v. Doe](#), 509 U.S. 312 (1993) (statute requiring different standards of proof for committal of persons with mental illness and persons with mental retardation is constitutional); [Riggins v. Nevada](#), 504 U.S. 127 (1992) (reversed conviction because trial court enforced administration of antipsychotic drugs during defendant's trial); [Zinermon v. Burch](#), 494 U.S. 113 (1990) (state is required to inquire into person's with mental illness request for admission to and treatment in mental hospital); [Washington v. Harper](#), 494 U.S. 210 (1990) (the right to be free of medication must be balanced against the state's duty to treat inmates with mental illness and run a safe prison); [City of Cleburne v. Cleburne Living Ctr.](#), 473 U.S. 432 (1985) (mental retardation is a characteristic that the government may take into account); [Jones v. United States](#), 463 U.S. 354 (1983) (there is no correlation between severity of crime committed and time necessary for recovery); [Mills v. Rogers](#), 457 U.S. 291 (1982) (state may recognize greater liberty interests for persons with mental illness than U.S. Constitution); [Youngberg v. Romeo](#), 457 U.S. 307 (1982) (state is under duty to provide institutionalized individual with safe conditions, freedom from bodily restraint, and habilitation); [Vitek v. Jones](#), 445 U.S. 480 (1980) (inmate entitled to due process before he is found to be mentally ill and transferred to a mental hospital); [Addington v. Texas](#), 441 U.S. 418 (1979) (mental illness must be proven by more than a preponderance of evidence); [Parham v. J.R.](#), 442 U.S. 584 (1979) (holding statute requiring neutral fact finder to determine admission of children to state mental health hospitals comports with due process); [O'Connor v. Donaldson](#), 422 U.S. 563 (1975) (unconstitutional to confine a nondangerous person capable of surviving safely in freedom to a mental hospital); [Jackson v. Indiana](#), 406 U.S. 715 (1972) (statute that effectively condemned defendant to permanent institutionalization deprived him of equal protection and due process under the Fourteenth Amendment); [Rennie v. Klein](#), 653 F.2d 836 (3d Cir. 1981) (patients with mental illness committed involuntarily retain their constitutional right to refuse antipsychotic drugs); [Rogers v. Okin](#), 634 F.2d 650 (1st Cir. 1980) (psychiatrists are more well-suited to balancing interests of patients and public safety); [Wyatt v. Stickney](#), 325 F.Supp. 781 (M.D. Ala. 1971); aff'd sub. nom. [Wyatt v. Aderholt](#), 503 F.2d 1305 (5th Cir. 1974) (mentally ill have constitutional right to adequate treatment in mental hospital); [Lessard v. Schmidt](#), 349 F.Supp. 1078 (E.D. Wis. 1972) (a statute that fails to provide person alleged to be mentally ill with adequate

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procedural safeguards is unconstitutional); and, [Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.S.2d 74 \(1986\)](#) (persons with mental illness have right to control their own medical treatment).

[FN2]. See 1 Michael L. Perlin, *Mental Disability Law: Civil and Criminal* § 2B-1 to 2B-15, at 191-292 (2d ed. 1998).

[FN3]. See Perlin, *supra* note 2, § 2A-3.3, at 75-92; § 2C-7.3, at 491-99. For a discussion on "forensic patients" see Donald M. Linhorst & Marilyn A. Turner, *Treatment of Forensic Patients: An Expanding Role for Public Psychiatric Hospitals*, 24 *Health & Soc. Work* 184 (1999), stating:

Although definitions vary across states and types of mental health settings, the term forensic typically refers to a legal status whereby a person has a mental illness and is involved with the criminal justice system. Types of forensic patients may include defendants referred for court-ordered pretrial psychiatric evaluations, defendants found by the courts to be incompetent to stand trial, defendants acquitted as not guilty by reason of insanity (NGRI), defendants convicted as guilty but mentally ill, and some convicted defendants who committed sex crimes.

Linhorst & Turner, *supra*, at 184.

[FN4]. Michael L. Perlin, Keynote Address at the American Academy of Psychiatry & Law Annual Conference: On Desolation Row: The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What it Means for All of Us (Oct. 2002) (transcript on file with author).

[FN5]. On the significant differences in jurisprudence in the two systems, see Mitchell Lasser, *Comparative Readings of Roscoe Pound's Jurisprudence*, 59 *Am. J. Comp. L.* 719 (2002).

[FN6]. See Michael L. Perlin, "[Chimes of Freedom](#)": *International Human Rights and Institutional Mental Disability Law*, 21 *N.Y.L. Sch. J. Int'l & Comp. L.* 423, 423-24 (2002).

[FN7]. See, e.g., Mental Disability Rights International, <http://www.mdri.org> (last visited Oct. 29, 2006) (Washington, D.C.-based organization dedicated to promoting human rights of people with disabilities worldwide), Mental Disability Advocacy Center, <http://www.mdac.info> (last visited Oct. 29, 2006) (Budapest-based organization dedicated to promoting and protecting the human rights of people with mental health problems and intellectual disabilities across Central and Eastern Europe and Central Asia).

[FN8]. See, e.g., Eric Rosenthal & Leonard S. Rubenstein, *International Human Rights Advocacy under the Principles for the Protection of Persons with Mental Illness*, 16 *Int'l J.L. & Psychiatry* 257 (1993); Eric Rosenthal & Clarence J. Sundram, [International Human Rights in Mental Health Legislation](#), 21 *N.Y.L. Sch. J. Int'l & Comp. L.* 469, 527-31 (2002).

[FN9]. *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, G.A. Res. 46/119, U.N. GAOR, 46th Sess., Supp. No. 49, Annex, at 188-92, U.N. Doc. A/46/49 (Dec. 17, 1991). On the significance of soft law in the development of international human rights, see Christian Courtis, [Disability Rights in Latin America and International Cooperation](#), 9 *Sw. J. L. & Trade Am.* 109, 113-14 (2002-2003). Soft law "may guide the interpretation, elaboration, or application of hard law; constitute norms that aspire to harden; serve as evidence of hard law; exist in parallel with hard law obligations and act as a fall-back; or serve as a source of relatively hard obligations through acquiescence or estoppel." Jose Alvarez, [The New Dispute Settlers: \(Half\) Truths and Consequences](#), 38 *Tex. Int'l L.J.* 405, 421 (2003).

[FN10]. On the difficulties inherent in creating innovative programs in such nations, see World Bank, *Disability Overview*, <http://web.worldbank.org/> (last visited Oct. 29, 2006); United Nations Education, Scientific and Cultural Organization ("UNESCO") *World Education Forum, Education for All: The Dakar Framework for Action*, http://www.unesco.org/education/efa/ed_for_all/framework.shtml (last visited Oct. 29, 2006).

[FN11]. See Robert A. Gorman, [Copyright Conflicts on the University Campus](#), 47 *J. Copyright Soc'y U.S.A.* 291, 298 (2000).

[FN12]. See generally Jessica Litman, *Electronic Commerce and Free Speech*, 1 *J. Eth. & Info. Tech.* 213 (1999),

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available at <http://www-personal.umich.edu/~jdlitman/>.

[FN13]. The program was developed at the suggestion and the encouragement of Dean Richard A. Matasar, an early visionary in computer-based legal education. See, e.g., Richard A. Matasar, Legal Education [Skills and Values Education: Debate about the Continuum Continues](#), 46 N.Y.L. Sch. L. Rev. 395 (2002-2003); Richard A. Matasar, [Private Publics, Public Privates: An Essay on Convergence in Higher Education](#), 10 U. Fla. J.L. & Pub. Pol'y 5 (1998); Richard A. Matasar & Rosemary Shiels, [Electronic Law Students: Repercussions on Legal Education](#), 29 Valparaiso U. L. Rev. 909 (1995).

[FN14]. See Perlin, *supra* note 6, at 433. In the creation of this program, it was essential to combine students with different professional backgrounds and perspectives so as to have the best chance to maximize meaningful pedagogic interaction that would optimally lead to social change. Eventually, the creation of multi-professional classroom sections will also aid in the ambitious venture of democratizing legal education. Interestingly, this is a topic that, in recent years, has been discussed most frequently in the law journals in the context of nations with developing economies. See, e.g., Bado Attila & Nagy Zsolt, [Some Aspects of Legal Training in Hungary](#), 37 U. Tol. L. Rev. 7, 9 (2005) ("[T]he significant increase in the number of participants in higher education, and especially in legal education, which occurred in the last one and a half decades in Hungary and in the last two or three decades in Western-Europe, can be called the democratization of education."); Pamela Phan, [Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice](#), 8 Yale Hum. Rts. & Dev. L.J. 117, 133 (2005) ("For the rule of law to really take hold, should legal education elsewhere be similarly designed to strive for 'democratization' of the local legal culture?"). See generally Philip Iya, *The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges*, 51 J. Legal Educ. 255, 355, 358 (2001).

[FN15]. See Heather Ritchie & Peter Blanck, *The Promise of the Internet for Disability: A Study of On-line Services and Web Site Accessibility at Centers for Independent Living*, 21 Behav. Sci. & L. 4, 5 (2003). See generally Peter Blanck et al., *Technology for Independence: A Community-Based Resource Center*, 21 Behav. Sci. & L. 51-62 (2003).

[FN16]. See *infra* notes 27-41 and accompanying text.

[FN17]. Helen Leskovac, [Distance Learning in Legal Education: Implications of Frame Relay Videoconferencing](#), 8 Alb. L.J. Sci. & Tech. 305, 309 (1998).

[FN18]. Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?*, 12 B.U. Pub. Int. L.J. 73, 104 (2002).

[FN19]. There is no question that distance learning is gaining in acceptance at American law schools. Henry H. Perritt, Jr., *The Internet Is Changing the Face of American Law Schools*, 33 Ind. L. Rev. 253, 255 (1999); see also, Daniel Powell, *Five Recommendations to Law Schools Offering Legal Instruction Over the Internet*, U. Fla. J. Technol. & Pol'y (forthcoming 2006); William Wang, *The Restructuring of Legal Education Along Functional Lines*, J. Contemp. Legal Issues (forthcoming 2007) (discussing the Distance Learning Initiative of the Southeastern Association of Law Schools) (last visited Oct. 29, 2006); Leigh Jones, *Legal Education*, N.Y.L.J., Sept. 15, 2006, at 20;; Russell Weaver, *Southeastern Association Law Schools, Concept Paper on Distance Learning/Course Sharing Network*, http://www.nsulaw.nova.edu/seals/Distance_Learning_Course_Sharing_Initiative.pdf (last visited Nov. 10, 2006).

[FN20]. See Paula E. Berg, [Using Distance Learning To Enhance Cross-Listed Interdisciplinary Law School Courses](#), 29 Rutgers Computer & Tech. L.J. 33, 34 (2003).

[FN21]. See *id.* at 34.

[FN22]. *Id.* at 35. On the Internet's "integrative possibilities" in this context, see Richard Warner et al., [Teaching Law With Computers](#), 24 Rutgers Computer & Tech. L.J. 107, 156 (1998). "Studies [have shown] that students' social concerns, technological failure, time constraints, content, camera shyness, the site facilitator's role, and the time needed to process information all affect the extent to which students will interact" in a distance learning setting. Charlene L. Smith, [Distance Education: A Value-Added Model](#), 12 Alb. L.J. Sci. & Tech. 177, 181-82 (2001); see

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supra note 14.

[FN23]. See Shelley Ross Saxer, [One Professor's Approach to Increasing Technology Use in Legal Education](#), 6 Rich. J.L. & Tech. 21, 31 (1999-2000).

[FN24]. See Matasar & Shiels, supra note 13, at 911.

[FN25]. A.B.A. Section of Legal Education & Admissions to the Bar, Standard 306: Distance Education, <http://www.abanet.org/legaled/distanceeducation/distance.html> (last visited Oct. 29, 2006).

[FN26]. Peter Cukor & Lee W. McKnight, [Knowledge Networks, The Internet, and Development](#), 25 Fletcher F. World Aff. 43, 47 (2001).

[FN27]. See Jennifer Jolly-Ryan, [Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner](#), 6 Nev. L.J. 116, 116 (2005) (regarding the special challenges related to teaching law students with learning disabilities); Dan Carnevale, Colleges Strive to Give Disabled Students Access to On-Line Courses, Chron. Higher Ed., Oct. 29, 1999, at A69 (noting that colleges and universities face the task of creating disability-friendly access in building on-line educational tools).

[FN28]. See Press Release, Disability Rights Commission, User-Friendly Websites for All (Mar. 8, 2006), <http://www.bsi-global.com/News/Releases/2006/March/n440d89306e52b.xalter> (last visited Nov. 10, 2006); see also Axel Schmetzke, Web Accessibility at Universal Libraries and Library Schools, 19 Library Hi Tech 35, 41, 43 (2001)(in a study of the twenty-four most highly ranked schools of library and information science, only fifty-nine percent of main campus library web pages were accessible).

[FN29]. See Ritchie & Blanck, supra note 15, at 5.

[FN30]. H. Stephen Kaye, Ph.D., Computer and Internet Use Among Persons with Disabilities, 2000 Disability Stat. Rep. 13, 13, dsc.ucsf.edu/pdf/report13.pdf (last visited Nov. 10, 2006); Robert Rich et al., [Critical Legal and Policy Issues for People with Disabilities](#), 6 DePaul J. Health Care L. 1 (2002).

[FN31]. See Peter D. Blanck & Leonard A. Sandler, ADA Title III and the Internet: Technology and [Civil Rights](#), 24 Mental & Physical Disability L. Rep. 855, 857 (2000).

[FN32]. See Peter Blanck & Helen Schartz, Towards Reaching a National Employment Policy for Persons with Disabilities, in Emerging Workforce Issues: W.I.A., Ticket to Work, and Partnerships 1 (R. McConnell ed., 2001), available at <http://eric.ed.gov/>; Ritchie & Blanck, supra note 15, at 24 (citing Heidi Berven & Peter D. Blanck, Assistive Technology Patenting Trends and the Americans with Disabilities Act, 17 Behav. Sci. & L. 47 (1999)).

[FN33]. Blanck et al., supra note 15, at 59; see International Center for Disability Resources on the Internet, <http://www.icdri.org/> (last visited Oct. 31, 2006); DisabilityResources.org, <http://www.disabilityresources.org/ABC.html> (last visited Oct. 31, 2006).

[FN34]. Ozcan Konur, Access to E-learning in Higher Education by Disabled Students: Current Public Policy Issues, in Proceedings of the Third International Conference on Networked Learning (Sheena Banks et al. eds., 2002), available at <http://www.networkedlearningconference.org.uk/past/nlc2002/proceedings/papers/18.htm> (re-search-based conference on e-learning in Higher Education and Lifelong Learning).

[FN35]. See, e.g., World Wide Web Consortium, Web Accessibility: Equity, Ethical and Social Issues in Educational Technology (2004), <http://www.charlie-roberts.com/accessibility/index.htm> (last visited Oct. 31, 2006).

[FN36]. Westlaw Lawprac Index, [Westlaw Text Only Improved Westlaw Access For Users of Assistive Technology](#), 19 NO. 19 Law. PC 7, available at www.westlaw.com.

[FN37]. See, e.g., [Noah v. AOL Time Warner](#), 261 F. Supp.2d 532 (E.D. Va. 2003) (answering in the negative); Nat'l

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Fed. of the Blind v. America Online, Inc., No 99CV1203EFH (D. Mass., filed Nov. 4, 1999) (settlement in which AOL agreed to make the next version of its Internet software accessible to the blind), discussed in Richard E. Moberly, [The Americans with Disabilities Act in Cyberspace: Applying The "Nexus" Approach to Private Internet Websites](#), 55 *Mercer L. Rev.* 963, 970 (2004).

[FN38]. Peter Blanck et al., *Disability Civil Rights Law and Policy: Cases and Materials* 1097 (2005).

[FN39]. See Michael L. Perlin, ["You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching](#), 9 *Clinical L. Rev.* 683, 699 n.88 (2003) (discussing the role of psychiatric survivor groups on the development of mental disability law):

[S]urvivor groups generally have opposed the constitutionality or application of involuntary civil commitment statutes, see, e.g., [Project Release v. Prevost](#), 722 F.2d 960 (2d Cir. 1983), or supported the right of patients to refuse the involuntary administration of psychotropic drugs, see [Rennie v. Klein](#), 653 F.2d 836, 838 (3d Cir. 1981) (Alliance for the Liberation of Mental Patients, amicus curiae), but also have involved themselves in a far broader range of litigation. See, e.g., [Colorado v. Connelly](#), 479 U.S. 157 (1986) (impact of severe mental disability on Miranda waiver; Coalition for the Fundamental Rights and Equality of Ex-patients, amicus). The involvement of such groups in test case litigation--exercising the right of self-determination in an effort to control, to the greatest extent possible, their own destinies, see, e.g., Judi Chamberlin, *On Our Own: Patient-Controlled Alternatives to the Mental Health System* (197[8])--is a major development that cannot be overlooked by participants in subsequent mental disability litigation.

[FN40]. See Blanck et al., *supra* note 38, at 1098 ("students with disabilities are three times less likely to use the Internet to perform routine tasks than their nondisabled peers").

[FN41]. See Donald Polden, [Planning and Decision-Making for Law School Information Technology](#), 18 *Santa Clara Computer & High Tech. L.J.* 259, 259 (2002) (stressing how increased usage of information technology has the value of extending the geographic reach of faculty and student research and scholarship).

[FN42]. There are currently five courses being offered as part of the New York Law School ("NYLS") program: Survey of Mental Disability Law ("SMDL"), The Americans with Disabilities Act: Law, Policy and Practice ("ADA"), International Human Rights Law and Mental Disability Law ("IHR"), Lawyering Skills for the Representation of Persons with Mental Disabilities ("LS"), and Mental Health Issues in Jails and Prisons ("MHJ&P"). See NYLS's Website, <http://www.nyls.edu/pages/167.asp> (last visited Oct. 30, 2006). Four more courses are scheduled to be offered in the 2007-2008 school year: Sex Offenders, Competency and the Civil Law, Forensic Reports and Forensic Evidence, and Mental Illness, Dangerousness, the Police Power and Risk Assessment. The NYLS faculty has just approved the creation of an online Masters in mental disability law studies program, effective January 2008.

[FN43]. Michael L. Perlin et al., *Mental Disability Law: Cases and Materials* (2d ed. 2005).

[FN44]. Michael L. Perlin, *The Hidden Prejudice: Mental Disability on Trial* (2000).

[FN45]. Chatrooms are directed by adjunct professors who work directly with the author. These individuals are experienced mental disability law teachers, practitioners, and scholars. See, e.g., Keri K. Gould & Michael L. Perlin, ["Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudence and Clinical Teaching](#), 24 *Seattle U. L. Rev.* 339 (2000); Daniel Greenfield et al., *Second Opinion Legal Consultation in Criminal Competency Evaluations*, 23 *Am. J. Forens. Psychiatry* 59 (2002); Pamela F. Cohen, *Being Reasonable: Defining and Implementing a Right to Community-based Care for Older Adults with Mental Disabilities under the Americans with Disabilities Act*, 24 *Int'l J. L. & Psychiatry* 233 (2001); Éva Szeli & Dea Pallaska, *Violence Against Women with Mental Disabilities: The Invisible Victims in CEE-NIS Countries*, 76 *Feminist Rev.* 117 (1004); Henry A. Dlugacz, [Riggins v. Nevada: Towards a Unified Standard For A Prisoner's Right to Refuse Medication?](#), 17 *Law & Psychol. Rev.* 41 (1993).

[FN46]. In the domestic sections of the course, these seminars are one day each. The first seven weeks cover civil/constitutional issues (involuntary civil commitment, institutional rights, the right to refuse treatment, deinstitutionalization, and disabilities discrimination), the next six cover criminal issues (competencies, the insanity defense, sentencing, sexually violent predator acts, and the importance of mental disability in criminal trial process issues--such as confessions and the privilege against self-incrimination) and the final week sums up the course. See

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NYLS's Website, <http://www.nyls.edu/pages/167.asp> (last visited Nov. 10, 2006).

[FN47]. NYLS has now offered more than twenty sections of the initial online course, SMDL. This course is also being offered on an ongoing basis domestically at NYLS, at Southern University Law Center, at McGeorge Law School, at Gonzaga Law School and at Oklahoma City University School of Law. NYLS has offered five sections of its second online course, ADA, at NYLS, and at Southern University Law Center. Oklahoma City University will offer a third course, LS, in the Spring 2008 semester.

[FN48]. NYLS has offered sections of the SMDL course in Nicaragua and in Japan, and the ADA course in Japan. A compressed version of the IHR course was offered in Finland, and a section of the LS course will be offered in the Summer 2007 term in Japan.

[FN49]. In Japan, the course was offered in partnership with the Tokyo Advocacy Law Office, the Association for Better Mental Health and with Zenkanren. In Nicaragua, the course was offered in partnership with the Nicaraguan Association for Community Integration ("ASNIC") and with Inclusion Interamericana.

[FN50]. Much of the time in the live seminars is spent on comparing and contrasting legal developments in civil and common law nations, and considering the different litigation strategies that might need to be employed in the two systems.

[FN51]. See Perlin, *supra* note 6.

[FN52]. See NYLS's Website, <http://www.nyls.edu/pages/389.asp> (last visited Oct. 30, 2006).

[FN53]. See *supra* note 49.

[FN54]. See Rosenthal & Rubenstein, *supra* note 8; Rosenthal & Sundram, *supra* note 8.

[FN55]. See, e.g., Perlin et al., *supra* note 45, at 3-11; Michael L. Perlin, International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent, 39 Israel L. Rev. (forthcoming 2006); Michael L. Perlin, International Human Rights and Comparative Mental Disability Law: The Universal Factors, *Syr. J. Int'l L. & Com.* (forthcoming 2007).

[FN56]. Victor Rosario Congo v. Ecuador, Case 11.427, Inter-Am. C.H.R., Report No. 63/99, OEA/Ser/L/V/II.102, doc. 6 rev., P 54 (1999).

[FN57]. *Id.* at n.8 (citing Rosenthal & Rubenstein, *supra* note 8, at 273); see Perlin et al., *supra* note 43, at 367.

[FN58]. See, e.g., David Marshall & Shelley Inglis, The [Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo](#), 16 *Harv. Hum. Rts. J.* 95 (2003); Mental Disability Rights International, www.mdri.org (last visited Oct. 30, 2006); U.N. Enable (Secretariat for the Convention on the Rights of Persons with Disabilities), <http://www.un.org/esa/socdev/enable/disabout.htm> (last visited Oct. 30, 2006); Eric Rosenthal, International Human Rights Protections for Institutionalized People with Disabilities: An Agenda for International Action, in *Let the World Know-- International Seminar on Human Rights and Disability* (2000), available at www.independentliving.org/docs2/rosenthal.pdf (suggesting an agenda for international action based on Mental Disability Rights International's experience).

[FN59]. See Perlin, *supra* note 6, at 428.

[FN60]. See Grant 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); see also Michael L. Perlin, "For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities, 52 *Ala. L. Rev.* 193, 204 (2000).

[FN61]. Michael L. Perlin, ["Their Promises of Paradise": Will Olmstead v. L.C. Resuscitate the Constitutional "Least](#)

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[Restrictive Alternative" Principle in Mental Disability Law?](#), 37 Hous. L. Rev. 999, 1047 (2000) (citations omitted).

[FN62]. [Id. at 1049](#); see Michael L. Perlin, "And [My Best Friend, My Doctor ... Won't Even Say What It Is I've Got](#)": [The Role and Significance of Counsel in Right to Refuse Treatment Cases](#), 42 San Diego L. Rev. 735, 737 n.11 (2005); Michael S. Lottman, Paper Victories and Hard Realities, in Paper Victories and Hard Realities: The Implementation of the Legal and Constitutional Rights of the Mentally Disabled 93-105 (Valerie Bradley & Gary Clarke eds., 1976).

[FN63]. See generally Hernando DeSoto, *The Other Path: The Economic Answer to Terrorism* (1989); Eduardo Galeano, *Open Veins of Latin America: Five Centuries of the Pillage of a Continent*. (1997); Margaret Popkin, *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador* (2000); *Power and Popular Protests: Latin American Social Movements* (Susan Eckstein ed., 2001).

[FN64]. On the ways that the European Commission is, for these purposes, similar to the Inter-American Commission on Human Rights, see, Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 Tex. Int'l L.J. 272 (2002); George William Mugwanya, [Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System](#), 10 Ind. Int'l & Comp. L. Rev. 35 (1999).

[FN65]. David Hewitt, *Do Human Rights Impact on Mental Health Law?*, 151 New L. J. 1278, 1278 (2001).

[FN66]. See *id.* (discussing *Herczegfalvy v. Austria*, 15 Eur. Ct. H.R. 437 (1993)).

[FN67]. See *id.* (discussing *Dhoest v. Belgium*, 12 Eur. Ct. H.R. 135 (1987)).

[FN68]. See, e.g., Perlin et al., *supra* note 43; Perlin, *Institutional Psychiatry*, *supra* note 55.

[FN69]. See, e.g., Perlin, *supra* note 44; Perlin, *supra* note 6; Michael L. Perlin, "[Half-Wracked Prejudice Leaped Forth](#)": [Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did](#), 10 J. Contemp. Legal Issues 3 (1999).

[FN70]. See, e.g., Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 Ind. J. Global Leg. Stud. 79 (1999); Cynthia A. Williams, [Corporate Social Responsibility in an Era of Economic Globalization](#), 35 U.C. Davis L. Rev. 705 (2004).

[FN71]. See also, C. Raj Kumar, [Corruption in Japan--Institutionalizing the Right to Information, Transparency and the Right to Corruption-Free Governance](#), 10 New Eng. J. Int'l & Comp. L. 1, 24 n.120 (2003) (citing Vinay K. Bhargava & Emil Bolongaita, *Making National Anti-Corruption Policies and Programs More Effective: An Analytical Framework*, Global Distance Learning Program on Combating Corruption in the Asia-Pacific, Working Paper Series 01- 08 (National University of Singapore, 2001), available at www.spp.nus.edu.sg/docs/wp/wp14.pdf). Scholars have started to consider, in other contexts, the ways that distance learning can be a tool of social change in nations with developing economies; Anand Rumajogee, *Distance Education: Issues and Challenges in Sub-Saharan Africa*, in *Africa Dot Edu: IT Opportunities and Higher Education in Africa* 292 (Maria A. Beebe et al. eds., 2003); Magdallen Juma, *The African Virtual University (AVU): Challenges and Prospects*, in *Africa Dot Edu* *supra*, at 206. See, e.g., Alan Story, [Burn Berne: Why the Leading International Copyright Convention Must Be Repealed](#), 40 Hous. L. Rev. 763, 798 (2003) ("distance learning is an increasingly common avenue for the provision of educational opportunities in Africa, in part because of internal transportation and communications barriers"); Carmen Urdaneta, [Virtual Pathways in Africa's Fight Against HIV/AIDS](#), 31 Hum. Rts. 6 (Fall 2004) (describing Virtual Leadership Development Program held in 2004 for HIV/AIDS prevention organizations).

[FN72]. The logs of the Nicaraguan sessions are expected to be especially valuable for any subsequent programs in the Central or South American area.

[FN73]. The specific combination of modalities used in this course is designed to appeal to the widest range of student learning styles. See *supra* notes 42-46 and accompanying text; see also, *Learning Strategies and Learning Styles* (Ronald R. Schmeck ed., 1988); Richard M. Felder & Rebecca Brent, *Understanding Student Differences*, 94 J.

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Engineering Educ. 57 (2005).

[FN74]. In this Article, the author has chosen to focus on the Nicaraguan experience because of its status as a State with a developing economy (as opposed to Japan, which is highly industrialized and boasts a developed economy).

[FN75]. The course was funded by a grant from the U.S. Department of State, Agency for International Development.

[FN76]. There were eighteen students in the Nicaraguan program, including lawyers, judges, psychiatrists, psychologists, human rights activists, and non-psychiatric physicians. The instructors believe that this interdisciplinarity was critical to the success of the program. In the domestic sections of this program, having self-identified as persons with disabilities have frequently participated. The instructors hope to insure that such persons will regularly be part of future international sections.

[FN77]. As part of this work, section members produced three discrete sets of documents: the translation of all tape transcripts into Spanish; the publication of all Nicaraguan laws that affect mental disability law in that State; and the publication--in Spanish--of the most important U.S. constitutional mental disability law decisions, with brief commentaries as to their implications for international human rights law.

[FN78]. A host of empirical questions remains to be answered. In the long run, are face-to-face sessions essential (as the author believes)? Will the inclusion of participants with disabilities add a new perspective that shifts the focus of the section (as the author believes)? How does the quality of the students affect the program's success? Finally, will such programs always lead to ongoing collaboration on the part of the students?

[FN79]. See, e.g., Mental Disability Rights International, Human Rights and Mental Health: Uruguay (1995), available at <http://www.mdri.org>; Mental Disability Rights International, Human Rights and Mental Health: Hungary (1997), available at <http://www.mdri.org/>; Mental Disability Rights International, Human Rights and Mental Health: Mexico (2000), available at <http://www.mdri.org/>; Mental Disability Rights International, Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo (2003), available at <http://www.mdri.org/>; Oliver Lewis, Mental Disability Law in Central and Eastern Europe: Paper, Practice, Promise, 8 J. Mental Health L. 293 (2002).

[FN80]. See, e.g., Jennifer Fischer, [A Comparative Look at the Right to Refuse Treatment for Involuntary Hospitalized Persons with a Mental Illness](#), 29 Hastings Int'l & Comp. L. Rev. 153, 183-85; Rosenthal & Rubenstein, *supra* note 8; Rosenthal & Sundram, *supra* note 8; Bruce Winick, [Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law](#), 21 N.Y.L. Sch. J. Int'l & Comp. L. 537, 556-59 (2002).

[FN81]. See Kumar, *supra* note 71; Urdaneta, *supra* note 71; Rumajoyee, *supra* note 71; Urdaneta, *supra* note 71.

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Article

***735 "AND MY BEST FRIEND, MY DOCTOR/WON'T EVEN SAY WHAT IT IS I'VE GOT": THE
 ROLE AND SIGNIFICANCE OF COUNSEL IN RIGHT TO REFUSE TREATMENT CASES**

[Michael L. Perlin](#) [\[FNa1\]](#)

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I. Introduction

For over thirty years, lawyers have argued that involuntarily committed psychiatric patients have a right to refuse treatment (basing this argument, variously, on the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth ***736** Amendments, as well as on state common law and constitutional law). [\[FN1\]](#) For the same period of time, this has been the most contentious issue in the "turf" battle between what is incorrectly characterized as "law and psychiatry," [\[FN2\]](#) and is seen as the "pivotal issue in the determination of the future direction of the relationship between law and mental health," [\[FN3\]](#) or "the most important subject matter under consideration in the area of the legal regulation of mental health practice." [\[FN4\]](#)

At this point, legally, there can be little question that the ball game is over. The Supreme Court's decisions in *Washington v. Harper*, [\[FN5\]](#) *Riggins v. Nevada*, [\[FN6\]](#) and, most recently, *Sell v. United States*, [\[FN7\]](#) make it clear that: a qualified right to refuse medication is located in the Fourteenth Amendment's Due Process Clause; the pervasiveness of side effects is a key factor in the determination of the scope of the right; the state bears a considerable burden in medicating a patient over objection, and the "least restrictive alternative" mode of analysis must be applied to right to refuse cases. [\[FN8\]](#) Nonetheless, the controversy over the right continues unabated. [\[FN9\]](#)

During this same thirty years, scholars have carefully considered the right to refuse from a rich array of perspectives,

including, but not limited to, clinical perspectives, civil libertarian perspectives, philosophical perspectives, and political perspectives. [\[FN10\]](#) Yet, virtually all of this--remarkably--passes over what I believe is the single most important issue in "real life." This issue is the most relevant to the actual (as opposed to paper) existence of the right and the actual (as opposed to paper) implementation of that right: the availability and adequacy of counsel to represent patients seeking to assert this right to refuse. In spite of the extensive literature and caselaw that has developed in this area of the law, the topic remains egregiously underdiscussed and underlitigated.

***737** Simply put, if active, trained counsel is not provided for patients seeking to interpose this right, then the right becomes nothing more than a paper document: useless and meaningless (and perhaps, counterproductive) in the "real world." Anyone with more than a passing interest in mental disability law is familiar with the concept of the "paper victory," and how such "victories" are one of the shameful pretexts in this area of the law. [\[FN11\]](#)

In this Paper, I will discuss: (1) the generally mediocre job done by lawyers in the involuntary civil commitment process, (2) more particularly, the equally mediocre job done in the right to refuse treatment process, especially where both courts and legislatures have failed to articulate a universal right to counsel in right to refuse cases, (3) the reasons why counsel is so critical in such cases, (4) the significance of what I call "sanism" and what I call "pretextuality," and the application of a "therapeutic jurisprudence" mode of analysis to the topic in trying to understand all of this, and (5) my recommendations for the future.

My title comes from Bob Dylan's early song, Just Like Tom Thumb's Blues. In this couplet, he shares with the listener his sense of frustration and confusion with his place in the world:

Now if you see Saint Annie Please tell her thanks a lot I cannot move
My fingers are all in a knot I don't have the strength
To get up and take another shot And my best friend, my doctor Won't even say what it is I've got [\[FN12\]](#)

One of the reasons why the right to counsel is so critical in right to refuse cases is that it may be the only way of ensuring that the patient's doctor (the "best friend" descriptor is ironic in these circumstances) actually does tell the patient "what it is [he's] got." That would be a step in the right direction.

***738 II. Counsel in the Civil Commitment Process** [\[FN13\]](#)

The assumption that individuals facing involuntary civil commitment are globally represented by adequate counsel is an assumption of a fact not in evidence. [\[FN14\]](#) The data suggests that, in many jurisdictions, such counsel is woefully inadequate--disinterested, uninformed, roleless, and often hostile. [\[FN15\]](#) A model of "paternalism/best interests" is substituted for a traditional legal advocacy position, and this substitution is rarely questioned. [\[FN16\]](#) Few courts have ever grappled with adequacy of counsel questions in this context; fewer yet have found assigned involuntary civil commitment to be inadequate. [\[FN17\]](#)

Only the Supreme Court of Montana has ever adopted meaningful and complex performance standards for counsel in such cases. [\[FN18\]](#) In *In re the Mental Health of K.G.F.*, [\[FN19\]](#) that court dramatically launched a rewriting of this area of the law. K.G.F. was a voluntary patient at a community hospital in Montana, whose expressed desire to leave the facility prompted a state petition alleging her need for commitment. Counsel was appointed, and a commitment hearing was scheduled for the next day. The state's expert recommended commitment, and the patient's counsel presented the testimony of both the plaintiff herself and a mental health professional, who recommended that the patient be kept in the hospital a few days so that a community-based treatment plan could be arranged nearer to her home. The court ordered commitment, and K.G.F.'s appeal was premised, in part, on allegations of ineffective assistance of counsel. [\[FN20\]](#)

In a thoughtful and scholarly opinion, the Montana Supreme Court relied on state statutory and constitutional sources to find that "the right to counsel . . . provides an individual subject to an involuntary commitment proceeding the right to effective assistance of counsel. In turn, this right affords the individual with the right to raise the allegation of ineffective assistance of counsel in challenging a commitment order." [\[FN21\]](#) In assessing what constitutes "effectiveness," the court--startlingly, to my mind--eschewed ***739** the *Strickland v. Washington* standard [\[FN22\]](#) (used to assess effectiveness in criminal cases) as insufficiently protective of the "liberty interests of individuals such as K.G.F., who may or may not have broken any law, but who, upon the expiration of a 90-day commitment, must indefinitely bear the badge of inferiority of a once 'involuntarily committed' person with a proven mental disorder." [\[FN23\]](#) Interestingly, one of the key reasons why *Strickland* was seen as lacking was the court's conclusion that "reasonable professional assistance" [\[FN24\]](#)--the linchpin of the *Strickland* decision--"cannot be presumed in a proceeding that routinely accepts--and even requires--an unreasonably low standard of

legal assistance and generally disdains zealous, adversarial confrontation." [\[FN25\]](#)

In assessing the contours of effective assistance of counsel, the court emphasized that it was not limiting its inquiry to courtroom performance. Even more important was counsel's "failure to fully investigate and comprehend a patient's circumstances prior to an involuntary civil commitment hearing or trial, which may, in turn, lead to critical decision-making between counsel and client as to how best to proceed." [\[FN26\]](#) Such prehearing matters, the court continued, "clearly involve effective preparation prior to a hearing or trial." [\[FN27\]](#) The court further stressed state laws guaranteeing the patient's "dignity and personal integrity" and "privacy and dignity" [\[FN28\]](#) as a basis for its decision: "[q]uality counsel provides the most likely way-- perhaps the only likely way" to ensure the due process protection of dignity and privacy interests in cases such as the one at bar." [\[FN29\]](#)

After noting that the focus of its condemnation was not assigned counsel in the case before it, (but rather "the failure of the system as a whole, one that through the ordinary course of the efficient administration of a legal process threatens to supplant an individual's due process rights"), [\[FN30\]](#) the court again focused on the issue of dignity, quoting an *740 article by Professor Bruce Winick: "Perhaps nothing can threaten a person's belief that he or she is an equal member of society as much as being subjected to a civil commitment hearing" and when "legal proceedings do not treat people with dignity, they feel devalued as members of society." [\[FN31\]](#)

The court continued by considering the issues of prejudice, stereotyping, and stigma, [\[FN32\]](#) and specifically held that even pejorative language--the court here quoted a 1977 state supreme court case that had referred to persons with disabilities as "idiots and lunatics" [\[FN33\]](#)--was "repugnant to our state constitution." [\[FN34\]](#) Having set out this legal framework, the court observed that state statutes offered "little assistance" in determining the scope of "effective counsel," and thus sought to give depth to the terse statutory language. [\[FN35\]](#)

"At a bare minimum," the court observed, "counsel should possess a verifiably competent understanding of the legal process of involuntary commitments, as well as the range of alternative, less-restrictive treatment and care options available." [\[FN36\]](#) In the initial investigation, counsel must:

conduct a thorough review of all available records . . . necessarily involv [ing] the patient's prior medical history and treatment, if and to what extent medication has played a role in the petition for commitment, the patient's relationship to family and friends within the community, and the patient's relationship with all relevant medical professionals involved prior to and during the petition process. [\[FN37\]](#)

Also, counsel should be prepared to discuss with his or her client "the available options in light of such investigations," as well as the "practical and legal consequences of those options." [\[FN38\]](#) It is "imperative," the court stressed, "that counsel request a reasonable amount of time for such an investigation prior to the hearing or trial on the petition." [\[FN39\]](#) Moreover, counsel "should also attempt to interview all persons who have knowledge of the circumstances surrounding the commitment petition, including family members, acquaintances and any other persons identified by the client as having relevant information, and be prepared to call such *741 persons as witnesses." [\[FN40\]](#)

After similarly elaborating on counsel's role in the client interview and the need to insure that the patient understands the scope of the right to remain silent, the court concluded by underscoring counsel's responsibilities "as an advocate and adversary." [\[FN41\]](#) The lawyer must "represent the perspective of the [patient] and . . . serve as a vigorous advocate for the [patient's] wishes," engaging in "all aspects of advocacy and vigorously argu[ing] to the best of his or her ability for the ends desired by the client," and operating on the "presumption that a client wishes to not be involuntarily committed." [\[FN42\]](#) Thus, "evidence that counsel independently advocated or otherwise acquiesced to an involuntary commitment--in the absence of any evidence of a voluntary and knowing consent by the patient-respondent--will establish the presumption that counsel was ineffective." [\[FN43\]](#) In conclusion, the court stated:

[I]t is not only counsel for the patient-respondent, but also courts, that are charged with the duty of safeguarding the due process rights of individuals involved at every stage of the proceedings, and must therefore rigorously adhere to the standards expressed herein, as well as those mandated under [state statute]. [\[FN44\]](#)

Although K.G.F. provides an easily transferable blueprint for courts that want to grapple with adequacy of counsel issues in this context, but are reluctant to explore totally uncharted waters, [\[FN45\]](#) the decision remains the exception to the usual practice. K.G.F. has only been cited once outside of Montana, and in that case, the Washington Court of Appeals took issue with the K.G.F. court's rejection of the Strickland standard. [\[FN46\]](#) But globally, counsel's continuing failure here still appears

to be inevitable, given the bar's abject disregard of both consumer groups (made up predominantly of former recipients, both voluntary and *742 involuntary, of mental disability services) and individuals with mental disabilities, many of whom have written carefully, thoughtfully, and sensitively about these issues. [FN47] This inadequacy further reflects sanist practices--and I will soon elaborate on what this means--on the part of the lawyers representing persons with mental disabilities, as well as the political entities vested with the authority to hire such counsel. Although a handful of articulate scholars take this question seriously, [FN48] the questions raised here do not appear to be a priority agenda item for litigators or for most academics writing in this area.

The issue was addressed over twenty years ago, however, in an article by John Ensminger and Thomas Liguori, [FN49] in which the authors looked carefully at the way that the commitment process actually works, the effect it has on the individuals subject to commitment, and how state hospital employees respond to the litigational process. [FN50] In arguing that the civil commitment process had great therapeutic potential, the authors stressed that such hearings are therapeutic because, inter alia, they give patients an opportunity to present and hear evidence in a meaningful court procedure. [FN51] Writing about this topic some nine years ago, I speculated that "[t]hese same benefits can be attributed to medication hearings, particularly as these hearings are, in some jurisdictions, more *743 formal than commitment hearings." [FN52] Not one thing has happened in the intervening years to remotely change my mind.

It is to this question that I now wish to turn.

III. Counsel in Right to Refuse Cases [FN53]

There is scant literature that addresses the question of the availability and adequacy of counsel in right to refuse medication hearings. [FN54] This near-total lack of attention is even more striking when juxtaposed with the extensive scholarship that has developed discussing the law reform/test case litigation that led directly to the judicial articulation of a right to refuse treatment. [FN55]

Lawyers representing individuals with mental disabilities must familiarize themselves with information about the right to refuse treatment, both as to the law and as to the pharmacology. [FN56] The track record of lawyers representing persons with mental disabilities has ranged from indifferent to wretched; [FN57] in one famous survey, lawyers were so bad that a patient had a better chance of being released at a commitment hearing if he appeared pro se. [FN58] Further, simply educating lawyers about psychiatric *744 technique and psychological nomenclature does not materially improve lawyers' performance where underlying attitudes are not changed. [FN59] If counsel is to become even minimally competent in this area, it is critical that the underlying issues here be confronted. [FN60] This is underscored by judges' lack of basic knowledge about mental disability law; in one astonishing case, a Louisiana civil commitment order was reversed where the trial court did not even know of the existence of a state-mandated Mental Health Advocacy Service. [FN61] If lawyers continue to so abdicate their advocacy role, it is not surprising that so many areas of application of the right to refuse treatment remain judicially unexplored.

Like other legal rights, the right to refuse treatment is not self-executing. [FN62] A statement by a state supreme court or a federal court of appeals that a patient has a "qualified right to refuse treatment" does not, in and of itself, automatically translate into a coherent structure through which hearings are scheduled, counsel is appointed, and hearing procedures are established. Of the important right to refuse cases, only *Rivers v. Katz* establishes any mechanism for the appointment of counsel in individual right to refuse cases. [FN63] Although *Rennie v. Klein*--one of the first federal cases to find a substantive constitutional right to refuse--originally *745 mandated the appointment of counsel, [FN64] it later receded from this position and required only the presence of "Patient Advocates" (employees of the state Division of Mental Health and Hospitals) to serve as "informal counsel to patients who wish to refuse [antipsychotic medication]". [FN65]

A handful of statutes mandate the appointment of counsel in right to refuse treatment hearings; [FN66] however, at least one court has held that failure to appoint counsel is not reversible error, [FN67] and only a few cases have spoken to the role or scope of counsel at medication hearings. [FN68] Although more courts are beginning to articulate the criteria to be considered at a medication refusal hearing, [FN69] this level of specificity is simply not present in the assessment of the role and responsibilities of counsel. [FN70]

Without such an articulation of specificity, the authentic meaning of a "right to refuse" remains murky. A right without a remedy is no right at all; [FN71] worse, a right without a remedy is meretricious and pretextual--it *746 gives the illusion of a right without any legitimate expectation that the right will be honored. [FN72] This is especially significant in light of

Professor Tom Tyler's research in procedural justice finding that individuals subject to involuntary civil commitment hearings, like all other citizens, are affected by such process values as participation, dignity, and trust, and that experiencing arbitrariness in procedure leads to "social malaise and decreases people's willingness to be integrated into the polity, accepting its authorities and following its rules." [FN73] Also, subsequent research by Dr. Hoge and Professor Feucht-Haviar provides further empirical support for Professor Tyler's insights. Their study of long-term psychiatric patients found, in an informed consent context, that "capable patient involvement is an important check on a physician's judgment." [FN74]

"Empirical surveys consistently demonstrate that the quality of counsel 'remains the single most important factor in the disposition of involuntary civil commitment cases.'" [FN75] Certainly the presence of adequate counsel is of critical importance in the disposition of right to refuse treatment cases as well. Furthermore, the research makes clear that jurisdictions are wildly inconsistent in the implementation of the right to refuse laws in general, especially with regard to the specific issue of the provision of counsel, both from jurisdiction to jurisdiction and within jurisdictions. [FN76]

Again, these findings take on even more importance when considered in the context of the findings by the MacArthur Research Network [FN77] that mental patients are not always incompetent to make rational decisions *747 and are not inherently more incompetent than nonmentally ill medical patients. [FN78] Yet, what Professor Winick refers to as "19th-century notions equating mental illness with incompetence," [FN79] still, in practice, "continue to influence legal rules and practices in this area." [FN80]

If judges uncritically conflate institutionalization with incompetency, lack of meaningful counsel--to structure statutory, caselaw-based, and empirical arguments--may be fatal to the patient's case. [FN81] The mere existence of counsel on behalf of institutionalized mental patients is often invisible to trial courts; [FN82] certainly, there is no reason for optimism about judicial knowledge or interest in this area of the law, absent aggressive, advocacy-focused counsel.

If ward psychiatrists demonstrate a propensity to categorize "incompetent" as an equivalent of "makes bad decisions" and assume, in the face of conflicting statutory and case law, that incompetence in decisionmaking can be presumed from the fact of institutionalization, [FN83] then lack of counsel--to inquire into the bases of these views on cross-examination and to demonstrate to the court that they are dissonant with established case and statutory law--may similarly make the legal process an illusory safeguard.

In spite of the impressive body of caselaw outlined above, the existence of a right to refuse treatment remains enigmatic--at best--for many clinicians. [FN84] Some are resistant, arguing--unsuccessfully in court, *748 but, perhaps, more successfully in clinical practice--that the existence of the right is destructive; certainly the provocative titles of early articles written by prominent forensic psychiatrists about the right to refuse treatment suggest a basic tension that may not be resolvable absent sensitive articulation of the underlying legal concepts. [FN85]

IV. The Need for Organized Counsel

It is my conclusion that organized and regularized counsel is essential if there is to be adequate counsel in individual right to refuse treatment cases. Without such counsel, the meaningful implementation of rulings in class action/law reform cases and/or appellate decisions will be virtually impossible.

First, there is no evidence that occasional counsel has any concept of the complexity of the legal issues, the conflicts in medical research, the skills needed for effective cross-examination, or the potential range of available less restrictive alternatives that can be suggested to the court. The little literature that is available reflects the lack of competence on the part of counsel generally assigned to do such cases.

Eight years ago, Deborah Dorfman and I studied the right to refuse process in Utah, California, and Washington. We concluded that the litigation of individual right to refuse cases offered "no coherent framework" for policymakers seeking to create a global structure for such hearings. [FN86] We further noted the significant disparity in the way right to refuse cases were litigated and decided, both inter-jurisdictionally and intra-jurisdictionally, [FN87] finding that, in many counties, such hearings were nothing more than an "empty shell (offering only an illusion of due process)." [FN88] I have found nothing in the literature to suggest that there has been any significant improvement in the past eight years.

Perhaps the best and most important study that has been done on this issue has been the research reported by Professor Grant Morris on his experience as a California hearing officer whose role was to determine *749 patients' competence to refuse

medication. [\[FN89\]](#) Professor Morris's study tells us that, often, hospital doctors failed to tell patients the risks and benefits of the medications that were prescribed for them; [\[FN90\]](#) yet, this failure to inform--a necessary predicate, it seems to me, of "informed consent" under any definition of that term--was virtually never challenged by patients' counsel. [\[FN91\]](#) In other cases, patients might have had rational reasons to refuse, such as their familiarity with side-effects from past experiences with the drug in question, [\[FN92\]](#) but if the rationality of this request were not stressed by counsel (either on direct examination, cross-examination, or summation), then the hearing would, in fact, be the exact sort of "empty shell" that Dorfman and I described.

Without such counsel, it is likely that there will be no meaningful counterbalance to the hospital's "script," and the patient's articulated constitutional rights will evaporate. A recent piece by Professor Wenona Whitfield looked at Illinois practice in this area, and concluded that the attorneys assigned to do these cases--on behalf of both the hospital and the patient--"have little incentive or interest in making this area of the law their specialty." [\[FN93\]](#) And, few judges have the depth or breadth of knowledge (or, frankly, the interest) to "save" the ineffective *750 counsel. Whitfield notes that, similarly, the assigned judges "generally have little judicial experience and little incentive to develop expertise in this area." [\[FN94\]](#)

But this issue has largely been the subject of a stunning lack of commentary in the law journals. In the introduction to the symposium in which Dorfman and I published our paper, Professor Bruce Winick referred to this stage as a "critical and almost entirely unexamined aspect of the competency determination process." [\[FN95\]](#) Again, eight years later, it remains unexamined.

V. Sanism, Pretextuality, and Therapeutic Jurisprudence

The failure to assign adequate counsel bespeaks sanism and pretextuality, and a failure to consider the implications of therapeutic jurisprudence. 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. It infects both our jurisprudence and our lawyering practices. 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) [\[FN96\]](#) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process. [\[FN97\]](#)

Pretextuality defines the ways in which 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. 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 *751 testifying. [\[FN98\]](#) All aspects of mental disability law are pervaded by sanism and by pretextuality, whether the specific presenting topic is involuntary civil commitment law, right to refuse treatment law, the sexual rights of persons with mental disabilities, or any aspect of the criminal trial process. [\[FN99\]](#)

Therapeutic jurisprudence presents a new model by which we can assess the ultimate impact of case law and legislation that affects mentally disabled individuals, studying 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. [\[FN100\]](#)

I have suggested elsewhere that therapeutic jurisprudence should be employed to "expose pretextuality and strip bare the law's sanist facade" and to be used as a "powerful tool that will serve as 'a means of attacking and uprooting the 'we/they' distinction that has traditionally plagued and stigmatized the mentally disabled.'"" [\[FN101\]](#) How, then, do these concepts "fit" in the analysis I have undertaken in this Paper?

Recently, I have written critically of the way that lawyers--even lawyers who identify themselves as public interest lawyers--are often sanist. I have argued:

Sanism permeates the legal representation process both in cases in which mental capacity is a central issue, and those in which such capacity is a collateral question. Sanist lawyers (1) distrust their mentally disabled clients, (2) trivialize their complaints, (3) fail to forge authentic attorney-client relationships with such clients and reject their clients' potential contributions to case-strategizing, and (4) take less seriously case outcomes that are adverse to their clients. [\[FN102\]](#) Sanist lawyers cannot be relied upon to provide adequate representation to their clients in right to refuse treatment cases.

Judicial complicity in the assignment and performance of inadequate counsel evidences sanism. Again, the fact that, in the two and a half years since K.G.F. was decided, not another state has endorsed the *752 Montana Supreme Court's "take" on sanism is stark evidence of the fact that this issue is simply "off the docket" for the judicial system. [FN103] Passive sanism remains sanism.

I have often recounted the most chilling sanist comment that I have ever heard from a sitting trial judge:

[No example of judicial hostility] is perhaps as chilling as the following story: Sometime after the trial court's decision in Rennie [v. Klein], [FN104] 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." [FN105] It is probably no coincidence that the focal point of this conversation was a right to refuse treatment case.

When Dorfman and I did our initial survey about counsel in right to refuse cases, we stressed the pretextual nature of the enterprise:

The common wisdom is clear here. Drugs serve two major purposes of social control: They "cure" dangerousness, and they are the only assurance that deinstitutionalized patients can remain free in community settings. Both of these assumptions are reflected in the case law that has developed in individual involuntary civil commitment cases (in which a judge's perception of the likelihood that an individual self-medicates becomes the critical variable in case dispositions); they are also reflected in the public discourse that is heard in classrooms, hospital corridors, and courtrooms.

Neither of these assumptions has any basis in science or in law. Yet, without counsel to serve as a brake--to ask questions, to challenge assumptions, to identify false ordinary common sense, to point out the dangerous pitfalls of heuristic thinking--these assumptions will continue to dominate and control the disposition of individual right to refuse treatment cases . . . [FN106] Again, I have seen no evidence that there has been any change in these attitudes in the eight years since we reported our findings.

In his comprehensive and masterful book, *The Right to Refuse Mental Health Treatment*, Professor Bruce Winick discussed some of the ways that the implementation of such a right might advance therapeutic jurisprudence ends: such implementation could involve patient involvement in the design of her treatment program, [FN107] make it more likely that *753 treatment goals actually be articulated and set, [FN108] better ensure that informed consent was authentically honored, [FN109] and more likely lead to more ethical practices. [FN110] Similarly, in another law review article that I wrote with Keri Gould and Dorfman, I argued that the right to refuse treatment served the therapeutic jurisprudence value of "fairness":

The perception of receiving a fair hearing is therapeutic because it contributes to the individual's sense of dignity and conveys that he or she is being taken seriously. Other studies show that medication judicial-administrative proceedings can be therapeutic because they allow patients the opportunity to discuss thoroughly the medications and their benefits and risks with their doctors. By holding medication hearings, doctors must again discuss the medications, their purpose, and potential side effects. At the same time, patients have the opportunity to explain the reasons they do not want the medication and ask questions about the drugs. This may be therapeutic because the patients' medication concerns can be better considered in making medication determinations, thus enhancing the efficacy of medication decisions. This benefit is particularly important at large public hospitals where doctors, because of large caseloads, often have less time to spend with their patients on a day-to-day basis. [FN111] The research reported on by, variously, Ensminger and Liguori, [FN112] Dorfman and myself, [FN113] Gould, Dorfman, and myself, [FN114] Whitfield, [FN115] and Tyler [FN116]-- when read together--tells us that (1) counsel has an important role in effectuating such aims and ensuring dignity [FN117] in the entire mental disability law process, and (2) counsel has--globally--failed miserably in bringing about these ends in the right to refuse medication arena. An infusion of trained, focused counsel would prove to be a therapeutic jurisprudence elixir.

VI. Conclusion

What, then, are my recommendations? Here are a few:

1. Each state should adopt procedures that guarantee the appointment *754 of effective, trained counsel to represent patients at both involuntary civil commitment hearings and at right to refuse treatment hearings.
2. State attorneys general and county counsels should insist that lawyers representing hospitals in such cases be equally

effective and trained. [\[FN118\]](#)

3. Judicial educational agencies such as the National Judicial College should offer regular courses in all aspects of the right to refuse treatment for state court judges. [\[FN119\]](#)

4. All participants in the system should acknowledge the ways in which sanism and pretextuality corrupt the judicial process (especially this aspect of the judicial process), confront that corruption, and take seriously the significance of that corruption. [\[FN120\]](#)

5. A therapeutic jurisprudence lens should regularly be applied to this entire area of the law, and courts should begin to consider the issues discussed here through a therapeutic jurisprudence filter.

6. Scholars should seriously consider adding this issue to their research agendas. I have but scratched the surface of the problem in this Paper, and there is far more to be done.

Recall the title of this Paper. (Just Like) Tom Thumb's Blues is a difficult song to deconstruct (I have been working on it more or less fruitlessly for forty years), but the verse that I draw upon for my title seems to be a perfect fit here. Recall now my reference to Professor Morris's paper in which he chides counsel for not challenging hospital doctors for their failure to explain much about the medication process to their patients. If the doctor will not explain to the patient "what it is [he's] got," then that doctor is certainly not the patient's "best friend." But this failure is compounded by lawyer apathy. In the last line of the *755 song, Dylan sings, "I'm going back to New York City/I do believe I've had enough." In a few hours, I will be going back to New York City, and when it comes back to the behavior of lawyers in this area of the law, I, too, have had enough.

[\[FNal1\]](#). Professor of Law, and Director, International Mental Disability Law Reform Project, Justice Action Center, New York Law School, New York, New York. A.B., Rutgers University; J.D. Columbia University School of Law. The Author wishes to thank Jackie Halpern for her remarkable help and editorial assistance. An earlier version of this paper was presented at a conference on "Mental Health Law: Capacity to Consent to Treatment and/or Research", held on April 17, 2004 at USC Law School, Los Angeles, CA.

[\[FN1\]](#). See generally 2 Michael L. Perlin, *Mental Disability Law: Civil and Criminal* ch. 3B (2d ed. 1999).

[\[FN2\]](#). It is, rather, between lawyers representing patients and lawyers representing state hospital systems.

[\[FN3\]](#). Michael L. Perlin, *The Right to Refuse Treatment: A New Right Emerges*, 1 *Advoc. Now: J. Patient Rts. & Mental Health Advoc.* 8, 8 (1979).

[\[FN4\]](#). 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, 40 (1991).

[\[FN5\]](#). [494 U.S. 210 \(1990\)](#) (discussing the right to refuse treatment in prisons).

[\[FN6\]](#). [504 U.S. 127 \(1992\)](#) (discussing the right to refuse treatment at insanity defense trial).

[\[FN7\]](#). [539 U.S. 166 \(2003\)](#) (discussing the right to refuse treatment in determination of defendant's competency to stand trial).

[\[FN8\]](#). See, e.g., [id. at 177-83](#).

[\[FN9\]](#). See, e.g., William M. Brooks, [Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs](#), 31 *Ind. L. Rev.* 937, 937-38 (1998).

[\[FN10\]](#). See 2 Perlin, *supra* note 1, § 3B-2, at 165-67 nn. 24-33 (citing sources).

[\[FN11\]](#). See, e.g., Michael L. Perlin, ["Life Is in Mirrors, Death Disappears": Giving Life to Atkins](#), 33 *N.M. L. Rev.* 315, 315 (2003); Michael L. Perlin, ["Their Promises of Paradise": Will Olmstead v. L.C. Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?](#), 37 *Hous. L. Rev.* 999, 1049 (2000). See generally Michael S.

Lottman, Paper Victories and Hard Realities, in Paper Victories and Hard Realities: The Implementation of the Legal and Constitutional Rights of the Mentally Disabled 93 (Valerie Bradley & Gary Clarke eds., 1976).

[FN12]. Bob Dylan, Just Like Tom Thumb's Blues, on Highway 61 Revisited (1965).

[FN13]. See generally 1 Perlin, supra note 1, § 2B-11; Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial 146-49 (2000).

[FN14]. Michael L. Perlin, Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases, 16 Law & Hum. Behav. 39, 39 (1992).

[FN15]. Id. at 43.

[FN16]. Id. at 43-44.

[FN17]. See generally Michael L. Perlin, "[You Have Discussed Lepers and Crooks](#)": Sanism in Clinical Teaching, 9 Clinical L. Rev. 683, 686-90 (2003).

[FN18]. The text, infra, accompanying notes 19-45 is largely adapted from Perlin, supra note 17, at 691-94.

[FN19]. [29 P.3d 485 \(Mont. 2001\)](#).

[FN20]. Id. at 488-89.

[FN21]. Id. at 491.

[FN22]. [466 U.S. 668 \(1984\)](#) (establishing a weak effectiveness of counsel standard). See generally 1 Perlin, supra note 1, § 2B-11.2 (criticizing Strickland standard).

[FN23]. [K.G.F., 29 P.3d at 491](#).

[FN24]. See [Strickland, 466 U.S. at 689](#).

[FN25]. [K.G.F., 29 P.3d at 492](#) (citing Perlin, supra note 14, at 53-54 & n.84 (identifying Strickland standard as "sterile and perfunctory" where "reasonably effective assistance" is objectively measured by the "prevailing professional norms")).

[FN26]. [K.G.F., 29 P.3d at 492](#).

[FN27]. Id.

[FN28]. Id. at 493 (quoting [Mont. Code Ann. § § 53-21-101\(1\), 53-21-142\(1\) \(1979\)](#)).

[FN29]. Id. at 494 (citing Perlin, supra note 14, at 47).

[FN30]. Id.

[FN31]. Id. at 495 (quoting Bruce J. Winick, [Therapeutic Jurisprudence and the Civil Commitment Hearing](#), 10 J. Contemp. Legal Issues 37, 44-45 (1999)).

[FN32]. Id. at 495-96 (citing Michael L. Perlin, On "[Sanism](#)", 46 SMU L. Rev. 373, 374 (1992)); Winick, supra note 31, at 45).

[FN33]. Id. at 495 (quoting [In re Sonsteng, 573 P.2d 1149, 1153 \(Mont. 1977\)](#)).

[FN34]. Id.

[FN35]. Id. at 497.

[FN36]. Id. at 498.

[FN37]. Id.

[FN38]. Id. (quoting National Center for State Courts' Guidelines for Involuntary Civil Commitment, 10 Mental & Physical Disability L. Rep., 409, 465 pt. E2 (1986) [hereinafter Guidelines]).

[FN39]. Id.

[FN40]. Id. at 498-99.

[FN41]. Id. at 500.

[FN42]. Id. (quoting Guidelines, supra note 38, at 465 pt. E2; id. at 483 pt. F5).

[FN43]. Id.

[FN44]. Id. at 501.

[FN45]. See, e.g., [In re A.S., 87 P.3d 408, 413 \(Mont. 2004\)](#) (relying in part on K.G.F. to find that parents have a due process right to effective assistance of counsel in proceedings to terminate parental rights).

[FN46]. [In re Detention of T.A. H.-L., 97 P.3d 767, 771-72 \(Wash. Ct. App. 2004\)](#) ("We do not share the Montana Supreme Court's dim view of the quality of civil commitment proceedings, or their adversarial nature, in the state of Washington. The Strickland standard appears to be sufficient to protect the right to the effective assistance of counsel for a civil commitment respondent in this state.").

[FN47]. On the involvement of consumer groups in important patients' rights litigation, see 1 Perlin, supra note 1, § 1-2.1, at 10 n.43; Michael L. Perlin, ["Things Have Changed:" Looking at Non-Institutional Mental Disability Law Through the Sanism Filter](#), 46 N.Y.L. Sch. L. Rev. 535, 540 (2003). See generally Challenging the Therapeutic State: Critical Perspectives on Psychiatry and the Mental Health System, 11 J. Mind & Behav. 1-328 (David Cohen ed., 1990) (symposium issue).

[FN48]. See, e.g., Joshua Cook, [Good Lawyering and Bad Role Models: The Role of Respondent's Counsel in a Civil Commitment Hearing](#), 14 Geo. J. Legal Ethics 179 (2000); Stanley S. Herr, The Future of Advocacy for Persons with Mental Disabilities, 39 Rutgers L. Rev. 443 (1987); Stanley S. Herr, [Representation of Clients with Disabilities: Issues of Ethics and Control](#), 17 N.Y.U. Rev. L. & Soc. Change 609 (1989-1990); Peter Margulies, ["Who Are You To Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients](#), 68 N.C. L. Rev. 213 (1990); Paul R. Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515; Steven J. Schwartz, [Damage Actions as a Strategy for Enhancing the Quality of Care of Persons with Mental Disabilities](#), 17 N.Y.U. Rev. L. & Soc. Change 651 (1989-1990); Christopher Slobogin & Amy Mashburn, The [Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability](#), 68 Fordham L. Rev. 1581 (2000).

[FN49]. John J. Ensminger & Thomas D. Liguori, The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential, 6 J. Psychiatry & L. 5 (1978), reprinted in Therapeutic Jurisprudence: The Law as a Therapeutic Agent 245 (David B. Wexler ed., 1990) [hereinafter Therapeutic Jurisprudence].

[FN50]. I discuss the significance of the Ensminger/Liguori article in Michael L. Perlin, [A Law of Healing](#), 68 U. Cin. L. Rev. 407, 414-15 (2000).

[FN51]. Ensminger & Liguori, supra note 49, as reprinted in Therapeutic Jurisprudence, supra note 49, at 249-53.

[FN52]. Michael L. Perlin et al., Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?, 1 Psychol., Pub. Pol'y, & L. 80, 114 (1995).

[FN53]. This section is largely adapted from Michael L. Perlin, "Salvation" or a "Lethal Dose" ? Attitudes and Advocacy in Right to Refuse Treatment Cases, 4 J. Forensic Psychol. Prac. No. 4, at 51 (2004).

[FN54]. See Melvin R. Shaw, Professional Responsibility of Attorneys Representing Institutionalized Mental Patients in Relation to Psychotropic Medication, 22 J. Health & Hosp. L. 186, 192 (1989) (characterizing lawyers' arguments seeking to vindicate a right to refuse medication as an "injustice").

[FN55]. For recent literature, see, for example, 2 Perlin, *supra* note 1, § 3B-1, at 155 n.1, and § 3B-2, at 157 n.2.

[FN56]. See generally 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, 135-36 (1996).

[FN57]. See Perlin, *supra* note 14, at 43-45; see also, e.g., Schwartz, *supra* note 48, at 662 (describing the "wholesale lack of legal advocacy" available to patients in public mental institutions).

[FN58]. Elliott Andalman & David L. Chambers, Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal, 45 Miss. L.J. 43, 72 (1974). One-half of the lawyers assigned to represent individuals in civil commitment cases in Dallas were unaware of the existence of either of the two treatises written specifically about Texas's mental health law. Daniel W. Shuman & Richard Hawkins, The Use of Alternatives to Institutionalization of the Mentally Ill, 33 Sw. L.J. 1181, 1193-94 (1980) (noting that attorneys received \$25 per case).

[FN59]. Norman G. Poythress Jr., Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope with Expert Testimony, 2 Law & Hum. Behav. 1, 15 (1978); see also Perlin, *supra* note 17, at 690. There is similar evidence in other areas of the law that knowledge alone is an insufficient impetus for attitudinal change. See, e.g., Robert M. Bohm et al., Knowledge and Death Penalty Opinion: A Test of the Marshall Hypotheses, 28 J. Res. Crime & Delinq. 360 (1991).

[FN60]. For a rare judicial acknowledgment of the impact of lawyer incompetency in another area where inadequate counsel leads to morally intolerable results, see [Engberg v. Meyer, 820 P.2d 70, 104 \(Wyo. 1991\)](#) (Urbigkit, C.J., dissenting in part and concurring in part): "We... let 'chiropractors' with law degrees perform the equivalent of brain surgery in capital cases and, predictably, the 'patient' often dies. This is intolerable."

[FN61]. See, e.g., [In re Judicial Commitment of C.P.K., 516 So. 2d 1323, 1325 \(La. Ct. App. 1987\)](#) (reversing commitment order where trial court failed to comply with statute expressing explicit preference for representation by state Mental Health Advocacy Service, and rejecting as "untenable" argument that trial court should be excused "since it did not know... whether the Service really existed"). I discuss C.P.K. in this context in Perlin & Dorfman, *supra* note 56, at 120 n.67.

[FN62]. See, e.g., Bruce J. Winick, [Restructuring Competency to Stand Trial, 32 UCLA L. Rev. 921, 941 \(1985\)](#); see also Alan H. Macurdy, The Americans With Disabilities Act: Time for Celebration, or Time for Caution?, 1 B.U. Pub. Int. L.J. 21, 29 (1991); John Parry, [Rights Aplenty But Not Enough Money: A Paradox in Federal Disability Policies, 12 Mental & Physical Disability L. Rep. 486 \(1988\)](#) (pointing out that while there has been legislation to enhance the civil rights of persons with disabilities, the laws are not always fully implemented due to the lack of funding and other resources).

[FN63]. [Rivers v. Katz, 495 N.E.2d 337, 343-44 \(N.Y. 1986\)](#). Representation in Rivers hearings is provided by the state-funded Mental Hygiene Legal Services (MHLS) office. [In re St. Luke's-Roosevelt Hosp. Ctr., 607 N.Y.S.2d 574, 579 n.11 \(N.Y. Sup. Ct. 1993\)](#), *aff'd*, [675 N.E.2d 1209 \(N.Y. 1996\)](#).

[FN64]. [Rennie v. Klein, 462 F. Supp. 1131, 1147 \(D.N.J. 1978\)](#), *suppl.*, [476 F. Supp. 1294 \(D.N.J. 1979\)](#), modified, [653 F.2d 836 \(3d Cir. 1981\)](#), vacated, [458 U.S. 1119 \(1982\)](#).

[FN65]. [Rennie, 476 F. Supp. at 1311](#); see also [id. at 1313](#) ("[Patient Advocates] may be trained attorneys, psychologists, social workers, registered nurses or paralegals, "or have any equivalent experience."). This recession followed the Supreme Court's decision in [Parham v. J.R., 442 U.S. 584 \(1979\)](#), allowing for relaxed procedures in the cases of the involuntary civil commitment of juveniles. But see [United States v. Humphreys, 148 F. Supp. 2d 949 \(D.S.D. 2001\)](#) (holding that lay advocate,

who was supposed to appear on defendant's behalf at involuntary medication hearing, but who actually testified against him, did not meet requirements of due process).

[FN66]. See, e.g., Okla. Stat. Ann. 43A § 5-415(A)(1) (West Supp. 2005); [Wis. Stat. Ann. § 880.33\(2\)\(a\)\(1\)](#) (West 2002); [N.M. Stat. Ann. § § 43-1-4, 43-1-15](#) (Michie 2000); [405 Ill. Comp. Stat. Ann. 5/2-107.1\(a\)\(3\)](#) (West 1997 & Supp. 2004); see also [In re Jones](#), 743 N.E.2d 1090, 1094 (Ill. App. Ct. 2001) (holding that trial court committed reversible error in appointing guardian ad litem to represent individual in medication hearing, as he had a statutory right to an attorney).

[FN67]. [In re Steen](#), 437 N.W.2d 101, 105 (Minn. Ct. App. 1989). Steen, interestingly, has only been cited by the Minnesota Court of Appeals in the fourteen years since it was decided. Cf. [Cornett v. Donovan](#), 51 F.3d 894 (9th Cir. 1995) (concluding that the right to legal assistance extends only through pleading stage of habeas or civil rights action).

[FN68]. See, e.g., [Rennie](#), 476 F. Supp. at 1313 ("[Patient Advocates] must be given training in the effects of psychotropic medication and the principles of legal advocacy."); [In re Jarvis](#), 433 N.W.2d 120, 123-24 (Minn. Ct. App. 1988) (criticizing failure to give counsel adequate time to explore basis for treating psychiatrist's choice of medications); [Williams v. Wilzack](#), 573 A.2d 809, 821 (Md. 1990) (criticizing failure to give counsel opportunity to present evidence or cross-examine witnesses).

[FN69]. See, e.g., [Virgil D. v. Rock County](#), 524 N.W.2d 894, 899-900 (Wis. 1994).

[FN70]. See Perlin, *supra* note 14, at 56 & n.101 (asserting that as mental disability law becomes more complex, it is essential that counsel for patients understand differing right to refuse treatment doctrines and their rationales).

[FN71]. Donald H. Zeigler, [Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts](#), 38 *Hastings L.J.* 665, 678-79 (1987); see also, Donald H. Zeigler, [Rights, Rights of Action, and Remedies: An Integrated Approach](#), 76 *Wash. L. Rev.* 67 (2001).

[FN72]. This is not to suggest that the existence of a constitutional right is somehow illegitimate if it is not honored in each individual case seeking to vindicate it. Rather, "honored" here refers to the presence of a legally legitimate hearing at which a decision as to whether to honor the right is fairly assessed.

[FN73]. Tom R. Tyler, [The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings](#), 46 *SMU L. Rev.* 433, 443 (1992); see Perlin, *supra* note 50, at 415 (discussing Tyler's insights in this context).

[FN74]. Steven K. Hoge & Thomas C. Feucht-Haviar, Long-Term, Assenting Psychiatric Patients: Decisional Capacity and the Quality of Care, 23 *Bull. Am. Acad. Psychiatry & L.* 343, 349 (1995) ("[O]ur findings seem to undermine physicians' arguments that informed consent is an unnecessary intrusion into the doctor-patient relationship, which interferes with the provision of effective treatment."); see also Bruce J. Winick, [Competency to Consent to Treatment: The Distinction Between Assent and Objection](#), 28 *Hous. L. Rev.* 15, 46-47 (1991) (discussing the therapeutic value of patient choice); Julie Magno Zito et al., The Treatment Review Panel: A Solution to Treatment Refusal?, 12 *Bull. Am. Acad. Psychiatry & L.* 349, 357 (1984).

[FN75]. Perlin & Dorfman, *supra* note 56, at 120 (quoting Perlin, *supra* note 14, at 49).

[FN76]. See generally Perlin & Dorfman, *supra* note 56, at 122-24.

[FN77]. See 2 Perlin, *supra* note 1, § 3B-14.5, at 373-74.

[FN78]. See generally Thomas Grisso & Paul S. Appelbaum, The MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric and Medical Treatments, 19 *Law & Hum. Behav.* 149 (1995).

[FN79]. Bruce J. Winick, The MacArthur Treatment Competence Study: Legal and Therapeutic Implications, 2 *Psychol., Pub. Pol'y, & L.* 137, 153 (1996).

[FN80]. *Id.* (for an explanation of these "19th-century notions," see *id.* at 151).

[FN81]. On counsel's educative role, see 1 Perlin, *supra* note 1, § 2B-9, at 247; Michael L. Perlin & Robert L. Sadoff, *Ethical*

Issues in the Representation of Individuals in the Commitment Process, 45 Law & Contemp. Probs. 161, 168- 73 (Summer 1982).

[FN82]. See, e.g., [In re Judicial Commitment of C.P.K., 516 So. 2d 1323, 1325 \(La. Ct. App. 1987\)](#), discussed supra note 61.

[FN83]. See, e.g., Brian Ladds et al., The Disposition of Criminal Charges After Involuntary Medication to Restore Competency to Stand Trial, 38 J. Forensic Sci. 1442 (1993); Brian Ladds et al., Involuntary Medication of Patients Who Are Incompetent to Stand Trial: A Descriptive Study of the New York Experience with Judicial Review, 21 Bull. Am. Acad. Psychiatry & L. 529 (1993).

[FN84]. I have been presenting papers on this topic to mental health professionals for the better part of thirty years. Consistently, there are always questions from the audience expressing surprise that there is such a right, and often expressing the view that such a right is clinically unwarranted. For the Supreme Court's most recent foray into this area of the law, see [Sell v. United States, 539 U.S. 166 \(2003\)](#), in which the court established procedures for use in cases of persons incompetent to stand trial who wish to refuse the administration of antipsychotic medication.

[FN85]. See, e.g., Paul S. Appelbaum & Thomas G. Gutheil, "Rotting With Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients, 7 Bull. Am. Acad. Psychiatry & L. 306 (1979); Darold A. Treffert, Dying with Their Rights On, 130 Am. J. Psychiatry 1041 (1973); Steven Rachlin, One Right Too Many, 3 Bull. Am. Acad. Psychiatry & L. 99 (1975).

[FN86]. Perlin & Dorfman, supra note 56, at 124.

[FN87]. Id. at 124-29.

[FN88]. Id. at 130; see also [Sana Loue, The Involuntary Civil Commitment of Mentally Ill Persons in the United States and Romania: A Comparative Analysis, 23 J. Legal Med. 211, 235 n.120 \(2002\)](#) (same).

[FN89]. Grant H. Morris, [Judging Judgment: Assessing the Competence of Mental Patients to Refuse Treatment, 32 San Diego L. Rev. 343, 364 \(1995\)](#). These hearings were held in partial implementation of the California decision in [Riese v. St. Mary's Hospital & Medical Center, 271 Cal. Rptr. 199, 211 \(Ct. App. 1987\)](#); see generally 2 Perlin, supra note 1, § 3B-7.2c, at 276-79.

[FN90]. Morris, supra note 89, at 388.

[FN91]. Id. at 425-30.

[FN92]. The Supreme Court has explicitly linked the possibility of side effects to the rationale for Constitutional due process protections in right to refuse cases. See [Washington v. Harper, 494 U.S. 210, 229-30 \(1990\)](#) ("[I]t is also true that the drugs can have serious, even fatal, side effects... tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs... [is] irreversible in some cases, [and is] characterized by involuntary, uncontrollable movements of various muscles, especially around the face."); [Riggins v. Nevada, 504 U.S. 127, 137 \(1992\)](#) ("[I]t was suggested that the dosage administered to [the defendant] was within the toxic range, and could make him 'uptight' [or make him] suffer from drowsiness or confusion.... It is clearly possible that such side effects had an impact upon not just [defendants'] outward appearance, but also the content of his testimony..., his ability to follow the proceedings, or the substance of his communication with counsel." (internal citations omitted)); [Sell v. United States, 539 U.S. 166, 185 \(2003\)](#) ("Whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence....").

[FN93]. Wenona Y. Whitfield, [Capacity, Competency, and Courts: The Illinois Experience, 14 Wash. U. J.L. & Pol'y 385, 404-05 \(2004\)](#).

[FN94]. Id. at 404.

[FN95]. Bruce J. Winick, Foreword: A Summary of the MacArthur Treatment Competence Study and an Introduction to the Special Theme, 2 Psychol., Pub. Pol'y, & L. 3, 15 (1996).

[FN96]. OCS is a "powerful unconscious animator of legal decision making." Michael L. Perlin, "[She Breaks Just Like a Little Girl](#)": Neonaticide, The Insanity Defense, and the Irrelevance of "Ordinary Common Sense", 10 Wm. & Mary J. Women & L. 1, 25 (2003); see Richard K. Sherwin, [Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions](#), 136 U. Pa. L. Rev. 729, 737 (1986-1987) (stating that OCS exemplified by the attitude of "What I know is 'self evident'; it is 'what everybody knows'").

[FN97]. Perlin, supra note 96, at 24-25 (citing Michael L. Perlin, "[Half-Wracked Prejudice Leaped Forth](#)": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as it Did, 10 J. Contemp. Legal Issues 3, 4-5 (1999)).

[FN98]. Perlin, supra note 96, at 25.

[FN99]. Id.

[FN100]. Michael L. Perlin, "For the [Misdemeanor Outlaw](#)": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities, 52 Ala. L. Rev. 193, 228 (2000).

[FN101]. Perlin, supra note 47, at 544; Perlin, supra note 13, at 301.

[FN102]. Perlin, supra note 17, at 695.

[FN103]. See text accompanying note 46 (discussing [In re Detention of T.A. H.-L.](#), 97 P.3d 767 (Wash. Ct. App. 2004)).

[FN104]. [462 F. Supp. 1131 \(D.N.J. 1978\)](#) (granting involuntarily committed mental patients a limited right to refuse medication).

[FN105]. See, e.g., Perlin, supra note 97, at 16 n.70.

[FN106]. Perlin & Dorfman, supra note 56, at 135 (internal citations omitted).

[FN107]. Bruce J. Winick, The Right to Refuse Mental Health Treatment 84, 328-29 (1997).

[FN108]. Id. at 330-32.

[FN109]. Id. at 341.

[FN110]. Id. at 400-02.

[FN111]. Perlin et al., supra note 52, at 114.

[FN112]. Ensminger & Liguori, supra note 49.

[FN113]. Perlin & Dorfman, supra note 56.

[FN114]. Perlin et al., supra note 52.

[FN115]. Whitfield, supra note 93.

[FN116]. Tyler, supra note 73.

[FN117]. I discuss the significance of dignity values in this context in 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).

[FN118]. For one of the rare considerations of the role of the prosecuting/hospital attorney in civil commitment cases, see David B. Wexler, Inappropriate Patient Confinement and Appropriate State Advocacy, in Therapeutic Jurisprudence, supra

note 49, at 347. See also *supra* text accompanying note 95 (reporting on the "little incentive or interest" on the part of Illinois state attorneys in the representation of the state in such cases); Whitfield, *supra* note 93, at 404-05.

[FN119]. It is not enough that lawyers and judges learn about mental illness, diagnoses, etc.; it is essential that they learn also about attitudes. See *supra* note 59, at 15 (discussing Poythress). Poythress concluded that the "trained" lawyers' behavior in court was not materially different from that of "untrained" lawyers because the former group's attitudes toward their clients had not changed. Mere knowledge of cross-examination methods, he noted, "did not deter them from taking [the] more traditional, passive, paternal stance toward the proposed patients." As one trainee noted: "I really enjoyed your workshop and I've been reading over your materials and its [sic] all very interesting, but this is the real world, and we've got to do something with these people. They're sick."

[FN120]. See [Falter v. Veterans' Admin., 502 F. Supp. 1178, 1185 \(D.N.J. 1980\)](#) (stating that the central inquiry is "how [persons with mental disabilities] are treated as human beings"). I discuss Falter in this context in Perlin, *supra* note 47, at 541 n.49.

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***239 "EVERYTHING'S A LITTLE UPSIDE DOWN, AS A MATTER OF FACT THE WHEELS HAVE STOPPED": THE FRAUDULENCE OF THE INCOMPETENCY EVALUATION PROCESS**

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Introduction

I frequently lecture on questions of criminal incompetencies, [\[FN1\]](#) and, when I do, I am often asked to recommend what I think are the most "important" articles in the field. I invariably tell the audiences that there are two articles that stand head and shoulders above all others: Bruce Winick's 1985 piece in the UCLA Law Review, [\[FN2\]](#) and the 1993 article by Grant Morris and J. Reid Meloy in the U.C. Davis Law Review. [\[FN3\]](#) I tell my audiences that I say this not because they are first-rate analytical and doctrinal pieces of scholarship (which they are), but because, empirically, they force us to confront the glaring ***240** pretextuality [\[FN4\]](#) that is at the heart of incompetency-to-stand-trial (IST) law: the fact that decades after the United States Supreme Court's decision in *Jackson v. Indiana*--holding that an incompetent-to-stand-trial criminal defendant cannot be housed indefinitely in a maximum security forensic facility because of incompetent status unless it appears likely that he or she will regain competence to stand trial within the "foreseeable future" [\[FN5\]](#)--nearly half of the states still have not implemented, enforced or operationalized *Jackson*. [\[FN6\]](#) And I further tell my audiences that that failure--a failure unthinkable in other areas of constitutional law [\[FN7\]](#)--better than any other example, demonstrates the fraud and charade of mental disability law. [\[FN8\]](#)

In the decade since Morris and Meloy published their U.C. Davis article, nothing has been written that has led me to reconsider my position. [\[FN9\]](#) Until now. Flatly stated, the article published in this Symposium by Grant Morris and his co-authors (sometimes "the Morris article") is the most important piece about incompetency-to-stand-trial law ever published, and it may very well be the most important empirical piece ever published about any aspect of forensic ***241** mental disability law. If there is any rationality in the world, its publication will restructure for all time the debate and the dialogue about expert testimony by forensic mental health professionals in criminal law cases.

Morris and his colleagues show us that all our assumptions about forensic testimony--in what had always appeared to be a relatively "easy" area of mental disability law (competency-to-stand-trial determinations)--have been dead wrong. These authors force us to do what scholars, advocates, polemicists and politicians have failed at miserably for the past thirty years--they force us to reconceptualize the role of the expert in the decision making process in what is probably

the most important law/mental health professional interaction in the criminal law field: the adjudication of incompetency-to-stand-trial (IST) cases. This is not just "news"; this is big news. And it is news that no one could have possibly expected. It is groundbreaking, it is revolutionary, and it is profound. Mental disability law will never (or, at least, should never) be the same.

The reader of this essay at this point is logically entitled to ask: Why? What's the big deal? What is it about this seemingly straightforward and direct article, reporting on paper responses to a multiple-vignette test, that can cause such effusive hyperbole? [\[FN10\]](#) And this is a fair question. I say what I have said for multiple reasons (as I will explore below), but primarily for an overarching one.

This article forces us to acknowledge that the disagreement among experts-- and the most "expert" experts, at that [\[FN11\]](#)--is profound and pervasive, so much so that it is perhaps time to dust off the phrase made famous nearly thirty years ago by Bruce Ennis and Tom Litwack, discussing clinical predictions of future dangerousness in the context of civil commitment; that this exercise is no more than "flipping coins in the courtroom." [\[FN12\]](#)

*242 The implications of this insight reverberate throughout the entire criminal trial process, and will, eventually, force us to rethink the role of expertise in sexually violent predator determinations, [\[FN13\]](#) in insanity defense cases, [\[FN14\]](#) in sentencing matters, [\[FN15\]](#) and in death penalty inquiries. [\[FN16\]](#) These, though, are inquiries for a future day. At this point in time, we must focus on the matter at hand. If the odds of obtaining these results were less than one in a billion, [\[FN17\]](#) what does that say about the role of this evaluation in the criminal law system (and, most importantly, what does it say about the ultimate disposition of tens of thousands of felony cases a year in which there is an inquiry as to the defendant's competency)? [\[FN18\]](#) The genie, to use a shopworn cliché, is out of the bottle. It cannot be put back.

This article will proceed in the following manner. First, I will look at the Morris article's main findings, and explain why it is so precedent-shaking for all of forensic criminal law, and why it demonstrates, beyond any doubt, the pretextuality of this entire area of the law (something I have been seeking to do for a decade). [\[FN19\]](#) Second, I will focus on a cluster of points made in the article, and demonstrate how these points reflect the pretextuality to which I have just referred, and how they require us to rethink so many of the basic assumptions generally held about this area of the law. Third, I will focus on another cluster of points made in the article, and demonstrate how those points reflect the sanism that is pervasive in all of mental disability law. [\[FN20\]](#) Finally, I will offer some modest *243 conclusions that we can draw from the publication of this new data.

My title comes from Bob Dylan's towering masterpiece, Idiot Wind, [\[FN21\]](#) a song whose "searing metaphors and savage language" [\[FN22\]](#) create--to my mind--a perfect milieu for mental disability law analyses. The line in question is part of this angry verse:

It was gravity which pulled us down and destiny which broke us apart[.]

You tamed the lion in my cage but it just wasn't enough to change my heart.

Now everything's a little upside down, as a matter of fact the wheels have stopped[.]

What's good is bad, what's bad is good, you'll find out when you reach the top[.]

You're on the bottom. [\[FN23\]](#)

As I hope to demonstrate in this article, the world of incompetency-to-stand-trial law is truly "upside down," and, in many important ways, the "wheels [of justice] have stopped." I hope that the publication and dissemination of this symposium issue will be the first step in the taming of this "idiot wind."

I. The Significance of the Findings

Morris and his colleagues report that, in assessing Vignette 1, the 264 forensic psychiatrists and psychologists were evenly divided, [\[FN24\]](#) and characterize that division as "not merely surprising, [but] shocking." [\[FN25\]](#) This is an understatement: It is stupefying. It is *244 also not random. The authors calculate the chances of this split as being less than one in one billion. [\[FN26\]](#) This is equally stupefying. [\[FN27\]](#)

The authors logically conclude from the data that "the defendant's fate depends only on who performed the evaluation." [FN28] And, indeed, no other conclusion can reasonably be drawn from these facts, facts which lead the authors to ask--somewhat ruefully, I think--"are forensic psychiatrists and forensic psychologists competent to assess competence?" [FN29] What is the significance of these astounding findings? Let me suggest a few possibilities:

1. We have always accepted as conventional wisdom the fact there is high inter-rater concordance in the assessment of what should be a much more difficult evaluation: whether a defendant is insane (meaning, is he not responsible for his acts because of mental illness which led him to, variously, not know right from wrong, or be able to appreciate the nature or quality of his act). [FN30] It would be reasonable to expect greater ambiguity on insanity questions because of several factors: (a) the ambiguity of the tests, (b) the political context of insanity defense evaluations, (c) the greater publicity attached to these cases, and (d) the ultimate implications of the ultimate finding. [FN31] Yet most studies have demonstrated unflinchingly that the rate of agreement in these cases is remarkably high--often approaching 90%. [FN32] The contrast is startling.

2. The competency-to-stand-trial test is often seen as an "easy" or "minimalist" one. [FN33] Only, it is commonly argued, the most "out of it" criminal defendants will be found IST, in large part because the *245 competency test demands so little. What then to do with the utterly contrary findings in this survey?

3. In the years since Bernard Diamond exposed the fallacy of the "impartial expert," scholars, for the most part have avoided the "dirty little question" that was at the core of Diamond's writings in this area: Is there such a thing as a "neutral" or "objective" expert witness? I have always thought that this was a vastly under-discussed question, and perhaps, this article will reinvigorate that debate. [FN34]

We ignore the results reported here at our own peril. They tell us that all of our common wisdom about these evaluations is, to be blunt, dead wrong. We can no longer keep our heads conveniently and blissfully buried in the legal, moral and behavioral sands.

II. Pretextuality and Criminal Incompetency Law

Morris and his colleagues' findings also demonstrate the depths of the pretextuality of the criminal incompetency system. Over a decade ago, I wrote this about the pretexts of that system, under the guise of "morality," as expert witnesses seek to achieve the "right" ends:

"Morality" issues affect the incompetency to stand trial process in several critical ways. First, the process is subject to significant political bias. Second, the power imbalance issues that taint the entire forensic process are especially potent. Third, the fact that the inadequacy of pre-trial evaluations, cursory testimony, the misuse and misapplication of substantive standards, and the non-implementation of Supreme Court constitutional directives receive little judicial *246 or scholarly attention suggests that specific social ends animate the entire incompetency to stand trial system. [FN35]

What light does the Morris study shed on these issues?

The Morris article reveals the extent to which pretextuality dominates the incompetency-to-stand-trial system. First, the entire system--implicitly and explicitly --assumes that the defendant committed the predicate criminal act with which he is charged. [FN36] Although there is nothing in the invocation of the incompetency status that at all concedes factual guilt (as opposed to the entry of a not-guilty-by-reason-of-insanity plea that concedes the commission of the underlying criminal act), [FN37] it is assumed by all that the defendant did, in fact, commit the crime.

When I was a public defender, I represented in individual cases well over 200 criminal defendants who had been found--at some point--incompetent to stand trial. In not a single case did the prosecutor, the judge, or the forensic evaluator even acknowledge the possibility that the defendant might have been "factually innocent" of the underlying charge. This is a topic that is rarely, if ever, addressed in the case law or the legal or behavioral literature, but I am convinced that it is one that must be taken seriously if we are going to carefully and comprehensively examine this question. [FN38]

In fact, the research shows that "expert" evaluations frequently rely not on the examiners' experience or knowledge

but on the facts of the criminal act charged. [\[FN39\]](#) In one study, the "only variable" that distinguished those determined to be dangerous from those determined not to be dangerous was the alleged crime: "The more serious the alleged crime, the more likely that the psychiatrist would find the defendant dangerous." [\[FN40\]](#)

***247** Second, the paper notes the Supreme Court's fact-not-in-evidence assumption that, in competency-to-stand-trial determinations, defense counsel "will often have the best-informed view of the defendant's ability to participate in his defense," [\[FN41\]](#) and then observes that counsel "typically does not testify in the incompetency hearing." [\[FN42\]](#) The empirical data is even more dramatic than that. In a recent paper, Professor Randy Otto and his colleagues reported on data that revealed that, in a study of 674 juvenile incompetency cases (the subset where one might reasonably expect counsel would be more involved than in other cases), not a single defense counsel testified at the juvenile's competency hearing. [\[FN43\]](#) This pretext is just as glaring.

Third, the analysis of Vignette # 1 demonstrates that many forensic witnesses insist on "playing lawyer," making decisions as to incompetency based on their perceptions of whether a defendant's tactical decision (e.g., to refuse to raise an insanity defense) is a rational one. [\[FN44\]](#) There are many valid reasons why a defendant would want to reject an insanity defense (not the least of which is the likelihood that he would be incarcerated in a maximum security facility for a far greater time period following a successful insanity plea than had he been sentenced to the maximum term allowable under the criminal law). [\[FN45\]](#) For the forensic expert to make these conclusions reflects both inappropriate and pretextual behavior.

***248** Fourth, the responses reveal an inappropriate fusing on the part of some of the experts between their evaluative role and their (non-existent) treating role. [\[FN46\]](#) One respondent thus answered: "She [the subject of the vignette] appears to need medication. I would lean toward unfit with greater period of observation as an inpatient." [\[FN47\]](#) The inappropriateness of this sort of response was first noted over thirty years ago, [\[FN48\]](#) and remarkably, it still appears to be flourishing. Again, it is the rankest sort of pretext to invoke or adapt the competency evaluation process to serve as a vehicle for treatment needs.

Fifth, some of the responders simply rejected the significance of the difference between the two incompetency tests used in the study; "I'm not impressed with the standards . . . really being different," wrote one. [\[FN49\]](#) Again, there is nothing new here:

[A]fter considering Ontario's amended mental health law aimed at making involuntary civil commitment standards more stringent, a prominent local psychiatrist argued that the new law had little empirical weight: "Doctors will continue to certify those whom they really believe should be certified; they will merely learn a new language." [\[FN50\]](#)

What is depressing is that this behavior continues, unabated, after more than twenty years.

Sixth, the article reveals that, in spite of the impressive array of new competency assessment instruments now available to evaluators, "the overwhelming majority of psychiatrists and psychologists do not use psychological tests in assessing a defendant's competency." [\[FN51\]](#) This refusal to use such tools (e.g., the MacArthur ***249** Competence Assessment Tool--Criminal Adjudication (MacCAT--CA)) [\[FN52\]](#) reflects, again, a pretextual turn on the part of experts who presumably feel that their expertise enables them to make such determinations without the assistance of "standardized and nationally norm-referenced clinical measure[s]." [\[FN53\]](#)

Finally, the respondents consistently failed to differentiate between forensic and clinical issues, [\[FN54\]](#) and it is this error that in many ways best demonstrates the pretextuality that is at play here. The answers of "numerous" respondents "clearly suggested" that clinical questions concerning the presence of mental illness, psychosis and amenability to treatment were determinative of their final (putatively) forensic conclusion. [\[FN55\]](#) The overt--perhaps defiant--call on the part of the respondents to willfully ignore the legal standard and to superimpose their own moralistic sense of how the case should be resolved tells us that this pretextual system is far more corrupt than any of us had known.

Writing some 14 years ago, Michael Saks charged that expert witnesses often act like "imperial experts" who install themselves as "temporary monarch[s]" by replacing a "social preference expressed through the law and legal process with [their] own preferences." [\[FN56\]](#) Saks based his conclusion on court hearings that he watched in one courthouse. [\[FN57\]](#) The cohort of responders to the Morris survey--from across the nation [\[FN58\]](#)--clarifies that this is not, had

anyone so thought it to be, simply an idiosyncratic or local problem.

One evaluator, in responding to the vignettes, answered in this manner: "Irrespective of the specific legal definition of incompetency, in this case the defendant is incompetent based on active psychosis that impairs his reasoning ability and judgment." [FN59] Over thirty years ago, Professors Robert A. Burt and Norval Morris set *250 out the paradigmatic incompetency-to-stand-trial testimonial dialogue:

Judge: Doctor, is he incompetent?

Psychiatrist: Your Honor, he is psychotic! [FN60]

When I first wrote about this dialogue, I said this:

This is intuitively bad diagnosis, bad forensic testimony, and bad law. Yet it continues regularly. First, and perhaps foremost, it meets judicial needs. Judges are primarily concerned that incompetency assessments conform to minimal legal requirements. Accordingly, they are likely to require only that the evaluation "offer no less than what the judge has become accustomed to in past assessments." This attitude produces disincentive for new methods that might engender uncertainty, the low card in any heuristic judge's hand. [FN61]

Apparently, nothing has changed in thirty-plus years.

III. Sanism and Criminal Incompetency Law

In a 2000 law review article, I had this to say about sanism and criminal incompetency law:

Sanism similarly infects incompetency-to-stand-trial jurisprudence in at least four critical ways: (1) courts resolutely adhere to the conviction that defendants regularly malingering and feign incompetency; (2) courts stubbornly refuse to understand the distinction between incompetency to stand trial and insanity, even though the two statuses involve different concepts, different standards, and different points on the "time line"; (3) courts misunderstand the relationship between incompetency and subsequent commitment, and fail to consider the lack of a necessary connection between post-determination institutionalization and appropriate treatment; and (4) courts regularly accept patently inadequate expert testimony in incompetency to stand trial cases. [FN62]

If there is any better evidence than the Morris article to support the fourth of these assertions, I frankly cannot imagine what that might be. The Morris article--in its reportage on the responses and elsewhere--highlights other evidence of rampant sanism in the entire incompetency determination process. Initially, the authors note, *251 "trial judges appear to have little interest in carefully weighing all the evidence, and in making their own independent assessment of the defendant's competence." [FN63] Why? Why do judges agree with the forensic evaluator in 90% or 96.3% or 99.7% (!) of the cases studied? [FN64] This failure to make independent assessments in this area of law reflects the bleakest sort of sanism. Judge Bazelon's words of years ago still ring true:

Very few judges are psychiatrists. But equally few are economists, aeronautical engineers, atomic scientists, or marine biologists. For some reason, however, many people seem to accept judicial scrutiny of, say, the effect of a proposed dam on fish life, while they reject similar scrutiny of the effect of psychiatric treatment on human lives. [I]t can hardly be that we are more concerned for the salmon than the schizophrenic. [FN65]

This unprecedented-in-any-other-area-of-the-law abdication of judicial responsibility helps to define sanism. [FN66]

The finding of competence is not trivial, nor is it a "legal technicality" (if that beleaguered word has any place at all in discussions of constitutional law and policy). [FN67] It is, rather, the bedrock of a legal system purportedly, at least in part, premised upon the dignity of the individual, [FN68] and one which allows the punishment of only individuals who can comprehend the significance of that punishment. [FN69] For judges to say, as Professor Zapf has reported, that it would make their job "much easier" if experts would "simply state whether *252 the defendant is competent or not [FN70] is, to repeat a word I have already used here, stupefying.

As Morris and his colleagues underscore: "[T]he competency adjudication process has not been taken seriously, either by prosecutors or defense counsel who raise the issue of competence and introduce evidence on this issue, or by judges who supposedly consider that evidence and make their decisions." [FN71] This trivialization--premiered implicitly on the assumption that the people about whom these decisions are made are somehow not "worthy" of true constitutional protection (and are, perhaps, less than human) [FN72]--is the rotten core of sanism. [FN73]

The abdication on the part of lawyers (leaving it to mental health professionals to develop their own competence assessment standards with little assistance) [\[FN74\]](#) and on the part of judges (refusing to independently assess clinical testimony), [\[FN75\]](#) the failure of most clinicians to use standardized and validated tests, [\[FN76\]](#) the lack of meaningful dialogue between the lawyer and the evaluator, [\[FN77\]](#) are all symptoms of the same malignancy: the corrosive impact of sanism on the legal process.

IV. Conclusion

It is rare for a law review article to force us to significantly change the way that we construct an area of the law. The lead article in this symposium does that by exposing the fraudulence of the incompetency *253 evaluation process, and by demonstrating that our "ordinary common sense" [\[FN78\]](#) is gravely distorted and deeply flawed.

These astonishing revelations underscore the conclusion that the mental disability law system is a pretextual and sanist one, and force us to consider the implications of this teaching. If we now know that clinical decision-making is as random and incoherent as it appears to be, and that the courts wish to abdicate their role even more completely, what does that say about the way we continue to carry on business-as-usual in this area? At what point will we finally acknowledge that this system is completely damaged and in need of a complete rebuilding and reconceptualization?

Everything here, to return to the lyric used in my title, is more than "a little upside down." And although the "wheels" (of justice) have not "stopped," the authentic administration of justice has. In the next verse of Idiot Wind, the song from which the lyric comes, Dylan sings, "I noticed at the ceremony, your corrupt ways had finally made you blind." [\[FN79\]](#) Perhaps the publication of this remarkable article will finally open our eyes.

[\[FN1\]](#). For a sampling of my writings on this topic, see, e.g., Michael L. Perlin, Beyond Dusky and Godinez: Competency Before and After Trial, 21 Behav. Sci. & L. 297 (2003); Michael L. Perlin, "For the [Misdemeanor Outlaw](#)": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities, 52 Ala. L. Rev. 193 (2000) [hereinafter Perlin, Outlaw]; 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) [hereinafter Perlin, Dignity]; Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency](#), 47 U. Miami L. Rev. 625 (1993) [hereinafter Perlin, Pretexts]; Michael L. Perlin, Are Courts Competent to Decide Questions of Competency? Stripping the Facade From United States v. Charters, 38 U. Kan. L. Rev. 957 (1990) [hereinafter Perlin, Charters]; Michael L. Perlin & Joel Dvoskin, AIDS-Related Dementia and Competency to Stand Trial: A Potential Abuse of the Forensic Mental Health System, 18 Bull. Am. Acad. Psychiatry L. 349 (1990). See generally 4 Michael L. Perlin, Mental Disability Law: Civil and Criminal, ch. 8 (2d ed. 2002) [hereinafter 4 Perlin, Mental Disability Law].

[\[FN2\]](#). Bruce Winick, [Restructuring Competency to Stand Trial](#), 32 UCLA L. Rev. 921 (1985).

[\[FN3\]](#). 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).

[\[FN4\]](#). See Michael L. Perlin, ["Life Is In Mirrors, Death Disappears": Giving Life to Atkins](#), 33 N.M. L. Rev. 315, 343-44 (2003) [hereinafter Perlin, Mirrors]. "Pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." Id.; see also Perlin, Outlaw, supra note 1, at 227; Michael L. Perlin, [A Law of Healing](#), 68 U. Cin. L. Rev. 407, 422-23 (2000) [hereinafter Perlin, Healing]. I first developed these thoughts in 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, 133-35 (1991) [hereinafter Perlin, Morality and Pretextuality].

[\[FN5\]](#). 406 U.S. 715, 738 (1972).

[\[FN6\]](#). Winick, supra note 2, at 940-41; Morris & Meloy, supra note 3, at 9; see Michael L. Perlin, ["Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did](#), 10 J. Contemp. Legal Issues 3, 23-24 (1999) [hereinafter Perlin, Half-Wracked]; Michael L. Perlin, Fatal Assumption: A

Critical Evaluation of the Role of Counsel in Mental Disability Cases, 16 Law & Hum. Behav. 39, 48 (1992).

[FN7]. Imagine if half the states simply chose to ignore the Supreme Court's decisions in areas such as reproductive rights law, school desegregation, or environmental protection; what sort of public outcry would follow such failures of implementation.

[FN8]. See generally Michael L. Perlin, *The Hidden Prejudice: Mental Disability on Trial* (2000) [hereinafter Perlin, *Hidden Prejudice*].

[FN9]. This is certainly not to say that there has been no superb scholarship in this area of the law. See, e.g., 4 Perlin, *Mental Disability Law*, supra note 1, § 8A-2.2, at 11-12 n.57 (citing recent "significant" literature). However, I believe that none of this scholarship--no matter its intellectual rigor, empirical grounding, or theoretical brilliance--can match for importance the articles by Winick or by Morris and Meloy, of which I speak here.

[FN10]. Although Professors Morris and Haroun are friends of mine, I never met the third collaborator until after I submitted this paper. Be assured that these connections have no impact on what I am writing here.

[FN11]. The authors sent their questionnaire solely to individuals who were either Board Certified in Forensic Psychiatry or Diplomates in Forensic Psychology. See Grant Morris et al., [Competency to Stand Trial on Trial](#), 4 Hous. J. Health L. & Pol'y 193, 212 (2004).

[FN12]. Bruce Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693 (1974).

There is some irony here, to be sure, in that researchers and clinicians have finally broken the 50% barrier (as reflected in the Ennis and Litwack article). For the most comprehensive research on predictions of violence, see John Monahan, *Clinical and Actuarial Predictions of Violence*, in *Modern Scientific Evidence: The Law and Science of Expert Testimony* § § 7-2.0 to 7-2.4, at 300 (David Faigman et al. eds., 1997).

[FN13]. On the (unproven) assumption that evaluators have this expertise, see David Shapiro, [Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions](#), 34 Cal. W. L. Rev. 177, 199- 200 (1997).

[FN14]. See, e.g., 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, 1408 (1997) [hereinafter Perlin, *Borderline*] (one myth associated with the insanity defense is "[a] fear that the soft, exculpatory sciences of psychiatry and psychology, claiming expertise in almost all areas of behavior, will somehow overwhelm the criminal justice system by thwarting the system's crime control component").

[FN15]. See, e.g., Richard E. Redding & Lynda E. Frost, [Adjudicative Competence in the Modern Juvenile Court](#), 9 Va. J. Soc. Pol'y & L. 353 (2001).

[FN16]. See, e.g., Kenneth B. Dekleva, *Psychiatric Expertise in the Sentencing Phase of Capital Murder Cases*, 29 J. Am. Acad. Psychiatry & L. 58, 58 (2001).

[FN17]. Morris & Meloy, supra note 3, at 52.

[FN18]. See 4 Perlin, *Mental Disability Law*, supra note 1, § 8A-2.1, at 3 n. 5 (citing Henry J. Steadman, *Beating a Rap? Defendants Found Incompetent to Stand Trial* 4 (1979) and noting that 36,000 potentially incompetent defendants are evaluated yearly).

[FN19]. See generally Perlin, *Pretexts*, supra note 1.

[FN20]. See, e.g., Perlin, *Mirrors*, supra note 4, at 317 n.28. "Sanism" is an irrational prejudice towards mentally ill persons, which is of the same quality and character as other irrational prejudices, and is based largely upon stereotype, myth, superstition and deindividualization. Id.

[FN21]. Bob Dylan, Idiot Wind, on Blood on the Tracks (Ram's Horn Music 1975) available at <http://www.bobdylan.com/songs/idiot.html> (last visited July 28, 2004) [hereinafter Idiot Wind].

This is the fourth time that I have turned to that song as inspiration for the title of an article on mental disability law. See Perlin, Borderline, *supra* note 14, at 1379-80; Michael L. Perlin, The Americans with Disabilities Act: "[What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top. You're on the Bottom](#)": Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More than "Idiot Wind" ?, 35 U. Mich. J.L. Reform 235, 241 (2001-02) [hereinafter Perlin, Olmstead]; Michael L. Perlin, "Big Ideas, Images and Distorted Facts": The Insanity Defense, Genetics, and the "Political World," in Genetics and Criminality: The Potential Misuse of Scientific Information in Court 37, 39 (Jeffrey Botkin, et al., eds. 1999).

[FN22]. Perlin, Olmstead, *supra* note 21, at 241.

[FN23]. Idiot Wind, *supra* note 21.

[FN24]. Morris et al., *supra* note 11, at 215.

[FN25]. Id.

[FN26]. Id. at 216.

[FN27]. Only one of 273 respondents adequately explained why the Vignette #1 defendant might be competent under the "rational manner" language but incompetent under the "rational understanding" standard. Id. at 225.

[FN28]. Id. at 216.

[FN29]. Id. Cf. Perlin, Charters, *supra* note 1 (asking the same question about judges).

[FN30]. For a discussion of all insanity tests, see 4 Perlin, Mental Disability Law, *supra* note 1, § § 9A-3 to 9A-3.7, at 145-79.

[FN31]. See generally Michael L. Perlin, The Jurisprudence of the Insanity Defense (1994) [hereinafter Perlin, Insanity Defense].

[FN32]. Perlin, Half-Wracked, *supra* note 6, at 21 n.96 (citing, inter alia, Jeffrey L. Rogers et al., Insanity Defense: Contested or Conceded?, 141 Am. J. Psychiatry 885 (1984); Kenneth K. Fukunaga et al., Insanity Plea: Interexaminer Agreement and Concordance of Psychiatric Opinion and Court Verdict, 5 Law & Hum. Behav. 325, 326 (1981)).

[FN33]. See Martin Sabelli & Stacey Leyton, [Train Wrecks and Freeway Crashes: An Argument For Fairness And Against Self Representation in the Criminal Justice System](#), 91 J. Crim. L. & Criminology 161, 171 (2000).

[FN34]. Perlin, Pretexts, *supra* note 1, at 641 (discussing, inter alia, Bernard L. Diamond, The Fallacy of the Impartial Expert, 3 Archives Crim. Psychodynamics 221, 223 (1959)). I wrote this a decade ago:

I begin with the proposition that the phrase "neutral expert" is an oxymoron. Bernard Diamond, for one, believed that a witness' unconscious identification with a "side" of a legal battle or his more conscious identification with a value system or ideological leanings may lead to "innumerable subtle distortions and biases in his testimony that spring from this wish to triumph." Even demurring to Diamond's psychoanalytic speculations, subsequent behavioral research demonstrates that the expert's opinion in insanity defense cases and civil psychic trauma trials positively correlates with the expert's underlying political ideology.

Id. Diamond's article has been virtually ignored since that time. But see Daniel W. Shuman, et al., [Assessing the Believability of Expert Witnesses: Science in the Jurybox](#), 37 Jurimetrics J. 23, 25 n.10 (1996); Daniel W. Shuman, et al., An Empirical Examination of the Use of Expert Witnesses in the Courts-- Part II: A Three City Study, 34 Jurimetrics J. 194, 195 n.7 (1994) (both citing Diamond's article).

[FN35]. Perlin, Pretexts, *supra* note 1, at 653; see Perlin, Morality and Pretextuality, *supra* note 4.

[FN36]. See Morris et al., *supra* note 11, at 194-96.

[FN37]. See [Jones v. United States, 463 U.S. 354, 363 \(1983\)](#) ("A verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness.").

[FN38]. See Perlin, *Outlaw*, *supra* note 1, at 206-07.

Consider this easy hypothetical. A defendant is charged with crime and is, in fact, factually innocent. Walking to the courthouse for the initial bail hearing, he is hit on the head by a cinder block from ongoing courthouse construction, causing severe organic brain damage. He will be found--most likely--incompetent to stand trial, but such finding in no way should allow us to assume that he is factually "guilty" of the underlying charge.

[FN39]. Perlin, *Pretexts*, *supra* note 1, at 663.

[FN40]. *Id.* (quoting Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers L. Rev. 1084, 1096 (1976)).

[FN41]. Morris et al., *supra* note 11, at 199 (quoting [Medina v. California, 505 U.S. 437, 450 \(1992\)](#)).

[FN42]. *Id.*

[FN43]. Randy Otto, "Evaluations of Juveniles' Competence to Proceed," paper presented to the American Academy of Psychiatry and Law, Newport Beach, Cal., October 24, 2002; see also Annette Christy et al., *Juveniles Evaluated Incompetent to Proceed: Characteristics and Quality of Mental Health Professionals' Evaluation*, 35 Prof. Psychol.: Res. & Prac. 380 (2004) (of the 1357 evaluations generated in the 674 cases, only thirty-three reported on an interview by the examining psychologist of the juvenile's lawyer).

[FN44]. Morris et al., *supra* note 11, at 220.

[FN45]. See [Jones, 463 U.S. at 369](#) ("There simply is no necessary correlation between severity of the offense and length of time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment."). This is especially significant in a case such as the one in the vignette where the maximum sentence the defendant would face would be a year in the county jail. See Morris et al., *supra* note 11, at 213, 219.

The research demonstrates that, in the case of misdemeanors and lesser felonies, defendants who "successfully" plead insanity generally serve nine times as long in a maximum security facility than they would have served had they been convicted. See Perlin, *Outlaw*, *supra* note 1, at 210; Perlin, *Insanity Defense*, *supra* note 31, at 110-11; Henry J. Steadman et al., *Before and After Hinckley: Evaluating Insanity Defense Reform* 58-61 (1993).

On the right of a defendant to refuse to plead the insanity defense, see 4 Perlin, *Mental Disability Law*, *supra* note 1, § 9A-8, at 241-45.

[FN46]. Morris et al., *supra* note 11, at 222-23.

[FN47]. *Id.* at 222.

[FN48]. See Arthur Matthews, *Mental Disability and the Criminal Law* 134 (1970) (noting the competency process is frequently invoked to effect hospitalization that might not otherwise be possible under the state's civil commitment statute); see also Winick, *supra* note 2, at 933.

[FN49]. Morris et al., *supra* note 11, at 224.

[FN50]. Perlin, *Pretexts*, *supra* note 1, at 645 (quoting William O. McCormick, *Involuntary Commitment in Ontario: Some Barriers to the Provision of Proper Care*, 124 Can. Med. Ass'n J. 715, 717 (1981)).

[FN51]. Morris et al., supra note 11, at 234 (relying, inter alia, upon Randy Borum & Thomas Grisso, Psychological Test Use in Criminal Forensic Evaluations, 26 Prof. Psychology: Res. & Prac. 465, 468 (1995) (11% of psychiatrists and 36% of psychologists regularly used such tests)). For some perspective, consider that this test has only been referred to in two unpublished cases. See [Anderson v. State, No. 04-00-00751-CR, 2002 WL 31556954 \(Tex. App. 2002\)](#); [Commonwealth v. Morasse, No. 1999-01420, 2001 WL 1566407 \(Mass. Super. 2001\)](#).

[FN52]. See, e.g., Thomas Grisso, Evaluating Competencies: Forensic Assessments and Instruments 97 (2d ed. 2003).

[FN53]. Morris et al., supra note 11, at 233 (quoting Patricia Zapf & Jodi Viljoen, Issues and Considerations Regarding the Use of Assessment Instruments in the Evaluation of Competency to Stand Trial, 21 Behav. Sci. & L. 351, 359 (2003)).

[FN54]. Id. at 237.

[FN55]. Id.; see also Christy et al., supra note 43 (calling on examiners to understand the difference between forensic and therapeutic assessments).

[FN56]. Michael J. Saks, Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts, 14 Law & Hum. Behav. 291, 294 (1990).

[FN57]. Id. at 293.

[FN58]. See Morris et al., supra note 11, at 212.

[FN59]. Id. at 237-38.

[FN60]. Robert A. Burt & Norval Morris, A Proposal for the Abolition of the Insanity Plea, 40 U. Chi. L. Rev. 66, 92 n.109 (1972).

[FN61]. Perlin, Pretexts, supra note 1, at 657.

[FN62]. Perlin, Outlaw, supra note 1, at 235-36; see also Perlin, Pretexts, supra note 1, at 678 (discussing, inter alia, [Hensley v. State \(575 N.E.2d 1053, 1055 \(Ind. App. Ct. 1991\)\)](#) (no abuse of discretion on the issue of incompetency to stand trial where the defendant was able to deny the crime and name the alleged victim, despite the uncontested fact that the defendant's "testimony and actions at the competency hearing were not generally meaningful"; [State v. Pruitt, 480 N.E.2d 499, 504 \(Ohio Ct. App. 1984\)](#) (sole expert witness testified in conclusory terms that the defendant "suffered no mental disease or defect [and] understood the respective roles of the cast of characters at the trial, and the nature of the charges against him," yet "never indicated ... what the defendant actually understood").

[FN63]. Morris et al., supra note 11, at 199.

[FN64]. See id. at 199-200 nn.28, 30 (citing Ronald Roesch & Stephen Golding, Competency to Stand Trial (1980) (90%); Steven Hart & Robert Hare, Predicting Fitness to Stand Trial: The Relative Power of Demographic, Criminal and Clinical Variables, 4 Forensic Rep. 53 (1992) (96.3%); and Patricia A. Zapf et al., Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?, 4 J. Forensic Psychol. Prac. 27, 39 (2004) (99.7%)).

[FN65]. David L. Bazelon, Implementing the Right to Treatment, 36 U. Chi. L. Rev. 742, 743 (1969), quoted in Henry Dlugacz, [Riggins v. Nevada: Towards a Unified Standard for a Prisoner's Right to Refuse Medication?](#), 17 Law & Psychol. Rev. 41, 79 (1993).

[FN66]. On sanist judges in general, see Perlin, Hidden Prejudice, supra note 8, at 51-55; see also [id. at 47](#) ("Judges 'are embedded in the cultural presuppositions that engulf us all'") (quoting Anthony D'Amato, [Harmful Speech and the Culture of Indeterminacy](#), 32 Wm. & Mary L. Rev. 329, 332 (1991)).

[FN67]. See Robert J. Boeckmann & Tom Tyler, [Commonsense Justice and Inclusion Within the Moral Community: When Do People Receive Procedural Protections from Others?](#), 3 Psychol. Pub. Pol'y & L. 362, 363 (1997) (discussing public perceptions of insanity defense as such a "technicality").

[FN68]. See generally Perlin, Dignity, supra note 1.

[FN69]. See Perlin, Mirrors, supra note 4, at 326-47 (discussing the Supreme Court's decision in [Atkins v. Virginia](#), 122 S. Ct. 2242 (2002) (barring execution of persons with mental retardation)).

[FN70]. Zapf, supra note 64, at 35.

[FN71]. Morris et al., supra note 11, at 227.

[FN72]. Michael L. Perlin, On "[Sanism](#)," 46 SMU L. Rev. 373, 394 (1992) (discussing sanist myth that "mentally ill individuals are 'different,' and, perhaps, less than human"); 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, 785 (1998).

[FN73]. On sanism's "malignant," "corrosive," "pernicious," and "pervasive" impact on mental disability law, see Michael L. Perlin, "[She Breaks Just like a Little Girl](#)": Neonaticide, the Insanity Defense, and the Irrelevance of "[Ordinary Common Sense](#)," 10 Wm. & Mary J. Women & L. 1, 6, 24 n.188 (2003) [hereinafter Perlin, Neonaticide]; Michael L. Perlin, "[You Have Discussed Lepers and Crooks](#)": Sanism in Clinical Teaching, 9 Clinical L. Rev. 683, 685, 687 n.15 (2003); Perlin, Healing, supra note 4, at 419; Perlin, Mirrors, supra note 4, at 348.

[FN74]. Morris et al., supra note 11, at 235-36.

[FN75]. Id. at 235.

[FN76]. See id. at 234, 237-38.

[FN77]. Id. at 235-36.

[FN78]. "Ordinary common sense" refers to a self-referential and non-reflective way of constructing the world ("I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is"). See, e.g., Perlin, Neonaticide, supra note 73, at 8; Perlin, Hidden Prejudice, supra note 8, at 16-20; see also Michael L. Perlin, Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning, 69 Neb. L. Rev. 3 (1990); Perlin, Insanity Defense, supra note 31, at 287-310.

[FN79]. Idiot Wind, supra note 21.

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**Symposium: From Baby Blues to Mothers who Kill: Responses to Postpartum
Disorders in the Criminal and Civil Law
Article**

***1 "SHE BREAKS JUST LIKE A LITTLE GIRL" [\[FN1\]](#): NEONATICIDE, THE INSANITY
DEFENSE, AND THE IRRELEVANCE OF "ORDINARY COMMON SENSE"**

[Michael L. Perlin](#) [\[FN2\]](#)

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Some day, someone will probably propose dividing all law cases into two categories: those that make the national news and those that do not. [\[FN1\]](#) Commentators have written extensively about the impact of famous cases (is there anyone now reading this article who is not flashing on O.J.?) in different contexts including, (1) how the publicizing of a case may affect its verdict, [\[FN2\]](#) (2) how the public heuristically uses the vivid case as a representative of all cases, [\[FN3\]](#) (3) how the public heuristically assumes that a specific tactic or defense raised in one case is frequently used in other cases, [\[FN4\]](#) and (4) *2 how a verdict in a famous case can lead to changes in the substantive law. [\[FN5\]](#)

But, to the best of my knowledge, little has been written about the ways that the publicity given to one case involving a specific mental condition has led to a significant sea change in the ways that subsequent jurors decide cases involving defendants with a similar mental condition. [\[FN6\]](#)

I believe that our treatment of defendants with postpartum psychosis [\[FN7\]](#) who commit neonaticide [\[FN8\]](#) is an important example of this last category, and I wish to explore some preliminary ideas about that category of cases. Consideration of this numerically-unimportant but politically-significant subset will illuminate much about what is morally corrupt and what is incoherent about our insanity defense policies.

I have devoted much of my academic career to attempting to unpack and respond to a series of myths that have developed about the insanity defense, and that continue to dominate our insanity defense discourse. [\[FN9\]](#) There is no question in my mind that the vast majority of 'incorrect' insanity verdicts (that is, where the jury 'gets *3 it wrong') involve cases in which defendants who meet the substantive test for responsibility are nonetheless convicted. [\[FN10\]](#) On the other hand, I am also convinced that there are three numerically minute but socially significant mini-universes of cases in which defendants who were, in fact, responsible were nonetheless found not guilty by reason of insanity as a kind of nullification device, [\[FN11\]](#) a group of cases I refer to as "empathy outliers." [\[FN12\]](#) The first, and most important of these categories are some cases of neonaticide. [\[FN13\]](#)

Most neonaticide cases are unknown to the general public outside of the immediate geographic area where the killing took place. [\[FN14\]](#) On the other hand, both the Susan Smith [\[FN15\]](#) and the Andrea *4 Yates [\[FN16\]](#) cases-neither neonaticides (a category limited to killings within the first twenty-four hours of a baby's life)-held us in thrall, [\[FN17\]](#)

and served as the vivid heuristic [\[FN18\]](#) for a national "debate" on neonaticide, and its relationship to "mother love," [\[FN19\]](#) abortion rights, [\[FN20\]](#) permissive childraising, [\[FN21\]](#) and, even, President Clinton's impeachment trial. [\[FN22\]](#) Kris Franklin's apt observation about the laws of sodomy-"Sodomy decisions are fascinating because they broadcast not only legal theorizing, but also a political stance" [\[FN23\]](#)-is equally applicable here.

Lost in all of this is a series of questions of importance and interest to lawyers, policy makers, and other informed citizens who do not rely on "talk TV" to inform their political view. [\[FN24\]](#) The question that I wish to address is the relationship between the neonaticidal defendant and the insanity defense. This question also *5 immediately leads to many 'second generation' questions: Does the defense apply? Should it? Should there be a special or separate insanity-type defense for such cases? How do jurors respond? [\[FN25\]](#) What can we learn from all of this? Does the jurisprudence of such cases differ from the jurisprudence of other sorts of 'syndromic' behavior in insanity defense cases (e.g., battered spouse syndrome, rape trauma syndrome)? Has the application of the insanity defense in such cases changed since the Susan Smith and Andrea Yates cases? I cannot answer all of these questions, but I wish to at least raise them, with the hopes that they will remain "on the table" as this debate continues.

We may take it as a given that our insanity defense jurisprudence is incoherent. [\[FN26\]](#) This incoherence is made even less rational and normative in cases where the defense is based on postpartum depression or other postpartum psychosis. This category of cases reflects and refracts a *trompe d'oeil* illusion that must be addressed: whether we look at postpartum depression and psychosis cases as a reflection of the etiology of mental illness, or as a reflection of societal attitudes towards one population susceptible to jarringly conflicting stereotypes (mothers with mental disabilities who act violently towards their new-born children).

The incoherence of our insanity defense jurisprudence is especially troubling in cases involving women who kill their small children. For decades, this cohort was one of the mini-universes in which juror empathy (or, perhaps, juror disbelief that a mother could criminally kill her infant or young child) led to insanity acquittals, even in cases in which evidence of non-responsibility was limited (I have referred to this cohort in the past as "empathy outliers"). [\[FN27\]](#) Since the Susan Smith case (and the societal outrage that this case unleashed toward that specific defendant), jurors-using a warped and self-referential type of "ordinary common sense" (OCS) [\[FN28\]](#)-have become increasingly punitive toward all defendants charged with the death of their small children, even in cases that are in no way like (factually or clinically) the Smith case, and even in cases in which the evidence of non-responsibility is overwhelming. This radical shift in position flows partially from how sanism pervades *6 our mental disability law jurisprudence and partially from the conflicts in stereotypes that are present in such cases. It is impossible to understand this area of the law without a full recognition of these factors.

This area of the law is especially incoherent even when compared to insanity defense cases involving other 'syndromic' behavior. [\[FN29\]](#) On one hand, we are especially punitive towards such defendants because they have violently violated our precepts of motherhood. On the other, we are more willing to find some of these defendants not guilty by reason of insanity than we are in cases involving almost any other kind of insanity pleader (again, almost in a way that imitates nullification verdicts) [\[FN30\]](#) as a reflection of our desire to maintain an inviolate image of "mother love." [\[FN31\]](#) The shift here is primarily a result of the media response to the Susan Smith case. I argue further that it is impossible to understand this area of the law without a full consideration of the malignant and corrosive impact of "ordinary common sense," [\[FN32\]](#) sanism [\[FN33\]](#) and pretextuality [\[FN34\]](#) on this area of the law.

Thus, in Part I, I discuss the research on neonaticide, and highlight how it reflects our massive societal ambivalence about the underlying social issues. In Part II, I discuss the range of mental disorders manifested by neonaticidal mothers. In Part III, I consider the application of the insanity defense to these cases, focus on the "empathy outlier" [\[FN35\]](#) phenomenon, and then look at the extent how the public construction of such cases has changed in the aftermath of Susan Smith and Andrea Yates. In Part IV, I explain *7 "ordinary common sense" (OCS), sanism and pretextuality, and relate these factors to this jurisprudence. In Part V, I conclude that the dissonance created in such cases is so profound that it has distorted this jurisprudence beyond any level of coherence, and it has thwarted our desperate desires to impose a comforting level of OCS on this area of the law.

My title of this article comes from the refrain of Bob Dylan's song Just Like a Woman [\[FN36\]](#):

She makes love just like a woman, yes she does,
And she aches just like a woman,

But she breaks just like a little girl. [\[FN37\]](#)

Just Like a Woman is a song not without political controversy in the Dylan oeuvre. It was criticized by Marion Meade in 1971 as a "complete catalogue of sexist slurs." [\[FN38\]](#) The critics Robert Shelton and Tim Riley disagree. Shelton argues persuasively that the song reflects Dylan "ironically toying with [sexist] platitudes." [\[FN39\]](#) Riley-presciently, given the topic I am discussing here-concludes, "It straddles an almost inconceivably thin line between compassion and scorn, forgiveness and retribution." [\[FN40\]](#) To a great extent, that "thin line" [\[FN41\]](#) is a perfect metaphor for the issues we are discussing today.

Part I. Neonaticide and Ambivalence

All trial lawyering in jury cases involves and demands storytelling. [\[FN42\]](#) The effective trial lawyer paints a picture for the jury using a schema with which jurors can identify. [\[FN43\]](#) This is obviously *8 easier in some cases than in others (intuitively, it is easier to create a story with which jurors can empathize if one is representing an abused child with a disability rather than, for example, a contract killer). Storytelling, however, can hit a roadblock when the story is dissonant with the jurors' self-referential and non-reflective "ordinary common sense" (OCS) [\[FN44\]](#) ("I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is"). [\[FN45\]](#) In criminal procedure, by way of example, "OCS presupposes two self-evident truths: 1) everyone knows how to assess an individual's behavior, and 2) everyone knows when to blame someone for doing wrong." [\[FN46\]](#)

Not surprisingly, many of the greatest areas of OCS-caused dissonance emerge in cases involving family relationships ("If Joe was that bad, . . . why didn't the defendant divorce him? Why didn't she just leave him?"), [\[FN47\]](#) sexual assault ("Look at the way she was dressed; she was asking for it") [\[FN48\]](#) and mental illness ("If he had just tried harder, he really could have gotten better"). [\[FN49\]](#) Areas such as *9 these are treasure troves of self-righteousness, narrow thinking, and "atrophied [] moral development." [\[FN50\]](#) These characteristics are reflected in attitudes towards the cases about which I am writing in this article: a universe that is statistically infinitesimal, but charged with social significance. [\[FN51\]](#)

We are "morbid[ly] fascinat[ed]" with neonaticide cases. [\[FN52\]](#) Here, our stereotypes of motherhood, [\[FN53\]](#) of mental illness, [\[FN54\]](#) of "good girls" and "bad girls," [\[FN55\]](#) and of madness and badness [\[FN56\]](#) all commingle in a dissonant melange of conflicting images. [\[FN57\]](#) Until we confront the extent of this dissonance, [\[FN58\]](#) we can never hope to extract any meaningful doctrinal strands from this counterintuitive legal jumble. [\[FN59\]](#)

Infanticide (and, specifically, neonaticide) was, in many cases, "condoned, encouraged, or mandated by law" until the fourth century, [\[FN60\]](#) and has been practiced in most cultures-Judaism being the one major exception [\[FN61\]](#)-until the present day. Its ubiquity is *10 recorded in "mythological, philosophical, religious, and historical texts. . . ." [\[FN62\]](#) In early England, as many as twenty-five percent of all killings were infanticides; [\[FN63\]](#) in colonial America, that number was estimated to be thirty-three percent. [\[FN64\]](#)

It is far less common today. Nonetheless, cases, especially those subject to saturation publicity, [\[FN65\]](#) serve as "projective tests" [\[FN66\]](#) that reflect our massive societal ambivalence about motherhood, sexuality, social norms, and interpersonal relationships, and our shock when individuals act in a way "wholly alien" from our OCS, [\[FN67\]](#) especially when the defendant presents herself as a "nice, middle class [Caucasian, implied] girl." [\[FN68\]](#) With a review of the relevant literature, a number of points become clear:

1. The idea that a mother can kill her newborn consciously and with full criminal responsibility is inconceivable to many jurors, as it conflicts so radically and drastically with their OCS schemas of motherhood and "mother love" [\[FN69\]](#) or the "cultural myth of the good mother." [\[FN70\]](#) In many cases, this translates to a crime that "only a mad woman could do." [\[FN71\]](#) The alienation jurors feel in such cases *11 may well flow from the way that mother love is seen as a "moral imperative," [\[FN72\]](#) or, perhaps because the "infanticidal mother . . . damages the community by preemptively accusing it of abandonment." [\[FN73\]](#) "The myth of motherhood, so ingrained in the way in which the ambitions, desires, and needs of women are viewed and accommodated, cannot include in its account a state of mind so abominable, unnatural, and depraved that a child could be imperiled by its own mother." [\[FN74\]](#)

2. In some cases, though, jurors use very different schemas. When women are judged harshly by jurors (not to

mention the public), that judgment is often a function of the extent to which she personally varies from the social stereotype of the "good mother" [\[FN75\]](#) and exhibits behavior that is perceived simply as "unnatural." [\[FN76\]](#) Women who failed to conform to assumed gender characteristics in this context have been simply perceived as "bad." [\[FN77\]](#)

3. Notwithstanding these radically different attitudes towards defendants in such cases, and notwithstanding the fact that neonaticides "cut across all economic classes and cultural strata," [\[FN78\]](#) there are points in common in almost all neonaticide cases:

- . Neonaticidal crimes are "crime[s] of desperation." [\[FN79\]](#)
- . The mothers are generally young, single, [\[FN80\]](#) immature, socially isolated, in total (or near-total) denial of their pregnancy, [\[FN81\]](#) *12 in a state of profound "emotional detachment." [\[FN82\]](#)
- . The mothers virtually all suffer from some sort of mental disorder. Even in cases where there is no mental disorder, at the very least, the mothers' behavior is marked by "fear, depression, [and] panic," [\[FN83\]](#) as well as "shame and guilt," [\[FN84\]](#) often followed by "abject remorse." [\[FN85\]](#)
- . All had, at the most, "attenuated . . . relationships to the men who impregnated them." [\[FN86\]](#)
- . Although there are a variety of sociocultural and economic causes for neonaticide, [\[FN87\]](#) there are some markers shared by most neonaticidal defendants. Not all, but a significant number of the neonaticidal mothers in question, "grew up or currently live[s] in poverty, [are] under-educated, [have] a history of abuse (both physical and sexual), remain[] isolated from social supports, [have] depressive and suicidal tendencies, and [are] usually experiencing rejection by a male lover at the time of the murder[s]." [\[FN88\]](#)

4. Our societal ambivalence about these mothers is overwhelming. [\[FN89\]](#) Infanticide cases reflect society's mixed responses of "anger, empathy, and a profound yet unarticulated sense that these cases differ from other forms of homicide," [\[FN90\]](#) or, conversely *13 "abhorrence, rage and disbelief." [\[FN91\]](#) This ambivalence can be measured along several different socially-constructed scales. Michelle Oberman, for instance, observes that, in medieval Europe, married infanticidal women often escaped prison, whereas unmarried infanticidal women "generally received capital sentences that were carried out in excruciating manners." [\[FN92\]](#) Oberman's analysis of contemporary infanticide laws underscores how this ambivalence has continued:

The infanticide statutes from around the world evidence a shared sense that it is both legally and morally wrong for a mother to kill her infant. At the same time, they evince an equally powerful consensus that, both in terms of its genesis and in terms of maternal culpability, infanticide is a far different crime from other homicides. [\[FN93\]](#)

5. Almost all neonaticide cases show what Michelle Oberman refers to as:

[P]atterned circumstances that lead to the infants' death . . . [t]he women experienced severe cramping and stomach pains, which they often attributed to a need to defecate. They spent hours alone, most often on the toilet, often while others were present in their homes. At some point during these hours, they realized that they were in labor. They endured the full course of labor and delivery without making any noise. [\[FN94\]](#)

Neonaticidal behavior is thus "absolutely at odds with normative conceptions of motherhood and maternity commonly held by society." [\[FN95\]](#) As a result of all this, our attitudes towards such cases reflect a dialectic of condemnation and mercy, [\[FN96\]](#) and our reactions "tend to be at one extreme or another." [\[FN97\]](#) Legal disposition of such cases reflect this ambivalence. [\[FN98\]](#) Although surveys differ, it appears that the insanity defense is successful in one-third to one-half of all such cases [\[FN99\]](#) (and contrast this with data showing that the insanity *14 defense is successful in a fraction of one percent of all criminal cases); [\[FN100\]](#) the remainder are split between those involving relatively light sentences and those with puzzlingly lengthy sentences. [\[FN101\]](#) This ambivalence is reflected both in the wide charges brought (ranging from "unlawful disposition of a body . . . to first-degree murder"), [\[FN102\]](#) and in eventual case dispositions. [\[FN103\]](#) Again, Michelle Oberman succinctly quotes a Chicago defense lawyer on the pattern of "over-charging and under-convicting" in neonaticide cases. [\[FN104\]](#) This pattern perfectly captures the underlying ambivalence.

Part II. Postpartum Illnesses

Most mothers who kill their infant children (especially those who commit neonaticide, that is, who kill them in the first twenty-four hours of their lives) suffer from some sort of postpartum mental disorder. [\[FN105\]](#) This observation is nothing new; it was recognized as early as the time of Hippocrates. [\[FN106\]](#) There is a range of postpartum disorders, ranging from "maternity blues," to postpartum *15 depression, to the most severe, postpartum psychosis. [\[FN107\]](#) "Maternity blues" are common (and considered 'normal'), and their impact is usually seen as "trivial,

fleeting," [\[FN108\]](#) and affect eighty-five percent of all new mothers. [\[FN109\]](#) Postpartum depression, which is more severe, affects ten to fifteen percent of all mothers, and is characterized by "irritability, anxiety, fatigue, lack of love for the child, and a sense of guilt and inadequacy related to the inability to function as a mother." [\[FN110\]](#) Postpartum psychosis, on the other hand, is characterized by a "severe break with reality and a severely impaired ability to function due to hallucinations or delusions, usually related to the newborn baby." [\[FN111\]](#) This disorder affects relatively few women, [\[FN112\]](#) and is often marked by the presence of Brief Psychotic Disorder [\[FN113\]](#) and/or Depersonalization Disorder [\[FN114\]](#).

Postpartum psychosis is marked by denial. [\[FN115\]](#) Women with this mental disorder deny they are pregnant, [\[FN116\]](#) and it is the ubiquity of this denial that has led at least one commentator to urge the creation of a separate category: neonaticide syndrome: [\[FN117\]](#)

*16 Such a syndrome would consist of evidence introduced by the testimony of expert witnesses of common patterns of behavior in cases of neonaticide, such as denial of pregnancy, and self-deluding rationalization of the physical manifestations of pregnancy. The evidence introduced would thus serve to explain the behavior of a particular defendant within a recognized and documented pattern of behavior and clinically verified symptoms. [\[FN118\]](#)

This strategy was specifically rejected by the New York Court of Appeals in *People v. Wernick*, [\[FN119\]](#) notwithstanding the fact that such a syndrome appears to fit squarely within Professor Steven Morse's definition-"[a] syndrome, in medical terminology, is the collection or configuration of objective signs (e.g., fever) and subjective symptoms (e.g., pain) that together constitute the description of a recognizable pathological condition." [\[FN120\]](#)

I will now turn to the insanity defense to consider its application to cases involving defendants with these mental disorders.

Part III. The Insanity Defense

I have been writing about the insanity defense for more than three decades [\[FN121\]](#) (even since before I began to practice law) and turned to it as a serious focus for my scholarship some fourteen years ago. [\[FN122\]](#) Although I have sought to explain the subtle doctrinal differences between the major insanity defense tests [\[FN123\]](#) and the even more subtle distinctions between the positions taken by major moral philosophers on the meaning of such terms as "rationality," [\[FN124\]](#) I have chosen, instead, to focus most of my attention on the myths *17 that have developed about the insanity defense, [\[FN125\]](#) the ways that the defense has become contaminated by heuristic reasoning [\[FN126\]](#) and the false use of OCS, [\[FN127\]](#) and the ways that sanism and pretextuality have ultimately poisoned and corrupted this area of the law. [\[FN128\]](#)

I have done this because I believe that the core question we must address here is one that has been constant over the centuries (perhaps millennia)-"why do we feel the way that we do about these people?" [\[FN129\]](#)-and that, if we fail to come to grips with that question, we are in danger of reducing this entire enterprise to an interesting and highly intellectualized parlor game.

I have now written extensively in my attempts to answer this question, and am comfortable with my preliminary conclusions. [\[FN130\]](#) Yet, as I continue to do research and to think about this area of the law, there have always been a few strands of the jurisprudence that, somehow, looked different, including cases, by way of example, that involve "syndromic" behaviors (frequently, behaviors with identifiably cultural or behavioral bases). [\[FN131\]](#) These cases have *18 involved individuals with premenstrual stress syndrome, [\[FN132\]](#) Vietnam stress syndrome, [\[FN133\]](#) battered woman's syndrome, [\[FN134\]](#) the disorder of pathological gambling, [\[FN135\]](#) and a host of other syndrome-based defenses, [\[FN136\]](#) including, inter alia, postpartum depression. [\[FN137\]](#)

How do jurors respond to such cases? A broad-based examination of insanity defense cases demonstrates, beyond any doubt, that when jurors err, they are globally more likely to commit the error of the false negative: overwhelmingly, they reject the insanity defense in cases of defendants who authentically should have been found to have met the standard for criminal nonresponsibility. [\[FN138\]](#) There are many reasons for this (reasons that I have sought to explore exhaustively in other work), [\[FN139\]](#) but what connects all these reasons is our fear that a factually-guilty person will "escape" punishment. [\[FN140\]](#) We adhere resolutely to this *idée fixe* in spite of uncontradicted (indeed, uncontradictable) evidence that: (1) the insanity defense is rarely successful, [\[FN141\]](#) (2) a

failed insanity defense translates into significantly longer prison sentences than *19 those imposed on otherwise-like defendants for like crimes, [\[FN142\]](#) (3) a successful insanity defense translates into longer terms of institutionalization in maximum security confinement (albeit in a forensic "hospital" rather than in a prison), [\[FN143\]](#) and (4) evidence of successfully malingered insanity defenses is rare to the point of being virtually nonexistent. [\[FN144\]](#)

Notwithstanding all of this, however, there remain three statistically insignificant, but politically and culturally important, mini-universes of insanity defense cases in which it appears that jurors have acquitted defendants who do not necessarily meet the substantive insanity standard. [\[FN145\]](#) These are cases-"nullification verdicts" of a sort [\[FN146\]](#)-that I have called "empathy outliers". [\[FN147\]](#) Unlike the typical insanity-pleading defendant (who fills jurors with fear and loathing), these defendants puzzle jurors: "How could this defendant have committed such an inexplicable and irrational crime? She must have been crazy!" These cases fall into:

[T]hree general categories of defendants: who not only did not appear to be 'insane' under the prevailing substantive test, but seemed to be the recipients of jury sympathy: (1) mothers committing infanticide; [\[FN148\]](#) (2) law enforcement officials; and (3) a category labeled as the [we]-can-feel-sorry-for-you people-individuals with whom the jurors could empathize. [\[FN149\]](#) Over a ten year period, over two-thirds of all insanity acquittees in one jurisdiction fell into "categories of classes not necessarily predisposed to commit additional crimes." [\[FN150\]](#)

*20 Some claim that we view postpartum defendants as "insane because 'society seems unwilling to critically examine its belief in the concept of 'mother love,' because institutionalized sexism, masquerading as 'judicial chivalry,' allows us to accept 'certain cultural transgressions' more readily from women than from men." [\[FN151\]](#)

For decades, we had accommodated ourselves to this anomaly (especially, perhaps, because the defendant most likely to be the recipient of juror largesse was more likely to have a higher socio-economic status), [\[FN152\]](#) and we accept the fact that postpartum syndrome, like other syndromes, in the right case may, in fact, be a legitimate basis for an insanity defense. [\[FN153\]](#) And there is no question that the vast majority of these defendants suffer from some sort of mental disability. [\[FN154\]](#)

When I wrote *The Jurisprudence of the Insanity Defense* [\[FN155\]](#) in 1993, I had no sense that this was about to change. The "infamous" [\[FN156\]](#) case of Susan Smith, however, radically altered the way that we came to construct all of these cases. Smith told us the "big lie" and betrayed the greater community [\[FN157\]](#)-not by killing her children, but by appealing to our sympathy and empathy and then kicking us in our unconscious and leaving us with a "sense of betrayal." [\[FN158\]](#) Suddenly, the Smith case, a made-for-the-media circus, [\[FN159\]](#) radically and dramatically altered the way we thought about infanticide and neonaticide cases (even if the latter category shared nothing in common with the facts of the Smith case). [\[FN160\]](#) Instead of talking about whether the insanity defense should apply to such killings, [\[FN161\]](#) we debate whether this was a capital punishment-worthy case (a scenario tracked eerily five years later in the Andrea *21 Yates case). [\[FN162\]](#) I am convinced that we did not want to execute Susan Smith for the homicides of her infant children, but for making fools of us-conning us into feeling sorry for her. [\[FN163\]](#) Furthermore, by the time of the Yates trial, juror "disgust" at such a vile act trumped any prior feelings of outlier empathy, and contaminated any attempts to reach an objective and just verdict. [\[FN164\]](#)

Although scholars such as Robert Goldstein warned us years before the Susan Smith case of the 'she-must-be-crazy fallacy,' [\[FN165\]](#) and although scholars such as Michelle Oberman had, in the immediate wake of Susan Smith, noted that the insanity defense was inappropriate in some infanticide cases, [\[FN166\]](#) the Smith case, like John Hinckley's insanity case, irrevocably shifted the debate. [\[FN167\]](#) Linda Chavez, by way of example, referred to infanticidal mothers as "monster-women." [\[FN168\]](#) Commentators writing in the post-Susan Smith years warned direly of the potentiality of insanity defense abuses [\[FN169\]](#) and raise the shopworn specter that defendants are *22 "getting away with murder;" [\[FN170\]](#) as a result, the insanity defense has become as unattractive an option for these defendants as for all other defendants with mental disabilities post-Hinckley. [\[FN171\]](#)

Consider in this context the pre-Susan Smith but post-Hinckley North Carolina case of *State v. Holden*. [\[FN172\]](#) There, the trial court found that a seventeen year old mother with mental retardation and a history of severe past and present abuse was responsible for killing her three month old child because she was able to form a false story. [\[FN173\]](#) The judge reasoned that, if she could fabricate a story, she had cognitive abilities sufficient to hold her responsible for the crime. [\[FN174\]](#) Of course, the ability to fabricate a story is not evidence that one does not meet the insanity standard; although there may be a connection between the two, there is nothing in the law to suggest this kind of

dyadic choice. Interestingly, here, the defendant had not even pled insanity, but had asked for a mitigated sentence based on her diminished mental capacity. [\[FN175\]](#) Nonetheless, the trial judge mistakenly construed this request as an argument asserting insanity. [\[FN176\]](#) *23 Holden is a textbook case of how a trial judges' sanism [\[FN177\]](#) can contaminate an infanticide case. [\[FN178\]](#)

Mothers diagnosed with postpartum psychosis pleading the insanity defense in neonaticide cases have little in common with those diagnosed with postpartum depression who plead the defense in infanticide cases, but the post-Susan Smith paradigm shift has conflated and confounded these cases and these mental disabilities. Our anger at Susan Smith has so pervaded our criminal justice system that we deny the profundity of the mental illness suffered by many of the neonaticidal mothers. [\[FN179\]](#) In the words of one observer, "How did we become so mean?" [\[FN180\]](#) As a result, justice continues to suffer.

There is little to cull from the reported case law in this area. [\[FN181\]](#) As I have already noted, in the post-Susan Smith era, the New York Court of Appeals affirmed a neonaticide conviction, concluding that the trial court did not err in precluding expert testimony on neonaticide syndrome, [\[FN182\]](#) concluding that "neo-naticide syndrome did not meet the threshold of general scientific acceptability." [\[FN183\]](#) On the other hand, the Tennessee Court of Criminal Appeals remanded *24 a first-degree murder conviction, ordering the trial judge to enter a verdict of not guilty by reason of insanity, [\[FN184\]](#) reasoning that the State had failed to prove that the appellant was "capable of appreciating the wrongfulness of her conduct and conforming her conduct to the requirements of the law." [\[FN185\]](#) In a California case where a defense witness had testified that the defendant was suffering from "a kind of neonaticide dissociative syndrome," [\[FN186\]](#) the appellate court reduced the jury's verdict of second-degree murder to manslaughter, because of "insufficient evidence of malice." [\[FN187\]](#) That is essentially all there is. Certainly, there is no body of law from which we can extrapolate any overarching legal principles.

Part IV. Sanism, Pretextuality, and Ordinary Common Sense

My explanation for why this happens is premised, to a significant degree, on the extent to which sanism and pretextuality continue to contaminate the criminal justice system. [\[FN188\]](#) I define sanism as:

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. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividuation, and is sustained and perpetuated by our use of alleged "ordinary common sense" *25 (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process. [\[FN189\]](#)

I define "pretextuality" as the ways in which 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. 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, blase judging, and, at times, perjurious and/or corrupt testifying. [\[FN190\]](#)

All aspects of mental disability law are pervaded by sanism and by pretextuality, no matter whether the specific presenting topic is involuntary civil commitment law, [\[FN191\]](#) right to refuse treatment law, [\[FN192\]](#) the sexual rights of persons with mental disabilities, [\[FN193\]](#) or any aspect of the criminal trial process. [\[FN194\]](#) I have written extensively about the ways that sanism and pretextuality pervade our insanity defense policies, [\[FN195\]](#) and I am convinced that it is impossible to remotely understand how that jurisprudence has developed without a full consideration of the malignant and corrosive impact of these factors. Pretextuality in mental disability law is "reflected consciously, in the reception and privileging of 'moral' testimony that flouts legislative criteria, and unconsciously, in the use of heuristic devices in decisionmaking, and in the application of sanist attitudes toward such decisions." [\[FN196\]](#)

Underlying much of sanism and pretextuality is our meretricious use of OCS, a "powerful unconscious animator of legal decision making." [\[FN197\]](#) "[W]here defendants do not conform to 'popular images of "craziness,'" the notion of handicapping mental disability is flatly and unthinkingly rejected." [\[FN198\]](#) In arguing why it is essential *26 to understand OCS if we are to understand why insanity defense attitudes have developed as they have, I have written:

Not only is it "prereflective" and "self-evident," it is susceptible to precisely the type of idiosyncratic, reactive decisionmaking that has traditionally typified insanity defense legislation and litigation. It also ignores our rich, cultural, heterogenic fabric that makes futile any attempt to establish a unitary level of OCS to govern decision making in an area where we have traditionally been willing to base substantive criminal law doctrine on medieval conceptions of sin, redemption, and religiosity. [\[FN199\]](#)

I believe that it is our reliance on OCS - a self-referential, non-reflective, self-absorbed way of seeing the world at large and the legal system in particular-that helps to illuminate much of what happens when we decide neonaticide cases or when we discuss in the public media how we feel about such cases. [\[FN200\]](#) We seek to simplify our information-processing tasks by engaging in heuristic thinking and by taking refuge in a false OCS. Both of these limiting and narrowing devices cut us adrift from critical thinking and both offer overly-pat solutions for complex behavior. OCS, simply put, is an "incomplete and imperfect tool by which to assess criminality," [\[FN201\]](#) especially in cases that conjure up so many vivid stereotypes as do infanticide or neonaticide cases. I have characterized our use of OCS in confrontation clause and confessions case in this manner "[J]ust as OCS cannot be employed as the tool by which confessions or confrontation clause cases can be charted, neither is it applicable to insanity defense law jurisprudence, where human behavior is very often opposite to what OCS would suggest." [\[FN202\]](#) I believe that this is even more so in infanticide or neonaticide cases. Certainly, our predictable patterns of "over-indicting and under-convicting" [\[FN203\]](#) reflects the rankest sort of pretextuality in this context.

Through the typification heuristic, "people characterize a current experience via reference to past stereotypic behavior." [\[FN204\]](#) Through the vividness heuristics, we learn that "a single, vivid, *27 memorable case overwhelms the mountains of abstract, colorless data on which rational choices should be made." [\[FN205\]](#) In these ways, we highlight the worst-case anecdote, and make that a template for all behavior (and all expected outcomes). We use such cognitive-simplifying heuristic devices [\[FN206\]](#) to reinforce pre-existing stereotypes, [\[FN207\]](#) and allows us to willfully blind ourselves to the "gray areas" of human behavior. OCS is the ultimate form of self-referentiality, and its use estops us from looking at issues from external and/or alternative points of view. [\[FN208\]](#) Writing recently about juror behavior in insanity defense cases, Jennifer L. Skeem and Stephen L. Golding thus underscored that juror concepts of "commonsense justice" (a close relative of OCS) [\[FN209\]](#) are likely to result in "legally incorrect or even highly prejudicial [case judgments]." [\[FN210\]](#)

This morass leads us to impose a dyadic straightjacket on neonaticidal defendants. They are either crazy or they are evil. [\[FN211\]](#) Pretextually, we overcharge these defendants because we wish to tell the public that they are evil, and we will not let them "get away with it," [\[FN212\]](#) but we then under-convict them because we realize that they are, if not insane, "crazy." [\[FN213\]](#) We either empathize (perhaps, in some cases, overempathize) or we engage in our own version of denial: we deny that such defendants may, in fact, be mentally ill (perhaps using false OCS to rationalize in a sanist way: "I didn't succumb to the 'baby blues'; if she did, she must have a weak moral character. She's no crazier than I"). The reasoning of the trial judge *28 in the North Carolina case of State v. Holden-that the defendant must be responsible because she had the cognitive ability to fabricate a story after she killed her child [\[FN214\]](#)-is a perfect exemplar of this reasoning. This is also totally in line with the prosecutorial gambit that argues to the jury, in efforts to rebut insanity, that the defendant was "intelligent enough to feign mental illness." [\[FN215\]](#)

Dr. Caryl Boehnert has suggested that individuals who commit crimes that fall below the "community tolerance threshold," and thus would not trigger a concomitantly high level of community outrage, are more readily found not guilty by reason of insanity. [\[FN216\]](#) Dr. Daniel Schwartz has suggested that the success of an insanity plea frequently hinges on a defendant's "likeability." [\[FN217\]](#) Before Susan Smith, neonaticidal defendants did not trigger such a high level of "community outrage" and were seen as more likeable (perhaps because when we saw their pictures on television or in the press, we did not characterize them as people we recognized as hardened killers) than most other criminal defendants. In subsequent years, that has changed.

In an extraordinarily insightful student note, Judith Macfarlane has explained why testimony in neonaticide cases is subversive, [\[FN218\]](#) "because it questions society's existing morals by countering conventional myths and misconceptions of human nature." [\[FN219\]](#) This insight must be considered carefully and thoughtfully if we are ever to make any progress in reforming this area of the law.

In short, we have seen a major change in our construction of neonaticide cases. Infanticide cases had, until relatively

recently, been statistically over-represented in terms of the numbers of insanity defenses pled. [\[FN220\]](#) By way of example, one study of infanticide cases revealed that one-third of the cohort studied involved successful insanity defense pleas, [\[FN221\]](#) while that number is *29 a fraction of one percent when all felony cases are considered. [\[FN222\]](#) This changed dramatically following the case of Susan Smith. The schema that we had earlier created-the forlorn, almost pathetic young woman who commits a crime so inexplicable that it must have been the product of her mental illness [\[FN223\]](#)-was eradicated and replaced by a picture of, again in the words of Linda Chavez, "monster women." [\[FN224\]](#) In each case, jurors demonstrated their sanism, [\[FN225\]](#) by using a fatally-flawed faux OCS. [\[FN226\]](#) Authentic and reflective common sense has become irrelevant to the disposition of neonaticide cases.

Part V. Conclusion

While mental disability law jurisprudence and insanity defense jurisprudence are incoherent, neonaticide jurisprudence is especially incoherent. We take refuge in a sanism-drenched, false and distorted OCS, and we use this to inherently rationalize self-contradictory and pretextual social policies and legal decisions. We do this blindly and with little consideration for the implications of what we do.

Several commentators have offered attractive, thoughtful suggestions as to how this problem might be, optimally, remediated. [\[FN227\]](#) Jennie Lusk, for example, has made these recommendations: to "further investigate the medical origins of neonaticide," to "encourage *30 neonaticidal mothers to share their birth, dating, and labor experiences in sex education programs," to "use social science studies to aid in identifying a population at risk for committing neonaticide," to "consider the societal implications of our impulse to shun neonaticidal mother[s]," and to "reform crime policy for neonaticidal mothers." [\[FN228\]](#)

On the latter point she urges three specific reforms: the creation of a "neonaticide statute applicable to juveniles," [\[FN229\]](#) the requirement of "proofs of neonaticidal circumstances similar to those provided by common law for the 'benefit of linen' defense" [\[FN230\]](#) ("[i]n the 17th century, mothers were less likely to be prosecuted after an otherwise suspicious infant death if they had prepared for the birth, (the common law defense known as 'benefit of linen')"), [\[FN231\]](#) and the continuation of requiring "stringent proof both of intent and actus reus in all murders." [\[FN232\]](#)

Finally, Lita Schwartz and Nancy Isser have considered neonaticide from the perspective of therapeutic jurisprudence (TJ). [\[FN233\]](#) They conclude that TJ should lead trial courts to consider *31 "alternatives to imprisonment," and legislators "to enact laws that would encourage the judiciary to examine mitigating circumstances and to exercise thoughtful judgment." [\[FN234\]](#)

I applaud these recommendations, and largely concur with them. But, my sense is that we are as a society still far from being ready to make these changes. We remain, tragically, the prisoner of cultural, behavioral and social myths and stereotypes that have the ultimate effect of blunting any efforts at crafting a coherent and thoughtful jurisprudence in this area of the law. [\[FN235\]](#) There is little evidence that we should be optimistic about spontaneous social or political change in this area, especially after the Andrea Yates trial.

Recall that when I explained the derivation of my title, I quoted the rock critic Tim Riley, who argued that Dylan's song, Just Like a Woman, "straddles an almost inconceivably thin line between compassion and scorn, forgiveness and retribution." [\[FN236\]](#) Think again of the lyric that I used-"she breaks just like a little girl" - in the context of this paper, consider the "fit," and then think of the bridge to the song:

And your long-time curse hurts
But what's worse
Is this pain in here
I can't stay in here
Ain't it clear ... [\[FN237\]](#)

I don't think Bob was thinking of neonaticide cases when he wrote this song thirty-seven years ago. But it's there: the curse, the pain, the claustrophobic desperation. Maybe-just maybe-we can make some modest progress in, again using Riley's words, changing "scorn" and "retribution" to "compassion" and "forgiveness." [\[FN238\]](#)

[\[FNal\]](#). Bob Dylan, Lyrics, 1962-1985 231 (1985).

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[FN1]. See, e.g., Daniel Filler, [From Law to Content in the New Media Marketplace](#), 90 Cal. L. Rev. 1739, 1759-60 (2002) (citations omitted) ("And when breaking legal news occurs-as it did in Bush v. Gore, in the O.J. Simpson trial, and more recently in the Andrea Yates child-murder trial-many stations, including the news networks, bumped other content and dedicated extensive time to these legal proceedings.").

The line between reality and fiction is often hopelessly blurred. See generally Richard Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (2000) (discussing the consequences of merging legal and popular culture). See also Wayne R. LaFave, Essay, [The Fourth Amendment as a "Big Time" TV Fad](#), 53 Hastings L.J. 265, 265 (2001) ("At a party recently, a woman was overheard to say: 'My husband and I love watching 'The Practice.' It always gives us something to talk about we hadn't thought much about before, I don't know, like the Fourth Amendment.'") (quoting Julie Salamon, *Television Review: Justice and Lawyers Who May Not Comb Their Hair*, N.Y. Times, Nov. 14, 2000, at E8).

[FN2]. See, e.g., Wendy Davis, *The O.J. Effect, Since the Simpson Trial, Juries Have Been Reluctant to Acquit Celebrities*, Legal Aff. Oct. 2002, at 18, 19 ("Since the Simpson verdict, juries have repeatedly defied the predictions of legal observers by throwing the book at high-profile defendants: Andrea Yates, the mentally ill Texas woman who drowned her five children . . .").

[FN3]. See, e.g., Craig M. Bradley & Joseph L. Hoffmann, [Public Perception, Justice, and the "Search for Truth" in Criminal Cases](#), 69 S. Cal. L. Rev. 1267, 1270 (1996) ("The Simpson case is so aberrant that it does not even represent a very useful piece of empirical evidence [as to how the criminal justice system can be improved].").

[FN4]. See, e.g., 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, 1404 (1997) (citations omitted)[hereinafter Perlin, *Borderline*](*"And of course, the Dan White 'Twinkie defense' continues to be seen as some kind of norm in insanity cases."*). Interestingly, at least one recent study of infanticide emphasized that the use of a defendant's mental status to mitigate responsibility in such circumstances "is no Twinkie defense . . ." Janet Ford, [Susan Smith and Other Homicidal Mothers-In Search of the Punishment That Fits the Crime](#), 3 Cardozo Women's L.J. 521, 532-33 (1996).

[FN5]. See, e.g., Michael L. Perlin, *The Jurisprudence of the Insanity Defense* 138-42 (1994) [hereinafter Perlin, *Jurisprudence*](discussing the relationship between John W. Hinckley's insanity acquittal and the adoption of the Insanity Defense Reform Act of 1984). No one ever asks the reverse question: "Had Hinckley been convicted, would that have proven that the insanity defense system 'worked'?" See *id.* at 265, n.7 (quoting, Richard Rogers, *The American Psychological Association's Position on the Insanity Defense: Empiricism Versus Emotionalism*, 42 Am. Psychologist 840, 840 (1987) ("[Calls to abolish the insanity verdict] reflected a 'tenuous logic: if the verdict was wrong, then the standard [must have been] wrong.'")).

[FN6]. There was no question that John Hinckley, by way of contrast, was mentally ill. The controversy centered on his diagnosis and the relationship between that mental illness and his responsibility for the crime. See Richard J. Bonnie, et al., *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.* 28-31 (2d ed. 2000).

[FN7]. For a comprehensive definition of postpartum psychosis, see Brenda Barton, [When Murdering Hands Rock The Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers](#), 51 SMU L. Rev. 591, 602-03 (1998). See *infra* Part II.

[FN8]. "'Neonaticide' is defined as the killing of a child 24 hours old or younger." Phillip J. Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 Am. J. Psychiatry 1414 (1970). For an early consideration, see also, Morris Brozovsky & Harvey Falit, *Neonaticide: Clinical and Psychodynamic Considerations*, 10 J. Am. Acad. Child Psychiatry 673 (1971). For a discussion on the ways that neonaticide is differentiated from other forms of infanticide, see Cheryl Meyer & Michelle Oberman, *Mothers Who Kill Their Children: Understanding the Acts of Moms from Susan Smith to the "Prom Mom"* 20-31 (2001) [hereinafter *Mothers Who Kill*].

[FN9]. See, e.g., Perlin, Jurisprudence, supra note 5; Perlin, Borderline, supra note 4; Michael L. Perlin, Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning, 69 Neb. L. Rev. 3 (1990) [hereinafter Perlin, OCS]; Michael L. Perlin, [Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence](#), 40 Case W. Res. L. Rev. 599 (1989-90) [hereinafter Perlin, Myths].

[FN10]. For an array of cases, see Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial 237-38 (2000) [hereinafter Perlin, Hidden]. See also Perlin, Myths, supra note 9, at 617. On the significance of "wrong verdicts" in the development of other emotionally-charged areas of the law, see Perlin, OCS, supra note 9, at 8.

[FN11]. See Perlin, Borderline, supra note 4, at 1415, 1420-21. "Yet, as long as seventy-five years ago, William A. White responded to these charges: '(I)n my personal experience I have never known a criminal to escape conviction on the plea of insanity where the evidence did not warrant such a verdict [except in jury nullification cases].'" Id., at 1415 (quoting William A. White, *Insanity and the Criminal Law* 3 (1923)).

At least one commentator has questioned the impact that the verdict in the O.J. Simpson case - viewed by some as a sort of nullification verdict - has had on subsequent high-profile, 'celebrity' cases:

While juries have always had the power to nullify-to acquit despite evidence that strongly supports a conviction-the phrase 'jury nullification' gained fresh currency after the Simpson trial. Most references don't compliment happy-to-acquit juries, who find themselves accused of either going wild or being swayed by a high-priced defense lawyer. These examples are anecdotal-six acquittals out of thousands of cases-but they were invoked so often in the national press that the phenomenon became a cultural touchstone. Concern about making that error has apparently influenced jurors ever since. Since the Simpson verdict, juries have repeatedly defied the predictions of legal observers by throwing the book at high-profile defendants: Andrea Yates, the mentally ill Texas woman who drowned her five children; Louise Woodward, the Boston nanny convicted in 1997 of killing the baby in her charge; and Marjorie Knoller and Robert Noel in the San Francisco mauling-dog caseThese convictions amount to the opposite of conventional jury nullification, but they are a related form of defiance.

Davis, supra note 2, at 18-19.

[FN12]. Perlin, Jurisprudence, supra note 5, at 193. Prof. Michelle Oberman discusses this specifically in the infanticide context in [Mothers Who Kill: Coming to Terms with Modern American Infanticide](#), 34 Am. Crim. L. Rev. 1, 42 (1996).

[FN13]. This is not to say that no neonaticidal mothers are insane. See, e.g., [People v. Massip](#), 271 Cal. Rptr. 868 (App. 1990), transferred & vacated, 4 Cal. Rptr. 2d 762, 824 P.2d 588 (1992); [State v. Hudson](#), 1999 WL 77844 (Tenn. Crim. App. Feb. 19, 1999). See also Michael L. Perlin, Mental Disability Law: Civil and Criminal 283-84 n.995 (2d ed. 2002) (citing cases) [hereinafter Perlin, Mental Disability Law]. On those areas in which defendants appear to be over-acquitted on insanity grounds, see Perlin, Borderline, supra note 4, at 1420-21, discussed infra at text accompanying notes 96-97.

[FN14]. What percentage of the general public, for example, is familiar with the case of Laura Hudson or the case of Sharon Klamt? See [Hudson](#), 1999 WL 77844; [State v. Klamt](#), 831 P.2d 512 (Haw. 1992).

[FN15]. For an excellent overview of the Smith case, see Ford, supra note 4.

[FN16]. For an excellent overview of the Yates case, see Sandy Meng Shan Liu, Note, [Postpartum Psychosis: A Legitimate Defense for Negating Criminal Responsibility?](#), 4 Scholar 339 (2002).

[FN17]. On why some cases are self-selected by the media for over-attention, see Mothers Who Kill, supra note 8, at 47.

[FN18]. On the role of the vividness heuristic in mental disability law, see Perlin, Hidden, supra note 10, at 10. See also 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, 231 (1996) (citations omitted) ("We know how, as a result of the vividness heuristic, one salient case can lead to the restructuring of an entire body of jurisprudence.").

[FN19]. See, e.g., Katherine O'Donovan, "[Real Mothers for Abandoned Children](#), 36 *Law & Soc'y Rev.* 347, 358 (2002); Jennie Lusk, Note, [Modern New Mexican Neonaticide: Tranquilizing with this Jewel/The Torments of Confusion](#), 11 *Tex. J. Women & L.* 93, 95 (2002).

[FN20]. See generally Hunter Baker, [Storming the Gates of a Massive Cultural Investment: Reconsidering Roe in Light of its Flawed Foundation and Undesirable Consequences](#), 14 *Regent U. L. Rev.* 35 (2001-02) (discussing abortion rights' ascendancy in modern American society). The relationship between the "virulent, often violent attack on abortion rights" and our infanticide policies is examined in Judith E. Macfarlane, Note, [Neonaticide and the "Ethos of Maternity": Traditional Criminal Law Defenses and the Novel Syndrome](#), 5 *Cardozo Women's L.J.* 175, 179 (1998).

[FN21]. For a discussion on public attitudes to the case of Rebecca Hopfer, see Barton, *supra* note 7, at 611. See also *State v. Hopfer*, 679 N.E.2d 321, 328-29 (Ohio App. 2d 1996).

[FN22]. See, e.g., Karin Lewicki, [Can You Forgive Her?: Legal Ambivalence Toward Infanticide](#), 8 *S. Cal. Interdisc. L.J.* 683, 687 (1999) (discussing obsession in today's culture with trial coverage as illustrated in Susan Smith's, O.J. Simpson's, and President Clinton's trials); Michele Goodwin, The [Black Woman in The Attic: Law, Metaphor And Madness in Jane Eyre](#), 30 *Rutgers L.J.* 597, 599 n.6 (1999) ("Recent examples of legal literary drama would include the Independent Prosecutor's Referral to Congress on the Impeachment of President William Jefferson Clinton, abstracts from the infamous O.J. Simpson civil and criminal trials, and the police reports from the Susan Smith infanticide case.").

[FN23]. Kris Franklin, The [Rhetorics of Legal Authority Constructing Authoritativeness, the "Ellen Effect," and the Example of Sodomy Law](#), 33 *Rutgers L.J.* 49, 57 (2001).

[FN24]. On the significance of the "media frenzy" in highly-publicized neonaticide cases, see Mothers Who Kill, *supra* note 8, at 19.

[FN25]. For a discussion on how public misperceptions of the inflated use of the insanity defense contaminates neonaticide discourse, see Mothers Who Kill, *supra* note 8.

[FN26]. See, e.g., Michael L. Perlin, "For the [Misdemeanor Outlaw](#)": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities, 52 *Ala. L. Rev.* 193, 202 (2000); Perlin, *Borderline*, *supra* note 4, at 1424; Perlin, *Jurisprudence*, *supra* note 5, at 406-15.

[FN27]. Perlin, *Borderline*, *supra* note 4, at 1421; Perlin, *Jurisprudence*, *supra* note 5, at 193.

[FN28]. See Perlin, *OCS*, *supra* note 9, at 6.

[FN29]. See, e.g., Perlin, *Mental Disability Law* *supra* note 13, § § 9A-9.3 to 9.3e, at 264-84.

[FN30]. For a recent helpful overview, see Irwin Horowitz et al., [Jury Nullification: Legal and Psychological Perspectives](#), 66 *Brook. L. Rev.* 1207 (2001). See also Andrew D. Leipold, [Rethinking Jury Nullification](#), 82 *Va. L. Rev.* 253 (1996). I discuss this in an insanity defense context in Perlin, *Myths*, *supra* note 9, at 706 n.501, and in Perlin, *OCS*, *supra* note 9, at 40-46.

[FN31]. See Lusk, *supra* note 19, at 95:

Basically, it is our belief that society, in its desire to preserve an illusion of 'mother love', is hesitant to carefully scrutinize the mother-child relationship and recognize realistically that the most reasonable target for a mother's frustration and anger is her child. Instead, to preserve our illusions about 'mother love', we categorize women who murder their children as 'insane.'

(citing Oberman, *supra* note 12 (quoting Henry J. Steadman, et al., The Use of the Insanity Defense, in A Report to Gov. Hugh L. Carey on the Insanity Defense in New York, 37, 68-69 (1978))).

[FN32]. See generally Perlin, *OCS*, *supra* note 9.

[FN33]. See generally Perlin, Hidden, *supra* note 10, at 36-58; Michael L. Perlin, "[Half-Wracked Prejudice Leaped Forth: Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did](#), 10 J. Contemp. Legal Issues 3, 4-5 (1999) [hereinafter Perlin, Half-Wracked]. See generally Part IV *infra*.

[FN34]. See Perlin, Hidden *supra* note 10, at 59-75; Perlin, Half-Wracked, *supra* note 33, at 5.

[FN35]. See Perlin, Borderline, *supra* note 4, at 1420-21 (citation omitted).

[FN36]. Bob Dylan, Lyrics, 1962-1985 231 (1985).

[FN37]. *Id.*

[FN38]. Robert Shelton, No Direction Home: The Life and Music of Bob Dylan 323 (Da Capo ed., 1997). Similar sentiments are easily found on the Internet. See www.google.com (search: "JUST LIKE A WOMAN" AND SEXIST AND DYLAN) (last visited Jan. 7, 2003).

[FN39]. Shelton, *supra* note 38, at 323.

[FN40]. Tim Riley, Hard Rain: A Dylan Commentary 139 (1992).

[FN41]. *Id.*

[FN42]. See, e.g., Robert P. Burns, The [Lawfulness of the American Trial](#), 38 Am. Crim. L. Rev. 205, 213 (2001) ("Storytelling 'is a demand . . . for moral meaning, a demand that sequences of events be assessed as to their significance as elements of a moral drama.'") (quoting Hayden White, The Value of Narrativity in the Representation of Reality, in *On Narrative* 1 (W.J.T. Mitchell ed., 1981)).

[FN43]. "[J]urors' determination[s] of 'what really happened' will often be strongly influenced by the degree to which the concrete detailed stories told by the parties at trial match the instances or prototypes in the jurors' relevant schemas." Albert J. Moore, [Trial By Schema: Cognitive Filters in the Courtroom](#), 37 UCLA L. Rev. 273, 292 (1989). See also Nancy Pennington & Reid Hastie, Juror Decision-Making Models: The Generalization Gap, 89 Psychol. Bull. 246, 251-54 (1981); Loretta J. Stalans & Arthur J. Lurigio, Lay and Professionals' Beliefs About Crime and Criminal Sentencing: A Need for Theory, Perhaps Schema Theory, 17 Crim. Just. & Behav. 333-47 (1990).

[FN44]. See, e.g., Perlin, OCS, *supra* note 9, at 22-33; Perlin, Hidden, *supra* note 10, at 16-20.

[FN45]. See, e.g., Richard K. Sherwin, [Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions](#), 136 U. Pa. L. Rev. 729, 737 (1988); Michael L. Perlin, On "[Sanism](#)", 46 SMU L. Rev. 373, 380 n.46 (1992). On the pre-reflective component of OCS see for example, Keri K. Gould & Michael L. Perlin, "[Johnny's in the Basement/ Mixing up His Medicine](#)": [Therapeutic Jurisprudence and Clinical Teaching](#), 24 Seattle U. L. Rev. 339, 357 (2000).

[FN46]. Perlin, OCS, *supra* note 9, at 24-25 n.99, citing Sherwin, *supra* note 1, at 738. See also Anthony N. Doob & Julian V. Roberts, Social Psychology, Social Attitudes, and Attitudes Toward Sentencing, 16 Canad. J. Behav. Sci. Rev. Canad. Sci. Comp. 269, 275 (1984) ("[The public] appears simply to accept the information they have as adequate" in assessing perceived leniency of criminal sentences); Loretta J. Stalans & Shari Seidman Diamond, Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent, 14 Law & Hum. Behav. 199 (1990) (examining impressions behind public opinion regarding judges leniency in criminal sentencing).

[FN47]. [State v. Griffiths](#), 610 P.2d 522, 543 (Idaho 1980) (statement of prosecutor in closing argument).

[FN48]. See, e.g., Hubert S. Feild & Leigh B. Bienen, Jurors and Rape 54 (1980) (noting that, of a 1056-person sample, eleven percent believed that "if a woman was raped, she was asking for it," and sixty-six percent believed a woman's appearance or behavior could provoke rape).

[FN49]. See, e.g., Michael L. Perlin, [The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?](#) 8 J.L. & Health 15, 31 n.90 (1993-94):

See also 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'"); [State v. Duckworth](#), 496 So.2d 624, 635 (La. Ct. App. 1986) (holding that juror who felt defendant would be responsible for actions as long as he "wanted to do them" could not be excused for cause); K. Gould, et al., Criminal Defendants With Trial Disabilities: The Theory and Practice of Competency Assistance, 68 (unpublished manuscript on file with author) (trial judge responding to National Center for State Courts' survey indicated that, in his mind, defendants who were incompetent to stand trial could have communicated with and understood their attorneys "if they [had] only wanted").
Id. at 31 n.90.

[FN50]. See Perlin, Myths, supra note 9, at 644. See also id. at 668 (citing Michael Moore, Law and Psychiatry: Rethinking the Relationship 244-45 (1984) (discussing Professor Michael Moore's characterization of the insanity defense as a "morality play")).

[FN51]. Mothers Who Kill, supra note 8, at 19.

[FN52]. Id.

[FN53]. See Liu, supra note 16, at 378.

[FN54]. See, e.g., Judith S. Neaman, Suggestion of the Devil: The Origins of Madness 31, 144 (1975) (addressing the stereotype of persons with mental illness as evil).

[FN55]. See, e.g., Jacqueline St. Joan & Nancy Ehrenreich, [Putting Theory into Practice: A Battered Women's Clemency Clinic](#), 8 Clinical L. Rev. 171, 214 n.147 (2001).

[FN56]. See Ania Wilczynski, Images of Women Who Kill Their Infants: The Mad and the Bad, 2 Women & Crim. Just. 71 (1991). On this image in insanity defense jurisprudence in general, see Peter Margulies, The "Pandemonium Between the Mad and the Bad": Procedures for the Commitment and Release of Insanity Acquittes After Jones v. United States, 36 Rutgers L. Rev. 793 (1984). The phrase in Professor Margulies' title is found in [Benham v. Edwards](#), 501 F. Supp. 1050, 1076 (D. Ga. 1980).

[FN57]. This is especially telling in neonaticide cases in which "juries often find that [a] woman accused of neonaticide does not correspond to their imagination of a murderess." Lusk, supra note 19, at 104.

[FN58]. On the parallel issues of judicial cognitive dissonance in insanity defense cases, see Perlin, OCS, supra note 9, at 33-36.

[FN59]. Perlin, Myths, supra note 9, at 644 ("The insanity defense is, to a significant majority of the American public, counter-intuitive.").

[FN60]. Lewicki, supra note 22, at 685.

[FN61]. See Kathryn L. Moseley, [The History of Infanticide in Western Society](#), 1 Issues L. & Med. 345, 351 (1986) ("Jews had consistently resisted the societal pressures to kill their unwanted or disabled offspring, equating infanticide with murder"); Barton, supra note 7, at 595 (citing Cynthia Bouillon-Jensen, History of Infanticide, in 3 Encyclopedia of Bioethics 1201 (Warren Thomas Reich ed., 1995)). ("Among the first to condemn the killing of infants were the Jewish scholars.").

[FN62]. Macfarlane, supra note 20, at 177. For full historical surveys, see Liu, supra note 16, at 350-52; Mothers Who Kill, supra note 8, at 1-7; Lusk, supra note 19, at 101-03.

[FN63]. Barton, supra note 7, at 594.

[FN64]. Stuart Gordan, [Mothers Who Kill Their Children](#), 6 Buff. Women's L.J. 86, 96 (1998).

[FN65]. Neither of the two most famous infanticide cases of the current era—that of Susan Smith and that of Andrea Yates—involved neonaticide. On the other hand, publicity has been disproportionate in cases of other middle-class, Caucasian girls and women, and there is little in the public discourse that seems to differentiate between these two different categories of killings. See, e.g., Macfarlane, supra note 20, at 176 (discussing "the sensationalized 'poster girls' of neonaticide,"). See also id. at 178, discussing "[Melissa] Drexler, the suburban mother of the 'Prom Baby.'" See generally Mothers Who Kill, supra note 8, at 47 (discussing cases of, inter alia, Drexler and Amy Grossberg and stating that "[B]ecause they were relatively affluent, attractive young white girls from seemingly 'good' families, their crimes are shocking and therefore deemed newsworthy").

[FN66]. See Perlin, Borderline, supra note 4:

[T]he insanity defense has always been a symbol and a screen. It has always served as a litmus test for how we feel about a host of social, political, cultural and behavioral issues that far transcend the narrow questions of whether a specific defendant should be held responsible for what-on its surface-is a criminal act, or how responsibility should be legally calibrated, or of the sort of institution in which a successful insanity acquittee should be housed.

Id. at 1377.

[FN67]. Macfarlane, supra note 20, at 248.

[FN68]. Cf. Lusk, supra note 19, at 94 (citations omitted) ("Now, families realize that 'even nice girls do it' outside the obligations of marriage . . .").

[FN69]. Id. at 180.

[FN70]. E. Selene Steelman, [A Question of Revenge: Munchausen Syndrome by Proxy and a Proposed Diminished Capacity Defense For Homicidal Mothers](#), 8 Cardozo Women's L.J. 261, 263-64 (2002).

[FN71]. Ford, supra note 4, at 535 (citation omitted).

[FN72]. See Macfarlane, supra note 20, at 223.

[FN73]. Lewicki, supra note 22, at 686.

[FN74]. Macfarlane, supra note 20, at 248.

[FN75]. Liu, supra note 16, at 377 (citing Lita Linzer Schwartz & Natalie K. Isser, Endangered Children: Neonaticide, Infanticide, and Filicide 3 (2000)).

[FN76]. Macfarlane, supra note 20, at 226 (referring to divergence from the antenatal bond).

[FN77]. Schwartz & Isser, supra note 75, at 3.

[FN78]. Macfarlane, supra note 20 at 178 (citations omitted). See, e.g., Charles L. Briggs & Carla Mantini-Briggs, ["Bad Mothers" and the Threat to Civil Society: Race, Cultural Reasoning, and the Institutionalization of Social Inequality in a Venezuelan Infanticide Trial](#), 25 Law & Soc. Inquiry 299, 299- 302 (2000).

[FN79]. Mothers Who Kill, supra note 8, at 13.

[FN80]. Thirty-six of thirty-seven in one recent sample studied. See id. at 48.

[FN81]. Oberman, supra note 12, at 24; Mothers Who Kill, supra note 8, at 53; Lita Linzer Schwartz & Natalie Isser, Neonaticide: An Appropriate Application for Therapeutic Jurisprudence?, 19 Behav. Sci. & L. 703, 706 (2001); Morris Brozovsky & Harvey Falit, Neonaticide: Clinical and Psychodynamic Considerations, 10 J. Am. Acad. Child

Psychiatry 673, 679 (1971); Macfarlane, *supra* note 20, at 197. For a discussion on the way that many such defendants sought to hide their pregnancies from their families, see Macfarlane, *supra* note 20, at 187. See also Mothers Who Kill, *supra* note 8, at 49 (on fear of disclosure); Lusk, *supra* note 19:

Neonaticidal mothers may report mistaking labor pains for gas pains or flu symptoms. They give birth alone, often in bathroom stalls or bathrooms, perhaps because they do not anticipate a birth. The birth of a baby comes as a shock, forcing them to come to grips with facts and consequences they and their families have been at some pains to deny. The birth can come as a shock to teachers, counselors, and doctors as well. The mothers suddenly face the consequences, economic along with the emotional, moral, and career, of giving birth. They may fear their parents' wrath, shattering a secure and supportive family, admitting their sexual sophistication, or abandonment by their mothers. Whatever the source of fear, it leads to denial commonly so absolute that the neonaticidal teen mothers never fully admit the fact of pregnancy until giving birth.

Id. at 97-98 (citations omitted).

[FN82]. Lusk, *supra* note 19, at 99.

[FN83]. Schwartz & Isser, *supra* note 75, at 706; See also Robert L. Sadoff, Mothers Who Kill Their Children, 25 *Psychiatric Annals* 601 (1995).

[FN84]. Mothers Who Kill, *supra* note 8, at 44.

[FN85]. *Id.* at 54.

[FN86]. Oberman, *supra* note 12, at 23-24.

[FN87]. Mothers Who Kill, *supra* note 8, at 17.

[FN88]. Ford, *supra* note 4, at 538 (citing Myrna S. Raeder, [Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines](#), 20 *Pepp. L. Rev.* 905, 909-14 (1993)).

[FN89]. Lewicki, *supra* note 22, at 709-10 (quoting, in part, Cheryl I. Harris, [Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith-Spectacles of Our Times](#), 35 *Washburn L.J.* 225, 226 (1996) ("Infanticide is a crime knit up inextricably with society's most basic relationships, and as such is a crime inevitably defined by framework[s] of rules of social control through which certain beliefs and images are privileged, legitimated and ratified and myths are given power")).

[FN90]. Oberman, *supra* note 12, at 20.

[FN91]. Macfarlane, *supra* note 20, at 225.

[FN92]. Oberman, *supra* note 12, at 8 (citation omitted).

[FN93]. *Id.* at 19.

[FN94]. *Id.* at 24-25.

[FN95]. Macfarlane, *supra* note 20, at 208.

[FN96]. Oberman, *supra* note 12, at 5.

[FN97]. Anne Brusca, [Postpartum Psychosis: A Way Out for Murderous Moms?](#), 18 *Hofstra L. Rev.* 1133, 1166 (1990).

[FN98]. See, e.g., Barton, *supra* note 7, at 606-09 (discussing cases).

[FN99]. Daniel Katkin, Postpartum Psychosis, Infanticide, and Criminal Justice, in *Postpartum Psychiatric Illness: A Picture Puzzle* 275, 279 (James Hamilton & Patricia Harberger eds., 1992); Brusca, *supra* note 97, at 1166. Cf. Macfarlane, *supra* note 20, at 195 (only one of a sample of eight cases involved an insanity defense). On the incidence of insanity defense pleas and success rates in all felony cases, see for example, Perlin, *Borderline*, *supra* note 4, at 1395-96 (citations omitted) ("Researchers have demonstrated that the public grossly overestimates both the frequency and the success rate of the insanity defense plea. This overestimation is a product of the media publicity accorded to certain notorious criminal cases, virtually none of which involved defendants actually found NGRI.").

[FN100]. Perlin, *Jurisprudence*, *supra* note 5, at 108.

[FN101]. Brusca, *supra* note 97, at 1166 (discussing varying reactions to the postpartum psychosis defense); *Mothers Who Kill*, *supra* note 8, at 195 n.56 (discussing a life sentence imposed in a Cincinnati case). Jennie Lusk has questioned whether this disparity is a function of differences in "race and class." Lusk, *supra* note 19, at 104 (citation omitted). Compare Gordan, *supra* note 64, at 102 (one-third of all infanticidal murder defendants in the United Kingdom released on bail pending trial).

[FN102]. Macfarlane, *supra* note 20, at 185.

[FN103]. For a review of the case law, see *id.* at 187-94, and Schwartz & Isser, *supra* note 75, at 707-13. On the "incoherence" of the disparity in charges and dispositions, see *Mothers Who Kill*, *supra* note 8, at 58. For a thoughtful analysis of three such cases, see Beth E. Bookwalter, [Throwing the Bath Water Out with the Baby: Wrongful Exclusion of Expert Testimony on Neonaticide Syndrome](#), 78 B.U. L. Rev. 1185, 1194-96 (1998) (discussing *State v. Hopfer*, 679 N.E.2d 321 (Ohio Ct. App. 1996); *State v. Buffin*, 511 So. 2d 1255 (La. Ct. App. 1987); and *People v. Wernick* 674 N.E.2d 322 (N.Y. 1996)).

[FN104]. Oberman, *supra* note 12, at 81.

[FN105]. See *Mothers Who Kill*, *supra* note 8, at 76-79.

[FN106]. Brusca, *supra* note 97, at 1136. Cf. Connie Huang, [It's a Hormonal Thing: Premenstrual Syndrome and Postpartum Psychosis as Criminal Defenses](#), 11 S. Cal. Rev. L. & Women's Stud. 345, 353-54 (2002) (citing 1 Kaplan & Sadock's *Comprehensive Textbook of Psychiatry* 1276 (Benjamin Sadock & Virginia Sadock eds., 7th ed. 2000) which speculates that Hippocrates may have been referring to "puerperal fever," an infectious disease of childbirth.)).

[FN107]. Brusca, *supra* note 97, at 1139-44.

[FN108]. *Id.* at 1141.

[FN109]. See Pitt, *Maternity Blues*, 122 Brit. J. Psychiatry 431, 433 (1973); *Mothers Who Kill*, *supra* note 8, at 77.

[FN110]. Brusca, *supra* note 97, at 1143 (citing, *inter alia*, Sydney Brandon, *Depression After Childbirth*, 284 Brit. Med. J. 613, 613 (1982)).

[FN111]. Liu, *supra* note 16, at 355 (citing, *inter alia*, Ann L. Dunnewold, *Evaluation and Treatment of Postpartum Emotional Disorders* 41 (1997)). See also Liu, *supra* note 16, at 355-56 ("Hearing auditory hallucinations in which voices urge them to kill their children, new mothers typically exhibit strange behavioral tendencies in which they isolate themselves from others, stop speaking, suffer severe sleep deprivation, and/or undergo extreme emotional volatility.").

[FN112]. See *Mothers Who Kill*, *supra* note 8, at 12 (1 out of 2000).

[FN113]. See Macfarlane, *supra* note 20, at 205-07 ("Thus, the diagnostic criteria for Brief Psychotic Disorder are the presence of one or more of the following symptoms: 1) delusions; 2) hallucinations; 3) disorganized speech (e.g., frequent derailment or incoherence); 4) grossly disorganized or catatonic behavior.").

[FN114]. See id.:

Thus, the criteria for Depersonalization Disorder include: 1) persistent or recurrent episodes of the individual feeling like they are watching their body or mind from outside; 2) intact reality testing during the depersonalization episode; and 3) the depersonalization results in "clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Id. at 207-08.

[FN115]. Mothers Who Kill, supra note 8, at 39-60.

[FN116]. Christine A. Fazio & Jennifer L. Comito, [People v. Chavez, 176 P. 2d 92, 92 \(Cal. App. 1947\)](#) (discussing defendant's belief that she was having "an attack of 'cramps'"); [State v. Hopfer, 679 N.E.2d 321, 328 \(Ohio Ct. App. 1996\)](#) (discussing defendant's complaint of "'bathroom' problems").

[FN117]. See Macfarlane, supra note 20, at 216-34.

[FN118]. Id. at 180.

[FN119]. [674 N.E.2d 322, 324 \(N.Y. 1996\)](#) ("No threshold evidentiary foundation whatsoever was offered that acknowledged the validity or existence of defense counsel's postulate to warrant these experts using this kind of extrapolated material to bolster their expert opinions").

[FN120]. Steven Morse, [Excusing and the New Excuse Defenses: A Legal and Clinical Review, 23 Crime & Just. 329, 364 \(1998\)](#). See also Robert Schopp et al., [Battered Woman Syndrome, Expert Testimony, and the Distinctions Between Justification and Excuse, 1994 U. Ill. L. Rev. 45, 93](#) ("a psychological syndrome is a clinically significant pattern of impaired psychological functioning").

[FN121]. See, e.g., Michael L. Perlin, The Insanity Defense in English Speaking African Countries, 2 African L. Studies 73 (1969).

[FN122]. See, e.g., Perlin, Myths, supra note 9; Perlin, OCS, supra note 9.

[FN123]. See Perlin, Jurisprudence, supra note 5, at 73-96.

[FN124]. See id. at 128-32; Perlin, Myths, supra note 9, at 666 (discussing positions of Steven Morse and Michael Moore).

[FN125]. See Perlin, Jurisprudence, supra note 5, at 105-14.

[FN126]. See id. at 271-84.

[FN127]. See id. at 305-10.

[FN128]. This is not to say that these 'subtle distinctions' are not important (nor to say that the scholars who write eloquently and passionately and persuasively about them are expending time on inconsequential problems). Simply, my sense is that unless we come to grips with the questions on which I have chosen to focus, we cannot make authentic 'progress' in reconstructing the jurisprudence in this area. See Perlin, Myths, supra note 9, at 641:

As I will subsequently demonstrate, it is futile to be terribly concerned with the question of which school of moral philosophy "wins" or which set of scientific data is soundest or which database of empirical evidence is most persuasive. For the empiricist, the scientist and the moral philosopher all base their arguments on one important but unarticulated premise: that fact-finders are capable of being rational, fair and bias-free in their assessment of insanity defense cases, and it is only the absence of a missing link-the additional, irrefutable data as to NGRI demographics, the newest discovery in brain biology, the exact calibration of moral agency in the allocation of responsibility-that stands in the way of a coherent and well-functioning system. Yet, there is virtually no evidence that the addition of any (or all) of these extra factors really would make any such difference.

Id. at 641.

[FN129]. See Perlin, Hidden, *supra* note 10, at 223-24.

[FN130]. See, e.g., Perlin, Hidden, *supra* note 10; Perlin, Myths, *supra* note 9; Perlin, OCS, *supra* note 9; Perlin, Borderline, *supra* note 4.

[FN131]. See Perlin, Mental Disability Law, *supra* note 13, § 9A-9.3, at 264. On the specific question of the implications of accepting evidence of "female hormonal disorders" as a legal defense, see Huang, *supra* note 104, at 362-67. When I first wrote about this question thirteen years ago, I considered it from this perspective:

In the past decade, there has been an explosion of interest, research, and study of groups such as battered spouses and Vietnam veterans-groups whose members frequently exhibit so-called "syndromic" behaviors. While there has been significant scholarship devoted to the individual substantive syndromes, there has been virtually no attention paid to the legal implications of their use in insanity defense cases. For a rare example, see [sic] McCord, [Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases](#), 66 Or. L. Rev. 19, 64-69 (1987). On the question of the public's negative view toward defendants asserting such syndromes in insanity defense cases, see [Phillip J.] Resnick, [Perceptions of Psychiatric Testimony: A Historical Perspective on the Hysterical Invective], 14 Bull. Am. Acad. Psychiatry & L. 203, 208 (1986):

Today, the public views the following diagnoses as unjustly 'getting criminal off': dissociative reaction, the "Twinkie" defense, post-Vietnam stress disorder, temporal lobe epilepsy, premenstrual syndrome, and pathological gambling. The closer a defendant is to normality, the more public opinion is outraged by insanity acquittals. People are unwilling to excuse conduct that appears to have a rational criminal motive.
Perlin, Myths, *supra* note 9, at 616-17 n.75.

[FN132]. See Perlin, Mental Disability Law, *supra* note 13, § 9A-9.3a, at 266-70.

[FN133]. See *id.* § 9A-9.3b., at 271-74.

[FN134]. See *id.* § 9A-9.3c., at 275-79.

[FN135]. See *id.* § 9A-9.3d., at 279-81.

[FN136]. See *id.* § 9A-9.3e., at 181-84.

[FN137]. Others include "captivity syndrome," "confusional arousal syndrome," "black rage" defense, "Russian emigre" syndrome, "detail phobia," "homosexual anxiety panic syndrome," "hostage syndrome," "racial paranoia-induced delusional disorder defense," and "adopted child syndrome." See *id.* § 9A-9.3e, at 282-84, and nn.987-96 (citing cases).

[FN138]. For a representative sample, see Perlin, Hidden, *supra* note 10.

[FN139]. I believe one of the important reasons for this phenomenon is the inability of jurors to empathize with most insanity pleaders. See Perlin, Myths, *supra* note 9, at 697-700.

[FN140]. See Perlin, *supra* note 26, at 236; Perlin, Borderline, *supra* note 4, at 1423.

[FN141]. Perlin, Jurisprudence, *supra* note 5, at 108-09.

[FN142]. *Id.* at 107-09.

[FN143]. *Id.* at 109-10.

[FN144]. *Id.* at 111-12.

[FN145]. Perlin, Myths, *supra* note 9, at 701.

[FN146]. See Perlin, *Borderline*, supra note 4, at 1421. I have suggested that these cases may also reflect a kind of prosecutorial nullification: "prosecutors, like other citizens, 'feel sorry' for this tiny sub-group of insanity pleaders, and choose to allow such defendants to 'evade' responsibility." Perlin, *Myths*, supra note 9, at 704.

[FN147]. Perlin, *Jurisprudence*, supra note 5, at 192. See also Oberman, supra note 12, at 42 (discussing this in this precise context).

[FN148]. There are very few examples in the reported case law literature of the actual proffered use of postpartum psychosis as the basis for an insanity defense. See Daniel Katkin, *Postpartum Psychosis, Infanticide, and the Law*, 15 *Crime, L. & Soc'y* 109, 119 (1991) ("postpartum psychosis has been offered as a legal defense in a small number of infanticide cases"). For a well-known case in which such an effort was unsuccessful, see *People v. Wernick*, 674 *N.E.2d* 322, 324 (N.Y. 1996), discussed supra at text accompanying note 119. Wernick is criticized on these grounds in Bookwalter, supra note 103.

[FN149]. Perlin, *Myths*, supra note 9, at 701; See also Perlin, *Borderline* supra note 4, at 1420-21.

[FN150]. Perlin, *Myths*, supra note 9, at 701 n.480, (citing Scott Sherman, *Guilty But Mentally Ill: A Retreat From the Insanity Defense*, 7 *Amer. J.L. & Med.* 237, 261 (1981)). See also Richard Pasewark et al., *The Insanity Plea in New York State, 1965-1976*, 51 *N.Y.St. B.J.* 186, 224 (1979) (of thirty-nine female NGRI's in sample, eighteen had been tried for infanticide; of 239 acquittees in sample, four were police officers; the third over-represented group was composed primarily of "previously respectable, middle class individuals").

[FN151]. Perlin, *Myths*, supra note 9, at 702 (quoting Pasewark et al., supra note 150, at 224) (internal citations omitted).

[FN152]. Oberman, supra note 12, at 45.

[FN153]. Barton, supra note 7, at 604-05; Macfarlane, supra note 20, at 205.

[FN154]. *Mothers Who Kill*, supra note 8, at 93.

[FN155]. See Perlin, *Jurisprudence*, supra note 5.

[FN156]. *Mothers Who Kill*, supra note 8 at 68.

[FN157]. Ford, supra note 4, at 543.

[FN158]. *Id.* (discussing the outrage felt by those who had attempted to locate Smith's 'missing' children).

[FN159]. See *Mothers Who Kill*, supra note 8, at 39 (discussing "rabid media coverage" of the Smith case).

[FN160]. Smith's children were fourteen months and three years old at the time she killed them. See Ford, supra note 4, at 521.

[FN161]. There is no question that Susan Smith was mentally ill, though likely not insane. See *Mothers Who Kill*, supra note 8, at 72.

[FN162]. See Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 *Or. L. Rev.* 97, 120 (2002):

Perhaps one could argue that the greater use of existing capital statutes in states with greater criminal justice populism makes abolition that much more unthinkable; but one could also argue that greater use of capital punishment is more likely to produce . . . controversial cases, like the recent capital prosecution of Andrea Yates in Texas *Id.* at 120 (citation omitted).

A question that we might have to face in such a case - were a jury to deliberate on the question of capital punishment - is whether evidence as to mental status that had been introduced in support of mitigation would be inappropriately construed by jurors as evidence in support of aggravation. See *Atkins v. Virginia*, 122 *S. Ct.* 2242, 2252 (2002)

("[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury").

[FN163]. Cf. Michael L. Perlin, The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss?", 29 Ariz. L. Rev. 1, 98 (1987) (discussing defendants whose insanity defense pleas are unsuccessful ("[T]hey have made a 'play' for our unconscious, and have come up short")).

[FN164]. See Elizabeth Bangs, [Disgust and the Drownings in Texas: The Law Must Tackle Emotion When Women Kill](#), 12 *UCLA Women's L.J.* 87, 95 (2001) (reviewing *The Passions of Law* (Susan A. Bandes, ed., 1999)) [hereinafter *Passions*], assessing the Yates case (and our response to it) in the context of Professor Martha C. Nussbaum's definition of disgust as "a rejection of a possible contaminant. The core objects of disgust are reminders of mortality and animality, seen as contaminants to the human." (quoting Martha C. Nussbaum, "Secret Sewers of Vice:" Disgust, Bodies and the Law, in *Passions*, id. at 19, 26).

[FN165]. Robert Goldstein, The Psychiatrist's Guide to Right and Wrong: Part III: Postpartum Depression and the "Appreciation" of Wrongfulness, 17 Bull. Am. Acad. Psychiatry & L. 121, 125 (1989).

[FN166]. Oberman, *supra* note 12, at 31-33.

[FN167]. See Perlin, *Jurisprudence*, *supra* note 5, at 17-24, 279-80.

[FN168]. Mothers Who Kill, *supra* note 8, at 168 (citing Linda Chavez, The Tragic Story of Medea Still Lives, *Denver Post*, Dec. 3, 1995, at EO4).

[FN169]. Brusca, *supra* note 97, at 1168; Megan C. Hogan, [Neonaticide and the Misuse of the Insanity Defense](#), 6 *Wm. & Mary J. Women & L.* 259, 264-65 (1999).

[FN170]. Liu, *supra* note 16, at 374 (quoting W. Gaylin, Legal Insanity: Gone Bonkers, *Wash. Post*, June 20, 1982, at C1).

[FN171]. See, e.g., John Q. La Fond & Mary L. Durham, [Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?](#), 39 *Vill. L. Rev.* 71, 85 (1994).

[FN172]. [365 S.E. 2d 626 \(N.C. 1988\)](#) (affirming conviction).

[FN173]. *Id.* at 626-30. The defendant eventually pled guilty to second-degree murder.

[FN174]. *Id.* at 630.

[FN175]. *Id.*

[FN176]. See *id.* at 627-29:

Defendant, who was conceived when her thirteen-year-old mother was raped by her stepfather, was constantly reminded of her incestuous origins and made to feel responsible for turmoil within the family. Defendant's mother often told defendant that she wished she had never been born, that she wanted to kill her, and that she was in the way. Defendant's own complaints of sexual molestation by a family member were ignored.

Defendant began her relationship with David Johnson when she was thirteen. Johnson subjected her to constant physical and emotional abuse, beating her face and abdomen with his fists and threatening to molest the children. During both of defendant's pregnancies Johnson raped her repeatedly in an attempt to harm both her and the unborn child. Defendant's mother and Johnson incessantly berated defendant for becoming pregnant a second time. They told her that no one wanted the baby yet refused to allow defendant to put Dekavia up for adoption. After [child's] birth, much verbal abuse within the family centered on defendant's parental inadequacies. She became convinced that she was not capable of caring for the children competently. During stressful periods, defendant would hear voices censuring her and talking about [child]. These auditory hallucinations were very active on the day of the

drowning.

Id. at 627-29.

[FN177]. See *infra* Part IV. See generally Perlin, *Hidden* *supra* note 10, at 50-55.

[FN178]. For other similar post-Hinckley, pre-Susan Smith cases, see also [State v. Klufta, 831 P. 2d 512 \(Haw. 1992\)](#) (affirming sentence of 15 years to life); [State v. Mitchell, 781 S.W.2d 510 \(Ky. 1990\)](#), reh. den. (1990) (defendant sentenced to twenty years in prison). But see [id. at 512, 514](#) (Leibson, J., dissenting) (discussing defendant's "serious mental illness"); [Commonwealth v. Reilly, 549 A.2d 503 \(Pa. 1988\)](#) (affirming defendant's conviction of third-degree murder).

[FN179]. On the issues of whether the use of the insanity defense is "a benefit or detriment to the cause of women," see Huang, *supra* note 106, at 346- 48.

[FN180]. See Lewicki, *supra* note 22, at 710:

Questions of the potential culpability of the community frequently appear wherever an incident occurs...Also striking is some of the aftermath of the case of Amanda Wallace, an insane woman who killed her son within days of his re-release to her by the Illinois Department of Children and Family Services. Wallace was first sentenced to death, the charge later being commuted to life in prison. Following the initial sentencing, a psychologist who had known Ms. Wallace since she was seven remarked 'it's absolutely ridiculous to even think of executing someone like Amanda Wallace. She is ill. What is society's excuse. How did we become so mean?' Don Terry, *Mother Sentenced to Life in a Killing That Shook Chicago*, N.Y. Times, July 26, 1996, at A14. Later, Patrick Murphy, the Cook County Public Guardian said, 'everyone in the system failed Joey Wallace, including me She is very, very insane. But we're all getting off scot-free. She's going to spend the rest of her life in prison.' Id.

Lewicki, *supra* note 22, at 710 n.57.

[FN181]. There is also not much that is new. See [State v. Richmond, 7 So. 459 \(La. 1890\)](#), for a decision rejecting expert testimony on "puerperal mania" in an infanticide case.

[FN182]. [People v. Wernick, 674 N.E. 2d 322, 324-26 \(N.Y. 1996\)](#).

[FN183]. [Id. at 325](#). But Cf. Morse, *supra* note 120 (defining "syndrome").

[FN184]. [State v. Hudson, 1999 WL 77844 \(Tenn. Crim. App. 1999\)](#).

[FN185]. Id. at *8:

There was uncontested testimony in this case that defendant's behavior included the act of laying a crucifix on her pregnant sister's stomach confirming that the child was the son of Satan, [her] conversation with the Devil at a bar, her staying up all night to color and sleeping throughout the day, her fascination with becoming the queen of a motorcycle club and her face-to-face conversation with God.

Id.

[FN186]. [People v. Anderson, 91 Cal. Rptr. 2d 563, 568 \(Cal. App. 4th 1999\)](#).

[FN187]. [Id. at 571-72](#).

[FN188]. See Perlin, *Half-Wracked*, *supra* note 33, at 26:

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.

Id.

[FN189]. Perlin, *Half-Wracked*, *supra* note 33, at 4-5 (internal citations omitted).

[\[FN190\]](#). Id. at 5 (internal citations omitted).

[\[FN191\]](#). See Perlin, Hidden, supra note 10, at 79-112.

[\[FN192\]](#). See id. at 125-56.

[\[FN193\]](#). See id. at 157-74.

[\[FN194\]](#). See id. at 205-58.

[\[FN195\]](#). See, e.g., id. at 223-44.

[\[FN196\]](#). 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, 1260 (1998).

[\[FN197\]](#). Perlin, OCS, supra note 9, at 22-23. See supra text accompanying notes 44-46.

[\[FN198\]](#). Id. at 24. (quoting Harold Lasswell, Foreword to Richard Arens, The Insanity Defense xi (1974)).

[\[FN199\]](#). Id. at 29 (internal citations omitted).

[\[FN200\]](#). On the ways that media depictions of such cases "los[e] sight" of factual data. See Schwartz & Isser, supra note 77, at 712.

[\[FN201\]](#). Perlin, Jurisprudence, supra note 5, at 291.

[\[FN202\]](#). Id. at 294.

[\[FN203\]](#). See supra text accompanying note 103.

[\[FN204\]](#). See Perlin, Borderline, supra note 4, at 1417 (citing Mark Snyder et al., Social Perception and Interpersonal Behaviors: On the Self-Fulfilling Nature of Social Stereotypes, 35 J. Pers. & Soc. Psychol. 656, 657 (1977)).

[\[FN205\]](#). See Michael L. Perlin, [Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?](#), 20 N.Y.U. Rev. L. & Soc. Change 517, 536 n.118 (1992-94) (citing David Rosenhan, Psychological Realities and Judicial Policy, 19 Stan. Law., Fall 1984, at 10, 13); see also supra note 18 (citing sources).

[\[FN206\]](#). See Michael L. Perlin, "[What's Good is Bad, What's Bad is Good, You'll Find Out When You Reach the Top, You're on the Bottom': Are the Americans With Disabilities Act \(and Olmstead v. L.C.\) Anything More Than 'Idiot Wind'?](#)", 35 U. Mich. J.L. Reform 235, 250 (2002).

[\[FN207\]](#). See Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency](#), 47 U. Miami L. Rev. 625, 660 (1993).

[\[FN208\]](#). Perlin, Hidden, supra note 10, at 20.

[\[FN209\]](#). See Norman J. Finkel, [But It's Not Fair! Commonsense Notions of Unfairness](#), 6 Psychol. Pub. Pol'y & L. 898 (2000).

[\[FN210\]](#). Jennifer L. Skeem & Stephen L. Golding, [Describing Jurors' Personal Conceptions of Insanity and Their Relationship to Case Judgments](#), 7 Psychol. Pub. Pol'y & L. 561, 562 (2001) (citing Peter English & Bruce Sales, [A Ceiling or Consistency Effect for the Comprehension of Jury Instructions](#), 3 Psychol. Pub Pol'y & L. 381 (1997), and Vicky Smith, Prototypes in the Courtroom: Lay Representations of Legal Concepts, 76 J. Personality & Soc. Psychol., 76, 220 (1991)).

[FN211]. Oberman, *supra* note 12, at 43. On the significance of the "mad/bad" dichotomy in this context, see Mothers Who Kill, *supra* note 8, at 69-70.

[FN212]. E.g., Laura E. Reece, [Mothers Who Kill: Postpartum Disorders and Criminal Infanticide](#), 38 UCLA L. Rev. 699, 750 (1991).

[FN213]. Oberman, *supra* note 12, at 81.

[FN214]. See *supra* notes 172-78 and accompanying text.

[FN215]. [Fulgum v. Ford](#), 850 F.2d 1529, 1534 (11th Cir. 1988). I discuss the implications of Fulgum in Perlin, Myths, *supra* note 9, at 717-18.

[FN216]. See, Perlin, Myths, *supra* note 9 at 744, discussing Caryl E. Boehnert, Psychological and Demographic Factors Associated With Individuals Using the Insanity Defense, 13 J. Psychiatry & L. 9, 27-28 (1985).

[FN217]. Daniel Schwartz, The Proper Use of a Psychiatric Expert, in Scientific and Expert Evidence in Criminal Advocacy 97, 111 (Juris. G. Cederbaums & Selma Arnold eds., 1975).

[FN218]. Macfarlane, *supra* note 20, at 214.

[FN219]. Id. (quoting Susan Murphy, [Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome](#), 25 Colum. J. L. & Soc. Probs. 277, 281 (1992)).

[FN220]. See Katkin, *supra* note 99, at 279.

[FN221]. Id.

[FN222]. See Perlin, Jurisprudence, *supra* note 5, at 108.

[FN223]. I use this phrase ("product of her mental illness") consciously and carefully. This, of course, was the insanity test made famous in [Durham v. United States](#), 214 F.2d 862 (D.C.Cir.1954), overruled by, [United States v. Brawner](#), 471 F.2d 969, 981 (D.C.Cir.1972). See Perlin, Jurisprudence, *supra* note 5, at 86-89 (explaining how Durham was the "first modern break from the M'Naghten approach" to the insanity defense, and discussing the ensuing criticism by judges and some commentators). I believe, to some extent, that jurors in pre-Susan Smith infanticide cases were intuitively using a Durham-like formula in these cases.

[FN224]. Mothers Who Kill, *supra* note 8, at 168.

[FN225]. For a specific consideration of this phenomenon in the death penalty context, see 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).

[FN226]. See e.g., Perlin, Borderline, *supra* note 4, at 1425; Perlin, *supra* note 49, at 43.

[FN227]. Susan Hickman and Donald LeVine argue that the "taboo" on discussing and thinking about neonaticidal behavior is "lifting" for three reasons: the proliferation of support groups, academic conferences, and expanded media coverage. See Susan Hickman & Donald LeVine, Postpartum Disorders and the Law, in Postpartum Psychiatric Illness: A Picture Puzzle, *supra* note 99, at 282, 294-95. See also id. at 295 ("With the new and open attention directed toward postpartum psychosis illness, it is likely that the incidence of the disasters of infanticide and suicide, and the incidence of erratic case dispositions, will decrease markedly"). I hope the coming years offer some data to support these authors' optimism.

[\[FN228\]](#). Lusk, *supra* note 19, at 126-28.

[\[FN229\]](#). *Id.* at 127-28.

[\[FN230\]](#). *Id.* at 128.

[\[FN231\]](#). *Id.* at 110.

[\[FN232\]](#). *Id.* at 128. Lusk also asks a set of important psychological and behavioral questions:

Comparing the psychological evaluations of a larger group of neonaticidal mothers might help in identifying a profile: are they, as some studies suggest, markedly passive? Attached to their fathers or in fear of losing attachment with their mothers? Do many of them maintain a relationship of any duration with the father of the child, has the father disappeared long before the birth, and if so, does his absence contribute to the death of the child? How do their psychological scores of neonaticidal mothers compare with each other? What happens in the years after a neonaticide? How do neonaticidal mothers mature? Do they have psychological crises or depression when next they become pregnant? Do they appear pregnant, experience menstruation during pregnancy? Is the next pregnancy more normal? *Id.* at 127.

[\[FN233\]](#).

Therapeutic jurisprudence presents a new model by which we can assess the ultimate impact of case law and legislation that affects mentally disabled individuals, studying the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or anti-therapeutic 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.

Perlin, *supra* note 26, at 228. See generally *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: Recent Developments in Therapeutic Jurisprudence* (David B. Wexler & Bruce J. Winick eds. 1996); *Therapeutic Jurisprudence Applied: Essays on Mental Health Law* (Bruce J. Winick ed. 1997).

[\[FN234\]](#). Schwartz & Isser, *supra* note 77, at 715. Here they draw on the work of Christopher Slobogin and Mark Fondacaro, see Christopher Slobogin & Mark Fondacaro, *Rethinking Deprivations or Liberty: Possible Contributions from Therapeutic and Ecological Jurisprudence*, 18 *Behav. Sci. & L.* 499 (2000), on the models for justification of imprisonment as a "starting point for legislators and judges alike." Schwartz & Isser, *supra* note 77, at 715.

[\[FN235\]](#). See Perlin, OCS, *supra* note 9, at 4-5 (insanity defense is a prisoner of myths about the connection between mental illness, crime, and punishment).

[\[FN236\]](#). Riley, *supra* note 38, at 139.

[\[FN237\]](#). Dylan, *supra* note 34, at 231.

[\[FN238\]](#). Riley, *supra* note 38, at 139.

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Article

*683 "YOU HAVE DISCUSSED LEPERS AND CROOKS": SANISM IN CLINICAL TEACHING

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LED - Law School & Continuing Legal Education

There has been virtually no attention paid to the role of sanism in the clinical setting. 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. It permeates all aspects of mental disability law, and affects all participants in the mental disability law system: fact finders, counsel, expert and lay witnesses. Sanist myths exert especially great power over lawyers who represent persons with mental disabilities. These phenomena are especially troubling in the clinical setting, in which students are exposed for the first time to the skills that go to the heart of the lawyering process. The difficulties can be further exacerbated when the clinical teacher - either overtly or covertly - expresses sanist thoughts or reifies sanist myths. This article will explore the meaning of sanism, the general impact of sanism on the representation of persons with mental disabilities, the special problems faced when sanism infects the clinical teaching process, and some tentative solutions to this dilemma.

Introduction

There is a robust clinical literature on how issues of race, class, gender, and sexual orientation may influence all aspects of the clinical setting: on the relationship between student and client, between students, between student and clinical supervisor; the attitude of the fact-finder toward the clinical client and student lawyer. [\[FN1\]](#) But there has been virtually no attention paid to the role of sanism in the clinical *684 setting.

Sanism is an irrational prejudice of the same quality and character as other irrational prejudices that cause and are reflected in prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry. [\[FN2\]](#) It permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, expert and lay witnesses. [\[FN3\]](#) Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law, and all aspects of the criminal process (pretrial, trial and sentencing). It reflects what civil rights lawyer Florynce Kennedy has characterized the "pathology of oppression." [\[FN4\]](#)

Sanist myths exert especially great power over lawyers who represent persons with mental disabilities. [\[FN5\]](#) The use of stereotypes, typification, and deindividualization inevitably means that sanist lawyers will trivialize both their

client's problems and the importance of any eventual solution to these problems. Sanist lawyers implicitly and explicitly question their clients' competence and credibility, [\[FN6\]](#) a move that significantly impairs the lawyers' advocacy efforts. [\[FN7\]](#)

***685** These phenomena are especially troubling in the clinical setting, in which students are exposed for the first time to the skills that go to the heart of the lawyering process: interviewing, investigating, counseling and negotiating. All of these are difficult for us (and our students) to learn, but this difficulty is significantly increased when the client is a person with mental disability (or one so perceived). The difficulties can be further exacerbated when the clinical teacher - either overtly or covertly - expresses sanist thoughts or reifies sanist myths. And sanism problems continue at every "critical moment" of the clinical experience: the initial interview, the case preparation, case conferences, planning of litigation (and/or negotiation) strategy, trial preparation, trial and appeal.

This article will explore (1) the meaning of sanism, (2) the general impact of sanism on the representation of persons with mental disabilities (looking closely at the specific ethical dilemmas raised in these cases, the conflicts often faced by lawyers doing this work, and the special roles that such lawyers must perform), (3) the special problems faced when sanism infects the clinical teaching process, and (4) some tentative solutions to this dilemma.

My title draws on Bob Dylan's brilliant masterpiece, Ballad of a Thin Man. [\[FN8\]](#) Interpretations of this song abound, but no one has contradicted Robert Shelton's conclusion that it is about "an observer who does not see." [\[FN9\]](#) One of its central couplets begins:

You've been with the professors And they've all liked your looks. With great lawyers you have Discussed
lepers and crooks [\[FN10\]](#)

Since I started teaching a clinic in 1984, I have had this verse in my mind. Clinical teachers are professors who are lawyers. And clinical clients, all too often, strike clinical students as being "lepers and crooks." If we, like the eponymous Thin Man, allow ourselves to be "observer[s] who [do] not see," we will fall prey to sanism's corrosive and malignant power.

I. The Meaning of Sanism

Sanism is as insidious as other 'isms' [\[FN11\]](#) and is, in some ways, even ***686** more troubling, because it is largely invisible, to a considerable degree socially acceptable, and frequently practiced (consciously and unconsciously) by individuals who ordinarily take 'liberal' or 'progressive' positions decrying similar biases and prejudices involving gender, race, ethnicity and/or sexual orientation. [\[FN12\]](#) It is a form of bigotry that 'respectable people can express in public.' [\[FN13\]](#) Like other 'isms,' sanism is based largely upon stereotype, myth, superstition and deindividuation. To sustain and perpetuate it, we use pre-reflective 'ordinary common sense' and other cognitive-simplifying devices such as heuristic reasoning [\[FN14\]](#) in unconscious responses to events both in everyday life and in the legal process.

The practicing bar, courts, legislatures, professional psychiatric ***687** and psychological associations, and the scholarly academy are all largely silent about sanism. A handful of practitioners, lawmakers, scholars and judges have raised lonely voices, [\[FN15\]](#) but the topic is simply 'off the agenda' for most of these groups. [\[FN16\]](#) As a result, individuals with mental disabilities--'the voiceless, those persons traditionally isolated from the majoritarian democratic political system' [\[FN17\]](#)--are frequently marginalized to an even greater extent than are others who ***688** fit within the Carolene Products definition of 'discrete and insular minorities.' [\[FN18\]](#)

At its base, sanism is irrational. Any investigation of the roots or sources of mental disability jurisprudence must factor in society's irrational mechanisms for dealing with mentally disabled individuals. 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. These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we ourselves may become mentally disabled. [\[FN19\]](#) The most important question of all--why do we feel the way we do about these people?--is rarely asked. [\[FN20\]](#)

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 ***689** individuals can be treated differently (because of their mental disability, or because of behavioral characteristics that flow from that

disability), [\[FN21\]](#) 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. [\[FN22\]](#) And the steady stream of publication of new, comprehensive research does not promise any change in society's attitudes. [\[FN23\]](#)

II. Sanist Lawyers and Sanist Courts

A. Sanist Lawyers [\[FN24\]](#)

Twenty years ago, in a survey of the role of counsel in cases involving individuals with mental disabilities, Dr. Robert L. Sadoff and I observed:

Traditional, sporadically-appointed counsel . . . were unwilling to pursue necessary investigations, lacked . . . expertise in mental health problems, and suffered from 'rolelessness,' stemming from near total capitulation to experts, hazily defined concepts of success/failure, inability to generate professional or personal interest in the patient's dilemma, and lack of a clear definition of the proper advocacy function. As a result, counsel . . . functioned 'as no more than a clerk, ratifying the events that transpired, rather than influencing them.' [\[FN25\]](#)

Commitment hearings were meaningless rituals, serving only to provide a false coating of respectability to illegitimate proceedings; [\[FN26\]](#) in one famous survey, lawyers were so bad that a patient had a better chance to be released at a commitment hearing if he or she appeared ***690** pro se. [\[FN27\]](#) Merely educating lawyers about psychiatric techniques and psychological nomenclature did not materially improve lawyers' performance because lawyers' attitudes remained unchanged. [\[FN28\]](#) Counsel was especially substandard in cases involving mentally disabled criminal defendants. [\[FN29\]](#)

In the past two decades, the myth has developed that organized, specialized and aggressive counsel is now available to mentally disabled individuals in commitment, institutionalization and release matters. The availability of such counsel is largely illusory; in many jurisdictions, the level of representation remains almost uniformly substandard, [\[FN30\]](#) and, even within the same jurisdiction, the provision of counsel can be 'wildly inconsistent.' [\[FN31\]](#) Without the presence of effective counsel, substantive mental disability law reform recommendations may turn into 'an empty shell.' [\[FN32\]](#) Representation of mentally disabled individuals falls far short of even the most minimal model of 'client-centered counseling.' [\[FN33\]](#) What is worse, few courts even seem to notice. [\[FN34\]](#)

***691** B. The Significance of K.G.F.

One court that has noticed is the Montana Supreme Court. In *In the Matter of the Mental Health of K.G.F.*, [\[FN35\]](#) that court dramatically launched a rewriting of this area of the law. K.G.F. was a voluntary patient at a community hospital in Montana, whose expressed desire to leave the facility prompted a state petition alleging her need for commitment. [\[FN36\]](#) Counsel was appointed, and a commitment hearing was scheduled for the next day. The state's expert recommended commitment; patient's counsel presented the testimony of the plaintiff herself and a mental health professional who recommended that the patient be kept in the hospital a few days so that a community-based treatment plan could be arranged nearer to her home. [\[FN37\]](#) The court ordered commitment. K.G.F.'s appeal was premised, in part, on allegations of ineffective assistance of counsel. [\[FN38\]](#)

In a thoughtful and scholarly opinion, the Montana Supreme Court relied on state statutory and constitutional sources to find that "the right to counsel . . . provides an individual subject to an involuntary commitment proceeding the right to effective assistance of counsel. In turn, this right affords the individual with the right to raise the allegation of ineffective assistance of counsel in challenging a commitment order." [\[FN39\]](#) In assessing what constitutes "effectiveness," the court--startlingly, to my mind--eschewed the *Strickland v. Washington* standard [\[FN40\]](#) (used to assess effectiveness in criminal cases) as insufficiently protective of the "liberty interests of individuals such as K.G.F., who may or may not have broken any law, but who, upon the expiration of a 90-day commitment, must indefinitely bear the badge of inferiority of a once 'involuntarily committed' person with a proven mental disorder." [\[FN41\]](#) Interestingly, one of the key reasons why *Strickland* was seen as lacking was the court's conclusion that "reasonable professional assistance" [\[FN42\]](#)--the linchpin of the *Strickland* decision-- "cannot be presumed in a proceeding that routinely accepts--and even requires-- an unreasonably low standard of legal assistance and ***692** generally disdains

zealous, adversarial confrontation." [\[FN43\]](#)

In assessing the contours of effective assistance of counsel, the court emphasized that it was not limiting its inquiry to courtroom performance: Even more important was counsel's "failure to fully investigate and comprehend a patient's circumstances prior to an involuntary civil commitment hearing or trial, which may, in turn, lead to critical decision-making between counsel and client as to how best to proceed." [\[FN44\]](#) Such pre-hearing matters, the court continued, "clearly involve effective preparation prior to a hearing or trial." [\[FN45\]](#) The court further stressed state laws guaranteeing the patient's "dignity and personal integrity" [\[FN46\]](#) and "privacy and dignity" [\[FN47\]](#) as a basis for its decision; "[q]uality counsel provides the most likely way--perhaps the only likely way' to ensure the due process protection of dignity and privacy interests in cases such as the one at bar." [\[FN48\]](#)

After noting that the focus of its condemnation was not assigned counsel in the case before it (but rather "the failure of the system as a whole that through the ordinary course of the efficient administration of a legal process threatens to supplant an individual's due process rights"), [\[FN49\]](#) the court again focused on the issue of dignity, quoting an article by Professor Bruce Winick:

Perhaps nothing can threaten a person's belief that he or she is an equal member of society as much as being subjected to a civil commitment hearing" and when "legal proceedings do not treat people with dignity, they feel devalued as members of society." [\[FN50\]](#)

The court continued by considering the issues of prejudice, stereotyping, and stigma, [\[FN51\]](#) and specifically held that even pejorative language--the court here quoted a 1977 state Supreme Court case that had referred to persons with disabilities as "idiots and lunatics" [\[FN52\]](#)--was "repugnant to our state constitution." [\[FN53\]](#) Having set out this legal framework, the court observed that state statutes offered "little assistance" *693 in determining the scope of "effective counsel," [\[FN54\]](#) and thus sought to give depth to the terse statutory language.

"At a bare minimum," the court observed, "counsel should possess a verifiably competent understanding of the legal process of involuntary commitments, as well as the range of alternative, less restrictive treatment and care options available." [\[FN55\]](#) In the initial investigation, counsel must "conduct a thorough review of all available records, . . . necessarily involv[ing] the patient's prior medical history and treatment, if and to what extent medication has played a role in the petition for commitment, the patient's relationship to family and friends within the community, and the patient's relationship with all relevant medical professionals involved prior to and during the petition process." [\[FN56\]](#)

Also, counsel should be prepared to discuss with his or her client "the available options in light of such investigations," as well as the 'practical and legal consequences of those options.' [\[FN57\]](#) It is "imperative," the court stressed, "that counsel request a reasonable amount of time for such an investigation prior to the hearing or trial on the petition." [\[FN58\]](#) Moreover, counsel "should also attempt to interview all persons who have knowledge of the circumstances surrounding the commitment petition, including family members, acquaintances and any other persons identified by the client as having relevant information, and be prepared to call such persons as witnesses." [\[FN59\]](#)

After similarly elaborating on counsel's role in the client interview and the need to insure that the patient understands the scope of the right to remain silent, [\[FN60\]](#) the court concluded by underscoring counsel's responsibilities "as an advocate and adversary." [\[FN61\]](#) The lawyer must "represent the perspective of the [patient] and . . . serve as a vigorous advocate for the [patient's] wishes," [\[FN62\]](#) "engaging in "all aspects of advocacy and vigorously argu[ing] to the best of his or her ability for the ends desired by the client," [\[FN63\]](#) and operating on the "presumption that a client wishes to not be involuntarily committed." [\[FN64\]](#) Thus, "evidence that counsel independently advocated or otherwise *694 acquiesced to an involuntary commitment--in the absence of any evidence of a voluntary and knowing consent by the patient-respondent--will establish the presumption that counsel was ineffective." [\[FN65\]](#) In conclusion, the court stated:

It is not only counsel for the patient-respondent, but also courts, that are charged with the duty of safeguarding the due process rights of individuals involved at every stage of the proceedings, and must therefore rigorously adhere to the standards expressed herein, as well as those mandated under [state statute]. [\[FN66\]](#)

Although, on one hand, K.G.F. provides an easily transferable blueprint for courts that want to grapple with adequacy of counsel issues in this context but are reluctant to explore totally uncharted waters, the decision remains

the exception to the usual practice. Counsel's failure here still appears to be inevitable, given the bar's abject disregard of both consumer groups (made up predominantly of former recipients, both voluntary and involuntary, of mental disability services) and mentally disabled individuals, many of whom have written carefully, thoughtfully and sensitively about these issues. [\[FN67\]](#) This inadequacy further reflects sanist practices on the part of the lawyers representing persons with mental disabilities, as well as the political entities vested with the authority to hire such counsel. Although a handful of articulate scholars take this question seriously, [\[FN68\]](#) the questions raised here do not appear to be a priority agenda item for litigators or for most academics writing in this area.

***695 C. Sanism and Legal Representation**

Sanism permeates the legal representation process both in cases in which mental capacity is a central issue, and those in which such capacity is a collateral question. Sanist lawyers (1) distrust their mentally disabled clients, (2) trivialize their complaints, (3) fail to forge authentic attorney-client relationships with such clients and reject their clients' potential contributions to case-strategizing, and (4) take less seriously case outcomes that are adverse to their clients. I will address each of these factors. [\[FN69\]](#)

1. Distrust of the Client

One of the basic building blocks of mental disability law is the principle that incompetence cannot be presumed either because of mental illness or because of a past record or history of institutionalization. [\[FN70\]](#) Furthermore, there is 'no necessary relationship between mental illness and incompetency which renders [mentally ill persons] unable to provide informed consent to medical treatment.' [\[FN71\]](#) As stated forcefully by the New York Court of Appeals:

We conclude however, that neither the fact that appellants are *696 mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical wellbeing. [\[FN72\]](#)

This reasoning is supported by the most important contemporary research. Publications by the MacArthur Foundation's Network on Mental Health and the Law dramatically conclude that mental patients are not always incompetent to make rational decisions and that mental patients are not inherently more incompetent than patients who are not mentally ill. [\[FN73\]](#) In fact, on 'any given measure of decisional abilities, the majority of patients with schizophrenia did not perform more poorly than other patients and non-patients.' [\[FN74\]](#)

In short, the presumption in which courts have regularly engaged--that there is both a de facto and de jure presumption of incompetency to be applied to medication decision making [\[FN75\]](#)--appears to be based on an empirical fallacy. Yet, lawyers distrust their clients with mental disabilities, both in cases in which mental disability is a central issue, and in those in which it is collateral. Lawyers assume, for example, that a criminal defendant with mental disabilities is not competent to decide whether to plead insanity or another fact-based defense. [\[FN76\]](#) Such lawyers apply an equivalent assumption of incompetency when representing civil clients with mental disabilities, [\[FN77\]](#) and that assumption certainly rears its head if the client is institutionalized. [\[FN78\]](#) Like *697 mental health professionals, these lawyers treat their clients as "patients that are sick." [\[FN79\]](#)

The attitudes displayed by such lawyers are echoed in some case law. On the question of the procedures to be employed in determining whether a witness is competent to testify, the influential case of *Sinclair v. Wainwright* [\[FN80\]](#) set out the controlling legal standards as follows:

If a patient in a mental institution is offered as a witness, an opposing party may challenge competency, whereupon it becomes the duty of the court to make such an examination as will satisfy the court of the competency of the proposed witness. *Shuler v. Wainwright*, 491 F.2d 1213, [1223-24] (5th Cir. 1974). And if the challenged testimony is crucial, critical or highly significant, failure to conduct an appropriate competency hearing implicates due process concerns of fundamental fairness.

The assumption that institutionalization ought inevitably lead to a competency challenge is seriously flawed, as demonstrated by the relevant valid and reliable scientific research. [\[FN81\]](#) Yet, it is clear that some courts, at least, will continue to follow this doctrine, sub silentio, especially in criminal cases.

2. Trivialization of the Client's Complaints

Clients often have complaints. They complain about the way a case is progressing, the impact the litigation is having on their life, and a plethora of other matters, many of which are only tangentially connected to the lawyer-client relationship.

If a presumably mentally competent client complains to a lawyer, we can expect (or at least hope) that the lawyer will take the complaint relatively seriously, if for no other reason than that the failure to do so may trigger a disciplinary investigation. But if the client has a mental disability--or is perceived as having a mental disability--such complaints are often trivialized, ignored, or mocked.

How do I know this? For the thirty-plus years that I have been a member of the bar, devoting my practice and consultation almost exclusively to issues of mental disability law, I have witnessed such behavior and heard such comments by countless lawyers, many of whom (e.g., criminal defense lawyers, civil legal aid lawyers) should know better (if for no other reason than that they regularly represent clients whose problems are not taken seriously by a large segment of society). I have no empirical data to share at this point, but can estimate--*698 with absolute confidence--that hundreds of lawyers have expressed this view to me over the years. Clients with mental disabilities are seen as an annoyance, and their problems are simply not as "important" as are the problems of others. [\[FN82\]](#)

3. Effects on the Lawyer-Client Relationship

If lawyers do not take the clients or their legal problems seriously, the lawyers probably will not forge the sort of attorney-client relationship that is the aspirational goal of law practice. Certainly, doubting your client's competence (and/or veracity) and trivializing your client's complaints will not advance the building of such a relationship. Because persons with mental disabilities are trivialized as persons, [\[FN83\]](#) and the essence of their basic humanity is often questioned, [\[FN84\]](#) an adverse case outcome is simply not taken as seriously as it would be if the client were perceived to be mentally competent.

In problematic attorney-client relationships of this sort, lawyers will be prone to dismiss or ignore the client's view about the course of litigation, including, for example, the selection of a theory of the case, pre-trial discovery, case strategizing, choice of witnesses, structuring of cross-examination, and choice of remedy. Such suggestions are rarely taken seriously. There is some relevant criminal procedure case law on the right of a competent criminal defendant to refuse to plead *699 not guilty by reason of insanity. [\[FN85\]](#) I have found no case law at all on this issue in a civil litigation context, but I do not think that the absence of such case law signifies the absence of a problem.

Another voice that is typically ignored is that of "psychiatric survivor groups." [\[FN86\]](#) For at least 25 years, formerly-hospitalized individuals and their supporters have formed an important role in the reform of the mental health system [\[FN87\]](#) and in test case litigation. [\[FN88\]](#) Yet, there is *700 little evidence that these groups are taken seriously either by lawyers [\[FN89\]](#) or academics. [\[FN90\]](#)

D. Ethical Issues [\[FN91\]](#)

Even a cursory examination of the ethical issues permeating the representation of persons with mental disabilities readily evidences the omnipresence of sanism. To some extent, the fact that persons with mental disabilities have always been significantly underrepresented in all phases of the legal process [\[FN92\]](#) has led to the relegation of ethical issues to "the 'backburner' until other substantive and procedural issues involving the right to representation [\[FN93\]](#) and the means of providing such representation [\[FN94\]](#) are resolved more definitively." [\[FN95\]](#) Also, because of the nature of the subject matter, "the issues raised by investigating ethical standards in civil commitment representation may dredge up unconscious feelings which lead to avoidance--by clients, by lawyers, and by judges--of the underlying problems." [\[FN96\]](#) It is likely that, as more persons with mental disabilities are afforded diffuse legal representation, [\[FN97\]](#) the ethical issues will inevitably receive *701 a fuller airing. [\[FN98\]](#) But, because counsel's role traditionally has been so murkily defined and because the underlying ethical problems have been so widely ignored, the serious role and process conflicts [\[FN99\]](#) must be considered in detail so that the specific ethical questions can be addressed.

[\[FN100\]](#)

E. Role of Counsel [\[FN101\]](#)

Although the U.S. Supreme Court has articulated clearly the role of counsel in criminal trials--"the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of amicus curiae" [\[FN102\]](#) -- few courts [\[FN103\]](#) have ever examined closely the role of counsel (and his or her commensurate duties) in the civil commitment process or in the context of other representation of individuals with mental disabilities. [\[FN104\]](#) Although courts have acknowledged that there are substantial differences between representation in a criminal action and a juvenile delinquency proceeding, *702 [\[FN105\]](#) the courts--with one important exception [\[FN106\]](#)--generally have failed to recognize the additional "lawyering qualities" [\[FN107\]](#) required to represent a person with mental disabilities. [\[FN108\]](#) An examination of the attorney's duties in such representation, however, reveals that there are greater obligations here than in other types of litigation or in other counseling situations. Think about the impact this has in clinical teaching and practice settings.

First, the attorney's initial interview with a person facing civil commitment is usually conducted on alien territory, a factor that may "shape interview content." [\[FN109\]](#) The first principle of interviewing is that the interview room "should not be threatening, noisy or distracting." [\[FN110\]](#) When initial interviews are typically held randomly in corners of crowded wards [\[FN111\]](#)--in a context dramatically unlike that of the prototypical attorney-client office interview [\[FN112\]](#)--the interviewee often may become "suspicious, terrified, puzzled or simply distrustful of the attorney." [\[FN113\]](#) Also, just as "examiner bias" [\[FN114\]](#) is prevalent in the doctor-patient interview, it likely pervades this attorney-client relationship as well.

Second, the attorney's investigation will differ from that of "ordinary cases." [\[FN115\]](#) The ability to read and understand medical charts [\[FN116\]](#) *703 and the ability to communicate with mental disability professionals [\[FN117\]](#) are essential aspects of the investigation of virtually every case involving a person who is putatively mentally disabled and facing civil commitment. Also, attorneys will need to employ independent psychiatric (or other medical disability) experts [\[FN118\]](#) in a significant percentage of such cases.

Third, while attorneys need to develop special skills and sensitivities in interviewing witnesses in any case, [\[FN119\]](#) these skills must be more finely honed and sensitivities heightened in cases involving the interviewing of mental disability professionals and mentally disabled persons with regard to events leading to hospitalization and the fact of hospitalization itself. [\[FN120\]](#)

Fourth, the attorney must be able to assume responsibility for answering "classic social service" [\[FN121\]](#) questions regarding the range of alternatives to inpatient hospitalization of the client--questions that likely will play a significant factor in the court's disposition of the case:

What halfway houses, community mental health centers, or patient-run alternatives are available? What economic benefits and entitlements might the patient receive outside the hospital? Is the alternative program one likely to survive economically in the coming budget cuts? Is the program one specifically suited for persons with *704 the client's condition? [\[FN122\]](#)

Counsel also must explore all likely outcomes of the commitment hearing [\[FN123\]](#) and advise the client of all possible dispositions. [\[FN124\]](#) Because of the more open-ended dispositional phase of the commitment process, the range of outcomes here is often significantly greater than in "ordinary cases."

Fifth, because the prosecution of a civil commitment case often involves multiple parties--hospital staff, the community authority, a patient's family [\[FN125\]](#)--an attorney often must conduct simultaneous multiple negotiation with parties and nonparties, [\[FN126\]](#) who often "have radically differing views as to [an individual case's] appropriate disposition." [\[FN127\]](#) Although "the likelihood of success at this stage is demonstrably greater than at any other," [\[FN128\]](#) the demands made on the attorney to develop appropriate negotiation skills [\[FN129\]](#) are commensurately greater.

Sixth, the attorney's lawyering skills at the commitment hearing must be heightened for at least three overlapping reasons. Because so many of the procedural issues raised by commitment have so rarely been litigated, each contested hearing becomes, to some extent, a "case of first impression," [\[FN130\]](#) and a court's procedural decision therefore *705 will have far greater "ripple effects" than in more coherently developed areas of the law. [\[FN131\]](#) Because of the nature of the proceeding, attorney-client disputes over such issues as whether a certain witness should be called to the stand or whether the patient should testify [\[FN132\]](#) will likely be heightened, again requiring more sophisticated counseling skills on the attorney's part. [\[FN133\]](#) Finally, because the court will often be poorly informed as to both substantive and procedural commitment law, [\[FN134\]](#) the attorney will need to educate the court as to the law's nuances. [\[FN135\]](#)

Seventh, because case dispositions do not fit into a "discrete paradigm," [\[FN136\]](#) "there is a far greater burden on the attorney to seek dispositional alternatives than in an ordinary case." [\[FN137\]](#) A vivid example is that of New Jersey's first "discharged pending placement" (DPP) cases, in which counsel had to assume a heightened role. [\[FN138\]](#)

Eighth, the attorney should be available for representation at periodic review hearings and appeals. Counsel also should be available *706 to provide legal services in such "collateral" matters [\[FN139\]](#) as the patient's right to treatment, right to refuse treatment, and protection of civil rights while institutionalized. [\[FN140\]](#)

F. Counsel's Role [\[FN141\]](#)

Counsel's role also must be considered through a series of other filters: the reality that legal rights are not implicitly self-executing; the myth that adequate counsel is regularly available to all individuals with mental disabilities; the need for counsel to serve an educative function for the court; the impact of counsel on the vindication of collateral legal rights; and the significance of counsel in the confrontation of other related moral, social and political issues that flow from the trial process when individuals with mental disabilities are at risk.

1. Rights Are Not Self-executing

Legal rights are not necessarily self-executing. [\[FN142\]](#) A court's declaration of a right "to" a service or a right to be free "from" an intrusion does not in se provide that service or guarantee such freedom from intrusion. A right is only a paper declaration without an accompanying remedy. [\[FN143\]](#) Without counsel to guarantee enforcement, the rights "victories" that have been won in test case and law reform litigation in this area are unlikely to have any real impact on persons with mental disabilities. [\[FN144\]](#)

*707 2. The Myth of Adequate Counsel

The development of organized and regularized counsel programs has given rise to the supposition that such counsel is regularly available to persons with mental disabilities in individual matters involving their commitment to, retention in and release from psychiatric hospitals. *708 [\[FN145\]](#) But, this appearance of general availability is largely illusory. [\[FN146\]](#) Moreover, such representation is rarely available in a systemic way in law reform or test cases and is rarely provided in any systemic way in cases that involve counseling or negotiating short of actual litigation. [\[FN147\]](#)

Empirical surveys consistently show that quality of counsel is the single most important factor in the disposition of cases in involuntary civil commitment systems and in the trial of mentally disabled criminal defendants. It is only when counsel is provided in an organized, specialized and regularized way that there is more than a random chance of lasting, systemic change. Yet, few states appear willing to provide such counsel in such a manner.

A contrast between the development of case law in Virginia and Minnesota is especially instructive. Notwithstanding the fact that Virginia's population is approximately 15% greater than Minnesota's, [\[FN148\]](#) Virginia had only two published litigated civil cases on questions of mental hospitalization during the decade from 1976 to 1986, while Minnesota had at least 101 such cases in the same period. [\[FN149\]](#) Significantly, *709 Minnesota has a tradition of providing vigorous counsel to persons with mental disabilities, [\[FN150\]](#) while Virginia does not. [\[FN151\]](#)

3. Counsel's Educative Function

The presence of structured counsel--of lawyers supported by mental health professionals--also serves an important internal educative function by making it more likely that all participants in the mental disability trial process, including judges, are sensitized to the social, cultural and political issues involved in representation of such a marginalized class. [\[FN152\]](#) The disappointing results reported nearly 25 years ago by Dr. Norman Poythress-- that merely training lawyers about psychiatric techniques and psychological nomenclature made little difference in ultimate case outcome [\[FN153\]](#)--reveal that education about the law and the clinical details of mental illness are not enough. Counsel must be attitudinally and ethically [\[FN154\]](#) educated if they are to provide truly adequate representation.

4. Implementation of Collateral Rights

If counsel is not adequate, it is unlikely that attorneys will vigorously ***710** seek to execute and implement other collateral rights. In *Ake v. Oklahoma*, for instance, the U.S. Supreme Court ruled that a criminal defendant who makes a threshold ex parte showing that his or her sanity at the time of the offense is likely to be a "significant factor" at trial is constitutionally entitled to state funded psychiatric assistance. [\[FN155\]](#) But because *Ake* generally has been read narrowly and with little creativity, [\[FN156\]](#) the rationale of Justice Marshall's opinion--that psychiatrists will assist lay jurors "to make a sensible and educated determination" about the defendant's medical condition at the time of the offense [\[FN157\]](#)--has rarely been fulfilled. If litigants with mental disabilities were afforded more adequate counsel, *Ake* probably would have been implemented in a manner that was truer to the spirit of the Supreme Court's decision. [\[FN158\]](#)

5. Other Moral, Social and Political Issues

Adequate counsel also is needed to deal with other collateral moral, social and political issues that, to an important degree, affect legal and public decision-making in this area. [\[FN159\]](#) These include issues such as the "dilemma of the moral clinician," [\[FN160\]](#) the impact of pretextuality on the mental disability trial process, [\[FN161\]](#) the degree to which ***711** "ordinary common sense" drives decision-making by judges and jurors in such cases, [\[FN162\]](#) and the pervasiveness of heuristic biases in such decision-making. [\[FN163\]](#) If these issues are not confronted by counsel, it is likely that the pervasive cognitive and behavioral biases infecting decision-making in this area will continue to go unnoticed and unabated. [\[FN164\]](#)

It is apparent, therefore, that the role of counsel in the representation of persons with mental disabilities is multi-textured and continually evolving. Systemic decision-makers need to acknowledge the complexity of this role, the historic shortcomings of sporadic counsel serving the population in question, and possible remedies for the longstanding systematic problems. Yet, scant attention has been paid--by judges, [\[FN165\]](#) by scholars, [\[FN166\]](#) and practicing lawyers [\[FN167\]](#)--to the questions that I have posed here. This is a topic that appears--inexplicably--"off the table" for purposes of legal discourse. This contrasts--sharply and sadly--with the legal academy's interest in parallel issues that affect women, people of color, and other minorities. [\[FN168\]](#) In the following section, I explore some of the possible explanations for this "disconnect."

***712** III. Sanism and the Clinical Setting

Given this depressing background, sanism in the clinical classroom must be considered from two different perspectives: the clinical teacher's and the clinic student's. There is no database of empirical evidence on which to draw; I am basing this section largely on my varied personal experiences. As a practitioner, I supervised clinical students for ten years in placements in the New Jersey Department of the Public Advocate (mostly in the Division of Mental Health Advocacy, which I directed from 1974-82). [\[FN169\]](#) As a professor, I was the director of New York Law School's Federal Litigation Clinic from 1984- 90; the bulk of the clinic's caseload involved representation of mentally and physically disabled persons in SSI and SSDI cases. [\[FN170\]](#) Since 1992, I have taught a course, Mental Disability Litigation Seminar and Workshop, in which students are placed in mental disability law settings (mostly, but not exclusively, with offices of the N.Y. Mental Hygiene Legal Services). [\[FN171\]](#)

Much of what follows is admittedly impressionistic. I cannot, and do not, offer it as a valid or reliable behavioral study. [\[FN172\]](#) But I am writing it nonetheless so as to share with the reader the conclusions I have reached after

having worked in this area of the law for nearly 30 years.

***713** A. Sanism and Clinical Teaching

Several years ago, I gave the keynote presentation at a Society of American Law Teachers (SALT) conference, and presented a paper titled, "Mental Disability, Sanism, Pretextuality, Therapeutic Jurisprudence, and Teaching Law." [\[FN173\]](#) SALT regularly provides speaking forums for professors whose primary scholarly (and often personal) interests are the rights of the "discrete and insular minorities" described in footnote 4 of the *Carolene Products* case. [\[FN174\]](#) SALT draws from the ranks of politically progressive law professors, including many who articulate a commitment to social justice as one of the reasons they joined the academy. The organization has been a consistent voice in the fight to insure diversity in the classroom and the curriculum. [\[FN175\]](#) Each year, at the Association of American Law Professors' annual conference, there is a SALT meeting, and often (if not always), some political activity "in the streets." [\[FN176\]](#) Yet, the response to my talk was strikingly at odds with this commitment to diversity and social justice. In an article subsequently published in the *SALT Equalizer*, Professor Rogelio Lasso wrote that he found it particularly disturbing that 'Sanism' merited a plenary presentation but that the 'disgraceful lack of racial diversity of law school faculties' did not. [\[FN177\]](#)

While I recognize that this reaction may be idiosyncratic, I do not think that this is the case. One of my major scholarly interests is the rights of persons institutionalized because of mental illness to engage in voluntary sexual interaction. [\[FN178\]](#) In my first paper on this topic, partially*714 titled, *Beyond the Last Frontier?*, I explained that portion of the title in this manner:

I have borrowed this phrase from [former] New York Law School Professor Keri Gould's response to my incredulity when I told her of the hostile and astonished responses I received from several other law professors upon telling them that I was researching this topic. Professor Gould (who, like me, represented institutionalized persons with mental disabilities in her prior career) responded, 'Michael, why are you surprised? For almost everyone, this really is beyond the last frontier!' [\[FN179\]](#)

But when I present this topic to a live audience, I elaborate in this manner:

Last year, I was sitting at my faculty lunch table, and conversation turned to upcoming presentations that we would soon be doing. My colleagues mostly take left-liberal positions on a wide variety of issues, and are generically the exact mix of retro '60s generationists and early baby boomers that you'd expect. They (appropriately) are quick to criticize any behavior that is racist, sexist, ethnically bigoted or homophobic. Rush Limbaugh would probably view them as one of his worst 'politically correct' horror fantasies. As you might expect, I'm not terribly out of place in this group . . .

Anyway, when it got to be my turn, I said that I was going to be speaking about the right of institutionalized mentally disabled persons to sexual interaction. All conversation came to a screeching halt.

'Michael, are you serious?' 'Are you crazy (sic)?' 'Michael, even for you, you've gone too far!' 'What are you going to say next: that they can get married?!?' Et cetera.

At this stage of my life and career, few things surprise me. Yet, I must admit that I was stunned--not by the response (I spend lots of time in places where few people agree with me about anything [my local bait and tackle shop, for instance], so I don't expect (or want) agreement with whatever it is I'm talking about), but by the identity and background of the people who were uttering these sentiments. As I've said, these were classic New York liberals many of whom had spent much of their distinguished professional, academic and personal lives rooting out and exposing prejudiced and stereotypical behavior toward virtually every minority group one could imagine. The buck, though, stopped there.

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To the general public--and when we talk about the idea of mental patients having sex, a roomful of left-leaning law professors is the general public (in the same way that I suspect a roomful of left-*715 leaning psychologists, psychiatrists or social workers would be)--this idea is far beyond the last frontier. And that insight (probably not a terribly original one on my part) really is the heart of the meta-thesis of my talk today. [\[FN180\]](#)

(Cite as: 9 Clinical L. Rev. 683)

For years, I regularly and religiously attended the full-day Clinical Section program at the AALS January conference. I never miss an issue of the truly-excellent Clinical Law Review. My attendance at AALS has gotten spottier over the years, but I generally spend at least some time at the clinical meetings. I cannot recall the last time, if ever, that a mental disability law issue was discussed [\[FN181\]](#)--and let me be clear, the failure to take mental disability law issues seriously is an indicator of sanism - nor can I ever recall sanist student attitudes on the scholarly agenda (although certainly, racist, sexist, and homophobic attitudes have been discussed frequently). [\[FN182\]](#)

Stigma may be part of the answer. We know that the stigma of mental illness also affects--and stigmatizes--mental health professionals [\[FN183\]](#) and medical students. [\[FN184\]](#) The extent to which it affects law *716 teachers who teach mental disability law, law students who study the subject and practicing psychiatrists and other mental health professionals who treat persons subject to mental disability law is not known, but it would be naive to assume that it is not an issue. [\[FN185\]](#)

Because sanism is so often invisible and because it remains politically acceptable, sins of omission can be perhaps even more troubling than sins of commission (which can, at least, be addressed frontally). By way of example, I have been told on many occasions by clinical colleagues that sanism simply isn't as "important" or as "hurtful" as is racism or sexism or homophobia. (The use of the descriptor "hurtful" is especially illuminating because it implicitly suggests that persons with mental disabilities do not have the same range of feeling that the rest of us presumably possess.) [\[FN186\]](#) And this attitude also blindly ignores the reality that so much of our bias toward persons with mental disabilities is race- and class-based. [\[FN187\]](#) Consider the story with which I begin my recent book, *The Hidden Prejudice: Mental Disability on Trial*:

Soon 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 *717 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 costar 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. [\[FN188\]](#)

Blindness to sanism is epidemic. When I discuss the Americans with Disabilities Act with friends and with other lawyers--a universe that presents prototypically, liberal "takes" on a variety of social issues (race discrimination, homophobia, misogyny, etc) --two issues typically emerge:

(Cite as: 9 Clinical L. Rev. 683)

First, virtually every person has a horror story about how "unreasonable" ADA demands caused clients to go out of business, prevented *718 other clients from opening new offices, and so forth. The ADA applications in these stories usually concern ramps and other matters involving physical accessibility. Generally, these stories do not, on the surface at least, appear to have anything to do with mental disability law.

Second, not a single person accepts--on any level--my arguments that discrimination against persons based on disability is like discrimination based on race, religion, or sexual preference. [\[FN189\]](#) Even friends who have "outed" themselves by telling of their experiences in psychiatric hospitals, or who have movingly shared the impact of major depression or bipolar illness on their own lives and/or on the lives of loved ones, refuse to take me seriously when I argue that disability-based discrimination is as pernicious, harmful and morally corrupt as other types of discrimination. [\[FN190\]](#)

Recent years have--happily--seen an outpouring of clinical scholarship on virtually every aspect of clinical law. [\[FN191\]](#) Yet, a WESTLAW search reveals no literature on the question that I have been addressing here. [\[FN192\]](#) Moreover, there is scant literature on the importance of collaboration between lawyers and mental health professionals in a clinical setting. [\[FN193\]](#)

There is a further disconnect in constitutional and statutory mental disability law that most of us have perhaps missed. There have *719 been no attempts, so far, to answer the question that has bedeviled civil rights activists since the 1950's: "how to capture 'the hearts and minds' of the American public so as to best insure that statutorily and judicially articulated rights are incorporated-- freely and willingly-- into the day-to-day fabric and psyche of society." [\[FN194\]](#)

On the other hand, I am somewhat optimistic about the faint glimmers of interest in the intersection between therapeutic jurisprudence (TJ) [\[FN195\]](#) and clinical teaching. In a recent article, Professor Keri Gould and I argued that "therapeutic jurisprudence provides a new and exciting approach to clinical teaching. By incorporating TJ principles in both classroom and fieldwork components of clinic courses, law professors can help students gain new and important insights into some of the most difficult problems regularly raised in clinical classes and practice settings." [\[FN196\]](#) In doing so, we explicitly warned that "therapeutic jurisprudence analyses must be undertaken with a full awareness of the impact of sanism and pretextuality on all aspects of the mental disability law system." [\[FN197\]](#) In an earlier article, Professor Mary Berkheiser had identified several areas in which TJ holds out "promising prospects" for clinical legal education. [\[FN198\]](#) She explored four topics: "(a) problem solving, (b) client counseling, (c) self-reflection or 'learning to learn,' and (d) professional responsibility." [\[FN199\]](#) In all of these, I contend, an understanding of sanism will enrich the entire enterprise. [\[FN200\]](#)

*720 But sadly, clinical educators have--at least in the literature--been largely blind to the corrosive and ravaging forces of sanism. [\[FN201\]](#) The real tragedy is that no one has mentioned it until now.

B. Sanism and Clinical Students

In considering the ways in which sanism affects clinical students, there are at least three questions that we must seek to answer: (1) Are students who take clinical courses more or less sanist than other students? (2) How do clinical students manifest sanism?, and (3) How can sanism be combated in clinical settings?

1. Clinical Students' Susceptibility to Sanism

Discussing the law school classroom, Lila Coleburn and Julia Spring have suggested: "If [the law student] speaks without emotions, he is untrue to himself, but if he speaks with them, he may be laughed out of the class as touchy-feely." [\[FN202\]](#) Discussing alternative dispute resolution classes, Professor Jean Sternlight similarly observed:

ADR survey courses attract a diverse mix of students. Some are drawn to ADR because they are uncomfortable with adversarial approaches and litigation. Such students tend to enjoy the negotiation and mediation portions of the material and recoil a bit from arbitration. Others take the course because they believe it would be useful for litigation or because it meets at a convenient time. Some of these students prefer the

traditional arbitration material, focusing on cases and doctrine, to what they perceive as more 'touchy feely' content. [\[FN203\]](#)

And addressing the need for students to develop rapport with the client, Professor Peter Margulies, in an article entitled, Reframing ***721** Empathy in Clinical Legal Education, points out, "Often we 'sell' the importance of connection to students, who are wary of touchy-feely perspectives, by pointing out the instrumental aspects of rapport." [\[FN204\]](#)

Certainly, clinical courses appear to attract students more comfortable with what these authors refer to as "touchy-feely" perspectives. [\[FN205\]](#) My experiences in teaching clinical students about "active listening" were certainly mixed. Some were able to grasp it and do it; others simply parroted the text (Binder-Price) and never appeared to internalize the skills in any meaningful way. [\[FN206\]](#) This, however, begs the question: Does this, in and of itself, make them less likely to be sanist? [\[FN207\]](#) To this, I have no answers, other than to point out that --and I have certainly never studied this in any way that could be reliably validated--those students who had decided upon a career in mental disability law did seem to manifest less sanism in the clinical setting than did other students. [\[FN208\]](#)

2. Manifestation of Sanism by Clinical Students

Clinical students--like virtually all students I have ever ***722** taught [\[FN209\]](#)--resolutely adhere to a series of myths about persons with mental disabilities. [\[FN210\]](#) These include the following:

- Like other lawyers, clinical students frequently presume that persons with mental illness are incompetent to engage in autonomous decisionmaking. [\[FN211\]](#) Students typically apply that presumption to matters directly involving mental disability law issues (commitment, treatment, etc.), choice of trial strategy, and external "life decisions" (choice of housing, employment, etc.).

- Like other lawyers, clinical students often complain, in referring to their clients with mental disabilities, that "the clients could try harder." Students are impatient with persons with mental disabilities (especially in cases involving governmental benefits that turn on one's capacity to work), and do not believe that a mental impairment should be considered disabling in the same way that certain physical impairments may be. [\[FN212\]](#) Clinical students sometimes complain that persons with mental disabilities "get too much of a free ride" from governmental assistance programs, and may be prone to view such programs as inhibiting their clients from 'trying harder.' These attitudes track the common sanist myth that mental illness is somehow the mentally ill person's "fault." [\[FN213\]](#)

***723** • Like other lawyers, clinical students look primarily for visual clues as an indicator of whether a client is 'truly' mentally disabled, thereby falling into a cognitive error made by trial and appellate judges for decades. [\[FN214\]](#)

- Like other lawyers, clinical students express fear of their mentally disabled clients' potential dangerousness, rejecting the rich database that has proven--conclusively--that mental illness is only a 'modest' risk factor for dangerous behavior [\[FN215\]](#) and that an overwhelming proportion of the population of persons with mental illness is not dangerous. [\[FN216\]](#)

- Like other lawyers, clinical students assume that 'quality of life' concerns are less significant for persons with mental disabilities, and that issues such as housing, family relationships, and job satisfaction do not 'count' as much.

- Like other lawyers, clinic students tend to disbelieve what their mentally disabled clients tell them if the information does not conform to the student's stereotype of what a mentally disabled person 'is like.' [\[FN217\]](#) If such a client speaks of past employment as a professional or of having earned graduate degrees or of having once lived in an upper class suburb, such information is rejected out of hand (and often is viewed as evidence of the client's 'craziness' (and thus inherent untrustworthiness)).

- Like other lawyers, clinical students express discomfort about representing persons with mental disabilities when the court-ordered outcome of a case might not be in the client's "best interests." [\[FN218\]](#)

***724** • Like other lawyers. clinical students frequently engage in a pre-reflective "ordinary common sense" (OCS)

in approaching their clinical case assignments. [\[FN219\]](#) This OCS frequently involves sanist stereotypes about persons with mental disabilities. [\[FN220\]](#)

On clinic-specific issues, students often complain in other ways about representing persons with mental disabilities. They complain, specifically, about:

*725 • difficulty in interviewing (especially in coping with narrative styles that may differ radically from those of persons without mental disabilities). If a client says something that appears 'crazy,' students sometimes may trivialize all of the client's concerns and question the credibility of the client's entire account.

- difficulty in investigating (especially if the client is institutionalized). [\[FN221\]](#) It is certainly more difficult to investigate a case on behalf of a client who has been deprived of freedom of movement (be it civil or criminal), but the fact that a client is often in a psychiatric hospital makes this a more difficult enterprise in many ways. Such persons will, for example, have limited access to cash, to telephones, and to visitors.

- difficulty in counseling. Many clinical students are extraordinarily uncomfortable about 'acting like a social worker,' [\[FN222\]](#) and counseling is the aspect of legal practice that most closely approximates the work of a mental health professional. [\[FN223\]](#)

- difficulty in negotiating. To some extent, cases involving clients with mental disabilities are negotiated in very different ways than those involving other clients. [\[FN224\]](#) My years as a Public Defender and mental health advocate taught me that prosecutors, *726 attorneys general and other lawyers with whom I came regularly in contact never took negotiation in these cases as seriously, perhaps due to a belief that the stakes were not particularly high for my client, or perhaps due to an inability to empathize with my client.

- difficulty in resisting the tendency to impose the student's own views as to what is in the client's best interests (in ways that are not typical of the ways that lawyers act in "garden variety" civil and criminal cases). [\[FN225\]](#)

3. Combating Sanism in the Clinical Setting

There is no question that participation in a clinical course is stressful - for both students and teacher. [\[FN226\]](#) A student of mine once came to me, distraught, to tell me that her husband had threatened to leave her if she continued to work with 'those people' (forensic patients at a NY state psychiatric institution). [\[FN227\]](#) In a thoughtful piece on the factors that can influence clinical casework, Professor Ann Juergens includes mental illness as one of the stressors. [\[FN228\]](#) Students who are thrust into clinical settings are forced to confront 'difficult, complex, and often contradictory feelings about what he or she is doing *727 and how he or she is doing it.' [\[FN229\]](#) There is no question that dealing with mental illness in a client is stressful--especially for a law student--and that clinical teachers must acknowledge that and work with students to combat the causes that lead to such stress. [\[FN230\]](#) The representation of "real clients" in clinics--including persons with mental disabilities--presents "profound moral implications" for every clinical professor and clinical student. It is imperative that clinical teachers take seriously the impact of sanism in what their students do, and how they do it, if this representation is to be authentically meaningful. [\[FN231\]](#)

IV. Conclusion

As I have tried to show in this article, notwithstanding the self-selection of clinical students, [\[FN232\]](#) clinics are not sanism-free. I believe, however, that sanism can be rebutted in the clinical setting (notwithstanding the fact that the stress of clinical education may exacerbate sanist tensions), perhaps with a healthy infusion of therapeutic jurisprudence, [\[FN233\]](#) or simply by the clinical professor's use of the "bully pulpit" of the clinical classroom to explain sanism [\[FN234\]](#) and to discuss *728 strategies for dealing with sanist behaviors and attitudes (on the part of the teacher, the student, court personnel, other lawyers, witnesses, and anyone else involved in the case).

What else should we do? We must discuss the underlying issues openly, and "system decision-makers must regularly engage in a series of 'sanism checks' to insure--to the greatest extent possible--a continuing conscious and self-reflective evaluation of their decisions to best avoid sanism's power." [\[FN235\]](#) At the same time, "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." [\[FN236\]](#)

The issues considered must be added to the research agendas of social scientists, behaviorists and legal scholars so as to "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." [\[FN237\]](#) We must also find ways to "attitudinally educate counsel . . . so that representation becomes more than the hollow shell it all too frequently is." [\[FN238\]](#) Further, we need to consider carefully the burden of heuristic thinking, [\[FN239\]](#) especially the ways that judges use such devices in deciding important cases.

There is much for clinical professors to do here. First, as I just indicated, they must explain sanism to their students (not just in the context of "mental disability law" cases, [\[FN240\]](#) but in all cases that in any way involve persons with mental disabilities or the impact of mental disabilities on any direct or tangential legal questions), [\[FN241\]](#) must identify sanist behaviors, and discuss strategies for confronting, neutralizing and overcoming such behaviors and attitudes. Second, they must be alert to the ways that sanist vocabulary creeps into classroom language and discourse. When a student uses words like "retard" or "nutcase," the teacher should deal with the situation in precisely the way one would if a student were to use a pejorative word to describe *729 women, African-Americans, gays, Jews, or any other racial or religious minority. Third, they must consciously and overtly discuss how perceptions of a client's (or witness's) mental disability affect all aspects of a case--including all aspects of lawyering, trial strategy, and courtroom performance. Fourth, they must be especially vigilant for the sorts of sanist behavior that I discuss in this paper, and must be alert for subtle hints of passive-aggressive sanism (e.g., "I just can't empathize with this guy"; [\[FN242\]](#) "Professor, how can I do active listening with my client if he makes me so uncomfortable?"). Fifth, they must be similarly vigilant in case preparation conferences, so as to identify behavior that potentially trivializes clients' legal problems and needs. Sixth, they must urge their law school administration to create more clinics for representation of persons with mental disabilities.

This list is not meant to be exhaustive. Indeed, it barely skims the surface of what is needed. I offer it here, however, as an elementary working blueprint for beginning this struggle. [\[FN243\]](#)

This is not an easy problem. As Mary Berkheiser candidly and perceptively notes, "Incorporating therapeutic jurisprudence into clinical teaching, ... could simultaneously create tensions that would further complicate an already complex educational process." [\[FN244\]](#) Yet, I believe that this is a mission that we must undertake--for the integrity of the clinic and the autonomy and personhood of our clients.

In the chorus of *Ballad of a Thin Man* (from which the title of this paper derives), Bob Dylan sang:
Because something is happening here But you don't know what it is Do you Mister Jones?" [\[FN245\]](#)

For decades we did not know what was happening here. But now we do. It is time for us to do something.

[\[FN41\]](#). Professor of Law, New York Law School. I wish to thank Jeanie Bliss for her invaluable research assistance, Betsy Fiedler for her excellent editing assistance, and the participants at the New York Law School Clinical Theory Workshop (especially Gene Cerruti) and the UCLA/Lake Arrowhead International Clinical Workshop for their helpful recommendations.

[\[FN1\]](#). See, e.g., Jane Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 Clin. L. Rev. 1 (1997); Jon Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 *Hastings L.J.* 445 (2000); Bill Ong Hing, *Raising Personal Identification of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 *Stan. L. Rev.* 1807 (1993); Kevin Johnson & Amagda Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 *SMU L. Rev.* 1423 (1998); Margaret Montoya, *Voicing Differences*, 4 Clin. L. Rev. 147 (1997).

[\[FN2\]](#). See generally Michael L. Perlin, *The Hidden Prejudice: Mental Disability on Trial* (2000) (Perlin, *Hidden Prejudice*). The classic study is Gordon W. Allport, *The Nature of Prejudice* (1955). But see Elisabeth Young-Bruehl, *The Anatomy of Prejudices* (1996).

The phrase 'sanism' was, to the best of my knowledge, coined by Dr. Morton Birnbaum. See Morton Birnbaum, *The Right to Treatment: Some Comments on its Development*, in *Medical, Moral and Legal Issues in Health Care* 97, 106-07 (Frank Ayd ed., 1974) (Birnbaum, *Right to Treatment: Comments*). See also [Koe v. Califano](#), 573

[F.2d 761, 764 n.12 \(2d Cir. 1978\)](#). 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 Michael L. Perlin, *Mental Disability Law: Civil and Criminal* § 3A-2.1, at 8-12 (2d ed. 1999) (Perlin, *Mental Disability Law*).

I recognize that the use of the word 'sanism' (based on the root 'sane' or 'sanity') is troubling from another perspective: The notion of 'sanity' or 'insanity' is a legal construct that has been rejected by psychiatrists, psychologists, and other behavioralists for over 150 years. I nevertheless use it here, in part to reflect the way in which inaccurate, outdated and distorted language has confounded the underlying political and social issues, and to demonstrate, ironically, how ignorance continues to contribute to this bias.

[FN3]. On the way that sanism affects lawyers' representation of clients, see Perlin, *Hidden Prejudice*, supra note, 2 at 28, 55-56.

[FN4]. See Birnbaum, *Right to Treatment: Comments*, supra note 2, at 107 (quoting Kennedy). See also id. at 106 ('It should be understood that sanists are bigots'). For a more recent consideration in this context, see Bruce Link et al., *The Consequences of Stigma for Persons with Mental Illness: Evidence from the Social Sciences*, in *Stigma and Mental Illness* 87 (Paul Fink & Allan Tasman eds., 1992) (Stigma).

[FN5]. See Michael L. Perlin, On "[Sanism](#)", 46 *SMU L. Rev.* 373 (1992).

[FN6]. See Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency](#), 47 *U. Miami L. Rev.* 625 (1993).

[FN7]. See Keri K. Gould & Michael L. Perlin, "Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudence and Clinical Teaching, 24 *Seattle L. Rev.* 339 (2000).

[FN8]. Bob Dylan, *Lyrics, 1962-1985*, at 198 (1985).

[FN9]. Robert Shelton, *No Direction Home: The Life and Music of Bob Dylan* 280 (DaCapo ed., 1997).

[FN10]. Dylan, supra note 8, at 198.

[FN11]. Michael L. Perlin, ['What's Good Is Bad, What's Bad Is Good, You'll Find out When You Reach the Top, You're on the Bottom': Are the Americans with Disabilities Act \(And Olmstead v. L.C.\) Anything More than 'Idiot Wind?'](#), 35 *U. Mich. J.L. Ref.* 235, 236 (2001-02).

[FN12]. See, e.g., David Rothman & Sheila Rothman, *The Willowbrook Wars* 188- 89 (1984) (discussing role of paradigmatically liberal Congresswoman Elizabeth Holtzman in attempting to block group homes for the mentally retarded from opening in her district).

[FN13]. Cf. J. Michael Bailey & Richard Pillard, *Are Some People Born Gay?*, *N.Y. Times* (Dec. 17, 1991), at A21 (arguing that homophobia is the only form of bigotry that can be so expressed).

[FN14]. For example, I explain how these approaches have distorted our insanity defense policies in Michael L. Perlin, [Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence](#), 40 *Case W. Res. L. Rev.* 599 (1989-90) (Perlin, *Myths*), and Michael L. Perlin, *Psychodynamics and the Insanity Defense: 'Ordinary Common Sense' and Heuristic Reasoning*, 69 *Neb. L. Rev.* 3 (1990) (Perlin, *OCS*); see generally Michael L. Perlin, *The Jurisprudence of the Insanity Defense* (1994). I explain how they have distorted our approaches on questions of patient sexuality in Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 *NYU Rev. L. & Soc. Change* 302 (1993-94) (Perlin, *Sexual Interaction*); Michael L. Perlin ['Make Promises by the Hour': Sex, Drugs, the ADA, and Psychiatric Hospitalization](#), 46 *DePaul L. Rev.* 947 (1997) (Perlin, *Promises*). I explain how they have distorted our approaches on questions of criminal competencies in Perlin, *Pretexts*, supra note 6; 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) (Perlin, *Dignity*); Michael L. Perlin, ["For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental](#)

[Disabilities, 52 Ala. L. Rev. 193 \(2000\)](#) (Perlin, Misdemeanor Outlaw). I explain how they have distorted our approaches in death penalty cases in 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.* 239 (1994); 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 (1996); Michael L. Perlin, "Life Is in Mirrors: Death Disappears": Giving Life to Atkins, *N.M. L. Rev.* (forthcoming 2003). I explain how they have distorted our approaches in right to refuse treatment cases in 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 *Psychology, Pub. Pol'y & L.* 114 (1996); Michael L. Perlin, *Decoding Right to Refuse Treatment Law*, 16 *Int'l J. L. & Psychiatry* 151 (1993). I explain how they have distorted our approaches in neonaticide cases in Michael L. Perlin, *"She Breaks Just Like a Little Girl": Neonaticide, The Insanity Defense, and the Irrelevance of "Ordinary Common Sense"*, *Wm. & Mary J. Women & L.* (forthcoming 2003) (Perlin, Neonaticide).

[FN15]. The most important recent case is *In the Matter of the Mental Health of K.G.F.*, 29 P. 3d 485 (Mont. 2001). See *infra* text accompanying notes 35-66. See also, e.g., [City of Cleburne v. Cleburne Living Center](#), 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (mentally retarded individuals subjected to 'history of unfair and often grotesque mistreatment' (quoting [Cleburne Living Center, Inc. v. City of Cleburne, Texas](#), 726 F. 2d 191, 197 (5th Cir. 1974) (decision below)), and *id.* at 461 (Marshall, J., concurring in part & dissenting in part) ('virulence and bigotry' of state-mandated segregation of the institutionalized mentally retarded 'rivaled, and indeed paralleled, the worst excesses of Jim Crow'); David Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 *Colum. L. Rev.* 897 (1975); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 *Harv. C.R. - C.L. L. Rev.* 22 (1987).

For recent scholarly considerations of sanism, see, e.g., Peter Blanck, *The Americans with Disabilities Act and the Emerging Workforce: Employment of People with Mental Retardation* 59-60 (1998); Justine Dunlap, [Mental Health Advance Directives: Having One's Say](#), 89 *Ky. L.J.* 327, 353 (200-01); Bryan Dupler, [The Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure](#), 55 *Okla. L. Rev.* 1, 63 (2002); Sana Loue, [The Involuntary Civil Commitment of Mentally Ill Persons in the United States and Romania](#), 23 *J. Leg. Med.* 211, 235 n.120 (2002); Grant Morris, [Defining Dangerousness: Risking a Dangerous Definition](#), 10 *J. Contemp. Legal Issues* 61, 98 (1999); Christopher Slobogin, [An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases](#), 86 *Va. L. Rev.* 1199, 1244 (2000); Winiviere Sy, *The Right of Institutionalized Disabled Patients to Engage in Consensual Sexual Activity*, 23 *Whittier L. Rev.* 541, 549 (2001); Bruce Winick, [Therapeutic Jurisprudence and the Civil Commitment Hearing](#), 10 *J. Contemp. Legal Issues* 37, 41 (1999). I am gratified that student authors are also beginning to examine sanism's pernicious effects. See, e.g., Sara Bredemeier, Note, [Hollow Verdict: Not Guilty by Reason of Insanity Provokes Animusbased Discrimination in the Social Security Act](#), 31 *St. Mary's L.J.* 697, 730 (2000); Eva Subotnik, Note, [Past Violence, Future Danger?: Rethinking Diminished Capacity Departures under Federal Sentencing Guidelines Section 5k2.13](#), 102 *Colum. L. Rev.* 1340, 1369 n.189 (2002); Elisa Swanson, Note, ["Killers Start Sad and Crazy": Mental Illness and the Betrayal of Kipland Kinkel](#), 79 *Or. L. Rev.* 1081, 1103-10 (2001).

[FN16]. Judicial hostility is commonplace. See, e.g., Perlin, *Hidden Prejudice*, *supra* note 2, at 34-35, 63-64; Michael L. Perlin, [A Law of Healing](#), 68 *U. Cin. L. Rev.* 407, 420 n.94 (2000):

[No example of judicial hostility] is perhaps as chilling as the following story: Sometime after the trial court's decision in [Rennie v. Klein](#), 462 F. Supp. 1131 (D.N.J. 1978) (granting involuntarily committed mental patients a limited right to refuse medication), 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 sonofabitch behind the courthouse and had him shot.'

[FN17]. Perlin, *supra* note 5, at 375-76.

[FN18]. I discuss [United States v. Carolene Products Co.](#), 304 U.S. 144, 152 n.4 (1938), more broadly in this context in Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 *Loy. L.A. L. Rev.* 249, 1250-51 (1987).

The Americans with Disabilities Act cites this very language in its findings section. On the question of whether this will be viewed merely as a hortatory aspiration or as a Congressional command for authentic behavioral and

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societal change, see Perlin, Promises, supra note 14, at 958-60; Michael L. Perlin, "[I Ain't Gonna Work on Maggie's Farm No More](#)": [Institutional Segregation, Community Treatment, the ADA, and the Promise of Olmstead v. L.C.](#), 17 T.M. Cooley L. Rev. 53 (2000) (Perlin, Maggie's); Perlin, Misdemeanor Outlaw, supra note 14; Michael L. Perlin, "Their Promises of Paradise": Institutional Segregation, Community Treatment, the ADA, and [Olmstead v. L.C.](#), 37 Hous. L. Rev. 999 (2000) (Perlin, Paradise).

[FN19]. See, e.g., Joseph Goldstein & Jay Katz, Abolish the 'Insanity Defense'--Why Not? 72 Yale L.J. 853, 868-69 (1963); Michael L. Perlin, [Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization](#), 28 Hous. L. Rev. 63, 108 (1991) (on society's fears of persons with mental disabilities), 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.") (emphasis in original). 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). 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).

[FN20]. See Perlin, supra note 14, at 6-7 (asking this question). Compare 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 contaminated').

On the ways that stigma affects psychiatrists and medical students, see Howard Dichter, The Stigmatization of Psychiatrists Who Work with Chronically Mentally Ill Persons, in Stigma, supra note 4, at 203; Leah Dickstein & Lisa Hinz, The Stigma of Mental Illness for Medical Students and Residents, in Stigma, supra note 4, at 153.

[FN21]. On the Supreme Court's confusion over the meaning of 'mental disorder,' see 1 Perlin, Mental Disability Law, supra note 2, § 2A-3.3, at 75- 92 (2d ed. 1998), discussing [Kansas v. Hendricks](#), 521 U.S. 346 (1997) (upholding Kansas' Sexually Violent Predator Act).

[FN22]. See generally J. Alexander Tanford, The [Limits of a Scientific Jurisprudence: The Supreme Court and Psychology](#), 66 Ind. L.J. 137 (1990).

[FN23]. For the most comprehensive research on predictions of violence, for example, see John Monahan, Clinical and Actuarial Predictions of Violence, in Modern Scientific Evidence: The Law and Science of Expert Testimony § § 7-2.0 to 7-2.4, at 300 (David Faigman et al. eds., 1997).

[FN24]. This section is generally adapted from Perlin, Hidden Prejudice, supra note 2, at 55-56.

[FN25]. Michael L. Perlin & Robert L. Sadoff, Ethical Issues in the Representation of Individuals in the Commitment Process, 45 Law & Contemp. Probs. 161, 164 (Summer 1982) (footnotes omitted).

[FN26]. Virginia Hiday, The Attorney's Role in Involuntary Civil Commitment, 60 N.C. L. Rev. 1027, 1030 (1982).

[FN27]. Elliot Andalman & David Chambers, Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal, 45 Miss. L.J. 43, 72 (1974).

[FN28]. Norman Poythress, Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony, 2 Law & Hum. Behav. 1, 15 (1978). See infra text accompanying notes 152-54.

[FN29]. David Bazelon, Questioning Authority: Justice and Criminal Law 49 (1988); See Perlin, Myths, supra note 17, at 654. A survey conducted by Harvard Medical School revealed that the 'great majority' of defense counsel interviewed were unaware of the operative criteria for competency to stand trial. 4 Perlin, Mental Disability Law, supra note 2, § 8A-4.3 at 60 (citing study). For a particularly shocking example of poor counsel in a death penalty case involving a mentally disabled criminal defendant, see [Alvord v. Wainwright](#), 469 U.S. 956 (1984) (Marshall, J., dissenting from denial of certiorari).

[FN30]. See Michael L. Perlin, Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases, 16 Law & Hum. Behav. 39, 49-52 (1992).

[FN31]. Perlin & Dorfman, *supra* note 14, at 122.

[FN32]. *Id.* at 121.

[FN33]. The standard text is David Binder & Susan Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977), updated in David A. Binder, Paul Bergman & Susan C. Price, Lawyers as Counselors: A Client Centered Approach (1991). Compare Stephen Ellmann, [Lawyers and Clients](#), 34 UCLA L. Rev. 717 (1987) (critiquing Binder's and Price's work).

[FN34]. See, e.g., [In re C.P.K.](#), 516 So.2d 1323, 1325 (La. Ct. App. 1987) (discussed in Perlin & Dorfman, *supra* note 14, at 120 n.67) (reversing commitment order where trial court did not comply with statute expressing explicit preference for representation by state Mental Health Advocacy Service, and rejecting as 'untenable' the argument that trial court should be excused 'since it did not know ... whether the Service really existed'). But cf., [State ex rel. Memmel v. Mundy](#), 75 Wis.2d 276, 249 N.W. 2d 573 (1977) (setting out duties of adversary counsel in involuntary civil commitment cases).

There is now some empirical data suggesting that patients represented by public defender organizations generally obtain significantly more favorable outcomes in contested involuntary civil commitment cases than do patients represented by private counsel hired on short-term contracts. Mary Durham & John La Fond, The Impact of Expanding a State's Therapeutic Commitment Authority, in *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* 121, 122 (David Wexler ed., 1990) (Therapeutic Jurisprudence); Mary Durham & John La Fond, The Empirical and Policy Implications of Broadening the Statutory Criteria for Civil Commitment, 3 Yale L. & Pol'y Rev. 395 (1985).

[FN35]. [306 Mont. 1, 29 P.3d 485 \(2001\)](#).

[FN36]. *Id.* at 488.

[FN37]. *Id.*

[FN38]. *Id.* at 489.

[FN39]. *Id.* at 491.

[FN40]. [466 U.S. 668 \(1984\)](#) (establishing weak effectiveness of counsel standard). See generally 1 Perlin, Mental Disability Law, *supra* note 2, § 2B-11.1.

[FN41]. [K.G.F.](#), 29 P.3d at 491.

[FN42]. See [Strickland](#), 466 U.S. at 689.

[FN43]. [K.G.F.](#), 29 P.3d at 492 (citing Perlin, *supra* note 30, at 53-54 (identifying Strickland standard as 'sterile and perfunctory' where 'reasonably effective assistance' is objectively measured by the 'prevailing professional norms')).

[FN44]. [K.G.F.](#), 29 P.3d at 492.

[FN45]. *Id.*

[FN46]. *Id.* at 493 (quoting [Mont. Code Ann. § 53-21-101\(1\)](#)).

[FN47]. *Id.* at 493 (quoting [Mont. Code Ann. § 53-21-141\(1\)](#)); see also [Mont. Const. art. II, § 4](#) ("the dignity of the human being is inviolable"). See generally Perlin, Dignity, *supra* note 14.

[\[FN48\]](#). Id. at 494 (citing Perlin, *supra* note 30, at 47).

[\[FN49\]](#). Id. at 494.

[\[FN50\]](#). Id. at 495 (quoting Winick, *supra* note 15, at 44-45).

[\[FN51\]](#). Id. at 495-96 (quoting Perlin, *supra* note 5, at 374; Winick, *supra* note 15, at 45).

[\[FN52\]](#). Id. at 495 (quoting [Matter of Sonsteng](#), 175 Mont. 307, 573 P.2d 1149, 1153 (1977)).

[\[FN53\]](#). Id. at 495.

[\[FN54\]](#). Id. at 497.

[\[FN55\]](#). Id. at 498.

[\[FN56\]](#). Id.

[\[FN57\]](#). Id. (quoting National Center for State Courts' Guidelines for Involuntary Civil Commitment, 10 Ment. & Phys. Dis. Law Rptr., 409, 465 (Part E2) (1986) (Guidelines)).

[\[FN58\]](#). Id. at 498.

[\[FN59\]](#). Id. at 498-99.

[\[FN60\]](#). Id. at 499-500.

[\[FN61\]](#). Id. at 500.

[\[FN62\]](#). Id. at 500 (quoting Guidelines, *supra* note 57, Part E2, at 465).

[\[FN63\]](#). Id. at 500 (quoting *id.*, Part F5, at 483).

[\[FN64\]](#). Id. at 500.

[\[FN65\]](#). Id.

[\[FN66\]](#). Id. at 501.

[\[FN67\]](#). On the involvement of consumer groups in important patients' rights litigation, see 1 Perlin, Mental Disability Law, *supra* note 2, § 1-2.1, at 10 n.43; Michael L. Perlin, "Things Have Changed:" Looking at Non-Institutional Mental Disability Law Through the Sanism Filter, 46 N.Y.L. Sch. L. Rev. (forthcoming 2002-03). See generally Challenging the Therapeutic State: Critical Perspectives on Psychiatry and the Mental Health System, 11 J. Mind & Behav. 1-328 (1990) (symposium issue). See generally *infra* note 88.

[\[FN68\]](#). See, e.g., Joshua Cook, [Good Lawyering and Bad Role Models: The Role of Respondent's Counsel in a Civil Commitment Hearing](#), 14 Geo. J. Legal Ethics 179 (2000); Stanley Herr, The Future of Advocacy for Persons with Mental Disabilities, 39 Rutgers L. Rev. 443 (1987); Stanley Herr, [Representation of Clients with Disabilities: Issues of Ethics and Control](#), 17 N.Y.U. Rev. L. & Soc. Change 609 (1991); Peter Margulies, ["Who Are You To Tell Me That?" Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients](#), 68 N.C. L. Rev. 213 (1990); Paul Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515; Steven Schwartz, Damage Actions as a Strategy for Enhancing the Quality of Care of Persons with Mental Disabilities, 17 N.Y.U. Rev. L. & Soc. Change 657 (1989-1990); Christopher Slobogin & Amy Mashburn, The [Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disabilities](#), 68 Fordham L. Rev. 1581 (2000). See also Perlin, *supra* note 30, at 58-59 (recommending research agenda on this issue).

[FN69]. Certainly, many lawyers distrust and trivialize their non-mentally disabled clients as well. I believe, however, that the problems here are magnified for several overlapping reasons:

- It remains socially acceptable to treat persons with mental disabilities this way, at a time when we are, finally, becoming more enlightened about our sorry history of trivialization and disparagement of other minority groups.
- There are robust specialized bars and well-funded special interest groups willing to "go to bat" for members of other minority groups when their personhood is diminished by callous lawyers.
- The potential outcome of some mental disability cases - the way, for instance, that defendants on whom an insanity defense is imposed may spend far longer in maximum security custody than if they been convicted of the underlying criminal charges, see, e.g., Perlin, *supra* note 14, at 110-11-makes the issues here even more problematic.

[FN70]. See, e.g., [In re LaBelle](#), 107 Wash.2d 196, 728 P.2d 138, 146 (1986); Perlin & Dorfman, *supra* note 14, at 210; Bruce Winick, The MacArthur Treatment Competence Study: Legal and Therapeutic Implications, 2 Psychol., Pub. Pol'y & L. 137, 151 n.80 (1996). See also Slobogin & Mashburn, *supra* note 68, at 1602, discussing the work of Professor Elyn Saks (see Elyn Saks, [Competency to Refuse Treatment](#), 69 N.C. L. Rev. 945, 948-61 (1991)):

Professor Saks argues that requiring any degree of rationality beyond that demanded by the basic rationality standard is inappropriate, in light of the "pervasive influence of the irrational and the unconscious" in everyone's decision-making process. As she notes, '[p]sychiatrists and psychologists have demonstrated convincingly the ever-present influence of primitive hopes, wishes, and fears on the mental lives of us all.' Under a heightened rationality test (as opposed to a 'basic rationality' test), too many decisions would be considered incompetent. (footnotes omitted).

[FN71]. [Davis v. Hubbard](#), 506 F. Supp. 915, 935 (N.D. Ohio 1980); Perlin, *supra* note 19, at 113-14; Bruce J. Winick, [Competency to Consent to Treatment: The Distinction Between Assent and Objection](#), 28 Hous. L. Rev. 15 (1991).

[FN72]. [Rivers v. Katz](#), 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 79 (1986).

[FN73]. Thomas Grisso & Paul S. Appelbaum, The MacArthur Treatment Competence Study (III): Abilities of Patients To Consent to Psychiatric and Medical Treatments, 19 Law & Hum. Behav. 149 (1995) (discussed in Perlin & Dorfman, *supra* note 14, at 120).

[FN74]. Grisso & Appelbaum, *supra* note 73, at 169.

[FN75]. On this presumption in general, see Winick, *supra* note 70.

[FN76]. See, e.g., [State v. Khan](#), 175 N.J.Super. 72, 417 A.2d 585 (App. Div. 1980) (when Public Defender heard Khan discuss "crazy" ideas, he insisted that Khan plead insanity, notwithstanding Khan's fact-based claim of self-defense) (I served as Khan's lawyer on appeal). Compare Slobogin & Mashburn, *supra* note 68, at 1631 (in more than one-third of insanity defense cases studied, "the attorneys appeared to have pre-empted their clients' participation in the decision-making process") (quoting Richard Bonnie et al., [Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubtful Client Competence](#), 87 J. Crim. L. & Criminology. 48, 57 (1996)).

[FN77]. See Perlin, Maggie's, *supra* note 18, at 63 n.78 (citing sources).

[FN78]. See Perlin & Dorfman, *supra* note 14, at 134 ("Ward psychiatrists demonstrate a propensity to equate incompetent with makes bad decisions and to assume, in face of statutory and case law, that incompetence in decision making can be presumed from the fact of institutionalization"); Brian Ladds et al., The Disposition of Criminal Charges After Involuntary Medication to Restore Competency to Stand Trial, 38 J. Forens. Sci. 1442 (1993); Brian Ladds et al., Involuntary Medication of Patients Who Are Incompetent to Stand Trial: A Descriptive Study of the New York Experience with Judicial Review, 21 Bull. Am. Acad. Psychiatry & L. 529 (1993). See also Dunlap, *supra* note 15, at 353 ("healthful decision[making] is not required of persons who are not mentally ill").

[FN79]. Bruce Arrigo, Punishing the Mentally Ill: A Critical Analysis of Law and Psychiatry 29-30 (2002).

[FN80]. [814 F.2d 1516, 1522-1523 \(11th Cir. 1987\)](#) (citation omitted).

[FN81]. See supra text accompanying notes 73-75.

[FN82]. Perhaps I should be more charitable and acknowledge that these lawyers at least had the awareness to reach out and discuss the underlying issues with a colleague specializing in this area of the law. And I am grateful for that. Nonetheless, the rhetoric that is so often used ("Hey, Michael, I am representing a real whacko this time") suggests that I don't have to be that charitable.

[FN83]. Compare Henry Steadman & Joseph Cocozza, *Careers of the Criminally Insane* (1974).

[FN84]. See [Lessard v. Schmidt](#), 349 F. Supp. 1078, 1101-02 (E.D. Wis. 1971), vac'd & remanded on other grounds, 414 U.S. 473 (1974):

[The] conclusion [that due process is mandated at involuntary civil commitment hearings] is fortified by medical evidence that indicates that patients respond more favorably to treatment when they feel they are being treated fairly and are treated as intelligent, aware, human beings.

See also [Wyatt v. Stickney](#), 325 F. Supp. 781, 785 (M.D. Ala. 1971), aff'd sub nom. [Wyatt v. Aderholt](#), 503 F.2d 1305 (5th Cir. 1974) ('To deprive any citizen of his or her liberty upon the altruistic theory that confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process'); [Rennie v. Klein](#), 476 F. Supp. 1294, 1306 (D. N.J. 1979), modified & remanded, 653 F.2d 836 (3d Cir. 1981), vac'd & remanded, 458 U.S. 1119 (1982) ('Schizophrenics have been asked every question except, 'How does the medicine agree with you?' Their response is worth listening to,' quoting Van Putten & Roy, Subjective Response as a Predictor of Outcome in Pharmacotherapy, 35 Arch. Gen. Psychiatry 477, 478-80 (1978)); [Falter v. Veterans Administration](#), 502 F. Supp. 1178, 1184 (D. N.J. 1980) ('When I say that they are treated differently I am not referring to the substance of their medical or psychiatric treatment, I am referring to how they are treated as human beings').

[FN85]. See, e.g., [Khan](#), 417 A.2d at 590. For a recent helpful review of all relevant cases, see Martin Sabelli & Stacey Leyton, [Train Wreck and Freeway Crashes: An Argument for Fairness and Against Self-Representation in the Criminal Justice System](#), 91 J. Crim. L. & Criminology. 161, 172, 173 & n.28, 174 (2000). For a thoughtful consideration of the mentally disabled client's autonomy in decision making in criminal cases, see Slobogin & Mashburn, supra note 68, at 1627-36. See also Linda Fentiman, [Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of The Synthetically Sane Insanity Defendant](#), 40 U. Miami L. Rev. 1109, 1136-37 (1986):

Thus, the forcible medication of an insanity defendant with psychotropic drugs in order to eliminate the most overt symptoms of his mental illness and make him 'competent' to stand trial violates his fundamental due process right to present a defense, because of its impact on both his trial demeanor and his ability to actively participate in the planning of trial strategy.

[FN86]. See generally www.narpa.org.

[FN87]. See, e.g., Jennifer Honig & Susan Fendell, [Meeting The Needs of Female Trauma Survivors: The Effectiveness of The Massachusetts Mental Health Managed Care System](#), 15 Berkeley Women's L.J. 161, 185 (2000), quoting Patricia Spindel & Jo Anne Nugent, *The Trouble with Pact: Questioning the Increasing Use of Assertive Community Treatment Teams in Community Mental Health* 2 <[http:// www.madnation.org/papcttrouble.htm](http://www.madnation.org/papcttrouble.htm)> (citations omitted):

Psychiatric survivors are frequent critics of the mental health system's heavy reliance on the biomedical approach: "For over twenty years, the biomedical approach has been repeatedly criticized by psychiatric survivor groups and numerous authors, as being too drug-oriented and too controlling."

[FN88]. In such cases, survivor groups generally have opposed the constitutionality or application of involuntary civil commitment statutes, see, e.g., [Project Release v. Prevost](#), 722 F.2d 960 (2d Cir. 1983), or supported the right of patients to refuse the involuntary administration of psychotropic drugs, see [Rennie v. Klein](#), 653 F.2d 836, 838 (3d Cir. 1981) (Alliance for the Liberation of Mental Patients, amicus curiae), but also have involved themselves in a far broader range of litigation. See, e.g., [Colorado v. Connelly](#), 479 U.S. 157 (1986) (impact of severe mental disability on Miranda waiver; Coalition for the Fundamental Rights and Equality of Ex-patients, amicus). The involvement of such

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groups in test case litigation--exercising the right of self-determination in an effort to control, to the greatest extent possible, their own destinies, see, e.g., Judi Chamberlin, *On Our Own: Patient-Controlled Alternatives to the Mental Health System* (1979)--is a major development that cannot be overlooked by participants in subsequent mental disability litigation. See Kenneth Byalin, *Parent Empowerment: A Treatment Strategy for Hospitalized Adolescents*, 41 *Hosp. & Commun. Psychiatry* 89 (1990); Herbert S. Cromwell, Jr., et al., *A Citizens' Coalition in Mental Health Advocacy: The Maryland Experience*, 39 *Hosp. & Commun. Psychiatry* 959 (1988) (discussing impact of citizens' groups on state budgetary process); Marc Galanter, *Zealous Self-Help Groups as Adjuncts to Psychiatric Treatment: A Study of Recovery, Inc.*, 145 *Am. J. Psychiatry* 1248, 1253 (1988) (self-help group assessed as providing "meaningful help" to severely distressed ex-patients); Neal Milner, *The Right to Refuse Treatment: Four Case Studies of Legal Mobilization*, 21 *Law & Soc'y Rev.* 447 (1987) (discussing impact of ex-patient groups on course of right to refuse treatment litigation); William Snively, *Mental Illness: NAMI's View*, 39 *Hosp. & Commun. Psychiatry* 994 (1988) (letter to the editor)(explaining position of National Alliance for the Mentally Ill). The role of self-help groups is examined in detail in Howard Harp, *Taking a New Approach to Independent Living*, 44 *Hosp. & Commun. Psychiatry* 413 (1993); Peter Margulies, *The Cognitive Politics of Professional Conflict: Law Reform, Mental Health Treatment Technology, and Citizen Self-Governance*, 5 *Harv. J.L. & Tech.* 25 (1992); Beth Tanzman, *An Overview of Surveys of Mental Health Consumers' Preferences for Housing and Support Services*, 44 *Hosp. & Commun. Psychiatry* 450 (1993).

[FN89]. But see Francoise Boudreau, *Partnership as a New Strategy in Mental Health Policy: The Case of Quebec*, 16 *J. Health Pol., Pol'y & L.* 307, 319 (1991); Susan Stefan, *The Two Worlds of Psychiatric Disability: "Discredited," "Discreditable," and the Identities of Disabled People*, *Wm. & Mary L. Rev.* (forthcoming 2003).

[FN90]. One important exception is Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-based Lawyering*, 9 *Clin. L. Rev.* 195, 199 (2002) (discussing Osgoode Hall Law School's clinic's collaborative work with Parkdale Community Legal Services in representing one such group). See also *Tewksbury v. Dowling*, 169 *F. Supp. 2d* 103 (E.D.N.Y. 2001), and *Charles W. v. Maul*, 214 *F.3d* 350 (2d Cir. 2000) (litigants represented by Prof. William Brooks and the Mental Disability Law Clinic of Touro Law School).

[FN91]. This section is generally adapted from 1 Perlin, *Mental Disability Law*, supra note 2, § 2B-8, at 227-29.

[FN92]. 4 App., Task Panel Reports Submitted to the President's Commission on Mental Health 1353, 1366 (1978) (Task Panel Reports).

[FN93]. See, e.g., 1 Perlin, *Mental Disability Law*, supra note 2, § § 2B-3 to 2B-3.2. But see *K.G.F.*, 29 *P.3d* at 492: "[R]easonable professional assistance" cannot be presumed in a proceeding that routinely accepts--and even requires--an unreasonably low standard of legal assistance and generally disdains zealous, adversarial confrontation.

[FN94]. See, e.g., 1 Perlin, *Mental Disability Law*, § § 2B-4.1 to 2B-6.

[FN95]. Perlin & Sadoff, supra note 25, at 163.

[FN96]. Id. See, e.g., Michael L. Perlin, *Psychiatric Testimony in a Criminal Setting*, 3 *Bull. Am. Acad. Psychiatry & L.* 143, 147-48 (1975).

[FN97]. Task Panel Reports, supra note 92, at 1366-67.

[FN98]. Perlin & Sadoff, supra note 25.

[FN99]. See 1 Perlin, *Mental Disability Law*, supra note 2, § § 2B-8.2 to 2B-8.3.

[FN100]. Compare Samuel Jan Brakel, *Legal Schizophrenia and the Mental Health Lawyer: Recent Trends in Civil Commitment Litigation*, 6 *Behav. Sci. & L.* 3, 4 (1988) (characterizing much of then-recent patients' rights litigation as suffering from "florid legal schizophrenia," reflecting "aimless hyperactivity and aggressiveness, under which human problems are needlessly turned into legal battle, fought without regard to internal system costs, the larger

societal interests, or even the best interests of the client").

For a typically under-litigated and under-considered issue, compare [Matter of Grimes, 193 Ill. App.3d 119, 549 N.E.2d 616 \(App. 1990\)](#) (where record did not indicate whether attorney had been appointed for involuntarily committed patient as of date that hearing was scheduled, as statutorily required, or as of date of hearing, court deemed appointment to have been made in compliance with statute) with [Matter of Johnson, 191 Ill. App.3d 93, 546 N.E.2d 1176 \(App. 1989\)](#) (commitment order reversed where trial judge appointed counsel on date of hearing rather than on date when court selected hearing date).

[\[FN101\]](#). This section is generally adapted from 1 Perlin, Mental Disability Law, supra note 2, § 2B-8.1, at 229-37.

[\[FN102\]](#). *Anders v. California*, 386 U.S. 739, 744 (1967). See also [Pullen v. State, 802 So.2d 1113 \(2001\)](#) (Anders procedure for withdrawal of counsel in criminal proceedings applies to involuntary civil commitments).

[\[FN103\]](#). Three notable earlier exceptions are [Quesnell v. State, 83 Wash.2d 224, 517 P.2d 568 \(1974\)](#); [State ex rel. Hawks v. Lazaro, 157 W.Va. 417, 202 S.E.2d 109 \(1974\)](#); and [State ex rel. Memmel v. Mundy, 75 Wis.2d 276, 249 N.W.2d 573 \(1977\)](#). For the most recent important case, see [K.G.F., 29 P.3d 485](#), discussed supra text accompanying notes 35-66.

[\[FN104\]](#). For an analysis of the American Bar Association's Model Rules as they apply to this population, see 1 Perlin, Mental Disability Law, supra note 2, § § 2B-10 to 2B-10.2.

I focus here primarily on involuntary civil commitment hearings, as my experience suggests that these are the sort of civil mental disability law case most likely to be assigned in clinical settings. See generally 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. Problems 458, 459 (1988).

[\[FN105\]](#). See, e.g., [Miller v. Quatsoe, 332 F. Supp. 1269, 1275 \(E.D. Wis. 1971\)](#) ("These differences--the need to investigate an entire life, to devise a plan for a useful future and the maturity of his client--emphasize lawyering qualities which require time to germinate in each case rather than those qualities which come reflexively to the experienced attorney.") (emphasis added).

[\[FN106\]](#). See [K.G.F., 29 P.3d 498](#), discussed supra text accompanying notes 35-66.

[\[FN107\]](#). *Id.*

[\[FN108\]](#). But see *id.* at 490-95 (listing duties of counsel in involuntary civil commitment case, including detailed investigations and comprehensive client interviews). One of the leading theoretical commentaries states: "Once the adversary nature of the lawyer's role is reestablished in commitment proceedings, his role in operational terms resembles that in ordinary cases." Note, The Role of Counsel in the Civil Commitment Process: A Theoretical Framework, 84 Yale L.J. 1540, 1562 (1975) (emphasis added). For an excellent review of the pertinent issues, see Cook, supra note 68.

[\[FN109\]](#). Erving Goffman, *Asylums* 13 (1961); Perlin & Sadoff, supra note 25, at 169 (citing Lockwood, How to Represent a Client Facing Civil Commitment, 26 Practical Law. 51, 54 (1980)).

[\[FN110\]](#). Alfred Benjamin, *The Helping Interview* 3 (1969).

[\[FN111\]](#). See, e.g., Rosemary Balsam & Alan Balsam, *Becoming a Psychotherapist: A Clinical Primer* 28 (1974).

[\[FN112\]](#). See, e.g., Steven G. Fey & Steven Goldberg, Legal Interviewing from a Psychological Perspective: An Attorney's Handbook, 14 Willamette L.J. 217, 233-34 (1978)

[\[FN113\]](#). Perlin & Sadoff, supra note 25, at 170. A leading psychotherapy text notes that even a change in office location "may be particularly upsetting for a borderline psychotic or psychotic patient." Balsam & Balsam, supra note 111, at 30.

[\[FN114\]](#). I.e., doctors tend to assign more "favorable" diagnostic labels to wealthier patients. See, e.g., James Page, *Psychopathology: The Science of Understanding Deviance* 164 (1971).

[\[FN115\]](#). Perlin & Sadoff, *supra* note 25, at 170 n.76:

The lawyer must be highly aware of "hidden agenda" issues. Such hidden agendas--always a possibility in any case--may be more subtle and nefarious in commitment cases. Is the commitment hearing a cover for a divorce matter or a child custody dispute? Is the case simply a "back door" way of dealing with an adolescent with a drug problem or of attempting to avert a marriage unwanted by other family members? A lawyer's "lawyering" instincts must be at their highest level to ferret out such issues within issues.

See generally Michael L. Perlin, *Representing Individuals in the Commitment and Guardianship Process*, in 1 *Legal Rights of Mentally Disabled Persons* 497, 514- 15 (Paul Friedman ed., 1979).

[\[FN116\]](#). See Practice Manual: Preparation and Trial of a Civil Commitment Case, 5 *Ment. Dis. L. Rep.* 281, 285-87 (1981) (Preparation); See generally Guidelines, *supra* note 57, at 476 (Guideline E6):

Effective legal representation of a respondent requires that the respondent's attorney have free and immediate access to all pertinent documents, including, but not limited to, the commitment petition, the detention order, the police report, other documents used to initiate commitment proceedings, the screening report, the pre-hearing examination reports, and the medical records of the respondent. Because hearings in civil commitment cases occur much sooner than hearings in most civil cases, discovery should be expedited and not be impeded by restrictive procedures and time limits that generally apply in civil proceedings.

[\[FN117\]](#). See generally Andrew Watson, *Psychiatry for Lawyers* (2d ed. 1976).

[\[FN118\]](#). Such an expert will probably be "the single most valuable person to testify on behalf of a client in a contested commitment hearing." Preparation, *supra* note 116, at 289.

[\[FN119\]](#). See, e.g., Gary Bellow & Beatrice Moulton, *The Lawyering Process* 32-157 (1981).

[\[FN120\]](#). See, e.g., Watson, *supra* note 117, at 16-27.

[\[FN121\]](#). Perlin & Sadoff, *supra* note 25, at 170.

[\[FN122\]](#). Id. Of course, if the patient can "surviv[e] safely in freedom," [O'Connor v. Donaldson](#), 422 U.S. 563, 575 (1975), without any alternative treatment, "it is not the lawyer's role to attempt to impose such treatment over his client's objection." Perlin & Sadoff, *supra* note 25, at 170 (emphasis in original).

[\[FN123\]](#). See, e.g., Perlin & Sadoff, *supra* note 25, at 170-71 (attorney's role in discussing option of voluntary commitment is analogized to criminal defense counsel's exploration of guilty plea option, see, e.g., [McMann v. Richardson](#), 397 U.S. 759, 768-71 (1970)).

[\[FN124\]](#). For example, a client may not meet threshold income or residency eligibility requirements for a specific outpatient placement.

[\[FN125\]](#). See, e.g., [N.C. Gen. Stat. § 122C-261 \(1997\)](#). Compare [Heller v. Doe](#), 509 U.S. 312 (1993) (Kentucky statute granting relatives party status at involuntary civil commitment hearings is not unconstitutional).

[\[FN126\]](#). To some extent, the commitment process here approximates Prof. Chayes' model of public law litigation. See, e.g., [Abraham Chayes, The Role of the Judge in Public Law Litigation](#), 89 *Harv. L. Rev.* 1281 (1976).

[\[FN127\]](#). Perlin & Sadoff, *supra* note 25, at 171.

[\[FN128\]](#). Preparation, *supra* note 116, at 288. For a statistical confirmation, see Y. Kumasaka & J. Stokes, *Involuntary Hospitalization: Opinions and Attitudes of Psychiatrists and Lawyers*, 13 *Comprehen. Psychiatry* 201 (1972) (over 40% so released); Perlin, *supra* note 115, at 510; Michael L. Perlin, *Mental Patient Advocacy by a Patient Advocate*,

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54 Psychiatric Q. 169, 171 (1982) (over six-year period, almost 29% of all patients represented released to community following entry of advocacy agency as counsel, but prior to formal hearing).

[FN129]. See generally Roger Fisher & William Ury, *Getting to Yes* (2d ed. 1991).

[FN130]. See, e.g., [In re Watson](#), 91 Cal. App.3d 455, 154 Cal. Rptr. 151 (1979) (challenging exclusion of patient from commitment hearing); [In re James](#), 67 Ill. App.3d 49, 384 N.E.2d 573 (1978) (same); [Hashimi v. Kalil](#), 388 Mass. 607, 446 N.E.2d 1387 (1983) (enforcing statutory time limits for filing petition). See generally 1 Perlin, *Mental Disability Law*, supra note 2, chapter 2C (discussing other procedural litigation in involuntary civil commitment cases).

[FN131]. For a general discussion of this issue in a public interest law context, see Michael Meltsner & Philip Schrag, *Public Interest Advocacy: Materials for Clinical Legal Education* (1974).

[FN132]. See, e.g., [Tyars v. Finner](#), 518 F. Supp. 502 (C.D. Cal. 1981), rev'd, 709 F.2d 1274 (9th Cir. 1983); [Cramer v. Tyars](#), 23 Cal. 3d 131, 588 P.2d 793, 151 Cal. Rptr. 653 (1979); [State v. Mathews](#), 46 Or. App. 757, 613 P.2d 88 (1980), cert. denied, 450 U.S. 1040 (1981).

[FN133]. See, e.g., [Binder & Price](#), supra note 33, at 192-210.

[FN134]. In a North Carolina study, fewer than 20% of judges approved of an adversarial model for commitment hearings, see [Hiday](#), supra note 26, at 1037.

[FN135]. Cf., e.g., Robert L. Sadoff, *Forensic Psychiatry: A Practical Guide for Lawyers and Psychiatrists* 35, 47-48 (1985).

[FN136]. See [Perlin & Sadoff](#), supra note 25, at 166-67.

[FN137]. *Id.* at 172 (citing, in part, Nicholas Kittrie, *The Right to Be Different: Deviance and Enforced Therapy* (1973) (footnotes omitted)):

While a court-appointed probation officer in the criminal process is specifically charged with finding and monitoring alternatives to incarceration, such officials are rarely present in the commitment process. The impact of "transitional service" social staff at hospitals on structuring such alternatives has been little studied but the findings of such a study would probably show little impact on the day-to-day functioning of the commitment process. Individual courts may consider the full range of social, educational, and religious agencies and may find an acceptable alternative to the commitment process. Such possibilities place a burden on the attorney to search out and study such possible placements for his client, while at the same time avoiding the excesses of what Kittrie has termed "The Therapeutic State."

[FN138]. See [Matter of S.L.](#), 94 N.J. 128, 462 A.2d 1252 (1983). See also 1 Perlin, *Mental Disability Law*, supra note 2, § 2C-6.3 (discussing DPP status and the successor 'conditions extended placing placement' (CEPP) status in general), and Michael L. Perlin, *Discharged Pending Placement': The Due Process Rights of the Institutionalized Mentally Handicapped With 'Nowhere To Go,' in 5 Directions in Psychiatry, Lesson 21* (1985), reprinted in 4 *The Schizophrenias* 210 (Frank Flach ed., 1988) (discussing DPP status); [In re Commitment of B.L.](#), 346 N.J. Super. 285, 787 A.2d 928 (App. Div. 2002) (discussing CEPP status).

[FN139]. An early and helpful analysis is suggested in Robert J. Golten, *Role of Defense Counsel in the Criminal Commitment Process*, 10 Am. Crim. L. Rev. 385, 408-09 (1972). For other considerations, see James Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Criminal Defendant*, 52 U. Miami L. Rev. 529 (1998); [Slobogin & Mashburn](#), supra note 68.

[FN140]. On the interplay of the adjudication of treatment rights and the commitment hearing, see [In re D.J.M.](#), 158 N.J. Super. 497, 386 A.2d 870 (App. Div. 1978), discussed in 1 Perlin, *Mental Disability Law* supra note 2, § 2C-8.1, at 507-08.

[FN141]. This section is generally adapted from Perlin, *supra* note 30.

[FN142]. Bruce Winick, [Restructuring Competency to Stand Trial](#), 32 UCLA L. Rev. 921, 941 (1985). See also Grant 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, 8 (1993).

[FN143]. See generally Donald Zeigler, [Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts](#), 38 Hastings L.J. 665 (1987) (Zeigler, New Approach). See also Donald Zeigler, [Rights, Rights of Action, and Remedies: An Integrated Approach](#), 76 Wash. L. Rev. 67 (2001). According to Professor Zeigler:

[A] right without a remedy is not a legal right; it is merely a hope or a wish. ... Unless a duty can be enforced, it is not really a duty; it is only a voluntary obligation that a person can fulfill or not at his whim....

... Rights promote well-being in the broadest sense. They secure the dignity and the integrity of human beings....

Rights give people control over their lives and are essential to self-respect.

Zeigler, New Approach, *supra*, at 678-79 (footnotes omitted).

[FN144]. Three examples should suffice. In 1972, the Supreme Court decided in *Jackson v. Indiana* that it violates due process to commit an individual awaiting criminal trial for more than the "reasonable period of time" needed to determine "whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future." 406 U.S. 715, 733 (1972). Yet, thirteen years later, Professor Bruce Winick reported that, in almost half of the states, *Jackson* had yet to be implemented, and the pre-*Jackson* problem of overlong commitments "still persist[ed]." Winick, *supra* note 142, at 940; see also Ronald Roesch & Stephen Golding, *Competency to Stand Trial* 121-26 (1980); Barbara Weiner, *Mental Disability and the Criminal Law*, in Samuel J. Brakel et al., *The Mentally Disabled and the Law* 693, 704 (3d ed. 1985). A decade after Winick published his article, Morris and Meloy reported that *Jackson* remains 'ignored [and] circumvented.' Morris & Meloy, *supra* note 142, at 8.

In another setting, even though the District of Columbia Code permits patients seek either periodic review of their commitment or an independent psychiatric evaluation, evidence developed in an important case has revealed that, in twenty-two years following the enactment of the relevant provision, not a single patient exercised the rights to this statutory review. [Streicher v. Prescott](#), 663 F. Supp. 335, 343 (D. D.C. 1987). See generally 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 David Wexler, *The Waivability of Recommitment Hearings*, 20 Ariz. L. Rev. 175, 176-78 (1978) (discussing problems inherent in patient-initiated review mechanisms).

Similarly, hard-fought institutional reform "victories" in cases declaring broad rights to treatment had little "real world" impact because there were no lawyers available to ensure that the decisions would be properly implemented. For discussion of the implementation of the broad staffing orders in the landmark right to treatment case of [Wyatt v. Stickney](#), 344 F. Supp. 373 (M.D. Ala.), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), see Wyatt v. Stickney: Retrospect and Prospect (L.R. Jones & R. Parlour, eds., 1981); Joseph O'Reilly & Bruce Sales, *Setting Physical Standards for Mental Hospitals: To Whom Should the Courts Listen?*, 8 Int'l J.L. & Psychiatry 301 (1986); Joseph O'Reilly & Bruce Sales, *Privacy for the Institutionalized Mentally Ill: Are Court-Ordered Standards Effective?*, 11 Law & Human. Behav. 41 (1987). See generally 2 Perlin, *Mental Disability Law*, *supra* note 2, Chapter 3A. The litigation in Wyatt finally concluded less than three years ago. See [Wyatt v. Sawyer](#), 105 F. Supp. 2d 1234 (M.D. Ala. 2000).

There are many other equivalent examples involving potential collateral actions. Although several cases have recognized patients' right to vote, see, e.g., [Doe v. Rowe](#), 156 F. Supp. 2d 35, 21 NDLR P 155 (D. Me. 2001); [Boyd v. Board of Registrars of Voters of Belchertown](#), 368 Mass. 631, 334 N.E.2d 629 (1975); [Carroll v. Cobb](#), 139 N.J. Super. 439, 354 A.2d 355 (App. Div. 1976), this right becomes an empty shell if, for instance, there is no staff worker available to drive the patient to a poll; counsel could insure vindication of this right by filing a supplemental action to order the hospital to provide such transportation, compare [Reiser v. Prunty](#), 224 Mont. 1, 727 P.2d 538, 547 (1986) (hospital and psychiatrist had no responsibility to protect constitutional right to vote of patient detained under emergency detention statute). Similarly, a court order mandating the constitutional right to visitation, see, e.g., [Schmidt v. Schubert](#), 422 F. Supp. 57, 58 (E.D. Wis. 1976), becomes meaningless if a hospital announces that it cannot provide adequate staff to implement such visitation rights; again, counsel would be needed to insure an enforceable remedy.

[FN145]. See, e.g., Alan Stone, *The Myth of Advocacy*, 30 Hosp. & Commun. Psychiatry 819, 821-22 (1979)

(charging that a "one-sided advocacy system" exists in which patients are regularly represented by zealous and conscientious lawyers); see also, e.g., [French v. Blackburn](#), 428 F. Supp. 1351, 1357 (M.D.N.C. 1977), aff'd, 443 U.S. 901 (1979) (rejecting plaintiff's assumption that lawyer in involuntary civil commitment case will not act in client's best interest).

[FN146]. See M.C. Olley & James Ogloff, Patients' Rights Advocacy: Implications for Program Design and Implementation, 22 J. Ment. Health Admin, 368, 369 (1995). See generally [K.G.F., 29 P.3d 485](#).

[FN147]. See, e.g., [Washington v. Harper](#), 494 U.S. 210, (1990) (counsel is not required in hearing to determine whether prisoner has right to refuse involuntary administration of psychotropic medication); [Vitek v. Jones](#), 445 U.S. 480, 500 (1980) (Powell, J., concurring) (counsel is not required in hearing to determine whether prison inmate should be transferred to state psychiatric hospital);

Statistics compiled by the National Institute of Mental Health regarding the provision of counsel by P&A systems to institutionalized individuals suggest that class-action type cases were instituted in fewer than half of all jurisdictions in fiscal year 1989. FY 1989 Report on Activities Under [PL 99- 319](#), the Protection and Advocacy for Mentally Ill Individuals Act 61, Table 9 (1990).

On the variance in representation in right to refuse treatment cases, see Perlin & Dorfman, *supra* note 14.

[FN148]. As of April 1, 2000, Virginia's population was 7,078,515, while Minnesota's was 4,919,479.

[FN149]. Ingo Keilitz et al., A Study of the Emergency Mental Health Services and Involuntary Civil Commitment Practices in Virginia 47 (1989). While Minnesota court rules command patients' counsel to "advocate vigorously" on behalf of their clients, see Minn. R. Commitment, Rule 4.01 (1997), there is no comparable provision in Virginia law, cf. [Va. Stat. § 19.2-169.5 \(2002\)](#) (role of counsel in raising insanity in criminal proceedings).

Compare [K.G.F., 29 P.3d at 498-500](#) (constitutionally mandating adherence to Commitment Guidelines E5, E 2 and F5 (see Guidelines, *supra* note 57), on client interviews, the attorney's advocacy function, and the attorney's role in the courtroom).

[FN150]. Under Minn. R. Commitment, Comment to Rule 4.07 (1997):

A. All proceedings under the [Act] are adversarial. Minimum adversary representation ordinarily includes, but is not limited to:

1. being familiar with statute and case law and court rules which govern commitment proceedings; and
2. interviewing respondent no later than 24 hours after confinement ...; and
3. reviewing respondent's medical records ... early enough to insure sufficient time to investigate and secure additional medical evaluations, and/or prepare for the hearings; and
4. contacting or interviewing all persons whose testimony might tend to support respondent's position and subpoenaing witnesses if necessary; and
5. investigating alternatives less restrictive than those sought in the petition; and
6. attempting to interview prior to the hearing any persons who might testify for the petitioner at the hearing; and
7. informing respondent of the latter's rights, including the right to appeal.

B. [This rule] is intended to insure that once appointed, the same lawyer will continue to represent respondent

[FN151]. See Keilitz et al., *supra* note 149, at 39-45, and especially at 42 ("Given the absence of a district attorney representing the Commonwealth, or an attorney representing the petitioner, commitment proceedings are at best, quasi-adversarial").

[FN152]. See generally Perlin & Sadoff, *supra* note 25, at 168-73.

[FN153]. Poythress concluded that the "trained" lawyers' behavior in court was not materially different from that of "untrained" lawyers because the former group's attitudes toward their clients had not changed. Mere knowledge of cross-examination methods, he noted, "did not deter them from taking [the] more traditional, passive, paternal stance towards the proposed patients." Poythress, *supra* note 28, at 15. As one trainee noted: "I really enjoyed your workshop, and I've been reading over your materials and its [sic] all very interesting, but this is the real world, and we've got to do something with these people. They're sick." *Id.*

[FN154]. See David Wexler, Mental Health Law 111 n.55 (1981).

[FN155]. [470 U.S. 68, 74 \(1985\)](#).

[FN156]. See generally 3 Perlin, Mental Disability Law, *supra* note 2, § 10- 4.3, at 431-39 (2d ed. 2000), and cases cited in *id.* at nn.635-80.

[FN157]. [Ake, 470 U.S. at 80](#).

[FN158]. See, e.g., [In re Brown, 1986 WL 13385 \(Ohio Ct. App. Nov. 26, 1986\)](#), (child custody); [Interest of Goodwin, 366 N.W.2d 809, 814-15 \(N.D. 1985\)](#) (civil commitment case); [Matter of Sanders, 108 N.M. 434, 773 P.2d 1241, 1246 \(Ct. App. 1989\)](#) (treatment guardianship revocation). Goodwin is considered in [Interest of R.M., 555 N.W.2d 798 \(N.D. 1996\)](#).

For early consideration of the implementation of Ake in general, see Pamela Casey & Ingo Keilitz, An [Evaluation of Mental Health Expert Assistance Provided to Indigent Criminal Defendants: Organization, Administration, and Fiscal Management, 34 N.Y.L. Sch. L. Rev. 19 \(1989\)](#). On the related ethical implications of Ake, see Paul Appelbaum, In the Wake of Ake: The Ethics of Expert Testimony in an Advocate's World, 15 Bull. Am. Acad. Psychiatry & L. 15 (1987); Stephen Rachlin, From Impartial Expert to Adversary in the Wake of Ake, 16 Bull. Am. Acad. Psychiatry & L. 25 (1985). For a more recent inquiry, see Amber McGraw, [Life But Not Liberty? An Assessment of Noncapital Indigent Defendants' Rights to Expert Assistance under the Ake v. Oklahoma Doctrine, 79 Wash. U. L.Q. 951 \(2001\)](#).

[FN159]. See, e.g., Perlin, OCS, *supra* note 14; Michael L. Perlin, Power Imbalances in Therapeutic and Forensic Relationships, 9 Behav. Sci. & L. 111 (1991).

[FN160]. See, e.g., Perlin, *supra* note 144, at 135-36 (considering evidence suggesting that, in response to legislative actions tightening involuntary civil commitment criteria, some forensic mental health professionals responded that such mandates could be ignored if they conflicted with the witnesses' "moral judgment").

[FN161]. *Id.* at 133-35 (referring to the dramatic tension between those subject matter areas in which courts accept dishonesty and those in which they appear to erect insurmountable barriers to guard against what is perceived as malingering, feigning or other misuse of the legal system). See generally Perlin, Hidden Prejudice, *supra* note 2, at 59-75; 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 \(1998\)](#).

[FN162]. See, e.g., Perlin, OCS, *supra* note 14, at 22-39. This concept is examined in detail in Richard Sherwin, [Dialects and Dominance: A Study of Rhetorical Fields in Confessions, 136 U. Pa. L. Rev. 729 \(1988\)](#). I have returned to this topic recently in a criminal law context in Perlin, Neonaticide, *supra* note 14.

[FN163]. Perlin, OCS, *supra* note 14, at 12-22 (referring to simplifying cognitive devices that frequently lead to distorted and systematically erroneous decisions due to ignoring or misuse of rationally useful information). See generally Michael Saks & Robert Kidd, Human Information Processing and Adjudication: Trial by Heuristics, 15 Law & Soc'y Rev. 123 (1980-81).

[FN164]. The "therapeutic jurisprudence" scholarship should lead participants in the system to critically weigh the therapeutic (or anti-therapeutic) effects of the mental disability system. See Therapeutic Jurisprudence, *supra* note 34; Mary Berkheiser, Frasier Meets CLEA: Therapeutic Jurisprudence and Law School Clinics, 5 Psychol., Pub. Pol'y & L. 1147 (1999); Gould & Perlin, *supra* note 7. See *infra* text accompanying notes 195- 200. Adequate counsel is needed to insure consideration of the therapeutic potential inherent in mental disability litigation. See, e.g., John Ensminger & Thomas Liguori, The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential, 6 J. Psychiatry & L. 5 (1978), reprinted in Therapeutic Jurisprudence, *supra* note 34, at 245.

[FN165]. But see [K.G.F., 29 P.3d 485](#).

[FN166]. But see Cook, *supra* note 68; Slobogin & Mashburn, *supra* note 68.

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[FN167]. But see, e.g., 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 (1993-94); Deborah A. Dorfman, [Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law](#), 10 N.Y.L. Sch. J. Hum. Rts. 805 (1993).

[FN168]. See, e.g., sources cited supra note 1. And this, of course, is not to suggest that this interest is somehow inappropriate or unwarranted. My concern here is the starkly-contrasted lack of interest in the issues that I am discussing in this article.

[FN169]. The students came from a variety of law schools, local and national, public and private, "top ten" and otherwise.

[FN170]. See, e.g., [Tirado v. Bowen](#), 842 F.2d 595 (2d Cir. 1988); [Mejia v. Bowen](#), 1988 WL 125678 (S.D.N.Y. Nov. 10, 1988); [Tirado v. Bowen](#), 1987 WL 12377 (S.D.N.Y. July 2, 1987); [Cabrera v. Heckler](#), 1986 WL 9228 (S.D.N.Y. Aug. 11, 1986); [Barrino v. Bowen](#), 1986 WL 6482 (S.D.N.Y. June 4, 1986); [Hill v. Sullivan](#), 125 F.R.D. 86 (S.D.N.Y. Apr. 12, 1989); [Baran v. Bowen](#), 710 F. Supp. 53 (S.D.N.Y. 1989); [Tirado v. Bowen](#), 705 F. Supp. 179 (S.D.N.Y. 1989); [Alvarez v. Bowen](#), 704 F. Supp. 49 (S.D.N.Y. 1989); [Correa v. Bowen](#), 682 F. Supp. 755 (S.D.N.Y. 1988). The clinic also filed amicus briefs on behalf of coalitions of persons with mental disabilities in at least three United States Supreme Court cases: [Colorado v. Connelly](#), 479 U.S. 157 (1986); [U.S. Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto](#), 477 U.S. 556 (1986), and [Ake v. Oklahoma](#), 470 U.S. 68 (1985).

To the best of my knowledge, surprisingly few clinical programs have ever provided legal representation to "psychiatric survivor groups." Touro Law School's Mental Disability Law Clinic - directed by William Brooks - is an important exception. I was especially heartened to learn that the Parkdale Community Legal Services Clinic at Osgoode Hall Law School provides assistance to a psychiatric survivor group. See Imai, supra note 88, at 199. A recent survey (supplemented by personal knowledge) reveals that approximately ten American law schools - Chicago, Lewis & Clark, New England, New York Law School, Richmond, Texas, Touro, Virginia, William Mitchell, and Yale - offer courses that, broadly, could be called "mental disability law clinics." See Jean H. Bliss, Mental Disability Law Class Survey (Jan. 2002) (unpublished; on file with author).

[FN171]. See Gould & Perlin, supra note 7, at 342 (discussing this course), and id. at 365-71 (discussing placements).

[FN172]. I acknowledge that my reliance on anecdotal impressions may have inadvertently led me to omit other and different experiences.

[FN173]. See Marjorie Silver, Love, Hate, and Other Emotional Interference in the Lawyer/client Relationship, 6 Clin. L. Rev. 259, 288 n.151 (1999) (discussing SALT presentation).

[FN174]. See Perlin, Misdemeanor Outlaw, supra note 14, at 219, discussing the "heralded 'footnote 4' of the [United States v. Carolene Products](#) [304 U.S. 144, 152 n.4 (1938)] case, which has served as the springboard for nearly a half century of challenges to state and municipal laws that have operated in discriminatory ways against other minorities." See supra note 18.

[FN175]. [9:00 A.M. Opening Plenary, 75 Wash. U. L.Q. 1586, 1653 \(1997\)](#) ("The Society of American Law Teachers, for example, is an organization of progressive law professors who have annual or sometimes twice annual teaching conferences, many of which are directed at how our teaching can reflect our social values and how we can effectively raise these issues in the classroom").

[FN176]. See, e.g., Francisco Valdes, Solomon's Shames: Law as Might and Inequality, 23 Thurgood Marshall L. Rev. 351, 438 n.70 (1998) ("The SALT multiyear Action Campaign was kicked off with the march held in San Francisco during the 1998 AALS Annual Meeting").

[FN177]. Gould & Perlin, supra note 7, at 354 n.93 (quoting Rogelio Lasso, Diversity Is As Diversity Does, SALT Equalizer, Dec. 1994, at 18-19).

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[FN178]. See, e.g., Perlin, Hidden Prejudice, *supra* note 2, at 157-74; 2 Perlin, Mental Disability Law, *supra* note 2, § 3C-5.1, at 416-21; Douglas Mossman, Michael Perlin & Deborah Dorfman, Sex on the Wards: Conundra for Clinicians, 25 J. Am. Acad. Psychiatry & L. 441 (1997); Andrew Payne & Michael L. Perlin, Sexual Activity Among Psychiatric Inpatients: International Perspectives, 4 J. Forens. Psychiatry 109 (1993); Perlin, Sexual Interaction; *supra* note 14; Perlin, Promises, *supra* note 14.

[FN179]. Perlin, *supra* note 14, at 520 n.10.

[FN180]. See, e.g., Michael L. Perlin, Hospitalized Psychiatric Patients and Sexual Interactions: Rights and Responsibilities (keynote presentation, annual conference, National Association of Rights, Protection, and Advocacy, Sacramento, CA, October 2000). I must point out that none of my clinical colleagues participated in this lunchtable discussion.

There was probably only a handful of law professors in the room in Sacramento when I gave this talk. However, if the opportunity ever arises to speak about this topic to a mostly-law professor audience, I will definitely repeat the same story.

[FN181]. Of course, multiple variables affect the decisions of all scholars as to where to publish their articles. By way of example, my friend and colleague, the late Stanley Herr, regularly published articles about mental disability law in a wide range of "traditional" law reviews (see, e.g., [Reforming Disability Nondiscrimination Laws: A Comparative Perspective](#), 35 U. Mich. J. L. Reform 305 (Fall 2001/Winter 2002); [Special Education Law & Children with Reading and Other Disabilities](#), 28 J. L. & Educ. 337 (1999); [Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities](#), 42 Vill. L. Rev. 635 (1997); [A Way to Go Home: Supportive Housing and Housing Assistance Preferences for the Homeless](#), 23 Stetson L. Rev. 345 (1994)), and chose to publish about clinical pedagogy in this journal (see Ethical Decision-making and Ethics Instruction in Clinical Law Practice, 3 Clin. L. Rev. 109 (1996)).

[FN182]. For a rare law review piece discussing this issue from a personal perspective, see Naomi Himmelhoch, In the Padded Closet: Thoughts on a Secret Life, 10 Hastings Women's L.J. 463 (1999). Professor Marjorie Silver also shares with students experiences as a person with a diagnosed mental disability. Personal conversation, Oct. 19, 2001. But certainly there is no law review article in the mental disability law literature that parallels, say, Nancy Polikoff, [Am I My Client?: The Role Confusion of a Lawyer Activist](#), 31 Harv. C.R. - C.L. L. Rev. 443, 443-44 (1996):

I am a lesbian activist. I support and engage in a variety of activities designed to change the fundamental way in which American society views homosexuality. Some of this work entails changing the law, especially in the area of gaining respect and recognition for lesbian and gay families. Other aspects of this work fall outside the legal system, including organizing and attending demonstrations and conferences, public speaking, fundraising for groups involved in cultural change and political and economic empowerment, and writing for non-legal audiences.

[FN183]. See Dichter, *supra* note 20, at 203; Glen Gabbard & Krin Gabbard, Cinematic Stereotypes Contributing to the Stigmatization of Psychiatrists, in Stigma, *supra* note 4, at 113.

[FN184]. See Dickstein & Hinz, *supra* note 20, at 153.

[FN185]. I cannot resist sharing this story. In August 2000, I went to San Francisco to speak to the American Psychological Association's annual conference. On the airport shuttle, the shuttle driver asked, "Is anyone here for a convention?" I said, yes, and the driver asked me, "Which one?" When I replied, "The American Psychological Association," the woman sitting next to me on the van moved a few inches in the other direction. I then said, "But I'm not a psychologist." She moved back. When the driver asked me what I did, I said I was a law professor. She stayed where she was. But then another passenger in the back of the van - whom I later learned, coincidentally, was a law student - asked "What do you teach?" When I responded, "Mental disability law," the woman moved away again. As Dave Barry would have said, I am not making this up.

[FN186]. On the hurtfulness of homophobia, see, e.g., John Russ, [Shall We Dance? Gay Equality and Religious Exemptions at Private California High School Proms](#), 42 N.Y.L. Sch. L. Rev. 71, 77 n.33 (1998). On the hurtfulness of racism, see, e.g., Richard Delgado & Jean Stefancic, [Hateful Speech, Loving Communities: Why Our Notion of a "Just Balance" Changes So Slowly](#), 82 Calif. L. Rev. 851, 860 n.51 (1994). On the hurtfulness of sexism, see, e.g., Ann

Freedman, Feminist Legal Method in Action: Challenging Racism, Sexism, and Homophobia in Law School, 23 Ga. L. Rev. 849, 873 (1990).

[FN187]. See Perlin, Hidden Prejudice, *supra* note 2, at 84, and *id.* n.47 (citing studies). On the way that clinics approach race issues, see, e.g., Michelle Jacobs, [People from the Footnotes: The Missing Element in Client-Centered Counseling](#), 27 *Golden Gate U. L. Rev.* 345 (1997); Hing, *supra* note 1.

[FN188]. Perlin, Hidden Prejudice, *supra* note 2, at x. I also discuss this anecdote, and its impact on my thinking about sanism, in Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did, 10 *J. Contemp. Leg. Issues* 3, 8 (1999), and 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).

[FN189]. This is not to say, of course, that they are identical. Consider the differences - and similarities - between discrimination based on mental illness and that based on mental retardation. See e.g., [Heller v. Doe](#), 509 U.S. 312 (1993) (statute providing lesser standard of proof in cases involving persons with mental retardation than in cases involving persons with mental illness does not violate equal protection); compare [id.](#) at 335 (Souter, J., dissenting). My point is this: As a society, we trivialize the discriminatory harms done to persons with mental disabilities when compared with discriminatory harms based on race or religion or sexual preference.

[FN190]. See Perlin, *supra* note 11, at 249.

[FN191]. See, e.g., Clinical Legal Education: An Annotated Bibliography, *Clin. L. Rev.* (Special Issue #1) (2001).

[FN192]. A JLR database search of SANISM & "CLINICAL LEGAL EDUCATION" reveals just a handful of articles that cite to earlier articles that I wrote about sanism, and only Marjorie Silver's actually discusses the impact of sanism in this context. See Silver, *supra* note 173, at 288. And see also Beverly Balos, Conferring on the MacCrate Report: A Clinical Gaze, 1 *Clin. L. Rev.* 349, 357-61 (1994) (critiquing MacCrate Report for failing to sufficiently consider disability-based discrimination).

In the editing of this article for the Clinical Law Review, the editor questioned whether the term "sanism" is not sufficiently "widely known and accepted" by other clinical teachers (e-mail, March 10, 2002, on file with author). That may be, though a search of WESTLAW/JLR for SANISM! reveals a data-base of 119 articles (search done February 13, 2003). Assuming that about 25 of these articles are ones I wrote, that still leaves an n of nearly 100 scholarly papers the authors of which are familiar with the concept.

[FN193]. For an important exception, see Paula Galowitz, [Collaboration Between Lawyers and Social Workers: Re-examining The Nature and Potential of the Relationship](#), 67 *Fordham L. Rev.* 2123 (1999).

[FN194]. See Michael L. Perlin, The [ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?](#), 8 *J. L. & Health* 15, 22-23 (1993-94). The "hearts and minds" phrase was first used in Chief Justice Warren's opinion in [Brown v. Board of Educ. of Topeka](#), 347 U.S. 483, 494 (1954); see also, e.g., [In re Demos](#), 500 U.S. 16 (1991) (Marshall, J., dissenting from denial of certiorari); [Jones v. Alfred H. Mayer Co.](#), 392 U.S. 409, 445 (1968).

[FN195]. Therapeutic jurisprudence presents a new model by which we can assess the ultimate impact of case law and legislation that affects mentally disabled individuals, studying the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or anti-therapeutic consequences, and questioning whether such rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential, without subordinating due process principles. Perlin, *Misdemeanor Outlaw*, *supra* note 14, at 228. See generally *Essays in Therapeutic Jurisprudence* (David B. Wexler & Bruce J. Winick eds., 1991); *Law in a Therapeutic Key: Recent Developments in Therapeutic Jurisprudence* (David B. Wexler & Bruce J. Winick eds., 1996); *Therapeutic Jurisprudence*, *supra* note 34; *Therapeutic Jurisprudence Applied: Essays on Mental Health Law* (Bruce J. Winick ed., 1997); David B. Wexler, Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence, 16 *L. & Hum. Behav.* 27 (1992).

[FN196]. Gould & Perlin, *supra* note 7, at 342.

[FN197]. Id. at 342. See also 342-43 n.35 (discussing sanism in this context).

[FN198]. Berkheiser, *supra* note 164, at 1155.

[FN199]. Id.

[FN200]. A robust literature has begun to develop in the areas of holistic and preventive law. See, e.g., Warren Anderson, [Ecumenical Cosmology](#), 27 *Tex. Tech L. Rev.* 983, 1000 (1996); Susan Daicoff, Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers, 5 *Psychol., Pub. Pol'y. & L.* 811 (1999); Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, [Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering](#), 34 *Cal. W. L. Rev.* 15 (1997); Dennis Stolle, Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence, 14 *Behav. Sci. & L.* 257 (1996). See also Perlin, *supra* note 16, at 409 ("Therapeutic jurisprudence offers a path by which sanism and pretextuality may, eventually, be neutralized, so that mental disability law may eventually become a law of healing").

[FN201]. This is not to say, of course, that "all clinical teachers are sanists." I have been enriched by many discussions with clinical professors who have told me of examples of their practice - in the representation of criminal defendants and civil litigants - that reject sanist assumptions and that reflect thoughtful, sensitive lawyering on behalf of persons with mental disabilities (and those so perceived). By writing this article, I hope to encourage more of my colleagues to follow this path.

[FN202]. Lila Coleburn & Julia Spring, [Socrates Unbound: Developmental Perspectives on the Law School Experience](#), 24 *Law & Psychol. Rev.* 5, 27 (2000).

[FN203]. Jean Sternlight, Is [Binding Arbitration a Form of ADR?: An Argument That The Term 'ADR' Has Begun to Outlive Its Usefulness](#), 2000 *J. Disp. Resol.* 97, 103 n.33.

[FN204]. 5 *Clin. L. Rev.* 605, 624 (1999).

[FN205]. Women regularly outnumber men by a 3-1 or 4-1 ratio in my clinic. In the mental disability law workshop, a "typical" section has 10 women and 2 men. I most recently taught Mental Health Law (a non-skills course that deals with underlying issues of civil and constitutional mental disability law) in the fall 2001 term. At that time, there were approximately 25 women and five men in my class. This past term, five NYLS students registered for my on-line Survey of Mental Disability Law course; four were female and one was male. In my current seminar on Therapeutic Jurisprudence, there are eight women and two men. These numbers are fully consistent with my experiences since 1985, when I first taught my Mental Health Law course.

[FN206]. See Joshua Rosenberg, [Teaching Empathy in Law School](#), 36 *U.S.F. L. Rev.* 621 (2002), for a recent thoughtful article on a related issue.

[FN207]. See Pauline Tesler, Collaborative Law a New Paradigm for Divorce Lawyers, 5 *Psychol., Pub. Pol'y & L.* 967, 970 n.10 (1999) (discussing Susan Daicoff, [Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism](#), 46 *Am. U. L. Rev.* 1337, 1415 (1997)) (research indicates that one effect of legal education is to 'intensify law students' tendencies to ignore emotions, interpersonal concerns, and warm interpersonal relations ... this preference may become extreme and thus dysfunctional during law school and thereafter. It may contribute to an unbalanced approach to life and difficulties relating to peers ... and clients, thus increasing dissatisfaction and distress'); see also Stephen Reich, Psychological Inventory: Profile of a Sample of First-Year Law Students, 39 *Psychol. Rep.* 871 871-74 (1976).

Again, consider the connection to therapeutic jurisprudence: "Therapeutic jurisprudence focuses on the law's impact on emotional life." Gould & Perlin, *supra* note 7, at 353 (citing Dennis P. Stolle & David B. Wexler, [Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law](#), 39 *Ariz. L. Rev.* 25 (1997)).

[FN208]. On the fascinating collateral question of the impact of disability on the clinical education student selection process, see Sande Buhai, [Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements](#), 36 San Diego L. Rev. 137 (1999).

[FN209]. In addition to teaching five mental disability law-based courses, I also teach Criminal Law, Civil Procedure, and Criminal Procedure: Adjudication. Again, to be clear: Those students who plan on a career in mental health advocacy rarely (if ever) adhere to these myths. I have been extraordinarily fortunate as a law professor to have had such a high number of my students follow this career path; both in New York and New Jersey, and in distant states (including Washington, New Mexico, Utah, Massachusetts, New Hampshire, and elsewhere). These students are--no coincidences here--among the ones who regularly rejected these myths.

[FN210]. See *infra* note 220.

[FN211]. See *supra* text accompanying notes 70-72.

[FN212]. Each year, I offer the following hypothetical to my Civil Procedure class: "Imagine that you are a personal injury lawyer and have two cases that are ready for jury trial. You will not be able to pay your monthly bills if you are not successful on behalf of your client. One of your clients has a kneecap that was shattered in an automobile accident (and you have x-rays, treatment records, etc.); the other has suffered psychic trauma in a different automobile accident (and you have the testimony of his treating psychologist). Which case would you want to bring to trial?"

In the thirteen years that I have been teaching the course, I have never had a single student either "vote" for the psychic trauma case or view that case as a serious alternative. Certainly this may reflect my students' (probably accurate) perceptions of societal views rather than their own prejudices, but the post-hypothetical discussions generally reflect the same sort of sanism I discuss elsewhere in this article.

[FN213]. On the perceived connection between sickness and sin, see, e.g. Bernard Weiner, On Sin Versus Sickness: A Theory of Perceived Responsibility and Social Motivation, 48 Am. Psychologist 957 (1993) (proposing conceptual system of social motivation to balance societal tendencies that encourage punishment for those who demonstrate a 'lack of effort' or are 'responsible' for their failure). For a historical overview, see Norman Dain, Madness and the Stigma of Sin in American Christianity, in *Stigma and Mental Illness* 73 (Paul Fink & Allan Tasman eds., 1992).

[FN214]. See, e.g., 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, 1409 (1997) ("defendants' criminal responsibility is still being assessed by visual frames of reference: if he didn't 'seem frenzied' or appear insane, then 'there's no craziness here'"). *Id.* at 1422 (explaining how our insanity defense jurisprudence relies upon "a fixed vision of popular, concrete, visual images of craziness").

[FN215]. Monahan, *supra* note 23, § § 7-2.0-7-2.4, at 300.

[FN216]. *Id.* See also Renée Binder, Are the Mentally Ill Dangerous?, 27 J. Am. Acad. Psychiatry & L. 189, 195 (1999); John Monahan, [Assessment, Scientific Validity and Evidentiary Admissibility](#), 57 Wash. & Lee L. Rev. 901 (2000).

[FN217]. For an example of one set of these stereotypes, see William Breakey et al., Stigma and Stereotype: Homeless Mentally Ill Persons, in *Stigma*, *supra* note 4, at 97.

[FN218]. I ask my students to think about this attitude and to contrast it with the Sixth Amendment right to counsel in criminal prosecutions. Then I ask what they would do if they were ordered to represent, say, Tony Soprano. Or if they were working for a law firm during the summer, and that firm was representing a corporation accused by a regulatory agency of being a toxic polluter. In both cases, students invariably tell me that my hypo is "different," and that they would have no problems representing such individuals.

This hypo should not be read to suggest that I do not believe that Tony Soprano has a right to vigorous counsel. I do believe, however, that a lawyer in a private law firm who does not want to represent a civil client may have a right to decline the case assignment, with a full understanding that that decision may adversely affect her employment future with the firm in question.

[\[FN219\]](#). See Gould & Perlin, *supra* note 7, at 357; Perlin, *Neonaticide*, *supra*, note 14.

[\[FN220\]](#). See Perlin, *supra* note 5, at 393-97:

These are a few of the sanist myths that dominate our social discourse:

1. Mentally ill individuals are 'different,' and, perhaps, less than human. They are erratic, deviant, morally weak, sexually uncontrollable, emotionally unstable, superstitious, lazy, ignorant and demonstrate a primitive morality. They lack the capacity to show love or affection. They smell different from 'normal' individuals, and are somehow worth less.
2. Most mentally ill individuals are dangerous and frightening. They are invariably more dangerous than non-mentally ill persons, and such dangerousness is easily and accurately identified by experts. At best, people with mental disabilities are simple and content, like children. Either *parens patriae* or police power supply a rationale for the institutionalization of all such individuals.
3. Mentally ill individuals are presumptively incompetent to participate in 'normal' activities, to make autonomous decisions about their lives (especially in areas involving medical care), and to participate in the political arena.
4. If a person in treatment for mental illness declines to take prescribed antipsychotic medication, that decision is an excellent predictor of (1) future dangerousness and (2) need for involuntary institutionalization.
5. Mental illness can easily be identified by lay persons and matches up closely to popular media depictions. It comports with our common sense notion of crazy behavior.
6. It is, and should be, socially acceptable to use pejorative labels to describe and single out people who are mentally ill; this singling out is not problematic in the way that the use of pejorative labels to describe women, blacks, Jews or gays and lesbians might be.
7. Mentally ill individuals should be segregated in large, distant institutions because their presence threatens the economic and social stability of residential communities.
8. The mentally disabled person charged with crime is presumptively the most dangerous potential offender, as well as the most morally repugnant one. The insanity defense is used frequently and improperly as a way for such individuals to beat the rap; insanity tests are so lenient that virtually any mentally ill offender gets a free ticket through which to evade criminal and personal responsibility. The insanity defense should be considered only when the mentally ill person demonstrates objective evidence of mental illness.
9. Mentally disabled individuals simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self restraint.
10. If "do-gooder", activist attorneys had not meddled in the lives of people with mental disabilities, such individuals would be where they belong (in institutions), and all of us would be better off. In fact, there's no reason for courts to involve themselves in all mental disability cases.

[\[FN221\]](#). On the importance of the locus of the interview, see, e.g., Michael Lindsey, [Ethical Issues in Interviewing, Counseling, and the Use of Psychological Data With Child And Adolescent Clients](#), 64 *Fordham L. Rev.* 2035, 2042 (1996).

[\[FN222\]](#). The roots of this concept are explored in Kara Nelson, *The Release of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises*, 81 *Marq. L. Rev.* 1101, 1117 (1998).

[\[FN223\]](#). On the confusion often engendered here, see, e.g., Robert Benjamin, *A Critique of Mediation--Challenging Misconceptions, Assessing Risks And Weighing The Advantages*, 146 *Pitts. Legal J.* (June 1998), at 37; Marilyn Levitt, *The Elderly Questionably Competent Client Dilemma: Determining Competency and Dealing with the Incompetent Client*, 1 *J. Health Care, Law & Policy* 202, 217 (1998).

On the special issues involved when a client is charged with a crime, see Binny Miller, [Telling Stories About Cases and Clients: The Ethics of Narrative](#), 14 *Geo. J. Legal Ethics* 1, 42-43 (2000) ("Even if the lawyer's case theory prevails, this choice of theory means that the lawyer has defined the client as mentally ill to the outside world and that he will be institutionalized until he is found sane. Some clients don't wish to be portrayed as mentally ill or to be committed for mental health treatment. These clients would rather run a greater risk of jail on a weaker case theory where the consequences of a winning theory are so personally devastating").

[FN224]. When I was in practice, I represented the class in *Schindenwolf v. Klein*, No. L4129375 P.W. (N.J. Super. Ct. Law Div. 1979) (final order reprinted in 5 Perlin, *Mental Disability Law*, supra note 2, § 14-4, at 66-74 (2d ed. 2002)) (requiring compensation for institutionalized persons who perform work for which the institution would otherwise have to pay an employee). Before we approved the final settlement, my co-counsel (John Ensminger, see e.g., Ensminger & Liguori, supra note 164) and I went to each of the five state hospitals in which our clients resided, and met with the patients' governing council to explain the tentative settlement, request feedback and suggestions, and determine whether there was, in fact, wide-spread support for the settlement.

[FN225]. See, e.g., *Matter of M.R.*, 135 N.J. 155, 638 A.2d 1274 (1994) (advocacy diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system; counsel acts without well-defined standards if he or she forsakes a client's instructions to pursue the attorney's perception of the client's best interests) (citing Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique and A Proposal for Reform*, 23 Ariz. L. Rev. 599, 635 (1981)). See also id. at 634-35 ("if counsel has already concluded that his client needs 'help,'" he is more likely to provide only procedural formality, rather than vigorous representation). See also Maria M. Das-Neves, *The Role of Counsel in Guardianship Proceedings of the Elderly*, 4 Geo. J. Legal Ethics 855, 863 (1991) ("[i]f the attorney is directed to consider the client's ability to make a considered judgment on his or her own behalf, the attorney essentially abdicates his or her advocate's role and leaves the client unprotected from the petitioner's allegations"). Finally, the attorney who undertakes to act according to a best interest standard may be put into the position of making decisions about the client's mental capacity that the attorney is unqualified to make. Frolik, supra at 635. See also *Matter of Brantley*, 260 Kan. 605, 920 P.2d 433, 443 (1996) ("The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. ... in a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14."); *Buckler v. Buckler*, 195 W. Va. 705, 708, 466 S.E.2d 556, 559 (1995) ("It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law.").

[FN226]. Gould & Perlin, supra note 7, at 356.

[FN227]. Id. at 356 n.99.

[FN228]. Ann Juergens, *Teach Your Students Well: Valuing Clients in the Law School Clinic*, 2 Cornell J. L. & Pub. Pol'y 339, 355 (1993).

[FN229]. Gould & Perlin, supra note 7, at 357.

[FN230]. See, e.g., Bruce Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 Psychol. Pub. Pol'y & L. 1034, 1041 (1999):

Dealing with their criminal charges can be a highly emotional experience for most defendants. Moreover, when the behavior that resulted in criminal charges is related to substance abuse, mental illness, or psychologically maladaptive behavior patterns, confronting the existence of such a problem and coming to terms with the need to deal with it can produce considerable psychological distress. Dealing with the issue of rehabilitation and relapse prevention in the context of plea bargaining or sentencing thus may be regarded, within the terminology of therapeutic jurisprudence/preventive law, as a psycholegal soft spot. Attorneys involved in these processes need to be sensitive to the emotional difficulties that dealing with such issues can produce, to be able to identify a client's psychological distress, and to be able to deal with it effectively within the attorney-client relationship.

[FN231]. Gould & Perlin, supra note 7, at 358-59 (footnotes omitted).

[FN232]. I am not sure any of us is sanism-free. I do believe, however, that this is a goal to which we all should and must aspire. In a subsequent piece, I plan to write about the different perspectives of the "patients' rights," "survivors" and "consumers" movements, and assess those positions through a sanism filter. See Stefan, supra note 87.

[FN233]. See, e.g., Berkheiser, supra note 164, at 1171:

Law school clinics provide an experiential setting that is a natural laboratory for applying therapeutic

jurisprudence. As a theory whose purpose is to study the impacts of law on individual wellbeing, therapeutic jurisprudence can enhance clinical practice and its educational, service, and law reform missions.

[\[FN234\]](#). See Perlin, *supra* note 188, at 31:

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.

[\[FN235\]](#). Perlin, *Hidden Prejudice*, *supra* note 2, at 307 (quoting Perlin, *supra* note 14, at 440).

[\[FN236\]](#). *Id.*

[\[FN237\]](#). Perlin, *Hidden Prejudice*, *supra* note 2, at 307 (quoting Perlin, *supra* note 14, at 440-41). Compare Jacobs, *supra* note 187.

[\[FN238\]](#). Perlin, *Hidden Prejudice*, *supra* note 2, at 307 (quoting Perlin, *supra* note 14, at 441).

[\[FN239\]](#). See *supra* note 163.

[\[FN240\]](#). On "slotting" in mental disability law cases, see Perlin, *supra* note 139, at 125 n.112.

[\[FN241\]](#). Clinical caseloads no doubt include a disproportionate number of persons with mental disabilities. For the first scholarly consideration of the application of sanism to an area of business law, see Pamela Champine, *A Sanist Will?*, 46 N.Y.L. Sch. L. Rev. (forthcoming 2002-03).

[\[FN242\]](#). For elaboration on the point that labeling a client as "uncooperative" is "an exercise in power by the labeler," see Gay Gellhorn, *Law and Language: "My Client Won't Cooperate"* (unpublished manuscript, on file with the Clinical Law Review) (Nov. 5, 2001) (discussing Jacobs, *supra* note 187, at 374-75).

[\[FN243\]](#). I explain how I seek to do this in the clinical classroom in Gould & Perlin, *supra* note 7, at 365-67 (discussing the heroic work by a student, Lisa Bloch, on the Alan Andrews case).

[\[FN244\]](#). Berkheiser, *supra* note 164, at 1171.

[\[FN245\]](#). Dylan, *supra* note 8, at 198.

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Beyond Atkins: A Symposium on the Implications of Atkins v. Virginia

*315 "LIFE IS IN MIRRORS, DEATH DISAPPEARS": GIVING LIFE TO ATKINS

[Michael L. Perlin](#) [\[FN1\]](#)

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INTRODUCTION

Anyone who has spent any time in the criminal justice system-as a defense lawyer, as a district attorney, or as a judge-knows that our treatment of criminal defendants with mental disabilities has been, forever, a scandal. Such defendants receive substandard counsel, [\[FN1\]](#) are treated poorly in prison, [\[FN2\]](#) receive disparately longer sentences, [\[FN3\]](#) and are regularly coerced into confessing to crimes (many of which they did not commit). [\[FN4\]](#) And those of us who know about this system know that it is a scandal of little interest to most lawyers, most citizens, and most judges. We further know that the one question on which we obsessively focus-the scope and role of the insanity defense-is virtually irrelevant to this entire conversation. [\[FN5\]](#)

This is not news and has not been so for decades. [\[FN6\]](#) We are content to "bury our heads in the sand" and ignore the ramifications of the morally corrupt system that we have created. [\[FN7\]](#) But every once in a while, a case is decided that makes us reconsider this question and forces us to see what we do on a regular basis in that system. Atkins v. Virginia [\[FN8\]](#) is such a case.

My thesis is simple: In spite of the impressive victory earned in Atkins by advocates for persons with mental disabilities, that victory may be illusory unless we look carefully at a constellation of legal, social, and behavioral issues that have combined to poison this area of the law for decades. Atkins gives us a blueprint with which to work, but we must remain vigilant to make sure that it does not become merely a "paper victory." [\[FN9\]](#) This article will raise seventeen issues that must be *316 considered rigorously and carefully if Atkins is to make any sense and if it is to have any true meaning for the population that is its focal point.

The article will proceed in this manner. First, it will briefly look at some earlier signposts on this road-the Ford v. Wainwright [\[FN10\]](#) decision, then Penry v. Lynaugh [\[FN11\]](#) (with a brief nod at Penry v. Johnson [\[FN12\]](#))-and will try to uncover which meta-issues were really animating the majority and dissenting Justices in those opinions. [\[FN13\]](#) Next, the article will briefly summarize the key points of Atkins (from the perspective of this article) [\[FN14\]](#) and then will consider what will be characterized as the seventeen "pressure points" in Atkins, pressure points that must be taken extraordinarily seriously if the Atkins decision is, in fact, to be given life (pun clearly intended). [\[FN15\]](#) Finally, the article will offer some brief conclusions-both prescriptions and proscriptions-focusing primarily on what the likely meaning of the Atkins decision will be for the advocacy community. [\[FN16\]](#)

I am a Bob Dylan fan, and have been drawing on Dylan lyrics in my article titles for the past seven years. [\[FN17\]](#)

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When I last wrote about the death penalty-in a piece that looked both at the way jurors "convert" evidence offered in support of mitigation into evidence in support of aggravation, and at the abysmal job that defense counsel often does in death penalty cases-I drew on a line from Dylan's well-known masterpiece, A Hard Rain's A-Gonna Fall: [\[FN18\]](#) "the executioner's face is always well hidden." [\[FN19\]](#) For the title of this article, I draw on a somewhat-more obscure song, one that I have unfortunately never seen in person, [\[FN20\]](#) Political World, from Dylan's painfully-underrated 1989 album, Oh Mercy. [\[FN21\]](#) The song has been called by a critic "Bob's commentary on the state of the fallen world we live in," [\[FN22\]](#) and I think that is about right. The lyric that I have chosen, "Life is in mirrors; death disappears," is, I think, about as on point for this article as I could find anywhere. This is the couplet from which it comes:

We live in a political world
Where mercy walks the plank,
*317 Life is in mirrors, death disappears
Up the steps into the nearest bank. [\[FN23\]](#)

Interestingly, the following lyrics surround this couplet:

We live in a political world,
Wisdom is thrown into jail,
It rots in a cell, is misguided as hell
Leaving no one to pick up a trail.
We live in a political world
Where courage is a thing of the past
Houses are haunted, children are unwanted
The next day could be your last. [\[FN24\]](#)

"Rots in a cell"; "the next day could be your last"; I could not get much closer than this. And, of course, the "nearest bank" line pays homage to the issue focused on in the Executioner's Face article: the criminally-inadequate fee schedules in capital cases are often a contributing reason-perhaps the most important factor-in-volved in the calculus of who will live and who will die. [\[FN25\]](#) Yet my daughter Julie (a twenty-three-year-old recent college graduate and a serious Dylan fan in her own right) came up with an additional/alternative connection to the "mirrors" line. People see themselves in mirrors, she said, and are blinded to others. People with mental retardation remain invisible to us in many ways, especially after they are imprisoned. [\[FN26\]](#) I think Julie is on to something, and her insight needs to be added to any interpretation of the lyric in question. I note, also, that my most recent book is titled The Hidden Prejudice: Mental Disability on Trial [\[FN27\]](#) and deals with the invisibility of the prejudice against persons with mental disability, an invisibility that is a manifestation of what I call sanism. [\[FN28\]](#) One cannot read Atkins without thinking about sanism.

*318 I. THE ROAD FROM FORD TO PENRY TO ATKINS

A. The Ford Decision [\[FN29\]](#)

The Supreme Court's jurisprudence in this area of the law is tortured, and there is no easy way to reduce it to a coherent example of doctrinal growth and development. [\[FN30\]](#) The modern era begins with its decision in Ford v. Wainwright, [\[FN31\]](#) in which a fractured Court concluded that the Eighth Amendment did prohibit the imposition of the death penalty on an insane prisoner. [\[FN32\]](#)

Justice Marshall-writing in the only portion of any of the four opinions that captured a majority of the court-pointed out that since the Court decided *Sollesbee v. Balkcom* [\[FN33\]](#) in 1950, its Eighth Amendment jurisprudence had "evolved substantially." [\[FN34\]](#) Its ban on "cruel and unusual punishment embraced, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted" [\[FN35\]](#) and also recognized the "evolving standards of decency that mark the progress of a maturing society." [\[FN36\]](#) In coming to its determination, the Court took into account "objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects." [\[FN37\]](#)

The opinion traced the common law development of the doctrine barring execution of the insane, [\[FN38\]](#) noting that, while the reasons for the rule were not precisely clear, [\[FN39\]](#) "it is plain the law is so." [\[FN40\]](#) It concluded that

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there was "virtually no authority condoning the execution of the insane at English common law," [FN41] and that "this solid proscription was carried to America." [FN42]

*319 This "ancestral legacy" has not "outlived its time," the Court added. [FN43] No state currently permits execution of the insane, [FN44] and it is "clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England": [FN45]

The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. See Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan. L. Rev. 765, 777 n.58 (1980). Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across the Nation. Faced with such wide-spread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort or understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment. [FN46]

Justice Powell concurred, joining fully in the majority's opinion on the substantive Eighth Amendment issue [FN47] but writing separately, at least in part, to consider an issue not addressed by the Court: the meaning of "insanity" in the context of the case before it. [FN48] After considering the common law justifications for barring execution of the insane, Justice Powell concluded that the Eighth Amendment should only bar the execution of those "who are unaware of the punishment they are about to suffer and why they are to suffer it," [FN49] a category into which Ford "plainly fit." [FN50] Also, Powell argued, because the defendant "has been validly convicted of a capital crime and sentenced to death," the question is not "whether, but when, his execution may take place." [FN51] Thus making inapplicable earlier Court decisions imposing heightened procedural requirements on capital trials and sentencing proceedings. [FN52]

*320 Writing for herself and Justice White, Justice O'Connor concurred in part and dissented in part. Due process demands in this sort of case are "minimal," [FN53] she concluded, noting "substantial caution" was warranted "before reading the Due Process Clause to mandate anything like the full panoply of trial-type procedures." [FN54] This was so for several reasons: (1) after a valid conviction, the demands of due process are "reduced accordingly"; [FN55] (2) the potential for false claims and deliberate delay in this context is "obviously enormous"; [FN56] and (3) by definition, the defendant's protected interest can "never be conclusively and finally determined until the very moment of execution." [FN57]

Finally, Justice Rehnquist dissented on behalf of himself and the Chief Justice. [FN58] He saw no reason to abandon *Sollesbee*, which had sanctioned procedures vesting decision making in "the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved." [FN59] He concluded that state law did not grant the defendant the sort of entitlement "that gives rise to the procedural protections for which he contends." [FN60] To create a constitutional right to a judicial determination of sanity prior to execution "needlessly complicates and postpones still further any finality in this area of the law," [FN61] in an area where yet another adjudication "offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity." [FN62]

B. The Meaning of Ford

Ford was both a curious and difficult opinion, [FN63] and one that reflected much of the ambiguity and ambivalence that continues to permeate this subject matter. To some extent, Ford serves as a paradigm for the Supreme Court's confusion and, to some extent, its use of rationalization as a means of dealing with many of the cases it has decided in the past several decades dealing with mentally disabled criminal defendants. [FN64]

*321 There are significant inconsistencies between the positions articulated in the various Ford opinions and positions with which the Court had appeared to be entirely comfortable in the past. Justice Powell's position that the

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only question is not "whether but when" [\[FN65\]](#) ignored the possibility that organic brain damage, for instance, could make a once competent-to-be-executed defendant become irreversibly incompetent, or that, in a state that has abolished the insanity defense, it is not beyond the realm of possibility that a defendant like the petitioner in Jackson v. Indiana [\[FN66\]](#) might face execution. [\[FN67\]](#) And both Justice Rehnquist's and Justice O'Connor's opinions remained obsessed with the fear that defendants will raise "false" [\[FN68\]](#) or "spurious claims" [\[FN69\]](#) in desperate attempts to stave off execution. This fear-a doppelganger of the public's "swift and vociferous outrage" [\[FN70\]](#) over what it perceives as "abusive" [\[FN71\]](#) insanity acquittals, thus allowing "guilty" defendants to "beat the rap" [\[FN72\]](#)-was responded to more than adequately almost 150 years ago by Dr. Isaac Ray, the father of American forensic psychiatry:

The supposed insurmountable difficulty of distinguishing between feigned and real insanity has conduced, probably more than all other causes together, to bind the legal profession to the most rigid construction and application of the common law relative to this disease, and is always put forward in objection to the more humane doctrines. [\[FN73\]](#)

C. Following Ford

Subsequent to Ford, courts have split in their assessment of whether individual defendants were competent to be executed under the standards set out in that case. [\[FN74\]](#) As with other important areas of criminal procedure, the question of whether a defendant was "malingering" remains an important question in this context. [\[FN75\]](#) Other *322 cases decided on related questions reveal a continued failure on the part of many courts to authentically implement the Ford decision. [\[FN76\]](#)

D. The Penry I Decision

While Ford v. Wainwright [\[FN77\]](#) clarified the question of the constitutionality of executing persons with mental illness, [\[FN78\]](#) it did not answer the collateral and equally important issue of the constitutionality of executing individuals who have mental retardation. In Penry v. Lynaugh, [\[FN79\]](#) the Supreme Court approached the question from a significantly different perspective and reached a strikingly different conclusion. [\[FN80\]](#)

Penry was moderately mentally retarded (with an I.Q. of 50 to 63, the mental age of a six-and-a-half-year-old, and the social maturity of a nine-to-ten-year-old). [\[FN81\]](#) In addressing the question of whether the Constitution banned the execution of persons with mental retardation, the Supreme Court turned to the Eighth Amendment issue. While the Court conceded that it might be cruel and unusual punishment to execute those who are "profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions," [\[FN82\]](#) it suggested that, because of "the protections afforded by the insanity defense today," such persons were not likely either to be convicted or to face punishment. [\[FN83\]](#) Further, it distinguished the case before it on factual grounds: Penry had been found competent to stand trial, and the jury had rejected his insanity defense, reflecting their conclusion that he did know right from wrong at the time of the offense. [\[FN84\]](#) It further dismissed Penry's argument that there was an "emerging national consensus" against execution of persons with *323 retardation, noting that only one state had legislatively banned such executions and rejecting Penry's evidence on this point of public opinion surveys as an "insufficient basis" upon which to ground an Eighth Amendment prohibition. [\[FN85\]](#)

On the question of whether such punishment was disproportionate, Justice O'Connor [\[FN86\]](#) rejected Penry's argument that individuals with mental retardation do not have the same degree of culpability, as they do not have the same "judgment, perspective and control as persons of normal intelligence." [\[FN87\]](#) On the record before the Court, she could not conclude that all mentally retarded persons-"by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility-invariably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." [\[FN88\]](#) Further, she rejected the concept that there was a baseline "mental age" beneath which one could not be executed, arguing that this sort of a bright line test might have a "disempowering effect" on the mentally retarded if applied in other areas of the law (such as contracts or domestic relations). [\[FN89\]](#) Thus, she concluded that, while mental retardation might "lessen" a defendant's culpability, the Eighth Amendment did not preclude the execution of any mentally retarded person. [\[FN90\]](#)

In partial dissent, [\[FN91\]](#) Justice Brennan (for himself and for Justice Marshall) [\[FN92\]](#) stated that he would ban capital punishment in the case of any mentally retarded offender who "thus lack[ed] the full degree of responsibility

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for [his] crimes that is a predicate for the constitutional imposition of the death penalty." [\[FN93\]](#) First, on the question of proportionality, while Justice Brennan agreed that the treatment of persons with mental retardation as a homogeneous group is inappropriate for many reasons, he argued that the dangers associated with that sort of overgeneralization disappear in the context of the controlling clinical definition for the purposes of punishment. Quoting from documents prepared by the American Association of Mental Retardation, he reasoned that all mentally retarded individuals share the common attributes of "low intelligence and inadequacies of adaptive behavior" as well as "reduced ability" in such areas of functioning as "ability to control impulsivity [and] moral development." [\[FN94\]](#) Such impairment so limits the individual's culpability so as to make capital punishment "always and necessarily disproportionate to... blameworthiness and hence...unconstitutional." [\[FN95\]](#)

*324 Second, Justice Brennan found that the execution of an individual with mental retardation neither furthers the punishment aims of deterrence nor of retribution. Because such individuals lack the requisite culpability, execution can never be a "just desert" for a retarded offender. [\[FN96\]](#) Similarly, the factors that make capital punishment disproportionate when applied to persons with mental retardation give the penalty "the most minimal deterrent effect" as far as retarded potential offenders are concerned; the potential death penalty will not, for such individuals, "figure in some careful assessment of different courses of action." [\[FN97\]](#)

In a separate opinion, Justice Scalia (writing for himself, Justice White, Justice Kennedy, and the Chief Justice) parted company with those aspects of Justice O'Connor's opinions that dealt with proportionality, arguing that the concerns she expressed "ha[ve] no place in our Eighth Amendment jurisprudence." [\[FN98\]](#)

In an early analysis of this aspect of Penry, a student commentator characterized it as a "troubling decline in the Court's death penalty jurisprudence," [\[FN99\]](#) concluding that its Eighth Amendment analyses relied upon "overly narrow considerations [while] ignor[ing] the broader social and political context in which public sentiment and defendant culpability must be evaluated." [\[FN100\]](#) The author focused on those aspects of the opinion that relied on legislative silence as indicia that public opinion did not oppose such executions:

Even if one assumes that legislation reflects the collective will, the absence of legislation may only reflect a failure to secure a place on the legislative agenda. A strong consensus may never be articulated through legislation if the issue never comes to a vote. Therefore, in construing legislative silence, the Court should pay special heed to the political enactment and hesitate to draw substantive conclusions from the products of process failure. Because mentally retarded citizens have difficulty participating in the political process, the Court's assumption that legislative silence signified more than public misunderstanding and political inattention was unreasonable. [\[FN101\]](#)

Beyond this, two other curious aspects of Penry deserve mention. First, Justice O'Connor's bald assertion that the insanity defense serves as a bulwark to protect against the conviction and punishment of persons with severe mental disabilities stands in stark opposition to the track record of counsel in the representation of such *325 individuals in this area [\[FN102\]](#) and ignores the post-Hinckley political reality [\[FN103\]](#) that the insanity defense has been severely truncated in many jurisdictions and has been "abolished" in others. [\[FN104\]](#) Second, her discussion of disempowerment appears somewhat disingenuous; it is a strenuous leap in logic to suggest that a decision outlawing capital punishment of individuals with mental retardation as a violation of the Eighth Amendment will lead to a change in civil law standards as to whether an individual is, by way of example, competent to enter into a contract or a marriage agreement. [\[FN105\]](#)

On the other hand, Justice Brennan's focus on issues of moral development engrafted an important subject of philosophical and psychological speculation into one of the most contentious areas of the law. Although consideration of this issue came slowly, [\[FN106\]](#) the question as to its implications for subsequent developments still remains open. [\[FN107\]](#)

Some seven years ago, I had this to say about the two lead cases:

To some extent, Ford and Penry serve as paradigms for the Court's confusion about cases involving mentally disabled criminal defendants. Justice Rehnquist's and Justice O'Connor's opinions in Ford and Justice O'Connor's opinion in Penry remain infused with the obsessive fear that defendants will raise "false" or "spurious claims" in desperate attempts to stave off execution. This fear—a doppelganger of the public's "swift and vociferous outrage" over what it perceives as "abusive" insanity acquittals, thus allowing "guilty" defendants to "beat the rap"—remains

the source of much of the friction in this area. [\[FN108\]](#)

***326 II. THE ATKINS DECISION**

The opening paragraph of Atkins gives us important signposts as to the development of the case. This is how Justice Stevens begins the majority opinion:

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided Penry, the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution. [\[FN109\]](#)

Atkins had been convicted of capital murder stemming from an ATM robbery. [\[FN110\]](#) In the penalty phase, the defense called a forensic psychologist, who testified that Atkins was "mildly mentally retarded" (with an IQ of 59). [\[FN111\]](#) The jury convicted Atkins and sentenced him to death; after that sentence was set aside (for unrelated reasons), the same witness testified at the rehearing. [\[FN112\]](#) At this time, the state called its own witness (Dr. Stanton Samenow) in rebuttal. [\[FN113\]](#) Dr. Samenow testified that the defendant was not retarded, that he was "of average intelligence, at least," and that the appropriate diagnosis was antisocial personality disorder. [\[FN114\]](#) The jury again sentenced Atkins to death, and this sentence was affirmed by the Virginia Supreme Court (over a dissent that characterized the state's expert's testimony "incredulous as a matter of law" and argued that the imposition of the death sentence on one "with the mental age of a child between the ages of 9 and 12 [was] excessive"). [\[FN115\]](#)

In weighing the case, the Supreme Court first looked at the meaning of "excessive" in Eighth Amendment jurisprudence, stressing:

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in *Trop v. Dulles*, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [\[FN116\]](#)

***327** In engaging in proportionality review, the Court pointed out that its inquiry should be guided by "objective factors," and that, in assessing these factors, the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." [\[FN117\]](#) As part of this inquiry, it noted the significant changes since it decided Penry in 1989 when only two states banned the execution of persons with mental retardation; in the intervening thirteen years, at least another sixteen (and the federal government) enacted similar laws, [\[FN118\]](#) leading the Court to this conclusion:

It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it. [\[FN119\]](#)

Further, the Court perceived that this consensus "unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." [\[FN120\]](#) The Court added that "it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." [\[FN121\]](#)

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Mental retardation, the Court found, involves "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." [\[FN122\]](#) It continued in the same vein:

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not *328 warrant an exemption from criminal sanctions, but they do diminish their personal culpability. [\[FN123\]](#)

In light of these deficiencies, the Court found that its death penalty jurisprudence provided two reasons "consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution." [\[FN124\]](#)

First, there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders. *Gregg v. Georgia* [\[FN125\]](#) identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. [\[FN126\]](#) Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." [\[FN127\]](#)

On the question of retribution, the Court reasoned that, in light of its precedents in this area, [\[FN128\]](#)

[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate. [\[FN129\]](#)

On the question of deterrence, the Court again looked at earlier cases for a restatement of the proposition that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation" [\[FN130\]](#) and added,

Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with *329 respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence. [\[FN131\]](#)

The reduced capacity of mentally retarded offenders provided an additional justification for a categorical rule making such offenders ineligible for the death penalty. [\[FN132\]](#) The Court went on to note that there was an "enhanced" risk of improperly-imposed death penalty in cases involving defendants with mental retardation because of the possibility of false confessions, as well as "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." [\[FN133\]](#) The Court also stressed several additional interrelated issues: the difficulties that persons with mental retardation may have in being able to give meaningful assistance to their counsel, their status as "typically poor witnesses," and the ways in which their demeanor "may create an unwarranted impression of lack of remorse for their crimes." [\[FN134\]](#)

Here the Court acknowledged an important difficulty: "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found

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by the jury," [\[FN135\]](#) raising the specter that "mentally retarded defendants in the aggregate face a special risk of wrongful execution." [\[FN136\]](#) Thus, the Court concluded, "Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." [\[FN137\]](#)

There were two dissents. Chief Justice Rehnquist, dissenting for himself and Justices Thomas and Scalia, criticized that part of the majority's methodology that had relied upon public opinion polls, the views of professional and religious organizations, and the status of the death penalty in other nations as part of the basis for its decision. [\[FN138\]](#) According to the Chief Justice, only "two sources-the work product of legislatures and sentencing jury determinations-ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment." [\[FN139\]](#)

Justice Scalia also dissented (for himself, the Chief Justice, and Justice Thomas), noting immediately, "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." [\[FN140\]](#) Justice Scalia's dissent flatly rejected the notion that there was a "consensus" against the execution of persons *330 with mild mental retardation (relying both on historical sources that had exempted only persons with severe or profound mental retardation from that punishment [\[FN141\]](#) and on his alternative reading of the data cited by the majority that led him to conclude that, at best, a "fudged" forty-seven percent of death penalty jurisdictions had barred such executions). [\[FN142\]](#)

Rather than being based on a consensus, Justice Scalia continued, "what really underlies today's decision [is] pretension to a power confined neither by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) nor even by the current moral sentiments of the American people." [\[FN143\]](#) In his view, it was nothing more than "the feelings and intuition of a majority of the Justices that count-'the perceptions of decency, or of penology, or of mercy, entertained by a majority of the small and unrepresentative segment of our society that sits on this Court.'" [\[FN144\]](#) Here he specifically rejected the majority's assumption that judges and jurors were unable to "take proper account of mental retardation." [\[FN145\]](#)

Justice Scalia assessed the majority's retribution and deterrence analyses and found them both wanting. On the question of retribution, he noted rhetorically, "The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none." [\[FN146\]](#) He continued in the same vein: "As long as a mentally retarded offender knows 'the difference between right and wrong,' only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question." [\[FN147\]](#)

On the deterrence issue, Justice Scalia concluded that "the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class," [\[FN148\]](#) and, again, flatly rejected the majority's "flabby" argument that persons with mental retardation faced a "special risk" for wrongful execution (suggesting that "just plain stupid, inarticulate or even ugly people" might face a similar risk, but that, if this were in fact so, it was not an issue that came within the ambit of the Eighth Amendment). [\[FN149\]](#)

Finally, he expressed his "fear of faking":

One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association to realize that the symptoms of this condition can readily be feigned. And the capital defendant who feigns mental retardation risks nothing at all. [\[FN150\]](#)

*331 "Nothing has changed," he concluded, in the nearly 300 years since Hale wrote his Pleas of the Crown:

[Determination of a person's incapacity] "is a matter of great difficulty, partly from the easiness of counterfeiting this disability and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses." [\[FN151\]](#)

III. ATKINS' PRESSURE POINTS

Atkins leaves open many unanswered questions-the extent to which states will adopt new prophylactic

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implementation procedures, [\[FN152\]](#) the dangers in using a numerical IQ score as the primary retardation determination "cut off factor," [\[FN153\]](#) the difficulties in assessing mental retardation in persons who are not English-speaking, [\[FN154\]](#) the allocation of the burden of proof in making that assessment, [\[FN155\]](#) the application of Atkins in cases of "borderline" mental retardation, [\[FN156\]](#) the interplay between judge and jury in the determination of who is "mentally retarded" (no matter how that term is ultimately defined), [\[FN157\]](#) the question of retroactivity of application, [\[FN158\]](#) among others-that are not otherwise addressed in this article. [\[FN159\]](#) Also consciously avoided is any discussion of the costs of implementation, [\[FN160\]](#) which may be significant if the reforms urged in this article are, in fact, to be implemented. [\[FN161\]](#)

As will be discussed in the next section, I believe that it is impossible for Atkins to have any authenticity unless we restructure the ways in which counsel represent persons with mental retardation and we insure that such individuals have competent *332 experts assisting them. Here, however, the discussion will be limited to the seventeen "pressure point" issues [\[FN162\]](#) identified in Atkins on questions of implementation-issues that must be taken seriously if we are to understand the greater significance of the Atkins case.

1. The capacity of lawyers to "get" mental retardation;
2. The extent to which defense lawyers can "explain away" what may appear to jurors as a lack of remorse on the part of defendants;
3. The ways that failures to develop retardation evidence are treated in Strickland v. Washington [\[FN163\]](#) cases;
4. The underlying sanism of jurors in assessing mental retardation;
5. The ability of fact-finders to "unpack" the difference between cases involving the types of violent crimes more likely to be committed by persons with mental retardation (non-deliberate) and the types more likely to be committed by some persons with severe mental illness (very deliberate and planful, but equally immune from deterrence);
6. The extent to which jurors will use retardation evidence as an aggravator rather than as a mitigator;
7. The capacity of jurors to empathize with persons with mental retardation;
8. The willingness of states to read Ake v. Oklahoma [\[FN164\]](#) expansively to insure access to appropriate experts;
9. The role of experts in explaining the meanings of IQs, functional abilities, capacity for moral development, etc., of persons with mental retardation;
10. The reluctance of criminal defendants, even those facing the death penalty, to identify themselves as "mentally retarded;"
11. The ability of post-Atkins defendants to provide meaningful assistance to counsel (assuming a finding of competence to stand trial);
12. The impact of the Godinez v. Moran [\[FN165\]](#) morass;
13. The willingness of judges to enforce Atkins;
14. The extent to which Justice Scalia's fear-of-faking concerns will dominate post-Atkins jurisprudence;
15. The ability of all participants to understand the relationship between such cases and the insanity defense;
16. The attitude of prosecutors toward such cases; and
17. The ability of society to accept the reality of the number of death-eligible defendants with mental retardation.

These seventeen issues can be "sorted" as to the interest group whose attitudes and/or behaviors are most at issue (although there are certainly many overlaps): defense counsel, jurors, experts, defendants, trial court judges, appellate court judges, prosecutors, and, for lack of a better phrase, society as a whole. I will address them in order.

*333 A. Defense Counsel

Issue 1. The capacity of lawyers to "get" mental retardation

Lawyers have traditionally done a terrible job of being able to identify mental disability, being able to differentiate mental illness from mental retardation, and "seeing" mental disability if the defendant does not "look crazy." [\[FN166\]](#) Writing about this issue seven years ago, I noted,

Nearly twenty years ago, when surveying the availability of counsel to mentally disabled litigants, President Carter's Commission on Mental Health noted the frequently substandard level of representation made available to

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mentally disabled criminal defendants. Nothing that has happened in the past two decades has been a palliative for this problem; if anything, it is confounded by the myth that adequate counsel is available to represent both criminal defendants in general, and mentally disabled litigants in particular. And, as the importance of the construction of "mitigating" and "aggravating" evidence grows, so does the need for counsel to be able to understand and utilize mental disability evidence. [\[FN167\]](#)

The dangers here should be self-evident. If a lawyer does not "get" the fact that his client is mentally retarded, then the issues raised in *Atkins* may never be brought to the court's attention. [\[FN168\]](#) As will be explored below, there are countless cases of lawyers' failures to identify a client's mental disability, often resulting in an "effectiveness of counsel" challenge. [\[FN169\]](#) This issue is the first one that must be confronted; if counsel fails here, it is impossible for *Atkins* to be given any kind of meaningful life.

Issue 2. The extent to which defense lawyers can "explain away" what may appear to jurors as a lack of remorse on the part of defendants

Jurors frequently look for visual cues and clues in determining whether a defendant should be sentenced to death. In this process, they determine-based on their own flawed, pre-reflective "ordinary common sense" [\[FN170\]](#)-whether a defendant *334 looks sufficiently "remorseful." This behavior was noted accurately by Justice Kennedy in his concurrence in *Riggins v. Nevada*, [\[FN171\]](#) relying on research by William Geimer and Jonathan Amsterdam, demonstrating that an assessment of the defendant's level of remorse may be the most determinative factor in the decision as to who will live and who will die. [\[FN172\]](#)

Nonetheless, this remains a significant obstacle for lawyers representing persons with mental retardation, some of whom may gesture inappropriately, grimace, giggle, or manifest other behaviors that jurors may translate into meaning "I don't care." [\[FN173\]](#) A person with mental retardation may not understand the consequences of the proceedings; consequently, he may alienate the jury by "sleeping, smiling, or staring at nothing while in court." [\[FN174\]](#) This "unavoidable and inappropriate conduct" may also convey a "false impression of a lack of remorse or compassion for the victim." [\[FN175\]](#) A juror, by way of example, may perceive a defendant's sitting slumped down in his chair as acting "cool," and not showing "proper respect for the proceedings." [\[FN176\]](#) The lawyer must be able to neutralize these interpretations.

Beyond this, a defendant with mental retardation may not truly understand what is transpiring in court. Even if he meets the minimalist competency-to-stand-trial test set out in *Dusky v. United States*, [\[FN177\]](#) the defendant may not be able to adequately participate meaningfully in his or her own defense. Also, persons with mental retardation quite often suffer from very poor memory, an impediment that, when coupled with the tendency to fall prey to others' suggestions, may render communication of the facts to the defense lawyer, especially the most mitigating facts, "next to impossible." [\[FN178\]](#)

There is an ominous "flip side" to this coin, and it is one that cannot be understood without a nuanced appreciation of the extent to which the phenomenon that I call "sanism" dominates attitudes in such cases. [\[FN179\]](#) Jurors often expect people with mental retardation to be extremely low functioning and may not be expecting *335 a quiet, mild-mannered individual. When the defendant fails to exhibit any stereotypical behaviors (such as drooling, giggling, smiling with a vacant appearance, rocking), jury members may think that the mental retardation defense is untrue or unwarranted. [\[FN180\]](#) Courts see facial expressions-purportedly "decodable" by any layperson-as evidence of mental retardation. [\[FN181\]](#)

The burdens here on defense counsel are self-evidently immense. A leading article summarizes: "Counsel must explain mental retardation and its diagnostic process thoroughly and carefully so jurors will have a clear understanding of this often misunderstood disability. The defense lawyer must educate the jury about mental retardation, its various presentations, and the distinct difference between mental retardation and mental illness." [\[FN182\]](#)

The majority in *Atkins* clearly understood this (as evidenced by its focus on the ways that the demeanor of persons with mental retardation "may create an unwarranted impression of lack of remorse for their crimes"). [\[FN183\]](#) It is an open question whether defense lawyers will pay heed to this warning.

Issue 3. The ways that failures to develop retardation evidence are treated in *Strickland v. Washington* [\[FN184\]](#) cases

The quality of counsel in providing legal representation to mentally disabled criminal defendants is a disgrace. Judge Bazelon's reference to many of the lawyers in this cohort as "walking violations of the Sixth Amendment" [\[FN185\]](#) has, if anything, proven to be an understatement. [\[FN186\]](#) And when this shameful state of affairs is combined with what we know about the performance of sporadically-assigned counsel in death penalty cases, [\[FN187\]](#) then we should have a fairly decent sense of the enormity of this problem.

The case law is startling and abounds with examples of lawyers failing miserably in this area. [\[FN188\]](#) And often, such shoddy representation does not even result in a new *336 trial. [\[FN189\]](#) Although this is not a topic that is news to commentators, [\[FN190\]](#) the rich body of descriptive, analytical, anecdotal, and prescriptive literature has had little impact on the realities of practice in this area of the law.

B. Jurors

Issue 4. The sanism of jurors

In an earlier paper, I challenged the Supreme Court's assumption that jurors can be relied upon to apply the law in this area conscientiously and fairly. In that paper, I concluded,

A review of case law, controlled behavioral research and "real life" research not only casts grave doubt on its validity, but tends to reveal the opposite: that jurors generally distrust mental disability evidence, that they see it as a mitigating factor only in a handful of circumscribed situations (most of which are far removed from the typical scenario in a death penalty case), that lawyers representing capital defendants are intensely skeptical of jurors' ability to correctly construe such evidence, and that jurors actually impose certain preconceived schemas in such cases that, paradoxically, result in outcomes where the most mentally disabled persons (those regularly receiving doses of powerful antipsychotic medications) are treated the most harshly, and that jurors tend to over-impose the death penalty on severely mentally disabled defendants.

*337 Why is this? I argue that it results from a combination of important factors: jurors' use of cognitive simplifying devices (heuristics) in which vivid, negative experiences overwhelm rational data (and a death penalty case is a fertile environment for such cognitive distortions) and which reify their sanist attitudes, courts' pretextuality in deciding cases involving mentally disabled criminal defendants, and courts' teleological decision-making in reviewing such cases. [\[FN191\]](#)

Nothing that has taken place in the nine years since that paper was written has led me to change my mind. These issues must be addressed if *Atkins* is to be implemented in a meaningful and coherent manner.

Issue 5. The ability of fact-finders to "unpack" the difference between cases involving the types of violent crimes more likely to be committed by persons with mental retardation (non-deliberate) and the types more likely to be committed by some persons with severe mental illness (often very deliberate and planful, but equally immune from deterrence)

Fact-finders confuse and conflate mental retardation and mental illness. [\[FN192\]](#) This confusion may be fatal to the chances of a reasoned judgment in a death penalty case involving a defendant with mental retardation. First, the defendant may not appear to be "mad to the man on the street." [\[FN193\]](#) Second, the criminal conduct of a person with mental retardation often "stem[s] from an impulsive reaction against the painful awareness, hammered home by frustration, failure, and humiliation, of the cruel trick that biology has played on him." [\[FN194\]](#) Because persons with mental retardation often lack the ability to control impulsive behavior, they are far less likely to have planned out the commission of capital crimes [\[FN195\]](#) in the bizarre ways that some persons with profound mental illness do. [\[FN196\]](#) Thus, in many instances, given limitations in intellectual reasoning, control of impulsive behavior, and moral development, "it is not possible for a mentally retarded defendant to freely choose to commit a crime." [\[FN197\]](#) Again, I am not particularly optimistic about jurors' ability to make these discriminating judgments.

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***338** Issue 6. The extent to which jurors will use retardation evidence as an aggravator rather than as a mitigator

Although the Supreme Court has made it clear that mental illness is a mitigating factor in death penalty jurisprudence, [\[FN198\]](#) in reality, such evidence is often seen as an aggravating factor. [\[FN199\]](#) If competent counsel is present, the dilemma may paradoxically be even further confounded: if she should rely on certain kinds of "empathy" [\[FN200\]](#)-evidence of abuse, stress, retardation, institutional failure, and substance abuse-she runs the risk of putting before the jury the evidence that "has the greatest potential for turning into evidence in aggravation." [\[FN201\]](#) In the hands of sanist fact-finders, the presentation of such evidence can be deadly to the defendant. [\[FN202\]](#) My colleague Richard Sherwin has appropriately called this "the disempathetic effect." [\[FN203\]](#)

Thus, the decision whether to call experts to testify at the penalty phase of a capital trial has "far-reaching consequences for defendants." [\[FN204\]](#) Nonetheless, defense counsel may be inclined to withhold expert testimony as to defendants' mental health from capital sentencers. [\[FN205\]](#) The Atkins Court took this issue seriously, cautioning that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury," [\[FN206\]](#) and warning of "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." [\[FN207\]](#) Again, I am concerned about how this will "play out" in subsequent cases.

***339** Issue 7. The capacity of jurors to empathize with persons with mental retardation

Little has been written about this important question, but it is one we must consider seriously. The persistence of the mental retardation stereotype also frequently precludes the development of juror empathy. [\[FN208\]](#) In cases in which the crime is especially violent and inexplicable, we may "simply shut our eyes to the reality of his madness in order to reap the rewards of our revenge." [\[FN209\]](#) In the context of a capital trial, "empathy evidence," such as mental problems, substance abuse, or family background difficulties, "can facilitate the jury's image of the defendant as an 'irreparable monster' who was so retarded, scarred, or disturbed by child abuse that he just could not contain his rage." [\[FN210\]](#)

As one scholar has noted in the context of the substantively unrelated question of school financing,

Adding in the mentally retarded is a complicated matter: do we fear and detest them and find it wasteful to educate them (as was the conventional outlook) or do we now empathize with them and their parents and respond with a generous willingness to try to do something helpful for them even at higher than average cost? [\[FN211\]](#)

Can Atkins have any impact on this issue? Early on in my writings about sanism, I cited Chief Justice Warren's well-known phrase from *Brown v. Board of Education* [\[FN212\]](#)- "their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" [\[FN213\]](#)-and noted, in the civil mental disability law context,

There have been no attempts, so far, to answer the question that has bedeviled civil rights activists since the 1950s: how to capture "the hearts and minds" of the American public so as to best insure that statutorily and judicially articulated ***340** rights are incorporated-freely and willingly-into the day-to-day fabric and psyche of society. [\[FN214\]](#)

The same question must be repeated here. [\[FN215\]](#)

C. Experts

Issue 8. The role of experts in explaining the meanings of IQs, functional abilities, capacity for moral development, etc., of persons with mental retardation

There are multiple roles for experts in death penalty cases involving defendants with mental retardation. A mental retardation expert may be utilized to explain the relevance of mental retardation in either the guilt or penalty phases of trial, or both (including relevant aspects of confessions, waiver of Miranda rights, culpability, and potential future dangerousness). [\[FN216\]](#) Often, a multi-disciplinary team of experts is critical to the defense of capital defendants

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with mental retardation. One of the leading practice articles instructs that defense counsel should "always contact a mitigation or mental health expert to determine the existence of mental retardation and complete a social-medical history before requesting the assistance of a psychologist or psychiatrist." [\[FN217\]](#) The article also cautions that "ordinary psychiatrists and most psychologists are not trained in areas involving mental retardation and courts frequently fail to make the distinction between these experts." [\[FN218\]](#)

What are some of the factors that the expert must consider? "Speech, language and memory impairments, physical and motor disabilities, IQ examinations and other tests require a professional evaluation and assessment by various mental health experts." [\[FN219\]](#) Such experts should also be able to convey to the jury "the effects that mental retardation has on behavior and decision making, explain the vulnerable and suggestible nature of a mentally retarded individual, and educate juries about the full spectrum of mental retardation, irrespective of the defendant's appearance or demeanor," and must be able to "state their findings in plain, comprehensible language and common sense terms used by the average person." [\[FN220\]](#)

Finally, the expert must be able to rebut sanist myths (recall my earlier discussion about the defendant who failed to exhibit any stereotypical behaviors, such as *341 drooling, giggling, smiling with a vacant appearance, rocking). [\[FN221\]](#) In short, Atkins will be an empty shell without the aggressive participation of such experts.

Issue 9. The willingness of states to read Ake expansively to insure access to appropriate experts

In *Ake v. Oklahoma*, [\[FN222\]](#) the Supreme Court held that an indigent defendant is constitutionally entitled to psychiatric assistance when he makes a preliminary showing that his sanity "is [likely] to be a significant factor at trial." [\[FN223\]](#) Courts have split on the requisite professional background to satisfy Ake's command, for instance, on the question of whether a defendant is entitled to the appointment of an expert psychologist [\[FN224\]](#) (certainly the appropriate professional in many cases involving defendants with mental retardation). [\[FN225\]](#) A leading criminal procedure treatise concludes that, "[g]enerally speaking, the courts have read Ake narrowly, and have refused to require appointment of an expert unless it is absolutely essential to the defense." [\[FN226\]](#) The problems here are heightened by some experts' lack of expertise. Commentators have noted that even mental disability professionals often inappropriately confuse mental retardation with mental illness, [\[FN227\]](#) an error that could be, literally, fatal, in a post-Atkins case.

Will narrow readings of Ake (coupled in some cases with inexperienced experts) rob fact-finders of the full and rich explanation of mental retardation and its relationship to the commission of the charged criminal act? I cannot answer that question, but I believe this is an issue that cannot be ignored.

D. Defendants

Issue 10. The reluctance of criminal defendants, even those facing the death penalty, to identify themselves as "mentally retarded"

One of the basic sanist myths is that defendants regularly feign mental disability, and that they similarly succeed regularly in befuddling experts when they do that. I have written extensively in an attempt to demonstrate that this is not so (and why it is not so). [\[FN228\]](#) What I am concerned about here is the inverse: criminal defendants will mask their retardation from their counsel (and often from themselves).

*342 Dr. Dorothy Lewis documented that juveniles imprisoned on death row were quick to tell her and her associates, "I'm not crazy," or "I'm not a retard." [\[FN229\]](#) Moreover, a person with mental retardation will often attempt to conceal his condition from lawyers, not realizing that his condition could constitute a major part of his defense. [\[FN230\]](#) Especially in a case in which counsel is substandard, this could-again-be fatal to a defendant who ought otherwise come under the Atkins umbrella. [\[FN231\]](#)

Issue 11. The ability of post-Atkins defendants to provide meaningful assistance to counsel (assuming a finding of competence to stand trial)

Many defendants of ordinary intelligence do not contribute much help to their attorneys in extracting pertinent

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mitigating information. [\[FN232\]](#) This is certainly "exacerbated in the situation of a retarded defendant, who may not even understand what type of information her attorney needs, let alone begin to know how to provide it." [\[FN233\]](#) The Atkins Court stressed the difficulties that persons with mental retardation may have in being able to give meaningful assistance to their counsel, their status as "typically poor witnesses," and the ways that their demeanor "may create an unwarranted impression of lack of remorse for their crimes." [\[FN234\]](#) This is an extremely important issue to which scant attention has been paid, and it is one that is intensified by the reality that state criminal justice systems are ill equipped to deal with mentally ill or retarded defendants unable to aid their defense attorneys. [\[FN235\]](#)

Surveys of case law underscore the inability of mentally disabled criminal defendants to aid their counsel, even in cases in which no Dusky violation has been found. [\[FN236\]](#) This issue must be reexamined carefully in the post-Atkins generation of death penalty cases.

***343** Issue 12. The impact of the *Godinez v. Moran* morass

The Supreme Court held in *Godinez v. Moran* [\[FN237\]](#) that the standard for pleading guilty and for waiving counsel was no higher than for standing trial, rejecting the notion that competence to plead guilty must be measured by a higher (or even different) standard from that used in incompetence to stand trial cases. [\[FN238\]](#) It reasoned that a defendant who was found competent to stand trial would have to make a variety of decisions requiring choices: whether to testify, whether to seek a jury trial, whether to cross-examine his accusers, and, in some cases, whether to raise an affirmative defense. [\[FN239\]](#) While the decision to plead guilty is a "profound one," "it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial." [\[FN240\]](#) Finally, the Court reaffirmed that any waiver of constitutional rights must be "knowing and voluntary." [\[FN241\]](#) It concluded on this point:

Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the Dusky formulation, the Due Process Clause does not impose these additional requirements. [\[FN242\]](#)

The *Godinez* holding may lead to a potentially absurd scenario where a defendant with a history of mental illness or who is mentally retarded may be found competent to stand trial if he is found to have some ability to assist counsel in some way, and later may be allowed to remove counsel and represent himself. [\[FN243\]](#) The trial of Colin Ferguson "graphically symbolizes the dangerous implications of courts using *Godinez's* low standard of competency." [\[FN244\]](#)

Atkins, of course, is silent on this issue, as counsel represented the defendant. But it is an issue-how the Atkins standards can possibly be met in the case of a pro se defendant with mental retardation-that must be taken seriously.

E. Trial Judges

Issue 13. The willingness of judges to enforce Atkins

I have written extensively about the corrosive impact of pretextuality in mental disability law jurisprudence. "Pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest ***344** (frequently meretricious) decision making, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." [\[FN245\]](#) 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, blase judging, and, at times, perjurious and/or corrupt testifying. [\[FN246\]](#)

A careful examination of mental disability law reveals that judges are often pretextual because of their own "instrumental, functional, normative and philosophical" dissatisfaction with non-sanist constitutional decisions that grant a measure of dignity to persons with mental disabilities. [\[FN247\]](#) Trial judges who are similarly dissatisfied with Atkins-and it does not require research or citations to assert that there will be many-can easily sabotage it in hidden ways. This is an area that demands extraordinary vigilance.

F. Appellate Courts

Issue 14. The extent to which Justice Scalia's fear-of-faking concerns will dominate post-Atkins jurisprudence

Again, the sanist "fear of faking" myth dominates mental disability law. [\[FN248\]](#) I have discussed this extensively in the context of competency-to-stand-trial law, [\[FN249\]](#) the insanity defense, [\[FN250\]](#) and death penalty law, [\[FN251\]](#) and, in the insanity defense context, I have written that it is the fear that continues to "dominate" that jurisprudence. [\[FN252\]](#) Justice Scalia's dissent in Atkins is a pathetic recapitulation of this dreary myth and may prove to be the most significant roadblock to the implementation of Atkins.

His fears-similar to ones that the Chief Justice and Justice O'Connor expressed in Ford and in Penry [\[FN253\]](#)-reflect "society's suspicion that the defendant is faking the illness and, together with her defense lawyers, will hoodwink an unsuspecting jury into accepting fallacious medical testimony." [\[FN254\]](#) Despite the lack of empirical support, judges deciding legal questions related to sanity frequently appeal to what they perceive as the "significant dangers presented by feigned or spurious claims of *345 insanity." [\[FN255\]](#) Historically, society believed that insanity was too easily feigned, that such simulation easily deceived psychiatrists, and that the use of the defense was "an easy way to escape punishment." [\[FN256\]](#) The fear is one that has held some of this century's most respected jurists in its thrall, regardless of the fact that it is not an axiom of criminal procedure that rights be "denied to all because of the fear that a few might abuse them." [\[FN257\]](#)

This helps to explain why there is increasing support for relaxing the legal protections available to persons with mental illness, by making those persons equally subject to the same draconian penalties now generally in favor. Thus, in analyzing the decision of the legislature in Idaho to reduce the insanity defense to solely a consideration of mens rea, Geis and Meier found that Idaho residents concluded that mentally disabled criminal defendants should not be able to avoid punitive consequences of criminal acts by reliance on either a "real or faked plea of insanity." [\[FN258\]](#) A member of the Louisiana Supreme Court subsequently endorsed this sentiment. [\[FN259\]](#) Again, reconsider Justice Scalia's curious reference to the feigning insanity defense pleader who then "risks commitment to a mental institution until he can be cured (and then tried and executed)." [\[FN260\]](#)

The empirical realities are very different:

Malingering by mentally disabled criminal defendants is statistically rare. Research reveals that defendants attempt feigning in less than eight percent of all competency to stand trial inquiries. Yet, in deciding incompetency to stand trial cases, courts continue to focus, in some cases almost obsessively, on testimony that raises the specter of malingering. The fear of such deception has "permeated the American legal system for over a century," despite the complete lack of evidence that such feigning "has ever been a remotely significant problem of criminal procedure." This fear is a further manifestation of judicial sanism. [\[FN261\]](#)

*346 Again, this most compelling of all mental disability law myths [\[FN262\]](#) can be attributed to the ravaging existence of sanism. It is a myth that must be taken seriously in the aftermath of Atkins.

Issue 15. The ability of all participants to understand the relationship between such cases and the insanity defense

Sanism similarly infects competency-to-stand-trial jurisprudence in critical ways. Courts stubbornly refuse to understand the distinction between competency to stand trial and insanity, even though the two statuses involve different concepts, different standards, and different points on the "time line," and courts frequently misunderstand the relationship between incompetency and subsequent commitment. [\[FN263\]](#) Justice Scalia's curious reference to feigned insanity defenses suggests that this confusion persists. It is an issue that must be taken seriously in the world after Atkins, especially when we consider the extent to which the act of pleading the insanity defense may significantly increase the likelihood of a jury returning a death penalty verdict. [\[FN264\]](#)

G. Prosecutors

Issue 16. The attitude of prosecutors toward such cases

There has been little written about the ways that prosecutors construct cases involving defendants with mental retardation. Jamie Fellner, an attorney with Human Rights Watch, had this to say:

Even when a defense lawyer presents evidence of the client's retardation, prosecutors are all too often more concerned with the professional or political ramifications of obtaining a "victory"-a death sentence-than with giving serious consideration to the ways mental retardation has affected the defendant's comprehension and conduct. Faced with pressure from the community and the victim's family, they do not want to "excuse" the crime or let an offender "off too easy." During trials they vigorously challenge the existence of mental retardation, minimize its significance, and suggest that although a capital defendant may "technically" be considered retarded, he nonetheless has "street smarts"-and hence should receive the highest penalty. [\[FN265\]](#)

Nothing in the body of Atkins touches on this issue, but, operationally, its importance cannot be overstated. Again, those of us who watch post-Atkins developments must scrutinize this carefully.

*347 H. Society

Issue 17. The ability of society to accept the reality of the number of death-eligible defendants who are mentally retarded

It has been estimated that up to thirty percent of all persons on death row are mentally retarded. [\[FN266\]](#) Other surveys range from four percent to twenty percent. [\[FN267\]](#) Jonathan Bing's research reveals that

[o]f the first 157 convicted murderers executed since capital punishment was reinstituted in 1976, at least eleven of them (seven percent) were known to be mentally retarded, although the incidence of mental retardation among the population at large is estimated at only three percent. Of the 2,500 people on death row [in 1995], it is estimated that twelve to twenty percent of them are mentally retarded. [\[FN268\]](#)

These are numbers that many find jarring and all should find troubling. My point here is that there is little that is exceptional or idiosyncratic about the facts of the Atkins case. Any post-Atkins analyses must confront these statistics soberly and carefully.

IV. CONCLUSION

I know that I have painted a gloomy picture. The questions then are these: Is it too gloomy? If it is not, what is there, if anything, that we can do to ameliorate this situation (and "we" here refers to those of us who take this issue seriously)?

I am convinced that the picture is not inappropriately gloomy. I began to represent mentally disabled criminal defendants in 1971, and I have provided representation to members of this universe at every stage of the litigation process. I have taught about, written about, and spoken about this population since 1984. I am convinced that the issues that I have raised here are not new ones and that they continue to dominate this part of the legal landscape.

So this leads to my second question: What can be done? My prescriptions here are modest but are necessary if we are to break the cycles that I have described in this article, and if Atkins is to be, truly, given life.

First, it is essential that the organized criminal defense bar "step up to the plate" and take stock of the status quo. It is never easy to do public self-evaluation, and less so when the conclusions to be reached are inevitably so negative. But, if Atkins is to have authentic meaning, groups such as the National Legal Aid and Defenders *348 Association, the National Association of Criminal Defense Lawyers, and others must confront the issues raised in this article and "take the lead" in educating their members and in developing strategies to assure that counsel is authentically "effective" (which does not mean that it simply passes the pallid Strickland v. Washington standard). [\[FN269\]](#)

Second, the judiciary must-for the first time-take these issues seriously. Judges, like jurors and other lay people, still continue to take ordinary-common-sense-like refuge in stereotyping persons with mental retardation, especially in the cases of such persons charged with serious crimes. Legal resources are now available to all judges that help dispel these myths, [\[FN270\]](#) but it is not at all clear whether judges have availed themselves of these resources. It is time they

do.

Third, it is time for prosecutors to stop posturing. It is black letter law that the role of the prosecutor is not simply to win convictions, but to seek justice. [\[FN271\]](#) It is time that this happens in these cases.

Fourth, we must again confront the corrosive and malignant impact of sanism and pretextuality, [\[FN272\]](#) an impact that is at its most insidious in this sort of case. If we fail to do that, then Atkins can be no more than a "paper victory." [\[FN273\]](#)

I end as I began, with Bob Dylan. Think again about the line that I used for my title: "Life is in mirrors, death disappears." Then think about the words of Atkins and these hidden issues that I have sought to raise here. My hope is that the heart and soul of the Atkins decision do not disappear.

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[\[FN1\]](#). See, e.g., David L. Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 2 (1973) (referring to such lawyers as "walking violations of the Sixth Amendment").

[\[FN2\]](#). See, e.g., [Coleman v. Wilson](#), 912 F. Supp. 1282, 1320 (E.D. Cal. 1995). See generally National Alliance for the Mentally Ill, Where We Stand, Criminalization of People with Mental Illness, available at <http://www.nami.org/update/unitedcriminal.html> (last visited May 13, 2003).

[\[FN3\]](#). See, e.g., Thomas Hafemeister & John Petrila, [Treating the Mentally Disordered Offender: Society's Uncertain, Conflicted, and Changing Views](#), 21 Fla. St. U. L. Rev. 729, 754 n.91 (1994) (citing cases).

[\[FN4\]](#). This path is traced explicitly in Justice Brennan's dissent in [Colorado v. Connelly](#), 479 U.S. 157, 178 n.2 (1986). On false confessions in this context, see generally C.K. Sigelman et al., When in Doubt Say Yes: Acquiescence in Interview with Mentally Retarded Persons, 19 Mental Retardation 53, 53-58 (1981).

[\[FN5\]](#). See generally Michael L. Perlin, The Jurisprudence of the Insanity Defense 37-49 (1994).

[\[FN6\]](#). See generally 4 Michael L. Perlin, Mental Disability Law: Civil and Criminal, chs. 8-12 (2d ed. 2002) [hereinafter Perlin, Mental Disability Law]; Perlin, *supra* note 5, at 37-49 (discussing obsessive focus on role of insanity defense).

[\[FN7\]](#). See generally Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial (2000).

[\[FN8\]](#). [536 U.S. 304 \(2002\)](#).

[\[FN9\]](#). This concept is discussed in the mental disability litigation context in, inter alia, Michael L. Perlin, ["Their Promises of Paradise": Will Olmstead v. L.C. Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?](#), 37 Houston L. Rev. 999, 1049 (2000). See generally Michael S. Lottman, Paper Victories and Hard Realities, in Paper Victories and Hard Realities: The Implementation of the Legal and Constitutional Rights of the Mentally Disabled 93 (Valerie Bradley & Gary Clarke eds., 1976).

[\[FN10\]](#). [477 U.S. 399 \(1986\)](#).

[\[FN11\]](#). [492 U.S. 302 \(1989\)](#).

[\[FN12\]](#). [532 U.S. 782 \(2001\)](#).

[FN13]. See *infra* part I.

[FN14]. See *infra* part II.

[FN15]. See *infra* part III.

[FN16]. See *infra* part IV.

[FN17]. I began down this path with 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) [hereinafter Perlin, Dignity]. My most recent effort is Michael L. Perlin, "[What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top, You're on the Bottom](#)": [Are the Americans with Disabilities Act \(and *Olmstead v. L.C.*\) Anything More than "Idiot Wind"?](#), 35 *U. Mich. J.L. Reform* 235 (2001-02) [hereinafter Perlin, Idiot Wind].

[FN18]. Bob Dylan, *Lyrics, 1962-1985* (1985) 59.

[FN19]. 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 (1996).

[FN20]. He hasn't played it in ten years, but, knowing Bob, it may reappear miraculously one of these days. See *How Long Has It Been Since Dylan Played*, at <http://www.geocities.com/adam1117/boblast.html#OH> (last visited May 5, 2003).

[FN21]. Bob Dylan, *Oh Mercy* (Sony Records 1989).

[FN22]. Ring Them Bells Ye Heathen, A Review of "Oh Mercy," at <http://www.therebelbase.homestead.com/ohmercy.html> (last visited May 14, 2003).

[FN23]. Lyrics available at <http://bobdylan.com/songs/political.html> (last visited May 14, 2003).

[FN24]. *Id.*

[FN25]. See Perlin, *supra* note 19, at 205:
And one often gets what one pays for. Professor Robert Weisberg, an appellate defense counsel in death cases, has mordantly noted: "The fees [at trial] were infamously low. The second capital appeal I worked on was a case where the defense lawyer was paid \$150 for the entire case, and, believe me, he earned every penny of it." (Footnote omitted).

[FN26]. See Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?* 1 *Psychol., Pub. Pol'y & L.* 80, 87 (1995) ("They are the people society renders the most visible within the community, and they are virtually invisible when expelled from the community.").

[FN27]. Perlin, *supra* note 7 (emphasis added).

[FN28]. See, e.g., Perlin, *Idiot Wind*, *supra* note 17, at 236:
"Sanism" is defined as an irrational prejudice towards mentally ill persons, which is of the same quality and character as other irrational prejudices. Such other prejudices are reflected in prevailing social attitudes of racism, sexism, homophobia, and ethnicity. As I recently wrote:
Sanism is as insidious as other "isms" and is, in some ways, more troubling, because it is (a) largely invisible, (b) largely socially acceptable, and (c) frequently practiced (consciously and unconsciously) by individuals who regularly take "liberal" or "progressive" positions decrying similar biases and prejudices that involve sex, race, ethnicity, or sexual orientation. It is a form of bigotry that "responsible people can express in public." Like other "isms," sanism is based largely upon stereotype, myth, superstition and deindividualization.

The practicing bar, courts, legislatures, professional psychiatric and psychological associations, and the scholarly academy are all largely silent about sanism. A handful of practitioners, lawmakers, scholars and judges have raised lonely voices, but the topic is simply "off the agenda" for most of these groups. See also Michael L. Perlin, On "[Sanism](#)", [46 SMU L. Rev. 373, 374-76 \(1992\)](#); Perlin, *supra* note 7, at 22-23.

[FN29]. This section is generally adapted from 4 Perlin, *Mental Disability Law*, *supra* note 6 § 12-4.1c, at 527-38.

[FN30]. See generally Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss"?*, 29 *Ariz. L. Rev.* 1 (1987).

[FN31]. [477 U.S. 399 \(1986\)](#).

[FN32]. *Id.* at 405-10.

[FN33]. [339 U.S. 9 \(1950\)](#).

[FN34]. *Ford*, [477 U.S. at 405](#).

[FN35]. *Id.* at 405-06 (citing, *inter alia*, [Solem v. Helm](#), [463 U.S. 277, 285-86 \(1983\)](#) (Burger, C.J., dissenting)).

[FN36]. *Id.* at 406 (citing [Trop v. Dulles](#), [356 U.S. 86, 101 \(1958\)](#) (plurality opinion)).

[FN37]. *Id.* (citing [Coker v. Georgia](#), [433 U.S. 584, 597 \(1977\)](#) (plurality opinion)).

[FN38]. *Id.* at 406-07.

[FN39]. *Id.* See also 4 Perlin, *Mental Disability Law*, *supra* note 6 § 12- 4.1a, at 520-22.

[FN40]. *Ford*, [477 U.S. at 408](#) (quoting Hawles, *Remarks on the Trial of Mr. Charles Bateman*, 11 *How. St. Tr.* 474, 477 (1685)).

[FN41]. *Id.*

[FN42]. *Id.* "[I]t was early observed that 'the judge is bound' to stay the execution upon insanity of the prisoner." (citing 1 Chitty, *A Practical Treatise on the Criminal Law* *761 (5th Am. ed. 1847), and 1 Wharton, *A Treatise on Criminal Law* § 59 (8th ed. 1880)).

[FN43]. *Id.* at 408.

[FN44]. *Id.* at 408-09 n.2 (listing statutes).

[FN45]. *Id.* at 409.

[FN46]. *Id.* at 409-10.

[FN47]. *Id.* at 418 (Powell, J., concurring).

[FN48]. *Id.* See Mezer & Rheingold, *Mental Capacity and Incompetency: A Psychological Problem*, 119 *Am. J. Psychiatry* 827, 828 (1962) (identifying varying competency standards governing eleven separate areas of the law). See generally 3 Perlin, *Mental Disability Law*, *supra* note 6 § 7A-4.1.

[FN49]. *Ford*, [477 U.S. at 422](#).

[FN50]. *Id.* Compare [Rector v. Bryant](#), [501 U.S. 1239, 1239 \(1991\)](#) (Marshall, J., dissenting from denial of certiorari)

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(criticizing court's decision to deny certiorari in case presenting question of whether a prisoner whose mental incapacity renders him unable to recognize or communicate facts that would make his sentence unlawful or unjust is nonetheless competent to be executed). For further proceedings, see [Rector v. Clinton, 308 Ark. 104, 823 S.W.2d 829 \(1992\)](#).

[FN51]. [Ford, 477 U.S. at 425](#).

[FN52]. *Id.* at n.5 (noting that "some defendants may lose their mental facilities and never regain them, and thus avoid execution altogether").

[FN53]. *Id.* at 427 (O'Connor, J., concurring in part and dissenting in part). On those aspects of the majority opinion in *Ford* dealing with procedural issues, see 4 Perlin, *Mental Disability Law*, *supra* note 6 § 12-4.1c, at 531-34.

[FN54]. [Ford, 477 U.S. at 429](#).

[FN55]. *Id.* (citing [Meachum v. Fano, 427 U.S. 215, 224 \(1976\)](#)).

[FN56]. *Id.* at 429 (citing [Nobles v. Georgia, 168 U.S. 398, 405-06 \(1897\)](#)). Cf. Joseph Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 Rutgers L.J. 397, 404 (1983) (no question as to presence of serious mental illness in 138 of 141 successful insanity defense cases studied).

[FN57]. [Ford, 477 U.S. at 429](#).

[FN58]. [Id. at 431](#) (Rehnquist, J., dissenting).

[FN59]. [Id. at 432](#).

[FN60]. [Id. at 433](#).

[FN61]. [Id. at 434](#).

[FN62]. [Id. at 435](#):

A claim of insanity may be made at any time before sentence, and, once rejected, may be used again; a prisoner found sane two days before execution might claim to have lost his sanity the next day thus necessitating another judicial determination of his sanity and presumably another stay of execution.

[FN63]. See 4 Perlin, *Mental Disability Law*, *supra* note 6 § 12-4.1d, at 539- 42.

[FN64]. See generally Perlin, *supra* note 7, at 78-98.

[FN65]. [Ford, 477 U.S. at 425](#) (Powell, J., concurring). See 4 Perlin, *Mental Disability Law*, *supra* note 6 § 12-4.1c.

[FN66]. [406 U.S. 715, 726 \(1972\)](#) ("There is nothing in the record that even points to any possibility that Jackson's present condition can be remedied at any future time."). See generally 4 Perlin, *Mental Disability Law*, *supra* note 6 § 8A-5.2.

[FN67]. See, e.g., [People ex rel. Myers v. Briggs, 46 Ill. 2d 281, 263 N.E.2d 109 \(1970\)](#) (indicting defendant for murder in case "virtually indistinguishable" from the clinical and procedural facts of Jackson).

[FN68]. [Ford, 477 U.S. at 429](#) (O'Connor, J., concurring in part and dissenting in part).

[FN69]. [Id. at 435](#) (Rehnquist, J., dissenting).

[FN70]. See Ingo Keilitz & Junius Fulton, *The Insanity Defense and Its Alternatives: A Guide for Policymakers* (1984).

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[FN71]. See Michael L. Perlin, "The Things We Do for Love": John Hinckley's Trial and the Future of the Insanity Defense in the Federal Courts, 30 N.Y.L. Sch. L. Rev. 857, 859 (1985) (Book Review of Lincoln Caplan, *The Insanity Defense and the Trial of John W. Hinckley, Jr.* (1984)).

[FN72]. *Id.* at 860. See also David M. Nissman et al., *Beating the Insanity Defense: Denying the License to Kill* (1980).

[FN73]. Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity* § 247, at 243 (Winfred Overholser ed., 1962 ed.).

[FN74]. See 4 Perlin, *Mental Disability Law*, supra note 6 § 12-4.1e, at 542- 43 n.457 (citing cases).

[FN75]. See [Boggs v. State](#), 667 So. 2d 765, 766 n.3 (Fla. 1996) (discussing press report of trial judge's beliefs that defendant was "faking mental illness to avoid execution"). On the significance of this position to Justice Scalia's opinion in *Atkins*, see infra notes 150-151. See generally, on this question, 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).

[FN76]. See 4 Perlin, *Mental Disability Law*, supra note 6 § 12.4.1e, at 544:

Ford reflects the depth of the split on the question of the standards to be employed in determining one's competency to be executed. Further, the perplexing inconsistencies between the positions taken by several of the Justices and their opinions in other mental disability cases probably result from the grave difficulties the Justices face in resolving these questions. Unfortunately, the fact that the procedural aspect of Ford is "controlled" by a plurality opinion will make it far more difficult for legislators in those states with statutes similar to Florida's to draft new laws that are constitutionally sound.

See, e.g., [Cuevas v. Collins](#), 932 F.2d 1078, 1084 (5th Cir. 1991) (hearing not required unless defendant is "so deranged that he is unaware that he is about to be put to death"); [Garrett v. Collins](#), 951 F.2d 57 (5th Cir. 1992) (holding that defendant's belief that his dead aunt would protect him from effects of toxic agents used during execution did not preclude imposition of death penalty on grounds of incompetency); [Shaw v. Delo](#), 762 F. Supp. 853 (E.D. Mo. 1991) (holding that funds for investigative and expert services to support incompetency claim were not necessary). On the question of whether a trial court can exclude the death penalty as a possible punishment because of a defendant's mental illness, see [Commonwealth v. Ryan](#), 5 S.W.3d 113 (Ky. 1999) (finding that court lacked authority to do so).

[FN77]. [477 U.S. 399 \(1986\)](#).

[FN78]. See 4 Perlin, *Mental Disability Law*, supra note 6 § 12-4.1c-12- 4.1d, at 527-42.

[FN79]. [492 U.S. 302 \(1989\)](#). For the Supreme Court's subsequent decision in *Penry*, see [Penry v. Johnson](#), [532 U.S. 782 \(2001\)](#), discussed in 4 Perlin, *Mental Disability Law*, supra note 6 § 10-2.3e, 12-3.3. In the latter decision, the Supreme Court again remanded because of errors in the trial court's charge on the issue of mitigation. See [Penry](#), [532 U.S. at 797-801](#).

[FN80]. For representative pre-*Penry* cases dealing with this population, see, e.g., [Bell v. Lynaugh](#), [858 F.2d 978 \(5th Cir. 1988\)](#), cert. denied, [492 U.S. 925 \(1989\)](#) (mentally retarded individuals subject to death penalty); [State v. Jones](#), [298 S.C. 118, 378 S.E.2d 594 \(1989\)](#), cert. denied, [494 U.S. 1060 \(1990\)](#) (same outcome); [Brogdon v. Butler](#), [824 F.2d 338 \(5th Cir. 1987\)](#) (same outcome).

[FN81]. [Penry v. Lynaugh](#), [492 U.S. at 307-08](#).

[FN82]. *Id.* at 333.

[FN83]. *Id.*

[FN84]. *Id.*

[FN85]. *Id.* at 334. See generally V. Stephen Cohen, Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation, 19 Fla. St. U. L. Rev. 457 (1991).

[FN86]. No other member of the court joined in this aspect of Justice O'Connor's opinion. The remainder of the opinion reflected a majority.

[FN87]. *Penry v. Lynaugh*, 492 U.S. at 336.

[FN88]. *Id.* at 338-39.

[FN89]. *Id.* at 338-40. This assertion of Justice O'Connor has been used to buttress a decision upholding the admissibility of a confession of a person with mental retardation (see generally 4 Perlin, Mental Disability Law, *supra* note 6 § 10-3-10-3.3d). See *United States v. Macklin*, 900 F.2d 948, 952-53 (6th Cir. 1990).

[FN90]. *Penry v. Lynaugh*, 492 U.S. at 340.

[FN91]. *Id.* at 341. Justices Brennan and Marshall joined in those aspects of the majority's opinion that dealt with the question of mitigation.

[FN92]. *Id.* at 349. Justice Stevens also partially dissented (for himself and Justice Blackmun), concluding that executions of the mentally retarded are unconstitutional.

[FN93]. *Id.* at 341 (Brennan, J., concurring in part and dissenting in part).

[FN94]. *Id.* at 346.

[FN95]. *Id.* at 346-48. Even if mental retardation were not always associated with the requisite lack of culpability, Justice Brennan argued that he would still find capital punishment unconstitutional for such individuals, since there is no assurance that an adequate individualized assessment of whether the death penalty is a proportionate punishment will be made at the conclusion of each death penalty trial as the relationship between degree of culpability and status of mental retardation is not "isolated" as a factor that "determinatively bars a death sentence." *Id.*

[FN96]. *Id.* at 348 (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

[FN97]. *Penry v. Lynaugh*, 492 U.S. at 348-49.

[FN98]. *Id.* at 350-51 (Scalia, J., concurring in part and dissenting in part). If a punishment is not "unusual," he explained, then it is not unconstitutional "even if out of accord with the theories of penology favored by the Justices of this Court."

[FN99]. The Supreme Court-Leading Cases, 103 Harv. L. Rev. 137, 153 (1989).

[FN100]. *Id.* at 153-54.

[FN101]. *Id.* at 154. See also *id.* at 154-55 (noting that, in other death penalty rulings, the court has considered public opinion polls in weighing consensus questions). Compare Michael L. Perlin, Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning, 69 Neb. L. Rev. 3, 32-35 (1990) (discussing role of "imperfect public opinion" in death penalty and insanity defense jurisprudence).

[FN102]. See 4 Perlin, Mental Disability Law, *supra* note 6 § 9C-7. For a case example, see *Alvord v. Wainwright*, 469 U.S. 956, 957 (1984) (Marshall, J., dissenting from denial of certiorari).

[FN103]. See 4 Perlin, Mental Disability Law, *supra* note 6 § 9C-1-9C-8; see generally Perlin, *supra* note 5, at 333-48.

[FN104]. See 4 Perlin, Mental Disability Law, *supra* note 6 § 9C-7. In those jurisdictions where the defense has been "abolished," a limited mens rea defense remains. See Michael L. Perlin, [Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence](#), 40 Case W. Res. L. Rev. 599, 640 n.178 (1989-90).

[FN105]. On the multiple meanings of competency, and the courts' confusion in attempting to clarify them, see Michael L. Perlin, Are Courts Competent to Decide Questions of Competency? Stripping the Facade from United States v. Charters, 38 U. Kan. L. Rev. 957, 967-68 (1990).

[FN106]. Compare, e.g., Lawrence Kohlberg, The Philosophy of Moral Development (1981) to Carol Gilligan, In a Different Voice (1982); see Charles Thomas & Samuel Foster, A Sociological Perspective on Public Support of Capital Punishment, 45 Am. J. Orthopsychiatry 641 (1975).

[FN107]. Compare [Fleming v. Zant](#), 259 Ga. 687, 386 S.E.2d 339 (1989) (executing mentally retarded persons constitutes cruel and unusual punishment under the Georgia constitution; defendant must present evidence at habeas hearing so that the court can determine whether there is a genuine issue of fact as to his retardation), to [Buttrum v. Black](#), 721 F. Supp. 1268, 1307 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990) (noting that Penry "forecloses" defendant's argument that death penalty was unconstitutionally applied to her because she was "emotionally 12 or 13 at the time of the crime"). See also [Richardson v. State](#), 89 Md. App. 259, 598 A.2d 1 (Spec. App. 1991), *aff'd*, 332 Md. 94, 630 A.2d 238 (1993) (finding the issue of defendant's mental retardation as bar to capital punishment should be determined by trier of fact at sentencing stage, not at pretrial proceeding); *Ex parte Williams*, 833 S.W.2d 150 (Tex. Crim. App. 1992) (noting the defendant was entitled to a charge that the jury could consider and give mitigating effect to evidence of his mental retardation in the sentencing phase. A writ of habeas corpus was granted and the sentence vacated); [State v. Patillo](#), 262 Ga. 259, 417 S.E.2d 139 (1992) (barring execution of mentally retarded persons under Georgia statute, the jury should not be informed of the effect of a finding of mental retardation in a death penalty case).

[FN108]. Perlin, *supra* note 19, at 216.

[FN109]. [Atkins](#), 536 U.S. at 306.

[FN110]. [Id.](#) at 308.

[FN111]. [Id.](#)

[FN112]. [Id.](#) at 309.

[FN113]. [Id.](#)

[FN114]. [Id.](#)

[FN115]. [Id.](#) at 310 (quoting [State v. Atkins](#), 534 S.E. 2d 312, 323-24 (2000)).

[FN116]. [Atkins](#), 536 U.S. at 311.

[FN117]. [Id.](#) at 312 (quoting [Penry](#), 492 U.S. at 331).

[FN118]. [Id.](#) at 314-15.

[FN119]. [Id.](#) at 315-16.

[FN120]. [Id.](#) at 317.

[FN121]. [Id.](#)

[FN122]. [Id.](#) at 318.

[\[FN123\]](#). Id. (emphasis added).

[\[FN124\]](#). Id.

[\[FN125\]](#). [428 U.S. 153, 183 \(1976\)](#).

[\[FN126\]](#). Id.

[\[FN127\]](#). [Atkins, 536 U.S. at 319](#) (quoting, in part, Enmund, [458 U.S. at 798](#)).

[\[FN128\]](#). See, e.g., [Godfrey v. Georgia, 446 U.S. 420, 433 \(1980\)](#) (vacating death sentence because petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder").

[\[FN129\]](#). [Atkins, 536 U.S. at 319](#).

[\[FN130\]](#). [Enmund, 458 U.S. at 799](#).

[\[FN131\]](#). [Atkins, 536 U.S. at 320](#).

[\[FN132\]](#). Id.

[\[FN133\]](#). Id.

[\[FN134\]](#). Id. at 321.

[\[FN135\]](#). Id.

[\[FN136\]](#). Id.

[\[FN137\]](#). Id. (quoting, in part, Ford, [477 U.S. at 405](#)).

[\[FN138\]](#). Id. at 316 n.21.

[\[FN139\]](#). Id. at 324 (Rehnquist, C.J., dissenting).

[\[FN140\]](#). Id. at 338 (Scalia, J., dissenting).

[\[FN141\]](#). Id. at 338-39.

[\[FN142\]](#). Id. at 342.

[\[FN143\]](#). Id. at 348.

[\[FN144\]](#). Id. at 348-49 (quoting, in part, [Thompson v. Oklahoma, 487 U.S. 815, 873 \(1988\)](#) (Scalia, J., dissenting)).

[\[FN145\]](#). Id. at 349.

[\[FN146\]](#). Id. at 351.

[\[FN147\]](#). Id.

[\[FN148\]](#). Id. at 352.

[\[FN149\]](#). Id.

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[FN150]. *Id.* at 353. Justice Scalia contrasted this, curiously, with a reference to the feigning insanity defense pleader who then "risks commitment to a mental institution until he can be cured (and then tried and executed)." *Id.* How a defendant who feigns insanity can be cured is, to be honest, beyond me. See generally Perlin, *supra* note 75, at 1408-16.

[FN151]. [Atkins, 536 U.S. at 354](#) (quoting 1 Hale, Pleas of the Crown 32- 33 (1736)).

[FN152]. The states' track record in the wake of the parallel case of *Ford v. Wainwright* has been spotty, to say the least. See 4 Perlin, *Mental Disability Law*, *supra* note 6 § 12-4.1e, at 543 (noting that post-Ford case law reveals "a continued failure on the part of many courts to authentically implement the Ford decision").

[FN153]. See Douglas Mossman, [Atkins v. Virginia: A Psychiatric Can of Worms](#), 33 N.M. L. Rev. 255 (2003).

[FN154]. Compare, e.g., [Larry P. v. Riles, 793 F.2d 969 \(9th Cir.1984\)](#) (discussing discriminatory impact of IQ tests in school placements).

[FN155]. See Christopher Slobogin, [What Atkins Could Mean for People with Mental Illness](#), 33 N.M. L. Rev. 293 (2003).

[FN156]. See, e.g., [Smith v. State, 2002 WL 126985, at *57 \(Ala. Crim. App. 2002\)](#) (listing defendant Willie Smith's "verbal I.Q. of 75, classified as the borderline range between mild retardation and low-average intelligence" as a "properly found" mitigating factor) (decided prior to *Atkins*).

[FN157]. Compare [Apprendi v. New Jersey, 530 U.S. 466 \(2000\)](#) (enhancing jury role in determination of factors increasing defendant's potential punishment), with [Ring v. Arizona, 536 U.S. 584 \(2002\)](#) (holding that an Arizona statute authorizing trial judge to determine the presence or absence of the aggravating factors in a death penalty case violates the Sixth Amendment right to a jury trial in capital prosecutions).

[FN158]. [Harper v. Virginia Dep't of Taxation, 509 U.S. 86 \(1993\)](#) (explaining methodology for determining application of retroactivity doctrine).

[FN159]. I hope to do so in another paper relatively soon.

[FN160]. See Carol Steiker & Jordan Steiker, [Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment](#), 109 Harv. L. Rev. 355, 426 (1995):

On the other hand, if the Court remains committed to addressing in some significant sense the concerns that originally animated it in *Furman* and *Gregg*, it is hard to see why the Court has not attempted to flesh out the ideas for alternative regulatory regimes that we have sketched. It is difficult to imagine a body of doctrine that is much worse-either in its costs of implementation or in its negligible returns-than the one we have now.

[FN161]. See Judith Resnik, [Managerial Judges](#), 96 Harv. L. Rev. 374, 433 (1982) ("The mere existence of rules does not automatically result in their enforcement, and the costs of implementation can be high.").

[FN162]. On the use of this phrase in analyzing the Supreme Court's jurisprudence in the First Amendment context, see, e.g., Rodney Smolla, [Rethinking First Amendment Assumptions about Racist and Sexist Speech](#), 47 Wash. & Lee L. Rev. 171, 194 (1990).

[FN163]. [466 U.S. 668 \(1984\)](#).

[FN164]. [470 U.S. 68 \(1985\)](#).

[FN165]. [509 U.S. 389 \(1993\)](#).

[FN166]. On the public's demand that mentally disabled defendants "look crazy," see generally Perlin, *supra* note 104,

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at 724-27; 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, 265 (1994) ("[T]he public has always demanded that mentally ill defendants comport with its visual images of 'craziness'."). See also, e.g., John Parry & Eric Drogin, Civil Law Handbook on Psychiatric and Psychological Evidence and Testimony § 1.01, at 1-2 (2001).

[FN167]. Perlin, *supra* note 19, at 207-08.

[FN168]. The vast majority of criminal defense lawyers have had no training in identifying or understanding mental retardation. See, e.g., Ruth Luckasson, The Death Penalty and Those with Mental Retardation, in Amnesty International USA, *The Machinery of Death: A Shocking Indictment of Capital Punishment in the United States* 93 (1994); Sandra A. Garcia & Holly V. Steele, [Mentally Retarded Offenders in the Criminal Justice and Mental Retardation Services Systems in Florida: Philosophical, Placement, and Treatment Issues](#), 41 Ark. L. Rev. 809, 820 (1988).

[FN169]. See 4 Perlin, Mental Disability Law, *supra* note 6 § 12-3.6, at 506- 10 nn.179-194 (representative cases in the death penalty context). See also *infra* text accompanying notes 184-189.

[FN170]. See generally Perlin, *supra* note 101; Perlin, *supra* note 7, at 16- 20.

[FN171]. [504 U.S. 127 \(1992\)](#) (discussing the right of competent criminal defendants to refuse the involuntary administration of antipsychotic medications).

[FN172]. *Id.* at 144, relying on William Geimer & Jonathan Amsterdam, [Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases](#), 15 Am. J. Crim. L. 1, 51-53 (1987-1988). I discuss the significance of this finding in Perlin, *supra* note 19, at 220, and in Perlin, *supra* note 166, at 248. On the extent to which fear of persons with mental illness is a key determining factor in jury death penalty decision making, see Stephen Garvey, [The Emotional Economy of Capital Sentencing](#), 75 N.Y.U. L. Rev. 26 (2000). See also [Shannon v. United States](#), 512 U.S. 573, 585-86 (1994).

[FN173]. See generally Denis Keyes et al., [Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant](#), 22 Mental & Physical Disability L. Rep. 529 (1998).

[FN174]. See Joseph A. Nese, Jr, The [Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution Under the Eighth Amendment](#), 40 Duq. L. Rev. 373, 383 (2002) (citing Rosa Ehrenreich & Jamie Fellner, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation* 4 (Malcolm Smart & Cynthia Brown eds., Human Rights Watch) (2001)).

[FN175]. *Id.*

[FN176]. Keyes et al., *supra* note 173, at 536 (citing Robert Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967)).

[FN177]. [362 U.S. 402, 402 \(1960\)](#). In *Dusky*, the Court asked whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he has a "rational as well as factual understanding of the proceedings against him." See Michael L. Perlin, "For the [Misdemeanor Outlaw](#)": [The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities](#), 52 Ala. L. Rev. 193, 200 (2000) (criticizing *Dusky* as "confusing and less than helpful").

[FN178]. Nese, *supra* note 174, at 383 (citing Ehrenreich & Fellner, *supra* note 174, at 22).

[FN179]. See generally Perlin, *supra* note 7.

[FN180]. Keyes et al., *supra* note 173, at 536.

[FN181]. See Winiviere Sy, [The Right of Institutionalized Disabled Patients to Engage in Consensual Sexual Activity](#).

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[23 Whittier L. Rev. 545, 563- 64 \(2001\)](#) (discussing [State v. Soura, 796 P.2d 109, 115 \(Idaho 1990\)](#), where the court noted that the victim's "facial expressions consisting of a 'sagging jaw, mouth open' and tendency to 'stare off into space'" were evidence of her mental retardation). For an astonishing report, see Keyes et al., *supra* note 173, at 530 n.17: "In one recent case, one of the authors learned that the prosecutor's expert, a psychologist, suggested that because the defendant could wash his own laundry, ride the bus and watch TV on his own, he did not have mental retardation."

[\[FN182\]](#). Keyes et al., *supra* note 173, at 536 (citing Edgerton, *supra* note 176).

[\[FN183\]](#). [Atkins, 536 U.S. at 321.](#)

[\[FN184\]](#). [466 U.S. 668 \(1984\)](#) (holding that proper standard for attorney performance is that of reasonably effective assistance).

[\[FN185\]](#). Bazelon, *supra* note 1, at 2.

[\[FN186\]](#). See, e.g., Louis Bilionis & Richard Rosen, [Lawyers, Arbitrariness, and the Eighth Amendment, 75 Tex. L. Rev. 1301, 1321-22 n.65 \(1997\)](#) (citing examples).

[\[FN187\]](#). See, e.g., Perlin, *supra* note 19, at 203-05 (citing examples).

[\[FN188\]](#). See, e.g., [Smith v. Stewart, 189 F.3d 1004 \(9th Cir. 1999\)](#), [121 Sup. Ct. 358 \(2000\)](#) (finding that trial counsel did not even investigate evidence of mental disabilities and mental impairment at the time of the crimes, let alone present such evidence at trial); [Rompilla v. Horn, 2000 WL 964750, *14 \(E.D. Pa. July 11, 2000\)](#) (noting that trial counsel failed to inquire into and present evidence about defendant's mental retardation, cognitive impairments, and organic brain damage); [Valdez v. Johnson, 93 F. Supp. 2d 769, 787 \(S.D. Tex. 1999\)](#) (finding that trial counsel failed to present evidence of Valdez's childhood history of borderline intelligence, impaired judgment, and poor social skills); [Rondon v. Indiana, 711 N.E.2d 506, 522 \(Ind. 1999\)](#) (noting that trial counsel failed to present mitigating evidence of defendant's mental health). See generally Shruti S.B. Desai, [Effective Capital Representation of the Mentally Retarded Defendant, 13 Cap. Def. J. 251, 253 n.12 \(2001\)](#) (discussing these cases).

[\[FN189\]](#). See, e.g., [Boyd v. Johnson, 167 F.3d 907 \(5th Cir. Feb. 1999\)](#), cert. denied, [527 U.S. 1055 \(1999\)](#) (trial counsel's failure to investigate and present possible evidence of the defendant's mental retardation did not amount to ineffective assistance of counsel); [Andrews v. Collins, 21 F.3d 612, 623 \(5th Cir. 1994\)](#) (rejecting ineffective assistance claim of defendant whose experts estimated his IQ to be 68, because he was claiming complete innocence rather than using his mental deficiency as his defense), cert. denied, [513 U.S. 1114 \(1995\)](#); [Motley v. Collins, 18 F.3d 1223, 1227-28 \(5th Cir.\)](#) (counsel's failure to present evidence of defendant's organic brain disorder was not ineffective), cert. denied, [513 U.S. 960 \(5th Cir. 1993\)](#) (failure to offer mitigating evidence of diminished mental capacity not ineffective assistance); [Smith v. Black, 904 F.2d 950, 977 \(5th Cir. 1990\)](#) (counsel not ineffective, even though he did not introduce fact that defendant's IQ was 70); Kevin Cullen, The New Freedom Riders, Boston Globe, June 25, 1995, at 16 (discussing case where Georgia appeals court held that defendant's trial counsel was not ineffective, though his attorney did not raise the fact that his client's IQ was 63 nor cite the Georgia law that bans the execution of persons with mental retardation). See generally [Middleton v. Evatt, 855 F. Supp. 837, 842 \(D.S.C. 1994\)](#) (counsel's reference to the mentally retarded defendant as "dumb" during closing argument did not constitute ineffective assistance of counsel), as discussed in Doug Gardner, [Criminal Procedure, 31 Tex. Tech L. Rev. 517, 545 \(2000\)](#); Jonathan Bing, [Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future, 22 N.Y.U. Rev. L. & Soc. Change 59, 84-85 nn.157-158 \(1996\)](#). See also [Holladay v. Haley, 209 F.3d 1243 \(11th Cir. 2000\)](#) (affirming the denial of a convicted capital murder defendant's petition for a writ of habeas corpus, finding that his attorneys did not provide ineffective assistance of counsel in failing to properly pursue mitigation based on his mental retardation); Diminished Capacity; Effective Representation; MR; Miranda Rights, 21 Mental & Phys. Disability L. Rep. 26 (1997) (discussing United States ex rel. Davenport v. Peters, No. 96 C 2284 (N.D. Ill. Nov. 14, 1996), finding that defense counsel did not provide ineffective assistance to a murder defendant who claimed that his attorney did not present evidence of his mental retardation).

[\[FN190\]](#). See, e.g., Perlin, *supra* note 19; Bilionis & Rosen, *supra* note 186; Desai, *supra* note 188; Bing, *supra* note 189; John Blume & David Bruck, [Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41](#)

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[Ark. L. Rev. 725 \(1988\)](#); James Ellis & Ruth A. Luckasson, [Mentally Retarded Criminal Defendants](#), 53 Geo. Wash. L. Rev. 414 (1985).

[\[FN191\]](#). Perlin, *supra* note 166, at 241-42 (footnotes omitted).

[\[FN192\]](#). Research demonstrates that mental health professionals frequently commit this important error. See, e.g., Diane Courselle et al., [Suspects, Defendants, and Offenders with Mental Retardation in Wyoming](#), 1 Wyo. L. Rev. 1, 5 (2001) (relying upon President's Committee on Mental Retardation, Report to the President: Citizens with Mental Retardation and the Criminal Justice System 3-22 (1991)); Keyes et al., *supra* note 173, at 530. It defies credulity to suggest that lay jurors are more sophisticated in their determinations.

[\[FN193\]](#). Alan Stone, Mental Health and Law: A System in Transition 219 (1976). See also Caton F. Roberts et al., Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense, 11 Law & Hum. Behav. 207, 226 (1987) (the only defendant who will likely be found universally insane is the "totally mad individual who acts impulsively in response to a glaring psychotic process that is itself tied thematically to a criminal action").

[\[FN194\]](#). James S. Liebman & Michael J. Shepard, Guiding Sentencer Discretion Beyond the "Boilerplate": Mental Disorder as a Mitigating Factor, 66 Geo. L.J. 757, 825 (1978).

[\[FN195\]](#). Edward Miller, [Executing Minors and the Mentally Retarded: The Retribution and Deterrence Rationales](#), 43 Rutgers L. Rev. 15, 50 (1990).

[\[FN196\]](#). See, e.g., [Murtishaw v. Woodford](#), 255 F.3d 926 (9th Cir. 2001).

[\[FN197\]](#). Patricia Hagenah, [Imposing the Death Sentence on Mentally Retarded Defendants: The Case of Penry v. Lynaugh](#), 59 UMKC L. Rev. 135, 151 (1990).

[\[FN198\]](#). See [Eddings v. Oklahoma](#), 455 U.S. 104, 114 (1982) (sentencing authority must consider any relevant mitigating evidence); [Penry v. Lynaugh](#), 492 U.S. 302, 322 (1989) (mitigating evidence of a defendant's mental retardation had relevance to his moral culpability); [Penry v. Johnson](#), 532 U.S.782, 797-98 (2001) (jury must have adequate vehicle so as to assess mitigating effect of mental retardation).

[\[FN199\]](#). Perlin, *supra* note 19, at 233.

[\[FN200\]](#). See, e.g., Susan Bandes, [Empathy, Narrative, and Victim Impact Statements](#), 63 U. Chi. L. Rev. 361 (1996); Jeffrey J. Pokorak, [Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases](#), 30 St. Mary's L.J. 421 (1999).

[\[FN201\]](#). Perlin, *supra* note 19, at 233, quoting, in part, William S. Geimer, [Law and Reality in the Capital Penalty Trial](#), 18 N.Y.U. Rev. L. & Soc. Change 273, 286 (1990-1991).

[\[FN202\]](#). Perlin, *supra* note 19, at 233.

[\[FN203\]](#). See Richard Sherwin, [Law, Violence, and Illiberal Belief](#), 78 Geo. L.J. 1785, 1821 n.164 (1990).

[\[FN204\]](#). Elizabeth F. Maringer, [Witness for the Prosecution: Prosecutorial Discovery of Information Generated by Non-testifying Defense Psychiatric Experts](#), 62 Fordham L. Rev. 653, 653 n.3 (1993).

[\[FN205\]](#). Id. (One attorney, for example, "had a psychologist examine his client before his 1982 trial-but wouldn't allow the doctor to testify. Like many other defense attorneys, he assumed talk of brain disorders, mental retardation or childhood abuse could evoke fear instead of empathy."). See Scott W. Howe, [Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation](#), 26 Ga. L. Rev. 323, 359 n.136 (1992) (citing Marcia Coyle et al., Trial and Error in the Nation's Death Belt: Fatal Defense, Nat'l L.J., June 11, 1990, at 30, 34); see also Ellen F. Berkman, Note, [Mental Illness as an Aggravating Circumstance in Capital Sentencing](#), 89 Colum. L. Rev. 291, 304 (1989) (discussing defense counsels' dilemma concerning use of evidence of defendants' mental illness).

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[FN206]. [Atkins](#), 536 U.S. at 321 (citing [Penry v. Lynaugh](#), 492 U.S. at 323-25).

[FN207]. [Id.](#) at 320.

[FN208]. Robert L. Hayman, Jr., [Beyond Penry: The Remedial Use of the Mentally Retarded Label in Death Penalty Sentencing](#), 59 UMKC L. Rev. 17, 48 (1990); see [id.](#) n.166 (citing Samuel Pillsbury, [Emotional Justice: Moralizing the Passions of Criminal Punishment](#), 74 Cornell L. Rev. 655 (1989) (urging that empathy with the offender is crucial to the fairness of the sentencing scheme and must be explicitly mandated to counter "the myth of dispassion")).

[FN209]. Francine Banner, [Rewriting History: The Use of Feminist Narratives to Deconstruct the Myth of the Capital Defendant](#), 26 N.Y.U. Rev. L. & Soc. Change 569, 600 (2000-01) (citing Eileen McNamara, [Nobody Cared He Was Insane](#), Boston Globe, Nov. 30, 1996, at B1).

[FN210]. Banner, [supra](#) note 209, at 600. See also Welsh S. White, [Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care](#), 1993 U. Ill. L. Rev. 323, 362 (citing Deana D. Logan, [Is It Mitigation or Aggravation? Troublesome Areas of Defense Evidence in Capital Sentencing](#), Cal. Att'ys for Crim. Just. F., Sept./Oct. 1989, at 14 (discussing the possibility that a jury may "glean from evidence relating to defendant's mental problems or background difficulties that the defendant is an 'irreparable monster' who must be put to death to safeguard society")).

[FN211]. Stephen Sugarman, [Two School-Finance Roles for the Federal Government: Promoting Equity and Choice](#), 17 St. Louis U. Pub. L. Rev. 79, 84 (1997).

[FN212]. [347 U.S. 483 \(1954\)](#).

[FN213]. [Id.](#) at 494. See Michael L. Perlin, [The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?](#), 8 J.L. & Health 15, 22 (1993-94).

[FN214]. See Perlin, [supra](#) note 213, at 22.

[FN215]. On the impact of the fear-of-faking myth on this question, see [infra](#) text accompanying notes 248-262.

[FN216]. Keyes et al., [supra](#) note 173, at 536.

[FN217]. Desai, [supra](#) note 188, at 268.

[FN218]. [Id.](#)

[FN219]. [Id.](#)

[FN220]. [Id.](#) quoting, in part, John H. Blume & Pamela Blume Leonard, [Principles of Developing and Presenting Mental Health Evidence in Criminal Cases](#), The Champion, Nov. 2000, at 70:

Thus the testimony of lay witnesses, such as defendant's family, friends, teachers or neighbors, should always be presented to augment the testimony of experts. When testimony regarding the defendant's mental retardation is presented from various sources, defense counsel must interlock the testimonies and other relevant evidence to achieve a comprehensible presentation of the mental retardation issue.

[FN221]. See [supra](#) text accompanying note 181, discussing Keyes et al., [supra](#) note 173, at 536.

[FN222]. [470 U.S. 68 \(1985\)](#).

[FN223]. [Id.](#) at 83.

[FN224]. Compare [Jones v. State](#), 189 Ga. App. 232, 236-37, 375 S.E.2d 648, 652 (1988) (defendant not entitled under Ake to appointment of a psychologist), with [Funk v. Commonwealth](#), 8 Va. App. 91, 91-93, 379 S.E.2d 371,

[371-74 \(1989\)](#) (court decision to appoint clinical psychologist satisfies Ake).

[\[FN225\]](#). See, e.g., Parry & Drogin, *supra* note 166 § 1.09(e), at 35-37.

[\[FN226\]](#). Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure* 802 (6th ed. 2000). See also David A. Harris, [Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent](#), 68 N.C. L. Rev. 763, 783 (1990) ("Lower courts often have interpreted Ake less than generously, unduly constricting the availability of the right.").

[\[FN227\]](#). Keyes et al., *supra* note 173, at 530.

[\[FN228\]](#). See, e.g., Perlin, *supra* note 19, at 231.

[\[FN229\]](#). Perlin, *supra* note 75, at 1412, relying on findings reported in Dorothy Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 Am. J. Psychiatry 584, 588 (1988) (stating that death row juveniles "almost uniformly tried to hide evidence of cognitive deficits and psychotic symptoms"), and in Dorothy Otnow Lewis et al., *Psychiatric and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 Am. J. Psychiatry 838, 841 (1986) (stating that all but one of a sample of death row inmates studied attempted to minimize rather than exaggerate their degree of psychiatric disorders).

[\[FN230\]](#). Nese, *supra* note 174, at 383 (citing Ehrenreich & Fellner, *supra* note 174, at 4).

[\[FN231\]](#). See, e.g., [People v. McCleary](#), 567 N.E. 2d 434, 437 (Ill. App. Ct. 1990) (testimony from doctor finding that, in his opinion, defendant was insane and that "defendant did not want to be known as a crazy person and, in fact, was 'malingering sanity'").

[\[FN232\]](#). Michael Mello, [Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row](#), 37 Am. U. L. Rev. 513, 550 (1988).

[\[FN233\]](#). Rebecca Dick-Hurwitz, [Penry v. Lynaugh: The Supreme Court Deals a Fatal Blow to Mentally Retarded Capital Defendants](#), 51 U. Pitt. L. Rev. 699, 724 (1990).

[\[FN234\]](#). [Atkins](#), 536 U.S. at 321.

[\[FN235\]](#). James Liebman, [The Overproduction of Death](#), 100 Colum. L. Rev. 2030, 2108 n.185 (2000).

[\[FN236\]](#). See, e.g., Jeffrey Wertkin, [Competency to Stand Trial](#), 90 Geo. L.J. 1514, 1515-16 n.1308 (2002), discussing, inter alia, [United States v. Santos](#), 131 F.3d 16, 20-21 (1st Cir. 1997); [United States v. Morrison](#), 153 F.3d 34, 39-40, 46-47 (2d Cir. 1998); [Noland v. French](#), 134 F.3d 208, 211, 219 (4th Cir. 1998); [Moody v. Johnson](#), 139 F.3d 477, 482 (5th Cir. 1998); [United States v. Collins](#), 949 F.2d 921, 926-27 (7th Cir. 1991); [Wise v. Bowersox](#), 136 F.3d 1197, 1202-05 (8th Cir. 1998); [United States v. Frank](#), 956 F.2d 872, 874-75 (9th Cir. 1991); [Foster v. Ward](#), 182 F.3d 1177, 1189- 91 (10th Cir. 1999).

[\[FN237\]](#). 509 U.S. 389 (1993).

[\[FN238\]](#). [Id.](#) at 390.

[\[FN239\]](#). [Id.](#) at 398.

[\[FN240\]](#). [Id.](#)

[\[FN241\]](#). [Id.](#) at 400 (quoting [Parke v. Raley](#), 506 U.S. 20, 29 (1992)).

[\[FN242\]](#). [Id.](#) at 402, citing [Medina v. California](#), 505 U.S. 437 (1992).

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[FN243]. Jennifer W. Corinis, [A Reasoned Standard for Competency to Waive Counsel after *Godinez v. Moran*](#), 80 *B.U. L. Rev.* 265, 280 (2000). See generally Perlin, *supra* note 7, at 205-22; Perlin, *Dignity*, *supra* note 17.

[FN244]. Corinis, *supra* note 243, at 280; see generally Perlin, *Dignity*, *supra* note 17.

[FN245]. Perlin, *supra* note 177, at 227.

[FN246]. See, e.g., *id.* at 227; see generally Perlin, *supra* note 7, at 59-77.

[FN247]. 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, 1258 (1997), discussing, *inter alia*, judicial responses to *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (right to liberty); *Jackson v. Indiana*, 406 U.S. 715 (1972) (application of Due Process Clause to commitments following incompetency to stand trial findings); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) (application of substantive and procedural Due Process Clauses to involuntary civil commitment process).

[FN248]. See generally Perlin, *supra* note 75.

[FN249]. See Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency](#), 47 *U. Miami L. Rev.* 625 (1993).

[FN250]. See Perlin, *supra* note 75.

[FN251]. See Perlin, *supra* note 19.

[FN252]. See Perlin, *supra* note 5, at 247.

[FN253]. See Perlin, *supra* note 19, at 216.

[FN254]. E. Selene Steelman, [A Question of Revenge: Munchausen Syndrome by Proxy and a Proposed Diminished Capacity Defense for Homicidal Mothers](#), 8 *Cardozo Women's L.J.* 261, 305 (2002).

[FN255]. Bryan Dupler, The [Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure](#), 55 *Okla. L. Rev.* 1, 38 n.208 (2002).

[FN256]. Perlin, *supra* note 75, at 1408.

[FN257]. Perlin, *supra* note 105, at 714 (quoting, in part, *Bolton v. Harris*, 395 F.2d 642, 649 n.35 (D.C. Cir. 1968)).

[FN258]. Gilbert Geis & Robert F. Meier, Abolition of the Insanity Plea in Idaho: A Case Study, 477 *Annals* 72, 73 (1985) (explaining that Idaho residents hold the view that persons should not be able to avoid punitive consequences of criminal acts by reliance on "either a real or a faked plea of insanity").

[FN259]. See *State v. Perry*, 610 So. 2d 746, 781 (La. 1992) (Cole, J., dissenting) ("Society has the right to protect itself from those who would commit murder and seek to avoid their legitimate punishment by a subsequently contracted, or feigned, insanity").

[FN260]. *Atkins*, 536 U.S. at 353.

[FN261]. Perlin, *supra* note 249, at 678-79 (footnotes omitted). See also Perlin, *supra* note 75, at 1405:

Perhaps the oldest of the insanity defense myths is that criminal defendants who plead insanity are usually faking, a myth that has bedeviled American jurisprudence since the mid-nineteenth century. Of the 141 individuals found NGRI [not guilty by reason of insanity] in one jurisdiction over an eight year period, there was no dispute that 115 were schizophrenic and in only three cases was the diagnostician unwilling or unable

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to specify the nature of the patient's mental illness.

Compare Robert Wettstein & Edward Mulvey, Disposition of Insanity Acquittees in Illinois, 16 Bull. Am. Acad. Psychiatry & L. 11, 15 (1988) (one of 137 insanity acquittees seen as malingering).

[FN262]. See Perlin, *supra* note 75, at 1380.

[FN263]. Perlin, *supra* note 177, at 235-36; Perlin, *supra* note 249, at 680.

[FN264]. See, e.g., David Baldus et al., [Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia](#), 83 Cornell L. Rev. 1638, 1688-89, tbl. 6 (1998).

[FN265]. Jamie Fellner, [Beyond Reason: Executing Persons with Mental Retardation](#), 28 Hum. Rts. 9, 12 (2002).

[FN266]. Clive A. Stafford Smith & Remy Voisin Starns, [Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in Post-conviction Proceedings](#), 45 Loy. L. Rev. 55, 70 n.92 (1999).

[FN267]. Timothy Hall, [Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant after Penry v. Johnson](#), 35 Akron L. Rev. 327, 327 (2002); *id.* nn.2-3, citing, *inter alia*, Joan Petersilia, Justice for All? Offenders with Mental Retardation and the California Corrections System, Dec. 1, 1997 Prison J. 358380; Randall Coyne & Lyn Entzerth, [Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions](#), 4 Geo. J. on Fighting Poverty 3, 40 (1996) (between twelve and twenty percent).

[FN268]. Jonathon L. Bing, [Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future](#), 22 N.Y.U. Rev. L. & Soc. Change 59, 62-63 (1996).

[FN269]. See Perlin, *supra* note 19, at 205-06.

[FN270]. John Parry & Eric Drogin, Criminal Law Handbook on Psychiatric and Psychological Evidence and Testimony (2000).

[FN271]. E.g., [People v. Kelley](#), 142 Cal. Rptr. 457, 467 (Cal. Ct. App. 1977) (stating that a prosecutor is held to a higher standard because of his or her unique role in exercising sovereign state power); [State v. Ferrone](#), 113 A. 452, 455 (Conn. 1921) (stating that a prosecutor is a high public officer charged to seek impartial justice).

[FN272]. E.g., Perlin, *Idiot Wind*, *supra* note 17, at 236-37; Perlin, *supra* note 177, at 195; Michael L. Perlin, "[I Ain't Gonna Work on Maggie's Farm No More](#)": Institutional Segregation, Community Treatment, the ADA, and the Promise of *Olmstead v. L.C.*, 17 T.M. Cooley L. Rev. 53, 86 (2000); Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did, 10 J. Contemp. Leg. Iss. 3, 5 (1999).

[FN273]. See *supra* note 9.

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IV. DEALING WITH MENTAL DISABILITY IN TRUST & ESTATE LAW PRACTICE

***535** "THINGS HAVE CHANGED:" [\[FN1\]](#) LOOKING AT NON-INSTITUTIONAL MENTAL DISABILITY LAW THROUGH THE SANISM FILTER

[Michael L. Perlin](#) [\[FNa1\]](#)

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I have been writing about mental disability law for over 25 years, dating back to my days as Director of New Jersey's Division of Mental Health Advocacy. [\[FN2\]](#) My scholarship has proceeded through many phases, [\[FN3\]](#) but, in the past decade, I have come to focus more and more on what I call "sanism" and what I call "pretextuality." [\[FN4\]](#)

***536** I define "sanism" as "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." [\[FN5\]](#) It infects both our jurisprudence and our lawyering practices. [\[FN6\]](#) Sanism is largely invisible, and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization. It is sustained and perpetuated by our use of alleged "ordinary common sense" ("OCS") and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process. [\[FN7\]](#)

"Pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage in similarly dishonest (frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." [\[FN8\]](#) 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. [\[FN9\]](#)

I am convinced that it is impossible to understand any aspect of mental disability law without understanding the corrosive and malignant impact of these factors. [\[FN10\]](#) I wrote my most recent book, *The Hidden*537 Prejudice: Mental Disability on Trial*, [\[FN11\]](#) to illuminate this impact, to cast some light on why mental disability law has developed this way, and to indicate what the implications are for the future of this area of the law. I did this by looking at those areas of the law that I write and teach about (and almost all of which I practiced in): involuntary civil commitment, institutional rights law, the Americans with Disabilities Act, sexual autonomy, and all aspects of the criminal trial process. [\[FN12\]](#)

Each one of these legal subjects and just about all the mental disability law topics that I have and continue to write about, with the exception of Tarasoff/"psychiatric torts" issues, [\[FN13\]](#) deal primarily with one discrete population: persons who are subject to commitment to in-patient psychiatric hospitals. Some of my writing has looked at the involuntary civil commitment process, [\[FN14\]](#) some at the treatment of persons once institutionalized, [\[FN15\]](#) some at

their treatment in the community once released, [\[FN16\]](#) and some at the intersection between mental disability law and the criminal trial process. [\[FN17\]](#) Nevertheless, it has dealt with questions of institutionalization, and, by and large, these are questions that affect poor people. [\[FN18\]](#) This is certainly not to say that mental illness is limited to persons of low economic status, but rather, invariably, by the time a person becomes subject to the involuntary civil commitment process, there is an excellent chance she is indigent.

Of course, problems of mental disability are not solely institutional problems. A significant percentage of the public - the vast majority of which will never be in peril of institutionalization - exhibit some sort of serious mental illness during their lifetime. [\[FN19\]](#) A much *538 larger percentage exhibits some sign of mental disability or mental disorder. [\[FN20\]](#) This population - like the rest of the population - frequently has problems that require resolution by a lawyer and the legal system. Such problems include issues regarding contracts, [\[FN21\]](#) property, [\[FN22\]](#) domestic relations, [\[FN23\]](#) and trusts and estates. [\[FN24\]](#)

Several years ago, I published a casebook, titled, predictably, *Mental Disability Law: Cases and Materials*. [\[FN25\]](#) Putting together the chapters in institutional mental disability law, and what I inartfully call "criminal mental disability law," posed one set of problems: so many cases and so few pages (though my students who have been schlepping this book around may disagree). In these areas there is a surfeit of cases, and I was faced with difficult questions of what to include and what to omit. When I did the first supplement, I encountered the same predicament. [\[FN26\]](#) But, when I decided to include a non-constitutional, non-institutionally-based civil law chapter, my dilemma was very different: what to include? Again, putting aside psychiatric tort issues (about which there is enough material to sustain a casebook of its own), [\[FN27\]](#) there has been what appears at first glance to be a startling paucity of recent developments in almost all other areas of private civil law: [\[FN28\]](#) just a handful of mostly-uninspired (and uninspiring) cases and a few student notes. I am satisfied that the selections I made were good ones, and continue to believe that they serve valuable pedagogic purposes. [\[FN29\]](#) That said, I certainly did not give them the thought, attention, *539 and focus that I gave the cases and materials in the remaining chapters of the book.

So why is this? I can conjure a few possible explanations:

1. The Supreme Court made it clear thirty years ago that the due process clause applies to all institutional decision-making, [\[FN30\]](#) and that all questions dealing with the "nature and duration" of commitment are constitutionally bound. [\[FN31\]](#) As a result, the "high ticket" questions in the constitutional litigator's arsenal have come to play a role in institutional litigation, leading to an explosion of case law and commentary. [\[FN32\]](#)
2. The Supreme Court has remained fascinated - again, for three decades - with the full range of questions involving the intersection of the criminal trial process and mental disability law. [\[FN33\]](#) The Court's fascination and resulting Supreme Court case law has translated into more scholarship and new lower court case decisions.
3. Issues of institutional mental disability law are contentious and are discussed in the public press, in both the serious and tabloid media. Questions of the proper scope of the involuntary civil commitment power (exemplified in New York by the debate over "assisted outpatient treatment" in the guise of "Kendra's Law"), [\[FN34\]](#) the dispositions of cases involving so-called "sexually violent predators" (exemplified *540 in New Jersey by the now world-famous "Megan's Law"), [\[FN35\]](#) the authority of hospitals to involuntarily administer medication to institutionalized patient (both in civil and forensic settings), [\[FN36\]](#) the application of the insanity defense in a handful of over-sensationalized cases, [\[FN37\]](#) and the relationship between mental retardation and the death penalty, [\[FN38\]](#) are all part of the public debate.
4. The passage of the Americans with Disabilities Act [\[FN39\]](#) (although not typically seen as a law that focuses on the status of persons with mental disabilities) [\[FN40\]](#) has forced us to rethink questions of discrimination, segregation, and exclusion in a variety of settings. [\[FN41\]](#) It has also to some extent, "fused" the mental disability law "movement" and the civil rights "movement." [\[FN42\]](#)
5. Consumers (or "survivors") (or "stakeholders") (or "ex-patients") are beginning to receive some public attention as a political action force. [\[FN43\]](#) While the National Alliance for the Mentally Ill ("NAMI") is the best known of these groups, [\[FN44\]](#) there are many others, *541 on all points of the political spectrum that continue to make important contributions to the ongoing debate. [\[FN45\]](#)

On the surface, none of these explanations appear to have very much to do with contracts law or trusts and estates law. Institutionalization is rarely an issue in such cases; the criminal trial process is not implicated; my legal research to date has revealed no Americans with Disabilities Act cases on point; [\[FN46\]](#) the public debate about "mental disability and the law" never seems to touch on these issues; [\[FN47\]](#) consumer groups do not list this as a priority. As a result of all this, perhaps, the legal academy has been to some extent uncharacteristically silent about this area of the law.

But is this as it should be? Is it possible that we - legal and behavioral scholars who write regularly about mental disability law - have truly missed the boat? I think we have. Are these areas of the law that we can continue to comfortably and unthinkingly marginalize? I don't think so.

When I started writing seriously about sanism, I asserted that it pervaded "all aspects of the mental disability law process." [\[FN48\]](#) I believed that then, and I believe it now. But for the reasons I have stated (and perhaps others), areas of private civil law such as trusts and estates have gotten a "free ride."

This should not be. If I am right about sanism's pervasiveness and its pernicious power, it should inevitably poison trusts and estates law just as it poisons involuntary civil commitment law or the right of institutionalized persons to sexual autonomy. If we stereotype persons with mental disabilities, "slot" them, stereotype them, deny them their social worth, emphasize their "differentness," distort their behavior, and trivialize their humanity - which is what we do in every area of mental disability law that I have taught, written about, or represented clients in - then it strains credulity to suggest that we do not do this in cases involving such areas of the law as trusts and estates. [\[FN49\]](#)

***542** In fact, not only do we do it, but we most likely do it even more invisibly. One of the arguments that I regularly make in discussing sanism is that it is "invisible:" [\[FN50\]](#) that it takes place in closed courtrooms, and is reflected in sealed transcripts. [\[FN51\]](#) It remains "under the radar screen" for most judges and other participants in the legal system. [\[FN52\]](#) But, at least there are other legal scholars writing about it, [\[FN53\]](#) and there are a handful of judges that have considered these issues in published decisions. [\[FN54\]](#) A recent Montana case that established performance standards for lawyers in involuntary civil commitment matters is the most sophisticated example yet of a court carefully assessing these issues. [\[FN55\]](#) And, not unimportantly, there is a sub-specialty "mental disability law bar" [\[FN56\]](#) that provides a cadre of dedicated lawyers whose sole job is to represent institutionalized individuals and those facing institutionalization. However, there is no such cadre in trust and estates law. And again, up until now, there has been no scholarship devoted to these issues.

***543** There is one analogy that may be of help. At about the same point in time that I was first developing my ideas about sanism, Professors David Wexler and Bruce Winick were developing their ideas about "therapeutic jurisprudence" ("TJ"). TJ studies the role of the law as a therapeutic agent. [\[FN57\]](#) This perspective recognizes that substantive rules, legal procedures, and lawyers' roles may have either therapeutic or anti-therapeutic consequences. It questions whether such rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles. [\[FN58\]](#) Wexler, Winick, and their colleagues - myself included - immediately began to apply TJ principles to every aspect of the mental disability law system. [\[FN59\]](#) I pounced on this approach, and began to use it as a basis of my discussions of involuntary civil commitment law, right to treatment law, right to refuse treatment law, and much more. [\[FN60\]](#) In fact, in *The Hidden Prejudice*, I devote my final chapter to a TJ "read" of all those aspects of mental disability law that I find to be sanist and pretextual, ***544** and conclude that TJ carries with it the potential to offer redemption for all mental disability law." [\[FN61\]](#) As I suggested, the use of therapeutic jurisprudence - to expose pretextuality and strip bare the law's sanist façade - will become a powerful tool that will serve as "a means of attacking and uprooting 'the we/they distinction that has traditionally plagued and stigmatized the mentally disabled' - then that result will be therapeutic: for the legal system, for the development of mental disability law, and ultimately, for all of us:" [\[FN62\]](#)

We cannot make any lasting progress in 'putting mental health into mental health law' until we confront the system's sanist biases and the ways that these sanist biases blunt our ability to intelligently weigh and assess social science data in the creation of a mental disability law jurisprudence.

I contend that therapeutic jurisprudence is our best strategy for confronting those biases. A practice based upon

the tenets of therapeutic jurisprudence forces such lawyers to adopt a multi-disciplinary investigation and evaluation of the therapeutic effects of the lawyering process and a case's ultimate disposition. In therapeutic jurisprudence, the client's perspective should determine the therapeutic worth or impact of a particular course of events. As a scholarly matter, it is helpful to use therapeutic jurisprudence as a framework within which to investigate and reformulate areas of law reform aimed at resolving difficult societal dilemmas. As a practical legal tool, I believe that therapeutic jurisprudence has the far-reaching potential to allow us to - finally - to come to grips with the pernicious power of sanism and pretextuality, and to offer us an opportunity to make coherent what has been incoherent - and to expose what has been hidden - for far too long. [\[FN63\]](#)

Why is this relevant? For this reason. A few years ago, TJ "broke out" of the mental disability law box, and began to look at many other aspects of the legal system: contracts law, tort law, gay rights law, mediation, *545 preventive law, and so much more. [\[FN64\]](#) Since TJ has done this, it has grown dramatically as a theoretical and jurisprudential force. [\[FN65\]](#)

This leads me to the current enterprise. Professor Pamela Champine has chosen to go where no law professor has ever gone. [\[FN66\]](#) She is exploring, for the first time, the impact of sanism on trusts and estates law. By doing so, she inaugurates a new era in mental disability law scholarship. I hope that it will inspire others to consider this and other private areas of the law, and bring the concept of "sanism" to new and receptive audiences, including those that have never had prior reason to think much about mental disability law and its significance to their practice-based and scholarly interests.

One final comment. My title starts with a Bob Dylan quote. I initially thought of Things Have Changed [\[FN67\]](#) simply because of the title: that things had changed. But the lyrics also added another level of connection. Listen to the chorus:

People are crazy and times are strange

I'm locked in tight,

I'm out of range,

I used to care, but things have changed. [\[FN68\]](#)

Dylan is a little more world-weary than I am, I guess. I still care, but he's right, of course, "things have changed." I believe that Professor Champine's new path will lead them to change even more.

[\[FN1\]](#). Bob Dylan, Things Have Changed, on The Essential Bob Dylan 2000 (Columbia 2000).

[\[FNa1\]](#). Professor Michael L. Perlin is a Professor of Law at New York Law School. Rutgers University, B.A. 1966; Columbia University School of Law, J.D. 1969.

[\[FN2\]](#). For articles from that time period, see, e.g., Michael L. Perlin, An Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger's "Time-Consuming Procedural Minuets" Theory in *Parham v. J.R.*, 9 Bull. Am. Acad. Psychiatry & L. 149 (1981); Michael L. Perlin, The Right to Participate in Voluntary, Therapeutic, Compensated Work Programs as Part of the Right to Treatment: A New Theory in the Aftermath of *Souder*, 7 Seton Hall L. Rev. 298 (1976); Joseph Rodriguez et al., Proportionality Review in New Jersey: An Indispensable Safeguard in the Capital Sentencing Process, 15 Rutgers L.J. 399 (1984); Joseph Rodriguez et al., The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders, 14 Rutgers L.J. 397 (1983); Michael L. Perlin & Robert L. Sadoff, Ethical Issues in the Representation of Individuals in the Commitment Process, 45 Law & Contemp. Probs. 161 (1982).

[\[FN3\]](#). For a sampling of doctrinal articles written in my earlier days as an academic, see, e.g., Michael L. Perlin, Are Courts Competent to Decide Questions of Competency? Stripping the Façade From *United States v. Charters*, 38 U. Kan. L. Rev. 957 (1990); Michael L. Perlin, State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?, 20 Loyola L.A. L. Rev. 1249 (1987); Michael L. Perlin, The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal

Abyss?," 29 Ariz. L. Rev. 1 (1987); Michael L. Perlin, Ten Years After: Evolving Mental Health Advocacy and Judicial Trends, 15 Fordham Urban L.J. 335 (1986-87); Michael L. Perlin, The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the Ake in Barefoot's Achilles Heel, 3 N.Y.L. Sch. Human Rts. Ann. 91 (1985); Michael L. Perlin, [Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence](#), 40 Case W. Res. L. Rev. 599 (1989-90).

[FN4]. See, e.g., Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial (2000) [hereinafter Hidden Prejudice]; Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth:" Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did, 10 J. Contemp. Leg. Issues 3 (1999) [hereinafter Half-Wracked].

[FN5]. See Michael L. Perlin, On "[Sanism](#)," 46 SMU L. Rev. 373 (1992). The classic treatment is Gordon Allport, The Nature of Prejudice (1955). For an important, more recent, and different perspective, see Elisabeth Young-Bruehl, The Anatomy of Prejudices (1996).

[FN6]. To the best of my knowledge, Dr. Morton Birnbaum coined the phrase "sanism." He is universally regarded as having first developed and articulated the constitutional basis of the right to treatment doctrine for institutionalized mental patients. E.g., Morton Birnbaum, The Right to Treatment, 46 A.B.A. J. 499 (1960). See Michael L. Perlin, [Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization](#), 28 Hous. L. Rev. 63, 92-93 (1991) (discussing Birnbaum's insights). See also [Koe v. Califano](#), 573 F. 2d 761, 764 (2d. Cir. 1978).

[FN7]. Michael L. Perlin, Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning, 69 Neb. L. Rev. 3 (1990). I discuss heuristics and "ordinary common sense" extensively in Perlin, Half-Wracked, *supra* note 4, at 3-20.

[FN8]. Charles Sevilla, The Exclusionary Rule and Police Perjury, 11 San Diego L. Rev. 839, 840 (1974); see also 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).

[FN9]. See generally Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency](#), 47 U. Miami L. Rev. 625 (1993).

[FN10]. See Perlin, Hidden Prejudice, *supra* note 4, at xv-xxv.

[FN11]. *Id.*

[FN12]. *Id.* at 79-112 (involuntary civil commitment), 125-56 (right to refuse treatment), 157-74 (right to sexual interaction), 175-204 (Americans with Disabilities Act), 205-22 (competency to plead guilty/waive counsel), 223- 44 (the insanity defense).

[FN13]. See, e.g., Michael L. Perlin, [Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's](#), 16 Law & Psychol. Rev. 29 (1992).

[FN14]. See, e.g., Michael L. Perlin, Mental Disability Law: Civil and Criminal chs. 2A, 2C (2d ed. 1998) [hereinafter Civil and Criminal].

[FN15]. See, e.g., *id.* at chs. 3A-3C (2d ed. 1999).

[FN16]. See, e.g., *id.* at chs. 4A-4C (2d ed. 2000).

[FN17]. See, e.g., *id.* at chs. 9-12 (2d ed. 2002).

[FN18]. On the question of the impact of a patient's "worth" on his treatment in the public mental health system, see Perlin, Hidden Prejudice, *supra* note 4, at 88.

[FN19]. 5.4% of Americans have a severe mental illness as measured by the criteria of the American Psychiatric

Association's Diagnostic and Statistical Manual. See R.C. Kessler et al, A Methodology for Estimating the 12-Month Prevalence of Serious Mental Illness, in *Mental Health, United States, 1999* (R.W. Manderscheid & M.J. Henderson eds. 1998).

[FN20]. 23% of Americans suffer from a diagnosable mental disorder in any given year. See D.A. Regier et al, *Epidemiologic Catchment Area Prospective: One Year Prevalence Rates of Disorders and Services*, 50 *Arch. Gen'l Psychiatry* 85 (1993).

[FN21]. See, e.g., [Rudnitsky v. Rudnitsky](#), 2001 WL 1671149 (Del. Ch.).

[FN22]. See, e.g., [Williams v. Williams](#), 73 S.W.3d 376 (Tex. App. 2002).

[FN23]. See, e.g., Perlin, *Civil and Criminal*, supra note 14, at § 5A-2.4, p. 201, nn. 264-66.

[FN24]. See, e.g., [Monahan v. Holmes](#), 139 F.Supp.2d 253 (D. Conn. 2001).

[FN25]. Michael L. Perlin, *Mental Disability Law: Cases and Materials* (1999) [hereinafter *Cases and Materials*].

[FN26]. See Michael L. Perlin, *Mental Disability Law: Cases and Materials* (2001 Supp.).

[FN27]. See Perlin, *Civil and Criminal*, supra note 14, at chs. 7A-7C.

[FN28]. The one exception involves the interrelationship between questions of parental rights, custody and adoptions and the Americans with Disabilities Act. See, e.g., Perlin, *Civil and Criminal*, supra note 14, at § 5A-2.4, p. 201, nn. 264-66 (citing cases).

[FN29]. I included several domestic relations law cases: [Matter of Sarah B.](#), 610 N.Y.S.2d 403 (N.Y. App. Div. 3d, Dep't 1994); [State of New Mexico ex rel. Children, Youth & Families Dept v. John D.](#), 934 P. 2d 308 (N.M. Ct. App. 1997); [Seltzer v. Seltzer](#), 584 So.2d 710 (La. Ct. App. 1991). See Perlin, *Cases and Materials*, supra note 25, at 700-09. However, I have limited my wills and contracts references to Laura Wolfe, [A Clarification of the Standard of Mental Capacity in North Carolina for Legal Transactions of the Elderly](#), 32 *Wake Forest L. Rev.* 563 (1997).

[FN30]. [Jackson v. Indiana](#), 406 U.S. 715, 731 (1972) ("Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process.").

[FN31]. [Id. at 738](#) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

[FN32]. I am far from the only mental disability law professor with extensive practice background in this field. See, e.g., the work of Susan Stefan, Jan Costello, or Arlene Kanter.

[FN33]. See, e.g., Michael L. Perlin, "No Direction Home:" *The Law and Criminal Defendants With Mental Disabilities*, 20 *Mental & Physical Disability L. Rep.* 605 (1996).

[FN34]. See [N.Y. Mental Hygiene Law § 9.60 \(2002\)](#). See also Perlin, *Civil and Criminal*, supra note 14 at § 2C-7.3; Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Commitment: Kendra's Law as Case Study*,--*Psychol. Pub. Pol'y & L.*--(2002) (in press).

[FN35]. See N.J. Stat. Ann § § 2C: 7-1 et seq. See also Perlin, *Civil and Criminal*, supra note 14, at § 2A-3.3; 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).

[FN36]. See Perlin, *Civil and Criminal*, supra note 14, at ch. 3B.

[FN37]. See generally, Michael L. Perlin, *The Jurisprudence of the Insanity Defense* (1994); 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).

[FN38]. In its most recent term, the Supreme Court held that execution of persons with mental retardation violates the Eighth Amendment. [Atkins v. Virginia](#), 536 U.S. 304, 122 S.Ct. 2242 (2002).

[FN39]. [42 U.S.C. § § 12101](#) et seq.

[FN40]. See, e.g., Michael L. Perlin, "[I Ain't Gonna Work on Maggie's Farm No More: Institutional Segregation, Community Treatment, the ADA, and the Promise of Olmstead v. L.C.](#)," 17 *T.M. Cooley L. Rev.* 53 (2000); Michael L. Perlin, "[Make Promises by the Hour: Sex, Drugs, the ADA, and Psychiatric Hospitalization](#)," 46 *DePaul L. Rev.* 947 (1997); Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 *J. L. & Health* 15 (1993-94).

[FN41]. See [Olmstead v. L.C.](#), 527 U.S. 581 (1999).

[FN42]. See, e.g., Michael L. Perlin, "[What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top, You're on the Bottom: Are the Americans with Disabilities Act \(and Olmstead v. L.C.\) Anything More than 'Idiot Wind?'](#)," 35 *U. Mich. J.L. Reform* 235 (2002).

[FN43]. See, e.g., Michael L. Perlin, [A Law of Healing](#), 68 *U. Cin. L. Rev.* 407, 414, n. 50 (2000); Rae E. Unzicker, [From Privileges to Rights](#), 17 *T.M. Cooley L. Rev.* 171 (2000).

[FN44]. See, e.g., <http://www.nami.org>.

[FN45]. See, e.g., <http://www.narpa.org>.

[FN46]. A WESTLAW/ALLCASES search of "Americans with Disabilities Act" AND "trusts and estates," conducted on March 4, 2002, revealed no cases.

[FN47]. On the public's preoccupation with the supposed dangerousness of persons with mental illness, see Study: More People Associating Mental Illness with Violence, available at <http://www.cnn.com/2000/HEALTH/09/27/mental.illness.ap> (last visited Sept. 27, 2000).

[FN48]. Perlin, *Hidden Prejudice*, supra note 4, at 30.

[FN49]. See [Falter v. United States](#), 502 F. Supp. 1178, 1185 (D. N.J. 1980) (the central inquiry is "how [persons with mental disabilities] are treated as human beings").

[FN50]. See, e.g., Michael L. Perlin, "For the [Misdemeanor Outlaw: The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities](#)," 52 *Ala. L. Rev.* 193, 227 (2000).

[FN51]. See, e.g., Michael L. Perlin, "[Their Promises of Paradise: Will Olmstead v. L.C. Resuscitate The Constitutional 'Least Restrictive Alternative' Principle in Mental Disability Law?](#)," 37 *Houston L. Rev.* 999, 1021 (2000).

[FN52]. See Perlin, supra note 42, at 249.

[FN53]. See, e.g., Peter Blanck, [Civil War Pensions and Disability](#), 62 *Ohio St. L.J.* 109, 203, n.309 (2001); Justine Dunlap, [Mental Health Advance Directives: Having One's Say?](#) 89 *Ky. L.J.* 327, 379-80 (2000-01); Grant Morris, [The Evil That Men Do: Perverting Justice to Punish Perverts](#), 2000 *U. Ill. L. Rev.* 1199, 1201, n.13 (2000); Christopher Slobogin, [An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases](#), 86 *Va. L. Rev.* 1199, 1203-04 (2000); Bruce Winick, [Therapeutic Jurisprudence and the Civil Commitment Hearing](#), 10 *J. Contemp. Legal Issues* 37, 41 (1999).

[FN54]. I discuss some of these cases in Perlin, Hidden Prejudice, supra note 4, at 307-08, and in Perlin, Half-Wracked, supra note 4, at 31-32 (discussing [State v. Wilson](#), 700 A.2d 633, 649-50 (Conn. 1997) (Katz, J., concurring); [United States v. Denny-Shaffer](#), 2 F.3d 999, 1009, 1021, n.30 (10th Cir. 1993); [State Farm Fire & Casualty Co. v. Wicks](#), 474 N.W.2d 324, 327 (Minn. 1991); and [Waters v. Thomas](#), 46 F.3d 1506, 1535 (11th Cir. 1995) (Clark, J., concurring in part and dissenting in part)).

[FN55]. In re the [Mental Health of K.G.F.](#), 29 P.3d 485 (Mont. 2001) (scope of right to effective counsel includes appointment of competent counsel with specialized training, right to make informed decision on whether to accept counsel, right to thorough investigation of case by counsel, right to initial client interview with counsel, and right to have counsel present during patient's court-ordered mental health examination).

[FN56]. For an example of organized mental health advocacy systems, see, e.g., [N.Y. Mental Hygiene Law § 47.01](#) (establishing Mental Hygiene Legal Services office); [N.J. Stat. Ann § 52:27E-65](#) (restructuring Division of Mental Health Advocacy); [42 U.S.C. § 10807](#) (establishing Protection and Advocacy Systems for Mentally Ill Individuals).

[FN57]. See, e.g., David Wexler, Therapeutic Jurisprudence: New Directions in Law/Mental Health Scholarship, in *Mental Health Law: Research, Policy and Services* 357 (Bruce D. Sales & Saleem S. Shah eds., 1996); Michael L. Perlin, Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law, 20 N. Eng. on J. Crim. & Civ. Confinement 369 (1994); Bruce Sales & Daniel Shuman, Mental Health Law and Mental Health Care: Introduction, 64 Am. J. Orthopsychiatry 172 (1994); David Wexler, Justice, Mental Health, and Therapeutic Jurisprudence, 40 Clev. St. L. Rev. 517 (1992); David Wexler & Bruce Winick, Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research, 45 U. Miami L. Rev. 979 (1991); David Wexler, [Reflections on the Scope of Therapeutic Jurisprudence](#), 1 Psychol. Pub. Pol'y & L. 220 (1995).

[FN58]. Christopher Slobogin, [Therapeutic Jurisprudence: Five Dilemmas to Ponder](#), 1 Psychol. Pub. Pol'y & L. 193 (1995); David Wexler, Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process, 27 Crim. L. Bull. 18, 19 n.5 (1991); David Wexler, [Therapeutic Jurisprudence: Restructuring Mental Disability Law](#), 10 N.Y.L. Sch. J. Hum. Rts. 759 (1993).

[FN59]. See, e.g., Michael L. Perlin et al., [Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?](#), 1 Psychol. Pub. Pol'y & L. 80 (1995) [hereinafter Therapeutic Jurisprudence], reprinted in *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* 739 (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter Key].

[FN60]. See, e.g., Keri Gould & Michael L. Perlin, "[Johnny's in the Basement/Mixing Up His Medicine:](#)" [Therapeutic Jurisprudence and Clinical Teaching](#), 24 Seattle U. L. Rev. 339, 366-71 (2000); 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 (1996) (right to refuse treatment); Michael L. Perlin, Decoding Right to Refuse Treatment Law, 16 Int'l J.L. & Psychiatry 151 (1993); Perlin et al., Therapeutic Jurisprudence, supra note 59, at 96-103 (right to treatment).

[FN61]. Perlin, Hidden Prejudice, supra note 4, at 301.

[FN62]. Id.

[FN63]. Id. at 302-03.

[FN64]. See, e.g., Key, supra note 59, at vii-x (listing articles).

[FN65]. As of March 4, 2002, the phrase "THERAPEUTIC JURISPRUDENCE" appears 514 times in the WESTLAW/JLR database.

[FN66]. Pamela Champine, [A Sanist Will?](#), 46 N.Y.L. Sch. L. Rev. 547 (2003).

[\[FN67\]](#). Dylan, *supra* note 1.

[\[FN68\]](#). Id.

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***235 "WHAT'S GOOD IS BAD, WHAT'S BAD IS GOOD, YOU'LL FIND OUT WHEN YOU REACH THE TOP, YOU'RE ON THE BOTTOM": ARE THE AMERICANS WITH DISABILITIES ACT (AND OLMSTEAD V. L.C.) ANYTHING MORE THAN "IDIOT WIND?"**

Michael L. Perlin [\[FN1\]](#)

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Perlin

Mental disability law is contaminated by "sanism," an irrational prejudice similar to such other irrational prejudices as racism and sexism. The passage of the Americans with Disabilities Act (ADA)--a statute that focused specifically on questions of stereotyping and stigma--appeared at first to offer an opportunity to deal frontally with sanist attitudes and, optimally, to restructure the way that citizens with mental disabilities were dealt with by the remainder of society. However, in its first decade, the ADA did not prove to be a panacea for such persons. The Supreme Court's 1999 decision in *Olmstead v. L.C.*--ruling that the ADA entitled certain state hospital residents to treatment in an "integrated community setting," and stressing that "unjustified isolation . . . is properly regarded as discrimination based on disability"--appeared to have the potential to transform and revolutionize mental disability law. This Article questions whether *Olmstead* has done that, and whether, in fact, it has the capacity to do that. Furthermore, a review of post-*Olmstead* caselaw--a universe that is "pretty pallid"--and the meager (in volume) scholarship, conclude that, in spite of *Olmstead*, "there are still many sanist attitudes that need to be undone."

Introduction

I began advocating on behalf of persons with mental disabilities in 1971, first on an occasional basis, then as part of my work with the New Jersey office of the Public Defender. Three years later, I began working full-time as the director of the New Jersey Division of Mental Health Advocacy in the New Jersey Department of the Public Advocate. This division was the nation's first state-wide, cabinet-level public interest advocacy office. [\[FN1\]](#) As a result of my experiences, I first wrote and spoke to national audiences about *236 mental disability law in 1975, [\[FN2\]](#) and began teaching it full-time in 1984.

In 1990, I turned my scholarly attention to questions of sanism. [\[FN3\]](#) "Sanism" is defined as an irrational prejudice towards mentally ill persons, which is of the same quality and character as other irrational prejudices. Such other prejudices are reflected in prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. [\[FN4\]](#) As I recently wrote:

Sanism is as insidious as other "isms" and is, in some ways, more troubling, because it is (a) largely invisible, (b) largely socially acceptable, and (c) frequently practiced (consciously and unconsciously) by individuals who

regularly take "liberal" or "progressive" positions decrying similar biases and prejudices that involve sex, race, ethnicity, or sexual orientation. It is a form of bigotry that "responsible people can express in public." Like other "isms," sanism is based largely upon stereotype, myth, superstition and deindividualization. To sustain and perpetuate it, we use prereflective "ordinary common sense" and other cognitive-simplifying devices such as heuristic reasoning in an unconscious response to events both in everyday life and in the legal process. . . .

The practicing bar, courts, legislatures, professional psychiatric and psychological associations, and the scholarly academy are all largely silent about sanism. A handful of practitioners, lawmakers, scholars and judges have raised lonely voices, but the topic is simply "off the agenda" for most of these groups. As a result, individuals with mental disabilities . . . are frequently marginalized to an even greater extent than are others who fit within the Carolene Products definition of "discrete and insular minorities." [\[FN5\]](#)

It is impossible to understand developments in mental disability law or to coherently construct any overarching mental disability law theory without recognizing the insidious and corrosive power and *237 impact of sanism. [\[FN6\]](#) In a book and series of articles, [\[FN7\]](#) I have considered questions of involuntary civil commitment law, [\[FN8\]](#) of institutional rights, [\[FN9\]](#) of the right to refuse treatment, [\[FN10\]](#) deinstitutionalization, [\[FN11\]](#) criminal incompetencies, [\[FN12\]](#) the insanity defense, [\[FN13\]](#) Federal Sentencing Guidelines, [\[FN14\]](#) and the death penalty. [\[FN15\]](#) I believe understanding the inconsistencies, ambiguities, and internal contradictions in any of these areas of the law requires coming to terms with the power and force of sanism.

Over two decades ago, the Supreme Court stressed the "adverse social consequences" associated with commitment to a mental hospital, and declared that "[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the *238 individual." [\[FN16\]](#) Underlying sanism's power is the malignancy of stigma. As John Parry and Eric Drogin wrote:

Stigma affects the law in at least two ways: (1) the negative effect on the liberty interests of the person with a mental disability who is the subject of a legal proceeding and (2) potential bias due to sanism that judges and other courtroom participants may demonstrate towards that person. [\[FN17\]](#)

The stigma that accompanies mental illness has been characterized by one state supreme court as "carr[ying] with it a stigma similar to that associated with a criminal record," [\[FN18\]](#) and likened by another court to the stigma that attaches to "dishonesty . . . serious felony . . . [or] manifest racism." [\[FN19\]](#) A diagnosis of mental illness carries with it legal disabilities as well as social stigmatization. [\[FN20\]](#) Surveys show that mental disabilities are the most negatively perceived of all disabilities. [\[FN21\]](#) Individuals with mental disabilities are denied jobs, refused access to apartments in public housing or entry to places in public accommodation, and turned down for participation in publicly-funded programs because they appear "strange" or "different." [\[FN22\]](#) Behavioral myths have emerged suggesting that persons with mental disabilities are deviant, worth less than "normal" individuals, are disproportionately dangerous, and are presumptively incompetent. [\[FN23\]](#)

Courts regularly issue sanist opinions. [\[FN24\]](#) In 1960, the Iowa Supreme Court held that the Fourteenth Amendment's Due Process *239 Clause did not protect the loss of liberty resulting from involuntary civil commitment. [\[FN25\]](#) In 1976, in a case involving a state law requiring mandatory retirement for certain police officers at age 50, the Supreme Court rejected plaintiff's equal protection argument:

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. [\[FN26\]](#)

On the other hand, some judicial opinions and some scholarly writings acknowledge the thrall in which stereotypes have imprisoned the legal system. These include stereotypes regarding mental illness and dangerousness, [\[FN27\]](#) mental illness and criminality, [\[FN28\]](#) mental illness and sin, [\[FN29\]](#) and mental illness and evil. [\[FN30\]](#) In a decision *240 involving a local ordinance that sought to bar the establishment of all group homes within a town, Supreme Court Justice Thurgood Marshall wrote:

A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to

warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded "unfit for citizenship." [\[FN31\]](#)

But opinions such as this are rare. [\[FN32\]](#) One recent positive example comes from the Montana Supreme Court which stated that "[t]he use of such stereotypical labels--which, as numerous commentators point out, helps create and reinforce an inferior second-class of citizens--is emblematic of the benign prejudice individuals with mental illnesses face, and which are, we conclude, repugnant to our state constitution." [\[FN33\]](#) Unfortunately, this in no way reflects the standard judicial "take" on these issues. [\[FN34\]](#)

*241 In 1990, Congress passed the Americans with Disabilities Act (ADA), [\[FN35\]](#) and it appeared that, for the first time, there was some consensus acknowledgment of the damage inflicted by generations of mechanical adherence to mindless stereotypes. [\[FN36\]](#) In 1999, the Supreme Court decided *Olmstead v. L.C.*, [\[FN37\]](#) affirming an Eleventh Circuit decision. The Eleventh Circuit had ruled that the ADA entitled plaintiffs--residents of Georgia State Hospital--to treatment in an "integrated community setting" as opposed to an "unnecessarily segregated" state hospital. This Article considers the ADA and *Olmstead* in an effort to determine the extent to which this Act and this decision have changed or are likely to change prevailing sanist norms.

Twice in the past I have turned to Bob Dylan's brilliant masterpiece, *Idiot Wind*, [\[FN38\]](#) for lyrics to use in article titles dealing with the insanity defense. [\[FN39\]](#) The searing metaphors and savage language of that song "fit" perfectly with that topic.

In *Idiot Wind*, Dylan sings, "What's good is bad, what's bad is good, you'll find out when you reach the top, You're on the bottom." [\[FN40\]](#) This leads into the question posed in this Article. The decision in *Olmstead* appears to have "reached the top" in the context of institutional mental disability law. But did it really? Has *Olmstead*, so far, really made a difference? [\[FN41\]](#) Or, are persons institutionalized because of mental disability, still "on the bottom?"

*242 The three Parts of this Article begin to answer these questions. Part I briefly examines the state of mental disability law before the ADA's passage and comments on the relative lack of success in cases litigated in its wake. Part II considers the *Olmstead* decision and its relative impact (or lack thereof) in the larger world of the ADA. Part III considers the possible impact of *Olmstead* on sanist attitudes displayed within the legal system. This Part suggests that *Olmstead*, for all its revolutionary potential, has still raised more questions than it has answered.

I. The ADA

The ADA's legislative history--as it applied to persons with mental disability--focused specifically on questions of stereotyping and "reflect[ed] Congressional awareness of the pernicious danger of stereotyping behavior." [\[FN42\]](#) The legislative history relied heavily on the language in *School Board of Nassau County v. Arline* [\[FN43\]](#) that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that follow from the actual impairment." [\[FN44\]](#) Congress' inclusion in the definition of disability an individual who is regarded as being impaired [\[FN45\]](#) "acknowledges this teaching about the power of myths." [\[FN46\]](#)

The ADA's passage was enough to excite and inspire those working in mental disability law, but that enthusiasm was tempered by concern that the ADA might be powerless to affect sanist attitudes. As I wrote soon after the ADA was passed, "if the ADA is to make any true headway in restructuring the way that citizens with mental disabilities are dealt with by society . . . , it must provide a means by which to deal frontally with . . . sanist attitudes." [\[FN47\]](#) Moreover, "unless advocates turn their attention to these attitudinal questions, the ADA may--in 'real life'--turn out to be little more than the last in a long (and depressing) series of 'paper victories' for mentally ill individuals." [\[FN48\]](#)

*243 There was also concern that the Supreme Court would see the ADA as little more than another in a series of "mom and apple pie" statutes with little substance or enforcement power:

Will courts say, "No, Congress really didn't mean what it said" ? Will they say, "Well, Congress may have meant it, but only in an aspirational way, and there's really nothing for us here" ? Or will they say, "Yes, Congress said it, Congress meant it, and, dammit, we're gonna enforce it" ? [\[FN49\]](#)

Early court decisions were spotty. A handful of courts applied the ADA boldly to cases involving municipal budget cuts that eliminated community recreational programs solely for persons with disabilities, [\[FN50\]](#) and to state laws that required state hospital residents to contribute to the costs of assigned counsel. [\[FN51\]](#) The most important case in this small universe, *Helen L. v. DiDario*, [\[FN52\]](#) held that a state welfare department regulation requiring certain patients to receive services in the segregated setting of a nursing home, rather than in their own homes, violated the ADA. [\[FN53\]](#)

Helen L. is significant for several reasons. First, the Third Circuit read the Act's antidiscrimination language expansively, [\[FN54\]](#) citing congressional findings that "[h]istorically, society has tended to isolate and segregate individuals with disabilities . . . [and that] such forms of discrimination . . . continue to be a serious and pervasive social problem." [\[FN55\]](#) Furthermore, it found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." [\[FN56\]](#) The court read the ADA to intend to ensure that "qualified individuals receive services in a manner *244 consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them." The court further declared that it would "not eviscerate the ADA by conditioning its protections upon a finding of intentional or overt 'discrimination,'" [\[FN57\]](#) focusing specifically on Congress' finding that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization." [\[FN58\]](#)

Unfortunately, *Helen L.* aside, the picture, for the most part, was bleak for persons with disabilities. A study by Professor Ruth Colker revealed that in ADA employment cases, for example, employers prevailed in 93% of district court cases and in 84% of court of appeals cases. [\[FN59\]](#) The ADA has not yet been a panacea for all problems faced by persons with disabilities. [\[FN60\]](#)

II. *Olmstead*

Then the Supreme Court decided *Olmstead v. L.C.* [\[FN61\]](#) In her majority opinion, Justice Ruth Bader Ginsburg stressed that "[u]njustified isolation . . . is properly regarded as discrimination based on disability" [\[FN62\]](#) and that "undue institutionalization qualifies as discrimination 'by reason of . . . disability.'" [\[FN63\]](#)

How important a decision is *Olmstead*? Soon after it was issued, I wrote that *Olmstead* was potentially "the most important civil mental disability law case since the Supreme Court decided *Youngberg v. Romeo* [\[FN64\]](#) in 1982 [If] taken seriously, it may change the debate *245 on [mental health issues], . . . and perhaps most importantly, on how we feel about persons with [mental] disabilities." [\[FN65\]](#)

Will *Olmstead* resuscitate and revitalize the constitutionally-grounded "least restrictive alternative" (LRA) principle in mental disability law? [\[FN66\]](#) Was it a harbinger of a sea change on the part of the Supreme Court, or an anomalous decision that simply cannot be harmonized with the rest of this area of law? Certainly, the other cases decided by the Supreme Court on the same day as *Olmstead*, frequently known as "the Sutton trilogy," [\[FN67\]](#) were seen as defeats by ADA supporters. The decisions were hailed by those unsympathetic to the ADA. [\[FN68\]](#) Was *Olmstead* "different" because it dealt with questions of institutionalized mental patients, thus not touching on the employment issues at the heart of *Sutton*, *Albertson's*, and *Murphy*? Or did *Olmstead*'s difference make it somehow irrelevant? Would these cases make a difference in how the public felt about all these issues? There can be no dispute that the ADA has spawned an astonishing number of published cases. [\[FN69\]](#) Sheer numbers, however, say little about attitudes and ultimate impacts.

A. *Olmstead*'s Impact?

Will the explosion of ADA litigation ultimately have a substantive and lasting impact on many of the most important questions of mental disability law? Will *Olmstead* actually provide the first important leverage in nearly a quarter of a century to bring about important changes in how we construct mental disability and how *246 we treat persons with mental disability? It is possible that *Olmstead* will give us an important, new, and revolutionary tool with which to fight sanism. [\[FN70\]](#) Of course, on the other hand, it may not. Mental disability law is strewn with examples of "paper victories," [\[FN71\]](#) bold pronouncements from the Supreme Court that fall are ignored at the trial court level. By way of example, I am not sure what is more astonishing: the fact that, 1) thirteen years after the Supreme Court decided *Jackson v. Indiana*, [\[FN72\]](#) one-half of the states had not implemented *Jackson*, [\[FN73\]](#) or, 2) in the decade

following the revelation, the matter remained status quo, [\[FN74\]](#) or, 3) according to Westlaw, other than the three professors who conducted this research, I am the only law professor who has ever written about this. [\[FN75\]](#)

Will it be this way with Olmstead and the ADA? Or will there be some sort of a perceptible, measurable shift in attitudes so that the promises of the ADA--"promises of paradise" [\[FN76\]](#)--become a reality?

Several years before Olmstead, I turned to a Dylan love ballad Love Minus Zero/No Limit, [\[FN77\]](#) for the lyric "make promises by the hour" in an effort to describe one of the then-unresolved dilemmas of the ADA. [\[FN78\]](#) Would the Supreme Court take the ADA seriously, or would the Court respond, as it had in the first Pennhurst State School & Hospital [\[FN79\]](#) decision by eviscerating the Developmental Disabilities Bill of Rights Act, [\[FN80\]](#) by delivering nothing? Olmstead answered that *247 question, [\[FN81\]](#) but, as I see now, that was only the first important question to be confronted.

The second, and perhaps arguably more important, question is this: Has Olmstead, so far, really made the difference that many of us hoped, predicted, and expected? What impact, if any, will Olmstead have on attitudes? [\[FN82\]](#) Will it begin to remediate decades (centuries? millennia?) of sanism? Will it augur in a new regime in which issues of stigma, exclusion, and segregation are finally taken seriously? Or, after the post- Olmstead dust settles, will the ADA remain little more than Idiot Wind, "blowing through the dust upon our shelves?" [\[FN83\]](#)

B. The ADA's Evolution

When enacting the ADA, Congress appeared to treat mental disability issues as a poor stepchild to matters dealing with physical disability. [\[FN84\]](#) There was little legislative debate, and what there was suggested a fairly wide gap between Congress' concerns in writing the legislation, and the extent of discrimination faced by persons with mental disabilities. [\[FN85\]](#)

To what extent could the ADA undo sanist attitudes? [\[FN86\]](#) Were courts willing to take seriously the remarkably strong language used by Congress in a series of fact findings that seemed to elevate ADA inquiries into questions of equal protection law? [\[FN87\]](#) Was the ADA *248 merely hortatory? [\[FN88\]](#) Was it an example of what Justice Harlan had described in *Rosado v. Wyman* [\[FN89\]](#) ("Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions"), [\[FN90\]](#) or was the Court going to give it true substance and true life?

In the pre- Olmstead years, things were happening in the courts and on the streets. First, mentally disabled plaintiffs fared poorly in individual employment discrimination cases. [\[FN91\]](#) Second, similarly-disabled individuals did surprisingly well, comparatively speaking, in institutionally-based litigation. [\[FN92\]](#) Third, the public debate on the ADA was limited by the grumbling op-ed critique that it is "preposterous" to argue that discrimination against persons with disabilities is equivalent to discrimination based on race, [\[FN93\]](#) or that persons with disabilities should simply be "thankful" that many facilities are accessible to them. [\[FN94\]](#) The language in these columns is almost identical to the language found in newspapers in the late nineteenth century, when editorial writers grumbled about how "parasites" received undeserved governmental largesse in the form of Civil War pensions. [\[FN95\]](#)

Although the ADA discourse is occasionally tempered by a heart-warming story about how the law made a true difference by empowering individuals with serious disabilities, [\[FN96\]](#) negative press *249 anecdotes far outweigh the positive ones. Certainly, the media-friendly Casey Martin saga has drawn more attention than all other individual ADA cases combined. [\[FN97\]](#) Fourth, the Supreme Court sent out what could charitably be called a mixed message in its 1999 decisions. The Sutton trilogy [\[FN98\]](#) sharply limited the ADA in employment cases, while Olmstead surprisingly broadened it. [\[FN99\]](#) But, after all of this, the issue of sanism remains off the radar screen of most public debate.

When I discuss the ADA with friends and with other lawyers, a universe that presents prototypically liberal "takes" on a variety of social issues (race discrimination, homophobia, misogyny, etc.), two issues emerge. First, virtually every person has a horror story about how "unreasonable" ADA demands caused clients to go out of business, prevented other clients from opening new offices, etc. These criticisms mostly concern ramps and other matters involving physical accessibility. None of these stories, on the surface at least, appear to have anything to do with

mental disability law. Second, not a single person accepts--on any level--the argument that discrimination against persons based on disability is like discrimination based on race, religion, or sexual preference. Even friends who have "outed" themselves and have told of their experiences in psychiatric hospitals, or who have movingly shared the impact of major depression or bipolar illness on their own lives and/or on the lives of loved ones, refuse to take seriously my arguments that disability-based discrimination is as pernicious, as harmful and as morally corrupt as other types of discrimination.

***250 III. The Ravages of Sanism**

For the past decade, I have written and continue to write relentlessly about the ravages of sanism. [\[FN100\]](#) I have also written about the way that stereotypes, prejudices, deindividualized thinking, and the use of cognitive-simplifying heuristics [\[FN101\]](#) have warped the way we think about mental disability, about persons with mental disability, about persons who provide mental health services to persons with mental disabilities. [\[FN102\]](#) It is this omnipresence of sanism--and its evil twin, pretextuality [\[FN103\]](#)--that continues to temper my enthusiasm about the ADA as a civil rights statute and Olmstead as an implementing (or, perhaps, motivating) decision.

In the immediate aftermath of Olmstead, I wrote the article I Ain't Gonna Work on Maggie's Farm No More. [\[FN104\]](#) This article argued that Olmstead carried with it the seeds to potentially revolutionize mental disability law just as Dylan's electric (and electrifying) performance at the 1965 Newport Folk Festival of Maggie's Farm, a song about redemption and freedom in the context of another civil rights struggle, revolutionized pop music. [\[FN105\]](#) A few months later, I wrote another piece, in an equally optimistic tone, arguing that Olmstead could potentially cause a restructuring of major aspects of the forensic mental health system, and Olmstead could further lead to a major reconceptualization of how and where we conduct incompetency-to-stand-trial and insanity evaluations. [\[FN106\]](#) A few months later, my post-Olmstead glow began to dim a bit. I wrote an article ***251** (alluded to previously), Their Promises of Paradise, [\[FN107\]](#) which argued that Olmstead may potentially revitalize the least restrictive alternative doctrine [\[FN108\]](#) in mental disability law. But, in all instances, I made clear that none of this would be any more than ephemeral unless we directly confronted the issue of sanist attitudes, which was the topic of my first ADA article in 1993. [\[FN109\]](#)

There is a disconnect in constitutional and statutory mental disability law that most of us have perhaps missed. There have been no analogous attempts, so far, to answer the question that has bedeviled civil rights activists since the 1950s:

How to capture "the hearts and minds" of the American public so as to best insure that statutorily and judicially articulated rights are incorporated-- freely and willingly--into the day-to-day fabric and psyche of society. Unless advocates turn their attention to these attitudinal questions, the ADA [even after Olmstead] may in real life turn out to be little more than the last in a long (and depressing) series of "paper victories" for mentally ill individuals. [\[FN110\]](#)

A. The Heart of Olmstead

1. Isolation as Discrimination--In Olmstead, the Supreme Court focused on what it saw as Congressional judgment supporting the finding that "unjustified institutional isolation of persons with disabilities is a form of discrimination." [\[FN111\]](#) First, the Court considered that institutionalization (as opposed to community-based therapy) perpetuated "unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." [\[FN112\]](#) Second, the Court concluded that confinement, "severely diminishes ***252** the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." [\[FN113\]](#) Yet, if the public rejects the empirical data that drives these arguments, then the relationship between the ADA, mental disabilities, and centuries of prejudice and mistreatment will be missed.

This may be obscure to laypersons. Given the prevalence of mental disability, [\[FN114\]](#) however, it strikes me that some of this obscurity is the result of willful ignorance. [\[FN115\]](#) Nevertheless, it cannot be obscure to lawyers with any familiarity with the history of institutional and community rights litigation in this country. The saga of institutional mental disability law in this nation is a saga of mistreatment and of non-treatment. As long ago as 1958, the president of the American Psychiatric Association called the state run psychiatric facilities "bankrupt beyond remedy." [\[FN116\]](#) The facts of the most important institutional conditions case in history--Wyatt v. Stickney

[\[FN117\]](#)--are truly stomach-turning. [\[FN118\]](#) As the Fifth Circuit noted in its decision, affirming the district court's order: "[One patient] died after a garden hose had been inserted into his rectum for five minutes by a working patient who was cleaning him; one died when a fellow patient hosed him with scalding water; another died when soapy water was forced into his mouth; and a fourth died from a self-administered overdose of drugs which had been inadequately secured." [\[FN119\]](#) The chairman of the legal action committee of the National Association of Retarded Children characterized the facility at issue before the court in both *Youngberg v. Romeo* [\[FN120\]](#) and *Pennhurst State School & Hospital v. Halderman* [I and II] [\[FN121\]](#) as "Dachau, without *253 ovens." [\[FN122\]](#) Attempts to establish small group homes for adults with mental retardation continue to meet with "protests, lawsuits, threats, vandalism, beatings, and fire bombings." [\[FN123\]](#) This is not a cheery tableau.

It is not at all clear how *Olmstead* will be constructed by lawyers, mental health professionals, and the general public (to the extent that a Supreme Court case that does not involve abortion, affirmative action, church-state relations, the death penalty, gay rights, or *Miranda* is ever "constructed" by the general public). [\[FN124\]](#) I think, however, that the Court's language about exclusion and segregation [\[FN125\]](#) has the potential to be extremely important in that context.

That portion--and perhaps the most critical part of *Olmstead*--makes two novel, interlocking points never made before by the Supreme Court. First, the Court acknowledged that the effect of discrimination against persons with mental disability is like the effect of discrimination against other persons who traditionally fall within the ambit of footnote four of *Carolene Products*: [\[FN126\]](#) *254 blacks [\[FN127\]](#) and women [\[FN128\]](#) (as signified by the Court in the cases supporting the *Olmstead* language). [\[FN129\]](#)

This is a major shift on the part of the Supreme Court. This holding in *Olmstead* is extremely important, as it gives life to Congress' findings that "individuals with disabilities are a "discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness." [\[FN130\]](#) Also, it emphasizes the legislative history that called for the abolition of "monoliths of isolated care in institutions and segregated educational settings." [\[FN131\]](#) It explicitly concluded that "integration is fundamental to the purposes of the ADA. Provision[s] of segregated accommodations and services relegate persons with disabilities to second-class citizen status." [\[FN132\]](#) A recent article focused on the importance of the *Carolene* language: [\[FN133\]](#) "[T]he statute plainly uses the . . . [phrase 'discrete and insular minority'] as constitutional code words to designate an identifiable group of people who experience a common set of obstacles to participation in public and private life." [\[FN134\]](#)

To what extent will *Olmstead* remove some of these obstacles? That question remains unanswered.

2. The Extent of Discriminatory Behavior--Second, *Olmstead*'s text recognizes that the pernicious impact of discrimination cannot separate institutional isolation from other discriminatory behavior. In its reliance upon the amicus briefs of the American Psychiatric Association and the United States, the Supreme Court integrated the issue of isolation with issues of "family relations, social contacts, *255 work options, economic independence, educational advancement, and cultural enrichment." [\[FN135\]](#) The Court also stressed that institutionalization requires individuals to "relinquish participation in community life [so] they could enjoy given reasonable accommodations." [\[FN136\]](#) In *Olmstead*, the Supreme Court demonstrated that it "got" one of the most important structures of the ADA. That is, questions of institutionalization and deinstitutionalization are far broader than simply inquiries into whether a patient is "behind the wall" (not for a moment to minimize the seriousness of that inquiry), and that these questions touch on virtually every important aspect of interpersonal interaction. [\[FN137\]](#)

B. The Post-*Olmstead* Universe: Two Surprises

This all leads to a critical series of questions: How have lower courts read *Olmstead*? Have they interpreted it expansively or narrowly? Have they fleshed out some of the ambiguities? Have they paid any particular attention to the language to which I just referred? Have they merely cited the holding as black-letter law, or has the universe of decisions reflected the potentially revolutionary impact of the case? Close examination of these questions leads to two surprises: the lack of case law and the lack of scholarly response to *Olmstead*.

1. Little Case Law--Somewhat surprisingly, there are few significant post-*Olmstead* developments in the case law. [\[FN138\]](#) Lower federal courts and state courts have cited *Olmstead* for the proposition that "the ADA in fact prohibits

segregation of persons with disabilities and requires states to make reasonable efforts to place institutionalized individuals with disabilities into the community" [\[FN139\]](#) in the "most *256 integrated setting to fit their needs." [\[FN140\]](#) Lower courts have also quoted the Olmstead language that the ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." [\[FN141\]](#) At least one circuit has read Olmstead extraordinarily narrowly in a case involving in-home safety monitoring for patients in need of personal-care services. [\[FN142\]](#) But there are, as of yet, no cases that seriously examine the crucial attitudinal questions that are at the core of the Olmstead decision. Astonishingly few decisions even cite Olmstead. [\[FN143\]](#)

2. Little Academic Literature--Even more surprising is the dearth of important literature in the law reviews critiquing and deconstructing Olmstead. [\[FN144\]](#) The case is barely mentioned in Professor Bagenstos' important recent article that urges what he characterizes as a "subordination-focused approach" as a means of resolving future ADA cases. [\[FN145\]](#) Most optimistic of the early commentators has been John Parry, editor of the Mental and Physical Disability Law Reporter. Parry concluded:

Of all the ADA Supreme Court decisions this term, Olmstead is the most significant for several reasons. Fundamentally, it expands the possibilities for persons in state-run mental institutions. Until Olmstead, the Court was suspicious of any kind of constitutionally based right to services in the community or least restrictive setting. In the past, the foundation of deinstitutionalization was the absence of dangerousness to self *257 or others, not the appropriateness of treatment or essential services in non-institutional settings. . . . The ADA's integration of service mandate, however, presented a new opportunity for advocates to obtain appropriate community-based services from the states, but many states argued that Title II did not obligate them to provide such services. Now that obligation is beyond dispute. [\[FN146\]](#)

Remarkably, there are only a handful of student notes published about Olmstead. [\[FN147\]](#) One student predicted that, as a result of Olmstead, "disabled individuals who have spent many years segregated from society and confined to institutions will finally be placed in community-based settings and will have the opportunity to live independent and productive lives." [\[FN148\]](#) In addition, a student commentator--writing generally about the relationship between mental disability and tort liability [\[FN149\]](#)--noted how Olmstead brought into "sharp focus . . . the law's clear preference, in the civil rights context, for care in the least restrictive environment." [\[FN150\]](#) Another student expressed concern that "the Court was unable to arrive at a uniform resolution of the cost issue." He saw this failure "combined with the deference given to the States regarding which individuals are qualified for community-based treatment," as potentially resulting in "fewer mentally disabled individuals receiving proper treatment." [\[FN151\]](#)

On the other hand, soon after the decision, Professor Paul Appelbaum speculated whether the initial "ecstatic" response of mental disability advocates was premature and concluded:

*258 [I]t is unclear to what extent the U.S. Supreme Court will support lower courts in compelling states to create community alternatives that do not now exist. No bright line has been identified to separate states that can rely on the fundamental-alteration defense from those that cannot. The reluctance of the courts to trample on executive branch prerogatives has always been the bugaboo of the least restrictive alternative doctrine. Whatever else it may accomplish, the decision in Olmstead v. L.C. is unlikely to precipitate the widespread creation of community-based services for persons with mental disabilities. [\[FN152\]](#)

As of the submission of this Article for publication, that is all there has been.

C. Why the Surprises?

I want to speculate a bit on both of these surprises (the lack of case law and the lack of literature). The first may be a bit easier. Ever since the Supreme Court's 1982 decision in *Youngberg v. Romeo* [\[FN153\]](#)--establishing a pallid "substantial professional judgment" test as the benchmark for assessing constitutional questions about psychiatric institutionalization [\[FN154\]](#)--the incidence of institutional law reform litigation has dropped dramatically. [\[FN155\]](#) The fact that there is *259 but one reference to *Youngberg* in *Olmstead* [\[FN156\]](#) is curious, and perhaps reflects this cessation of interest. Perhaps it should not be so surprising that post- *Olmstead* case law has been so scanty. Also, as *Olmstead* was decided just two years ago, it is certainly possible that cases currently in the pipeline have not yet percolated up to the appellate decision level.

The second is more perplexing. When the Supreme Court decides a mental disability law case, we have come to expect a cottage industry of commentary in the law reviews, both by professors and students. By way of contrast, within the first eighteen months of the Supreme Court's decision in *Kansas v. Hendricks*, [\[FN157\]](#) there were thirty-one law review articles about *Hendricks*. [\[FN158\]](#) Ironically, there has not been similar interest in the aftermath of the *Olmstead* case.

For years, I have bemoaned the lack of scholarly interest on the part of law professors about mental disability law. [\[FN159\]](#) Perhaps the lack of *Olmstead* literature reflects this. But also, perhaps, it reflects a deeper and ironic level of sanism that says that the issues before the Court in *Olmstead* just are not "important" or "interesting." And maybe it is this level of pervasive and as-of-yet-non-dislodgeable sanism that also explains the lack of case law. Perhaps lawyers representing potential ADA plaintiffs simply do not believe that the Supreme Court really meant what it said in *Olmstead*. [\[FN160\]](#) Perhaps lower courts are not convinced that the Supreme Court meant what it said. [\[FN161\]](#) Perhaps these courts do not "buy" the critical aspects of *Olmstead* that I have discussed about how discrimination against persons with disabilities is like discrimination based on race or *260 sex. [\[FN162\]](#) Nor have they "bought" how the psychological, social, and economic costs of institutionalization are much greater and graver than just (though my use of the word "just" here makes me wince) a loss of physical freedom. [\[FN163\]](#) Perhaps all of this is simply another indication of the reality that, in the long run, sanist attitudes have really not changed that much.

Conclusion

In August 2000, I was asked by this journal's editors to participate in this Symposium. At the time, I still basked in the afterglow of *Olmstead*. When I agreed to participate, I expected that I would write a piece celebrating *Olmstead*. I expected to look at yet another area of mental disability law that might be transformed by *Olmstead*--as I had done for several law school symposiums. [\[FN164\]](#)

So what tempered my enthusiasm in the intervening months? [\[FN165\]](#) There have been no vivid, memorable, "negative" cases--the ADA version of John Hinckley shooting Ronald Reagan [\[FN166\]](#)--that resulted in the type of saturation publicity that would be sure to bring ADA repeal to the forefront of the next Congressional agenda. Perhaps what happened is that I sat down and studied the entire post- *Olmstead* universe, what little there is of it. What is depressing is not so much what was said, but what wasn't said.

It is true that very few of the post- *Olmstead* cases are overtly hostile to persons with mental disabilities. Moreover, none of them engage in the "I-can't-believe-he- said-that" level of stereotyping about such persons that has been reflected in other areas of mental disability law. [\[FN167\]](#) That is a good thing. On the other hand, however, *261 very few of the cases are bold. Or visionary. Or reflect the type of quantum leap that we have come to experience, not infrequently, in other areas of mental disability law, both civil and criminal. [\[FN168\]](#)

The reality is that the post- *Olmstead* universe of cases is pretty pallid and uninspired. My sad conclusion is that, a decade after the passage of the ADA and in spite of *Olmstead*, many sanist attitudes still need to be undone. While *Olmstead* was a first major step, the path is still a long and winding one.

In *Idiot Wind*, Dylan sings, "What's good is bad, what's bad is good, you'll find out when you reach the top, You're on the bottom." [\[FN169\]](#) I chose this Dylan line to begin the title of this paper very specifically and carefully, because I believe it mirrors, almost perfectly, my frustration over the way the ADA continues to be read in post- *Olmstead* times. Hopefully, what's "good" does not turn out to be "bad," and we are not "on the bottom." Unfortunately, I am just not sure. Because I am not sure, I cannot yet say with confidence that the Americans with Disabilities Act is anything more than "Idiot Wind," . . . "blowing through the flowers on your tomb." [\[FN170\]](#) I truly hope that subsequent developments answer these questions in a positive way, and that, to conclude from the same song, "in the final end [we win] the wars/After losin' every battle." [\[FN171\]](#)

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[\[FN172\]](#). See, e.g., Michael L. Perlin, *Mental Patient Advocacy by a Public Advocate*, 54 *Psychiatric Q.* 169 (1982); Stanley C. Van Ness & Michael L. Perlin, *Mental Health Advocacy: The New Jersey Experience*, in *Mental Health Advocacy: An Emerging Force in Consumers' Rights* 62 (Louis E. Kopolow et al. eds., 1977).

[FN2]. Michael L. Perlin, Psychiatric Testimony in a Criminal Law Setting, 3 Bull. Am. Acad. Psychiatry & L. 143 (1975).

[FN3]. See generally Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial (2000) [hereinafter Perlin, Hidden Prejudice].

[FN4]. See, e.g., Michael L. Perlin, On "[Sanism](#)", 46 SMU L. Rev. 373 (1992) [hereinafter Perlin, Sanism].

[FN5]. Perlin, Hidden Prejudice, *supra* note 3, at 22-23 (footnotes omitted).

[FN6]. See *id.*; Michael L. Perlin, "[Half-Wracked Prejudice Leaped Forth](#)": [Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did](#), 10 J. Contemp. Legal Issues 3 (1999) [hereinafter Perlin, Half-Wracked]; 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 (1998).

[FN7]. See Perlin, Hidden Prejudice, *supra* note 3; 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) [hereinafter Perlin, Success]; Michael L. Perlin, [Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?](#), 20 N.Y.U. Rev. L. & Soc. Change 517 (1993-94) [hereinafter Perlin, Right to Sex]; Michael L. Perlin, Decoding Right to Refuse Treatment Law, 16 Int'l J. L. & Psychiatry 151 (1993); Michael L. Perlin & Deborah A. Dorfman, Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence, 11 Behav. Sci. & L. 47 (1993).

[FN8]. See Perlin, Hidden Prejudice, *supra* note 3, at 79-112.

[FN9]. See, e.g., *id.* at 113-24.

[FN10]. See, e.g., *id.* at 125-56; 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 (1996) [hereinafter Perlin & Dorfman, Dodging Lions].

[FN11]. See, e.g., Michael L. Perlin, [Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization](#), 28 Hous. L. Rev. 63, 91-93 (1991) [hereinafter Perlin, Marginalization].

[FN12]. See, e.g., Perlin, Hidden Prejudice, *supra* note 3, at 205-22; 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).

[FN13]. See, e.g., Perlin, Hidden Prejudice, *supra* note 3, at 323-42; Michael L. Perlin, The Jurisprudence of the Insanity Defense 385-90 (1994) [hereinafter Perlin, Jurisprudence]; 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, Borderline].

[FN14]. 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 (1995).

[FN15]. See, e.g., 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 (1996); 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. 239 (1994) [hereinafter Perlin, Sanist Lives].

[FN16]. [Vitek v. Jones](#), 445 U.S. 480, 492 (1980) (quoting [Addington v. Texas](#), 441 U.S. 418, 425-26 (1979)).

[FN17]. John Parry & Eric Drogin, Criminal Law Handbook on Psychiatric and Psychological Evidence and

Testimony 5 (2000) (footnotes omitted).

[FN18]. [Nelson v. Ferguson](#), 399 S.E.2d 909, 913 (W. Va. 1990).

[FN19]. [Green v. St. Louis Hous. Auth.](#), 911 F.2d 65, 69 (8th Cir. 1990) (quoting [Harrison v. Bowen](#), 815 F.2d 1505, 1518 (D.C. Cir. 1987)).

[FN20]. [State v. Bean](#), 762 A.2d 1259, 1265 (Vt. 2000).

[FN21]. Michael L. Perlin, "[I Ain't Gonna Work on Maggie's Farm No More](#)": Institutional Segregation, Community Treatment, the ADA, and the Promise of [Olmstead v. L.C.](#), 17 T.M. Cooley L. Rev. 53, 63 (2000) [hereinafter Perlin, Maggie's Farm].

[FN22]. [Id.](#) at 63-64 (citing Bonnie P. Tucker, The [Americans With Disabilities Act of 1990: An Overview](#), 22 N.M. L. Rev. 13, 16-17 (1992)).

[FN23]. [Id.](#) at 64. See, e.g., Perlin, Sanism, *supra* note 4, at 393-97 (citing, inter alia, Sander Gilman, *Difference and Pathology: Stereotypes of Sexuality, Race and Madness* (1985)); Thomas Grisso & Paul Appelbaum, *Mentally Ill and Non-Mentally Ill Patients' Abilities to Understand Informed Consent Disclosures for Medication*, 15 Law & Hum. Behav. 377, 385-86 (1991); Linda Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 Am. J. Psychiatry 593, 597-98 (1985).

[FN24]. See generally Perlin, *Hidden Prejudice*, *supra* note 3. For examples of sanism in insanity defense decision making, see Perlin, *Jurisprudence*, *supra* note 13, at 387-90 (discussing, inter alia, [State v. Zmich](#), 770 P.2d 776 (Ariz. 1989), [People v. DeAndo](#), 170 Cal. Rptr. 830 (App. 1980), [People v. Aliwoli](#), 606 N.E.2d 347 (Ill. App. Ct. 1992), and [State v. Dunne](#), 590 A.2d 1174 (N.J. 1991)); Perlin, *Sanist Lives*, *supra* note 15, at 277-78 (discussing [Riggins v. Nevada](#), 504 U.S. 127, 146 (1992) (Thomas, J., dissenting)).

[FN25]. [Prochaska v. Brinegar](#), 102 N.W.2d 870, 872 (Iowa 1960).

[FN26]. [Mass. Bd. of Ret. v. Murgia](#), 427 U.S. 307, 313 (1976).

[FN27]. See Richard Gardner, [Mind over Matter?: The Historical Search for Meaningful Parity Between Mental and Physical Health Care Coverage](#), 49 Emory L.J. 675, 677 (2000) (stating that "[historically, treatment] for mental illnesses ranged from exorcism to even more bizarre and often inhumane practices, such as torture or the removal of portions of the skull to allow evil spirits to escape").

[FN28]. See Sarah Bredemeier, [Hollow Verdict: Not Guilty by Reason of Insanity Provokes Animus-Based Discrimination in the Social Security Act](#), 31 St. Mary's L.J. 697, 732 (2000) (stating that "animosity toward the mentally ill reaches as far back as the earliest books of the Bible, inspiring myths, legends, and horror stories linking madness to God's punishment, sin, and evil."); [id.](#) at 732 n.180.

[FN29]. See Perlin, *Jurisprudence*, *supra* note 13, at 37 (stating that "ever since Prince Ptah-hotep attempted the first classification of mental illness almost five thousand years ago, conceptions of such illness have been inextricably linked to the notion of sin."); Deuteronomy 28:15-28 (cursing with madness those who fail to observe all of God's commandments); Perlin, *Sanism*, *supra* note 4, at 388-91 (pointing to the deep-rooted misconceptions and hatred toward the mentally ill throughout history); see also, e.g., John Biggs, Jr., *The Guilty Mind: Psychiatry and the Law of Homicide* 26-27 (1955) (explaining that insanity was tied to sin, and a special class of priests were the only people capable of ridding the sinner of his demonic possession); Wolf Wolfensberger et al., *The Principle of Normalization in Human Services* 12-25 (1972) (noting that mental retardation has often been regarded as the result of sin and God's punishment).

[FN30]. See Walter Bromberg, *From Shaman to Psychotherapist: A History of the Treatment of Mental Illness* 63-64 (1975) (discussing various historical perspectives of mental illness); Michael S. Moore, *Law and Psychiatry: Rethinking the Relationship* 64-65 (1984) (examining the American and English tests for insanity--specifically

knowing the difference between good and evil-- under the theory that humans become somewhat godlike once this distinction is recognized); Judith S. Neuman, *Suggestion of the Devil: The Origins of Madness* 31, 144 (1975) (addressing the stereotype of persons with mental illness as evil).

[FN31]. [City of Cleburne v. Cleburne Living Ctr.](#), 473 U.S. 432, 462-63 (1985).

[FN32]. See Perlin, *Jurisprudence*, supra note 13, at 391-92 (discussing non-sanist opinions). Decisions such as [Rennie v. Klein](#), 462 F. Supp. 1131 (D.N.J. 1978), [Wyatt v. Stickney](#), 325 F. Supp. 781 (M.D. Ala. 1971), and [Rivers v. Katz](#), 504 N.Y.S.2d 74 (1986), all implicitly acknowledge the virulence of sanist thinking and actions. For less well-known lower court opinions that focus on sanism issues, see Perlin, *Hidden Prejudice*, supra note 3, at 307-08 (discussing [Waters v. Thomas](#), 46 F.3d 1506, 1535 (11th Cir. 1995) (Clark, J., concurring & dissenting in part); [United States v. Denny-Shaffer](#), 2 F.3d 999, 1009, 1021 n.30 (10th Cir. 1993); [State v. Wilson](#), 700 A.2d 633, 649 (Conn. 1997) (Katz, J., concurring); and [State Farm Fire & Cas. Co. v. Wicks](#), 474 N.W.2d 324, 327 (Minn. 1991)).

For recent scholarship, see, e.g., Bredemeier, supra note 28, at 730; Justine A. Dunlap, [Mental Health Advance Directives: Having One's Say](#), 89 Ky. L.J. 327, 353 (2000-01); Eric S. Janus, *Hendricks and the Moral Terrain of Police Power Civil Commitment*, 4 Psychol., Pub. Pol'y & L. 297, 321 (1998); Carolee Lezuch, *The Americans with Disabilities Act: Redefining "Major Life Activity" to Protect the Mentally Disabled*, 44 Wayne L. Rev. 1839, 1861 n.130 (1999); Grant H. Morris, [Defining Dangerousness: Risking a Dangerous Definition](#), 10 J. Contemp. Legal Issues 61, 98 (1999); Christopher Slobogin, [An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases](#), 86 Va. L. Rev. 1199, 1244 (2000); Elisa Swanson, ["Killers Start Sad and Crazy": Mental Illness and the Betrayal of Kipland Kinkel](#), 79 Or. L. Rev. 1081, 1103-10 (2001); Bruce J. Winick, [Therapeutic Jurisprudence and the Civil Commitment Hearing](#), 10 J. Contemp. Legal Issues 37, 41 (1999).

[FN33]. [In re Mental Health of K.G.F.](#), 29 P.3d 485 (Mont. 2001) (footnotes omitted).

[FN34]. See Perlin, *Sanism*, supra note 4, at 400-01 (footnotes omitted) stating:

[J]udges reflect and project the conventional morality of the community. Like the rest of society, judges take refuge in flawed "ordinary common sense," heuristic reasoning and biased stereotypes to justify their sanist decisions.... [J]udicial decisions in all areas of mental disability law continue to reflect and perpetuate sanist stereotypes. The myths are cherished by trial judges, appellate judges, Supreme Court justices, and, especially, by the Chief Justice of the United States.

[FN35]. [42 U.S.C. § § 12101](#) (1994). See Perlin, *Maggie's Farm*, supra note 21, at 57-58 (stating that "the ADA provides basically the same bundle of protections for persons with disabilities as the Civil Rights Acts of the 1960s did for citizens of color with clear, strong, and enforceable standards").

[FN36]. See Michael L. Perlin, [The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?](#) 8 J.L. & Health 15, 22 (1993-94) [hereinafter Perlin, *Sanist Attitudes*].

[FN37]. [527 U.S. 581](#) (1999).

[FN38]. Bob Dylan, *Lyrics 1962-1985* 367 (1985).

[FN39]. Michael L. Perlin, "Big Ideas, Images and Distorted Facts": The Insanity Defense, Genetics, and the "Political World," in *Genetics and Criminality: The Potential Misuse of Scientific Information in Court* 37 (Jeffrey R. Botkin et al. eds., 1999); Perlin, *Borderline*, supra note 13.

[FN40]. Dylan, supra note 38, at 367.

[FN41]. This discussion sidesteps entirely the Eleventh Amendment issues resolved in [University of Alabama v. Garrett](#), 531 U.S. 356 (2001) (holding that states have Eleventh Amendment sovereign immunity in Title I ADA cases brought by state workers).

[FN42]. Michael L. Perlin, ["Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization](#), 46 DePaul L. Rev. 947, 968 (1997) [hereinafter Perlin, *Make Promises*].

[FN43]. [480 U.S. 273 \(1987\)](#).

[FN44]. [Id. at 284](#).

[FN45]. [42 U.S.C. § 12102\(2\)\(c\) \(1994\)](#) (stating the "term 'disability' means, with respect to an individual--being regarded as having such an impairment").

[FN46]. Perlin, *Make Promises*, *supra* note 42, at 968.

[FN47]. Perlin, *Sanist Attitudes*, *supra* note 36, at 22.

[FN48]. *Id.* at 22-23. See *infra* text accompanying note 109.

[FN49]. Perlin, *Make Promises*, *supra* note 42, at 955.

[FN50]. See, e.g., [Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach](#), 846 F. Supp. 986 (S.D. Fla. 1994).

[FN51]. See [T.P. v. DuBois](#), 843 F. Supp. 775 (D. Mass. 1993).

[FN52]. [46 F.3d 325 \(3d Cir. 1995\)](#), cert. denied, [516 U.S. 813 \(1995\)](#). *Maggie's Farm*, *supra* note 21, at 66-67, discusses the significance of Helen L. See generally Andrew Batavia, [A Right to Personal Assistance Services: "Most Integrated Setting Appropriate" Requirements and Independent Living Model of Long Term Care](#), 27 *Am. J. L. & Med.* 17, 32 (2001); Loretta Williams, [Long Term Care After Olmstead v. L.C.: Will the Potential of the ADA's Integration Mandate Be Achieved?](#), 17 *J. Contemp. Health L. & Pol'y* 205, 218-22 (2000); Sandra Yue, [A Return to Institutionalization Despite Olmstead v. L.C. ? The Inadequacy of Medicaid Provider Reimbursement in Minnesota and the Failure to Deliver Home- and Community-Based Waiver Services](#), 19 *Law & Ineq.* 307, 316 (2001).

[FN53]. See [46 F.3d at 327](#).

[FN54]. [Id. at 335](#).

[FN55]. [Id. at 332](#) (quoting [42 U.S.C. § 12101\(a\)\(2\) \(1994\)](#)).

[FN56]. *Id.* (citing [42 U.S.C. § 12101\(a\)\(8\)](#)).

[FN57]. *Id.* at 335.

[FN58]. *Id.* at 336.

[FN59]. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 *Harv. C.R.- C.L. L. Rev.* 99, 99-100 (1999); see also, Kathryn Moss et al., *Outcomes of Employment Discrimination Charges Filed Under the Americans with Disabilities Act*, 50 *Psychiatric Serv.* 1028 (1999) (stating that 15.7% of EEOC filings brought "some kind of benefit" to individual alleging ADA discrimination). See generally Susan Stefan, *Unequal Rights* (2001); Susan Stefan, *The Americans with Disabilities Act and Mental Health Law*, 10 *J. Contemp. Legal Issues* 131 (1999); Susan Stefan, *"You'd Have to Be Crazy to Work Here": Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 *Loy. L.A. L. Rev.* 795 (1998) [hereinafter Stefan, *Worker Stress*].

[FN60]. See, e.g., Stefan, *Worker Stress*, *supra* note 59.

[FN61]. [Olmstead v. L.C. Zimring](#), 527 U.S. 581 (1999).

[FN62]. [Id. at 597](#).

[FN63]. [Id. at 597-98](#). See also Perlin, Hidden Prejudice, *supra* note 3, at 175-204 (discussing Olmstead).

[FN64]. [457 U.S. 307 \(1982\)](#) (finding a limited constitutional right to training for certain persons institutionalized by reason of mental retardation). See 2 Michael L. Perlin, *Mental Disability Law: Civil and Criminal* §§ 3A-9 to 3A-9.9, at 87-108 (2d ed. 1999) [hereinafter Perlin, *Disability Law*].

[FN65]. Perlin, *Maggie's Farm*, *supra* note 21, at 56.

[FN66]. See Michael L. Perlin, "Their Promises of Paradise": Will *Olmstead v. L.C.* Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law? 37 *Hous. L. Rev.* 99 (2000) [hereinafter Perlin, *Promises of Paradise*].

[FN67]. [Albertson's, Inc. v. Kirkingburg](#), 527 U.S. 555 (1999); [Murphy v. United Parcel Serv.](#), 527 U.S. 516 (1999); [Sutton v. United Air Lines](#), 527 U.S. 471 (1999).

[FN68]. See, e.g., [Susan Norton, Resolved by Supreme Court, 51 Manage. May 1, 2000, at 1 available at 2000 WL 28951549](#) (stating that "to the collective relief of employers everywhere, the Supreme Court [decided *Sutton* and *Murphy*]").

[FN69]. On a purely personal anecdote, I wrote the first edition of a three volume mental disability law treatise in 1989. I have just submitted the manuscripts to volumes four and five of a five-volume second edition. Michael L. Perlin, *Mental Disability Law: Civil and Criminal* (1989); *id.*, (2d ed. 1998-2000). Each summer and fall, I write a new pocket part and supplement. I prepare to do this work by, first, dragging from my basement to my home office a group of packing boxes that contain all the mental disability law cases (and relevant law review articles) published in the prior year. This year, there were twenty-eight boxes. And eighteen of these twenty-eight boxes--when they were finally sorted--were filled with cases involving the ADA.

[FN70]. See Perlin, *Maggie's Farm*, *supra* note 21, at 56 (stating that "Olmstead potentially has the capacity to transform and revolutionize mental health law" (emphasis in original)).

[FN71]. *Id.* at 22 (quoting Michael Lottman, Paper Victories and Hard Realities, in *Paper Victories and Hard Realities: the Implementation of the Legal and Constitutional Rights of the Mentally Disabled* 93 (Valerie J. Bradley & Gary J. Clarke eds., 1976)). Lottman's article was one of the first published uses of this phrase in a mental disability law context. See, e.g., Perlin, *Promises of Paradise*, *supra* note 66, at 1049; Perlin & Dorfman, *Dodging Lions*, *supra* note 10, at 116; Paul Tremblay, [Acting "A Very Moral Type of God": Triage Among Poor Clients](#), 67 *Fordham L. Rev.* 2475, 2499 (1999).

[FN72]. [406 U.S. 715 \(1972\)](#) (holding that indefinite long-term commitment of persons unlikely to regain their competence to stand trial in the foreseeable future is unconstitutional). See generally Perlin, *Disability Law*, *supra* note 64, § 2A-4.4, at 122-24 (2d ed. 1998) (explaining the Jackson decision).

[FN73]. Perlin, *Half-Wracked*, *supra* note 6, at 23-24 (discussing and citing research presented in Bruce J. Winick, [Restructuring Competency to Stand Trial](#), 32 *UCLA L. Rev.* 921, 940 (1985)).

[FN74]. See *id.* at 24-25 (discussing and citing research presented in 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)).

[FN75]. See [id. at 24](#).

[FN76]. See Perlin, *Promises of Paradise*, *supra* note 66.

[FN77]. *Id.* at 167.

[FN78]. Perlin, *Make Promises*, *supra* note 42 at 958.

[FN79]. [Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 \(1981\)](#)

[FN80]. [Id. at 30](#) (stating that the Developmental Disabilities Bill of Rights Act was merely a federal/state grant program and that neither the right to treatment nor the least restrictive alternative sections of the bill of rights were enforceable in private action). See also Perlin, *Make Promises*, supra note 42, at 953, 958-59, 981.

[FN81]. See [Olmstead, 527 U.S. at 583](#) (stating that "the ADA stepped up earlier efforts in the Developmentally Disabled Assistance and Bill of Rights Act and the Rehabilitation Act of 1973 to secure opportunities for people with developmental disabilities to enjoy the benefits of community living").

[FN82]. See generally Perlin, *Maggie's Farm*, supra note 21 (asking this question about the ADA in general).

[FN83]. Dylan, supra note 38, at 368.

[FN84]. Perlin, *Sanist Attitudes*, supra note 36, at 24-26.

[FN85]. *Id.* Most of the debate as to mental disabilities centered on the question of whether certain sexual disorders--e.g., transvestism, transsexualism, and other "gender identity disorders" would be covered. [42 U.S.C. § 12211\(b\)\(1\) \(1994\)](#); see also Perlin, *Sanist Attitudes*, supra note 36, at 25 n.53.

[FN86]. See Perlin, *Sanist Attitudes*, supra note 36, at 22 (stating that "if the ADA is to make any true headway in restructuring the way that citizens with mental disabilities are dealt with by society (by employers, public agencies, and proprietors of places of public accommodations) it must provide a means by which to deal frontally with these sanist attitudes.")

[FN87]. Perlin, *Make Promises*, supra note 42, at 947-49. But see [University of Ala. v. Garrett, 531 U.S. 356, 374 \(2001\)](#) (noting that discrimination in employment is reviewed under the rational basis test for Equal Protection clause purposes in ADA cases).

[FN88]. Perlin, *Make Promises*, supra note 42, at 955-56.

[FN89]. [397 U.S. 397, 413 \(1970\)](#).

[FN90]. [Id. at 412](#).

[FN91]. See Moss, supra note 59, at 1028; Stefan, *Worker Stress*, supra note 59, at 802.

[FN92]. See Perlin, *Disability Law*, supra note 64, § 5A-2.4, at 195-96 nn.226-27 (citing cases).

[FN93]. Paul Clark, *ADA and Its Discontents: Court to Rule on Lawsuits Against States*, Wash. Times, Oct. 11, 2000, at A19.

[FN94]. Ed Miedema, *Enforcing the ADA Can Sometimes Go Too Far*, Ft. Lauderdale Sun-Sentinel, Sept. 19, 2000, at 20A.

[FN95]. See, e.g., [Peter David Blanck, Civil War Pensions, Civil Rights, and the ADA: Empirical Studies \(1869-1907, 1990-2000\), 62 Ohio St. L.J. 109 \(2001\)](#); Peter David Blanck & Michael Millender, [Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America, 52 Ala. L. Rev. 1 \(2000\)](#).

[FN96]. See Laura C. Scotellaro, Note, [The Mandated Move From Institutions to Community Care: Olmstead v. L.C., 31 Loy. U. Chi. L.J. 737, 737 \(2000\)](#) (footnotes omitted):

Larry McAfee, a twenty-nine year old civil engineer, became a quadriplegic as a result of a motorcycle accident. During the four years following his accident, he was transferred from institution to institution like a "sack of potatoes." The state in which he lived refused to pay for community-based living services for him and only paid

for the cost of nursing home care even though he was not ill and did not require any institutional care. In the nursing home, he was told when to eat, when to sleep, and even when he could watch movies on television. Because of these restrictions on his life, he requested the right to be removed from his life-sustaining respirator. Immediately after Mr. McAfee was placed in a community-based setting, however, he changed his mind about suicide.

For negative examples, see *supra* notes 93-94.

[FN97]. See [Martin v. PGA Tour, 204 F.3d 994 \(9th Cir. 2000\)](#), *aff'd*, [532 U.S. 661 \(2001\)](#) (holding that allowing golfer with disability to use a golf cart, despite the walking requirement that applied to the association's tours, was not a modification that would "fundamentally alter the nature" of those competitions and was required by Title III of the ADA).

[FN98]. See Perlin, Promises of Paradise, *supra* note 66, at 1029-30 n.214 (discussing [Sutton v. United Air Lines, 527 U.S. 471 \(1999\)](#), [Albertson's, Inc. v. Kirkinburg, 527 U.S. 555 \(1999\)](#), and [Murphy v. United Parcel Serv., 527 U.S. 516 \(1999\)](#)); Perlin, Maggie's Farm, *supra* note 21, at 58 n.46 (discussing the Sutton trilogy).

[FN99]. See Perlin, Disability Law, *supra* note 64, § 5A-2.4b at 219-20 (2d ed. 2000).

[FN100]. See Perlin, Hidden Prejudice, *supra* note 3, at 21-58; Perlin, Sanism, *supra* note 4; see also, Perlin, Maggie's Farm, *supra* note 21; Michael L. Perlin, [A Law of Healing, 68 U. Cin. L. Rev. 407 \(2000\)](#); Perlin, Half-Wracked, *supra* note 6; Michael L. Perlin, [Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law, 20 New Eng. J. on Crim. & Civ. Confinement 369 \(1994\)](#); Perlin, Sanist Lives, *supra* note 15.

[FN101]. See Perlin, Hidden Prejudice, *supra* note 3, at 4-16; Michael L. Perlin, Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning, 69 Neb. L. Rev. 3 (1990).

[FN102]. See Perlin, Jurisprudence, *supra* note 13, at 440-44; Perlin, Half-Wracked, *supra* note 6, at 30-31.

[FN103]. Perlin, Hidden Prejudice, *supra* note 3, at 59-75; Perlin, Success, *supra* note 7; Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency, 47 U. Miami L. Rev. 625, 669-70 \(1993\)](#); 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 (1991).

[FN104]. Perlin, Maggie's Farm, *supra* note 21.

[FN105]. *Id.* at 53-55.

[FN106]. Michael L. Perlin, "For the [Misdemeanor Outlaw](#)": [The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities, 52 Ala. L. Rev. 193 \(2000\)](#) [hereinafter Perlin, Outlaw].

[FN107]. Perlin, Promises of Paradise, *supra* note 66.

[FN108]. See [Lessard v. Schmidt, 349 F. Supp. 1078, 1096 \(E.D. Wis. 1972\)](#) (subsequent citations omitted). See generally Perlin, Disability Law, *supra* note 64, § 2A-4.4a, 2A-4.4c, at 126-32, 139-42.

[FN109]. Perlin, Maggie's Farm, *supra* note 21; see also Perlin, Sanist Attitudes, *supra* note 36.

[FN110]. Perlin, Sanist Attitudes, *supra* note 36, at 22-23. The "hearts and minds" phrase was first used in Chief Justice Warren's opinion in [Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494 \(1954\)](#); cf. [Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445 \(1968\)](#).

[FN111]. [Olmstead v. L.C., 527 U.S. 581 at 600 \(1999\)](#).

[FN112]. *Id.*; see also Brief of the United States as Amicus Curiae at 17, [Olmstead, 527 U.S. 581 \(No. 98-536\)](#).

[FN113]. [527 U.S. at 601](#); see also Brief for United States as Amicus Curiae at 6-7, [Olmstead v. L.C.](#), [527 U.S. 581 \(1999\)](#) (No. 98-536).

[FN114]. See Darrel A. Regier, One-Month Prevalence of Mental Disorders in the United States, 45 Archives Gen. Psychiatry 977, 981 tbl. 4 (1988), quoted in W. David Corrick, [Health and Welfare](#), [24 Pac. L.J. 885, 905-06 n.15 \(1993\)](#) (stating that 19.6% of Americans eighteen years old or older suffer from some form of diagnosable mental disability during their lives).

[FN115]. Cf. [United States v. Jewell](#), [532 F.2d 697, 700 n.7 \(9th Cir. 1976\)](#), cert. denied, [426 U.S. 951 \(1976\)](#) (stating that "he suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful [sic] blindness").

[FN116]. Harry Solomon, Presidential Address: The American Psychiatric Association in Relation to American Psychiatry, 115 Am. J. Psychiatry 1, 7 (1958).

[FN117]. [344 F. Supp. 373 \(D. Ala. 1972\)](#).

[FN118]. See 2 Perlin, Disability Law, *supra* note 64, § 3A-3.1, at 24 (2d ed. 1999) (stating that Wyatt was "one of the most influential mental disability law cases ever filed").

[FN119]. [Wyatt v. Aderholt](#), [503 F.2d 1305, 1311 n.6 \(5th Cir. 1974\)](#).

[FN120]. [457 U.S. 307 \(1982\)](#) (finding only a limited right to treatment for persons institutionalized because of mental retardation).

[FN121]. [451 U.S. 1 \(1981\)](#) (stating that the Developmental Disabilities Bill of Rights Act ([42 U.S.C. § 6010](#)) was merely a federal/state grant program and that neither the right to treatment nor the least restrictive alternative sections of the bill of rights were enforceable in private action); [465 U.S. 89 \(1984\)](#) (holding that the Eleventh Amendment bars federal relief in a right-to-community service case due to federalism concerns).

[FN122]. Leopold Lippman & I. Ignancy Goldberg, The Right to Education: Anatomy of the Pennsylvania Case and its Implication for Exceptional Children 17 (1973), quoted in Perlin, Marginalization, *supra* note 11, at 100 n.215.

[FN123]. Paul Longmore, [Elizabeth Bouvia, Assisted Suicide, and Social Prejudice](#), [3 Issues L. & Med. 141, 150 \(1987\)](#). See generally Michael Winerip, 9 Highland Road (1994) (describing the arduous task of establishing a group home in Glen Cove, New York).

[FN124]. See, e.g., Craig W. Christensen, [If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"](#), [66 Fordham L. Rev. 1699, 1724 n.146 \(1998\)](#) (hypothesizing similarities between public reaction to abortion and gay rights cases); Earl Martin, [Towards an Evolving Debate on the Decency of Capital Punishment](#), [66 Geo. Wash. L. Rev. 84, 85 \(1997\)](#) (discussing death penalty); Steven K. DiLiberto, Note, [Setting Aside Set Asides: The New Standard for Affirmative Action Programs in the Construction Industry](#), [42 Vill. L. Rev. 2039, 2047, nn.15-16 \(1997\)](#) (discussing affirmative action and abortion).

[FN125]. See [Olmstead v. L.C. Zimring](#), [527 U.S. 581, 599-600 \(1999\)](#).

[FN126]. See [United States v. Carolene Prods. Co.](#), [304 U.S. 144, 152-53 n.4 \(1938\)](#). For a discussion on the impact this footnote from Carolene Products has had on the development of mental disability law, see Perlin, Disability Law, *supra* note 64, § 1-2.1, at 7 (2d ed. 1998), and Perlin, Sanism, *supra* note 4, at 381 n.51. I discuss this in the ADA context in Perlin, Make Promises, *supra* note 42, at 948-49. Further, see Perlin, Outlaw, *supra* note 106, at 219- 20 (footnotes omitted):

The language that Congress chose to use in its introductory fact-findings [for the ADA] is of extraordinary importance. Its specific finding that individuals with disabilities are a "discrete and insular minority ... subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness" is not just precatory flag-and-apple-pie rhetoric. This language--granted "the force of law"--was carefully chosen; it comes

from the heralded "footnote 4" of the *United States v. Carolene Products* case, which has served as the springboard for nearly a half century of challenges to state and municipal laws that have operated in discriminatory ways against other minorities. The language also rejects a congressional commitment to provide "protected class" categorization for persons with disabilities. This in turn forces courts to employ a "compelling state interest" or "strict scrutiny" test in considering statutory and regulatory challenges to allegedly discriminatory treatment.

[FN127]. See [Olmstead, 527 U.S. at 600](#) (stating that "there can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action") (quoting [Allen v. Wright, 468 U.S. 737, 755 \(1984\)](#)).

[FN128]. See *id.* (stating that "'in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes'" (quoting [L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 \(1978\)](#) and quoting [Sprogis v. United Air Lines, 444 F.2d 1194, 1198 \(7th Cir. 1971\)](#))).

[FN129]. See sources cited *supra* note 113.

[FN130]. [42 U.S.C. § 12101\(a\)\(7\) \(1994\)](#).

[FN131]. Americans with Disabilities Act: Hearing Before the Senate Comm. On Labor and Human Res., 101st Cong. 215 (1989) (statement of former Sen. Weicker).

[FN132]. [H.R. Rep. No. 101-485, pt. 1, at 56 \(1990\)](#), reprinted in 1990 U.S.C.C.A.N. 445, 479.

[FN133]. Samuel R. Bagenstos, [Subordination, Stigma, and "Disability"](#), 86 Va. L. Rev. 397 (2000).

[FN134]. *Id.* at 420.

[FN135]. [Olmstead v. L.C., 527 U.S. 581, 601 \(1999\)](#).

[FN136]. *Id.*

[FN137]. See, e.g., Pamela Cohen, Being "Reasonable": Defining and Implementing a Right to Community-Based Care for Older Adults with Mental Disabilities Under the Americans with Disabilities Act, 24 Int'l J.L. & Psychiatry 235 (2001).

[FN138]. See Perlin, Promises of Paradise, *supra* note 66, at 1053-54; see also Jennifer Mathis, [Community Integration of Individuals with Disabilities: An Update on Olmstead Litigation, 25 Mental & Physical Disability L. Rep. 158, 158 \(2001\)](#) (stating that "although the Olmstead decision was of tremendous significance to the disability rights community, only a handful of lower court decisions have interpreted its meaning").

[FN139]. [Rolland v. Cellucci, 191 F.R.D. 3, 9 \(D. Mass. 2000\)](#).

[FN140]. [Kathleen S. v. Dep't of Pub. Welfare, No. Civ A 97-6610, 1999 WL 1257284, at *5 \(E.D. Pa. Dec. 23, 1999\)](#). See also [Creasy v. Rusk, 730 N.E.2d 659, 664-65 \(Ind. 2000\)](#) stating that:

Since the 1970s, Indiana law has strongly reflected policies to deinstitutionalize people with disabilities and integrate them into the least restrictive environment. National policy changes have led the way for some of Indiana's enactments in that several federal acts either guarantee the civil rights of people with disabilities or condition state aid upon state compliance with desegregation and integrationist practices.

[FN141]. [Kirbens v. Wyo. State Bd. of Med., 992 P.2d 1056, 1061 \(Wyo. 1999\)](#).

[FN142]. [Rodriguez v. City of N.Y., 197 F.3d 611, 618-19 \(2d Cir. 1999\)](#), cert. denied, [531 U.S. 864 \(2000\)](#).

[FN143]. A simple Westlaw search reveals that *Olmstead* was cited twenty-nine times as of October 18, 2000, and forty-five times by September 1, 2001. By contrast, consider what happened in the eighteen months after the Supreme Court decided [Kansas v. Hendricks, 521 U.S. 346 \(1997\)](#), upholding that state's sexually violent predator act. See Perlin, Success, *supra* note 7 (stating that there were 133 cites to *Hendricks* in the same time period). See generally Perlin, Disability Law, *supra* note 64, § 2A-3.3, at 75-92 (2d ed. 1998).

[FN144]. Text *infra* accompanying notes 144-46 is generally adapted from Perlin, Outlaw, *supra* note 106, at 230-31.

[FN145]. Bagenstos, *supra* note 134, at 402.

[FN146]. John Parry, The [Supreme Court Interprets the ADA, 23 Mental & Physical Disability L. Rep. 454, 456 \(1999\)](#) (citing [Youngblood v. Romero, 457 U.S. 307 \(1987\)](#)).

[FN147]. See Rosemary L. Bauman, Note, [Disability Law--Needless Institutionalization of Individuals with Mental Disabilities as Discrimination under the ADA --Olmstead v. L.C., 30 N.M. L. Rev. 287 \(2000\)](#); Shoshana Fishman, Note, [Olmstead v. Zimring: Unnecessary Institutionalization Constitutes Discrimination Under The Americans With Disabilities Act, 3 J. Health Care L. & Pol'y 430 \(2000\)](#); Joanne Karger, Note, "Don't Tread on The ADA": *Olmstead v. L.C. ex rel. Zimring and The Future of Community Integration For Individuals With Mental Disabilities*, 40 B.C. L. Rev. 1221 (1999); Scotellaro, *supra* note 96.

[FN148]. Scotellaro, *supra* note 96, at 782.

[FN149]. See Perlin, Disability Law, *supra* note 64, § 7B-1 et seq. (2d ed. 2000); see also *infra* notes 150 and 151.

[FN150]. Sarah Light, Note, [Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law, 109 Yale L.J. 381, 391 \(1999\)](#).

[FN151]. Neil S. Butler, Note, "In the Most Appropriate Setting": The Rights of Mentally Disabled Individuals Under the Americans with Disabilities Act in the [Wake of Olmstead v. L.C., 49 Cath. U. L. Rev. 1021, 1052 \(2000\)](#) (stating that "only Congressional clarification of the broad scope of the ADA's integration mandate will resolve the Court's current cost dilemma and ensure that in future years the full range of treatment options will be available to the mentally disabled").

[FN152]. Paul S. Appelbaum, Least Restrictive Alternative Revisited: *Olmstead's* Uncertain Mandate for Community-Based Care, 50 Psychiatric Serv. 1271, 1272 (1999). Cf. Note, Leading Cases: [Federal Statutes, Regulations, and Treaties, 113 Harv. L. Rev. 326, 332-33 \(1999\)](#), stating:

In *Youngberg*, the Court held that, in assessing the constitutionality of the use of restraints in mental institutions, the decision to use restraints, "if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Although the Court in *Olmstead* avoided citing *Youngberg*, its deference to professional judgment seemed to invoke the spirit of *Youngberg*. In the wake of *Olmstead* and its explicit deference to professional judgment, institutions may simply avoid complying with the ADA by creating cultures in which recommendations for patient community treatment are few and far between.

[FN153]. [457 U.S. 307 \(1982\)](#).

[FN154]. [Id. at 323](#). See Perlin, Disability Law, *supra* note 64, § 3A-9.4, at 95-98 (2d ed. 1999).

[FN155]. See, e.g., Michael L. Perlin et al., Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption? 1 Psychol., Pub. Pol'y & L. 80, 97-110 (1995) [hereinafter Perlin et al., Therapeutic Jurisprudence].

[FN156]. See [Olmstead, 527 U.S. at 605](#), stating:

For other individuals, no placement outside the institution may ever be appropriate. See ... [Youngberg v. Romeo](#),

[457 U.S. 307, 327 \(1982\)](#) (Blackmun, J., concurring) ("For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know.")

[FN157]. [521 U.S. 346, 371 \(1997\)](#) (upholding Kansas' Sexually Violent Predator Act ([Kan. Stat. Ann. § 59-29a01 \(1994\)](#))).

[FN158]. Westlaw search (Oct. 18, 2000).

[FN159]. Perlin, Sanism, *supra* note 4, at 406. See also Perlin et al., Therapeutic Jurisprudence, *supra* note 155, at 116. Although Hendricks may be classified as a "mental disability law case," its focus on sexual predator law is the reason for the extensive attention paid to it.

[FN160]. This eerily tracks the fear I expressed several years ago that the Supreme Court, when confronted with an Olmstead-type case, might have said that Congress really did not mean what it said in enacting the ADA. Perlin, Make Promises, *supra* note 42, at 955, and accompanying text. Mercifully, I was wrong.

[FN161]. Cf. Perlin, Make Promises, *supra* note 42, at 955 (anticipating a negative reaction by the Supreme Court to an Olmstead-like claim).

[FN162]. See *supra* text accompanying note 62 (discussing [Olmstead, 527 U.S. at 597](#)).

[FN163]. See *supra* text accompanying note 63 (discussing [Olmstead, 527 U.S. at 597-98](#)).

[FN164]. Thomas Cooley Law School symposium (on the potentially revolutionary potential of Olmstead), the University of Alabama symposium (on the relationship between the post- Olmstead ADA and forensic incompetency/insanity evaluations and commitments) and the University of Houston symposium (on how the post-Olmstead ADA might resuscitate the principle of the "least restrictive alternative" in mental disability law).

[FN165]. I did not become that much older, or crankier. I am also studiously avoiding any consideration of the decision in Garrett, see *supra* note 41.

[FN166]. See Perlin, Jurisprudence, *supra* note 13, at 278-81, 333-48; see also Perlin, Half-Wracked, *supra* note 6, at 12. See generally Perlin, Disability Law, *supra* note 64, § 1-2.3, at 24 (2d ed. 1998) (discussing the impact of the Hinckley acquittal on mental disability law).

[FN167]. See, e.g., Perlin, Sanist Lives, *supra* note 15, at 257 n.98 (citing [Battalino v. People, 199 P.2d 897, 901 \(Colo. 1948\)](#) (finding that the defendant was not insane where there was no evidence of a "burst of passion with paleness, wild eyes and trembling"), quoted in Michael L. Perlin, [Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence, 40 Case W. Res. L. Rev. 599, 727 n.608 \(1990\)](#)); Perlin, Right to Sex, *supra* note 7, at 538-39 (stating that "in one parental rights termination case, [In re McDonald, 201 N.W.2d 447, 450 \(Iowa 1972\)](#), expert testimony that persons with disabilities cannot show love and affection as well as persons of normal intelligence was relied upon to support termination findings").

[FN168]. See e.g., Perlin & Dorfman, Dodging Lions, *supra* note 10, at 115 (discussing the shift in the path of the right to refuse treatment litigation after the trial decisions and "since the trial decisions in Rennie v. Klein and Rogers v. Okin first articulated a limited constitutional right to refuse, a flood of court decision[s] from state and federal courts in practically every jurisdiction in the nation have tinkered with the contours of the right"). The discussion in Dodging Lions traces the Rennie case ([Rennie v. Klein, 476 F. Supp. 1294 \(D.N.J. 1979\)](#)), stay denied in part, granted in part, [481 F. Supp. 552 \(D.N.J. 1979\)](#), modified and remanded, [653 F. 2d 836 \(3d Cir. 1981\)](#) (en banc), vacated and remanded, [458 U.S. 1119 \(1982\)](#) and the Rogers case ([Rogers v. Okin, 478 F. Supp. 1342 \(D. Mass. 1979\)](#), modified, [634 F. 2d 650 \(1st Cir. 1980\)](#) (en banc), vacated sub nom [Mills v. Rogers, 457 U.S. 291 \(1982\)](#)).

[FN169]. Dylan, *supra* note 38, at 367.

[\[FN170\]](#). Id.

[\[FN171\]](#). Id.

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Articles

***423 "CHIMES OF FREEDOM:" [\[FN1\]](#) INTERNATIONAL HUMAN RIGHTS AND INSTITUTIONAL MENTAL DISABILITY LAW**

[Michael L. Perlin](#) [\[FNal\]](#)

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The past thirty years have witnessed a revolution in American mental disability law. This revolution is one that largely constitutionalized virtually every aspect of the involuntary civil commitment and release process, as well as most "pressure points" in the course of institutionalization (the right to treatment, the right to refuse treatment, the right to the least restrictive alternative course of treatment). It saw the first broad-based, federal civil rights statutes enacted on behalf of persons with mental disabilities. It witnessed the creation of a "patients' bar" to provide legal representation to such persons. Paradoxically, it also saw both a ferocious backlash against forensic patients (especially, but not solely, persons found not guilty by reason of insanity), and a "widening of the net," that, by "blurring" the boundaries of civil and criminal mental disability law, has increased the categories of persons subject to the involuntary civil commitment power (to now include those charged with certain sexually violent offenses and persons subject to "assisted outpatient commitment"). [\[FN2\]](#) This revolution continues today, and there is no reason to expect any abatement in case law, statutory amendments, or advocacy initiatives in the coming years.

But it is a revolution that has largely been a parochial one. There have been important developments in other nations--both in common and civil law countries--but, by and large, this has been an American revolution.

***424** This is curious to some extent. For the conditions that led reformers to launch a series of well-orchestrated attacks on institutional care and on the involuntary civil commitment process in the United States certainly exist in other nations. If there has ever been any question about this, the stunningly graphic and comprehensive reports done by Mental Disability Rights International ("MDRI") on conditions in Hungary, Uruguay, and Mexico eliminate any lingering doubt. [\[FN3\]](#) Yet, for a variety of reasons, there have been few legal developments in these countries--and others similarly-situated--that parallel what has happened in the United States over the past thirty years.

In the past two years, I have attempted to make a modest change in this picture. Under the auspices of MDRI, I have traveled to Budapest, to Tallinn, to Riga, to Budapest again, and to Sofia, to consult with activists, advocates, progressive mental health professionals, and lawyers providing legal services to persons with mental disabilities. In Budapest, I spoke to members of the Psychiatric Interest Forum; in Tallinn, to members and officials of the Estonian Psychiatric Patients Advocacy Association; in Riga, to members of the Latvian Center on Human Rights and Ethnic

Studies. In Budapest, I also met with the secretary of the National Disability Affairs Council, the secretary of the Hungarian Association for Persons with Mental Handicap, and the head of the Hungarian Civil Liberties Union. In Tallinn and Riga, I conferred with law school students and faculty. During my second trip to Budapest, I met with activists from Slovenia, Croatia, Kosovo, Poland, the Czech Republic, and other nations. While in Sofia, I had discussions with activist lawyers and advocates from some of these same nations, as well as from Albania. I also worked with members of the Bulgaria Helsinki Committee, and a representative of Amnesty International.

In each venue, I presented mini-versions of my two introductory mental disability law courses (Mental Health Law, and Criminal Law and Procedure: The Mentally Disabled Defendant), stressing issues involving involuntary civil commitment, institutional rights, deinstitutionalization, and advocacy. In Latvia, I also participated in a set of on-site visits to facilities for persons institutionalized because of mental disabilities. My aim in each case was to 'brainstorm' with workshop participants about the optimal sort of ombudsman/advocacy project for each country, to see what kinds of problems were indigenous to those nations, and which were global. It was no surprise that the pictures that I saw in January 2002, from facilities in Bulgaria--half-dressed patients in cage-like rooms, feces smeared on the wall--eerily reflected the conditions at Willowbrook State School in New York City when *425 they were exposed to a stunned nation some thirty years ago by the then-fledgling investigative reporter Geraldo Rivera. [\[FN4\]](#)

Teaching in Central and Eastern Europe taught me that the way we treat persons with mental disabilities--in institutions and in the community--is an international human rights issue, and it must be discussed, conceptualized, and taught in that context. It was that experience that led me to think about the need for today's program.

Before speaking further about today's symposium, there is one more "outside event" that I need to share with you: the development of New York Law School's distance learning, on-line Mental Disability Law course. Since the fall of 2000, we have been offering this program (basically a combination of the two introductory mental disability law courses to which I have already referred) domestically to lawyers, advocates, and mental health professionals. Early in January 2002, we launched our first international course in Tokyo. [\[FN5\]](#) We are now actively seeking philanthropic grant funding to allow us to offer this program to an audience of activists and advocates from Central and Eastern European nations. I tell you this now, because I believe that it may prove the best way of disseminating the important information that is at the core of much of the work that you will be hearing about all day today.

What will this course do, and how does it relate to today's program? I expect and hope that the Central & Eastern Europe ("C&EE") "section" of the Internet course will satisfy these objectives:

1. Provide participants with a firm grounding in all aspects of mental disability law--institutional, forensic, and private;
2. Offer them an opportunity to learn how the "law on the books" / "law in action" dichotomy--a gap that has plagued mental disability law for the past three decades--can best be resolved in the C&EE context; and
3. Allow them to interact in a collaborative way to search for solutions to problems unique to C&EE.

The international iterations of this course include:

- twelve hours of videotapes, which I prepared;

*426 - a notebook of readings, cases, and materials to supplement the casebook (Mental Disability Law: Cases and Materials) [\[FN6\]](#) and book of readings (The Hidden Prejudice: Mental Disability on Trial); [\[FN7\]](#)

- weekly reading assignments with "focus questions;"
- on-going, threaded, on-line message boards;
- a weekly, moderated on-line chat room; and
- two live two day-long seminars, one at the beginning of the course, and one at the conclusion.

The course substantively focuses on civil/constitutional issues (involuntary civil commitment, institutional rights, the right to refuse treatment, and deinstitutionalization), criminal issues (competencies, the insanity defense,

sentencing, sexually violent predator acts, and the importance of mental disability in criminal trial process issues, such as confessions, the privilege against self-incrimination, and the death penalty), and tort law. [\[FN8\]](#) Unlike the domestic sections, it also includes an advocacy-training component, specifically tailored for the needs of attorneys, activists, and advocates in C&EE. [\[FN9\]](#) I have included this additional material for several reasons:

First, I am convinced--after thirteen years of practicing law and eighteen of teaching it--that the presence of a vigorous, independent advocacy system (with trained, specialized counsel) is perhaps the most critical issue in determining whether any true mental health law reform is possible in any jurisdiction. [\[FN10\]](#) Second, there are multiple advocacy models, some of which may be more easily "transportable" to the civil law countries of Europe than others; this component will help participants assess which models will "work better" in their nations (as an aside, I certainly do not believe there is necessarily a "one size fits all" model of advocacy for all the nations in C&EE). Third, my earlier trips to Hungary, Estonia, Latvia, and Bulgaria, have clarified for me the importance of this issue to those who are likely participants in this course; probably a majority of the questions that I was asked in all of the programs in which I participated dealt with issues of advocacy models, ombudsmen projects, etc. Finally, I have written extensively about this issue in a domestic *427 context, and am eager to see the extent to which the conclusions that I have reached over the past three decades apply in an international setting. [\[FN11\]](#)

Earlier, I stated in summary fashion the objectives of the course. Let me now address each of these in a bit more detail, and explain how it links up with today's program.

1. It will provide participants with a firm grounding . . .

There is a remarkable overlap between the body of decisions that define American constitutional mental disability law and the body of international human rights standards that mandate humane treatment of persons with mental disability in every nation in the world. [\[FN12\]](#) Internationally, there is a shameful history of human rights abuses in psychiatric institutions: the provision of services in a segregated setting that cuts people off from society, often for life; the arbitrary detention from society that takes place when people are committed to institutions without due process; the denial of a person's ability to make choices about their life when they are put under plenary guardianship; the denial of appropriate medical care or basic hygiene in psychiatric facilities; the practice of subjecting people to powerful and dangerous psychotropic medications without adequate standards; and the lack of human rights oversight and enforcement mechanisms to protect against the broad range of abuses in institutions. [\[FN13\]](#)

Mental Illness Principles ("MI Principles") approved by the United Nations can be used as a guide to the interpretation of international human rights covenants as they apply to people with mental disabilities. In the case of *Congo v. Ecuador*, [\[FN14\]](#) for example, the Inter-American Commission on Human Rights made this finding:

[T]he Commission considers that in the present case the guarantees established under article 5 of the American Convention must be interpreted in light of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. These principles were adopted by the *428 United Nations General Assembly as a guide to the interpretation in matters of protection of human rights of persons with mental disabilities, which this body regards as a particularly vulnerable group. [\[FN15\]](#)

The case continued in a footnote:

The UN Principles for the Protection of Persons with Mental Illness are regarded as the most complete standards for protection of the rights of persons with mental disability at the international level. These Principles serve as a guide to States in the design and/or reform of mental health systems and are of utmost utility in evaluating the practices of existing systems. Mental Health Principle 23 establishes that each State must adopt the legislative, judicial, administrative, educational, and other measures that may be necessary to implement them. These Principles are also standards of assessment that makes international human rights monitoring by NGO's more possible. [\[FN16\]](#)

This course will teach participants the basics of all the major components of mental disability law: civil/constitutional mental disability law, institutional mental disability law, forensic mental disability law, and private mental disability tort law. It will illuminate the parallels with international human rights law (flowing from the promulgation of United Nations' standards, principles, treaties, and international court decisions) in such a way that

participants will be able to most effectively integrate the substance of the law into the practice of mental disability law (and mental disability advocacy) in Central & Eastern Europe.

2. The "law on the books" / "law in action" dichotomy . . .

There is a gap that has plagued American mental disability law since it began. Cases are decided on the Supreme Court level, yet are not implemented in the states. The United States Supreme Court has articulated sophisticated doctrine, for example, by mandating dangerousness as a prerequisite for an involuntary civil commitment finding, yet trial courts ignore that doctrine. [\[FN17\]](#) The Supreme Court has issued elaborate guidelines to be used in cases of criminal defendants who will likely never regain their competence to stand ^{*429} trial, yet, nearly thirty years later, half of the fifty states still ignore these standards. [\[FN18\]](#) This gap is a reflection of the level of pretextuality that permeates American mental disability law. By "pretextuality", I mean

that courts 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.' 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, blase judging, and, at times, perjurious and/or corrupt testifying. [\[FN19\]](#)

As a result of this pretextuality, the law on the books is often little more than an illusion; "successful" cases brought on behalf of persons with mental disabilities are often little more than "paper victories." [\[FN20\]](#)

Residents of Central and Eastern European nations are no strangers to pretextuality in many other areas of the law. I hope that through this course I will be able to help participants identify the pretexts endemic to mental disability law, and to develop strategies for dealing with these pretexts in their work. A recent analysis of the European Commission on Human Rights, by way of example, concluded that that body has interpreted the European Convention on Human Rights "very restrictively in psychiatric cases." [\[FN21\]](#) The cases analyzed in this article--cases that characterize the handcuffing of patients as "therapeutically necessary" [\[FN22\]](#) or that sanction the use of seclusion for "disciplinary" purposes [\[FN23\]](#)--certainly bespeak pretextuality. It is essential that such pretextuality be identified and answered.

3. Interactive collaboration . . .

Many of the problems faced in C&EE are regional ones that flow from decades of totalitarian regimes. Currently-existing advocacy programs are ^{*430} often modest and operate on "shoestring budgets." I believe that an interactive program, such as the one I am describing, offers participants an excellent opportunity for on-going, robust interaction in a supportive environment.

One of the course's features is permanent message boards on its web-site. Each week the instructor begins a new "threaded message" discussing that week's readings. All participants are encouraged to join in and discuss the reading and the videotapes prior to the chatroom session. Each week in the chatroom, the students and the mentor professor discuss the readings, focusing on a few of the most critical issues raised in the cases and materials. The conversation is free-wheeling, but always respectful. Time, literally, flies. And new ideas circulate with dizzying speed. After the chatroom sessions, flurries of e-mails--both to the entire group and to individuals--explore further and in greater depth some of the ideas pursued in the chatroom. The written assignments build on the readings, the tape viewings, the message boards, and the chatrooms. The in-person seminars are the culmination of the course.

Now, how does all this link up with today's program? I have several answers:

1. The hub of today's program is MDRI's release of its scathing Hungary social care home report. [\[FN24\]](#) That report excoriates the conditions of individuals in these facilities, and demonstrates the extent to which social reform efforts are needed. To plan a meaningful and potentially effective strategy, it is necessary to consider all of the past efforts (some successful, some not) over the past three decades of institutional litigation in the United States.

2. Hungary is not the only nation in its region in need of such social reform. You will also be hearing about conditions in Bulgaria (to which I have already alluded), and how other human rights groups have mobilized to meet

that challenge. There is no over-estimating the significance of this: finally, abuses of persons with mental disabilities are being considered human rights abuses. Again, there is a parallel here worth thinking about: it was not until 1972 that the United States Supreme Court--in the case of *Jackson v. Indiana* [FN25]--first held that the due process clause applied to the "nature and duration" of the involuntary civil commitment process. It would have been inconceivable to hold this conference the day before that case was decided. It is only when we reach a consensus that abuses in institutions for persons with mental disabilities are human rights violations that conferences, such as this one, will be replicated regularly in other nations.

3. I am thus convinced that although the problems in C&EE appear very different from the problems we face here, it is absolutely essential that constitutional developments over the past thirty years in the United States (developments *431 that form the basis of much of the international human rights law that will be the focus of today's program) be contextualized for advocates and activists. I believe that the most cost-efficient and effective means of doing that is via an Internet-based course.

4. Having said all of this, there are other issues involved that need to be considered as well: court processes, litigation, jurisprudence, the relationship between these human rights questions and broader political matters. Each of these will be addressed as well in the context of this program.

Our program is divided into four main segments, each one of which will be moderated by a New York Law School professor: myself, Stephen Ellmann, Terry Cone, and Paul Dubinsky. I am grateful to my colleagues for their help. In the first segment, Dr. Éva Szeli, Director of European Operations in MDRI's Budapest office, will speak on "International Mental Disability Law: The Central & Eastern European Experience." Dr. Szeli, a lawyer and a psychologist (as well as a frequent co-collaborator who has traveled with me through the old town neighborhoods of Riga and Tallinn on my never-ending search for Bob Dylan rarities) will discuss her work throughout the region, as well as her work in Hungary (both on the social care home report and other initiatives). Also, Krassimir Kanev, a human rights advocate with the Bulgaria Helsinki Committee, will talk about "International Mental Disability Law and Human Rights Law: The Helsinki Committee Perspective," and share with us the first important connections between the mental disability law "movement" and the international human rights movement.

In the second segment, three speakers, Dr. Katalin Peto, Eszter Kismodi, Esq., and Gabor Gombos (a psychiatrist, lawyer, and advocate for persons with mental disabilities), will each discuss the social care home report: what it says, how it came to be drafted, how the hands-on research was performed, and what its implications are for other nations in the region. Then, two New York Law School students, Sara Rotkin '02 and Jean Bliss '03, both of whom accompanied me to Budapest on my trip in October 2001, will present a report on that conference, and how it gave "life to advocacy ideals."

The third segment is one presentation by Eric Rosenthal, Executive Director of MDRI, in Washington, DC. He is the one person in the world most responsible for meaningful human rights reform in psychiatric institutions in Central and Eastern Europe. He will speak on "The Application of International Human Rights Law to Institutional Mental Disability Law," contextualizing today's programs in both contexts.

Then, there will be four interlinked presentations from four different perspectives. I've entitled it, "Bridging the Gap: American and Other Perspectives," in an effort to demonstrate how what we are talking about today is related to a variety of important jurisprudential, political, social, and judicial perspectives. Professor Bruce Winick, from the University of Miami Law *432 School, and one of the founders of the school of "therapeutic jurisprudence," [FN26] will speak on "Therapeutic Jurisprudence Perspectives" on the questions before us. Professor Robert Dinerstein, of American University Law School is one of the few American law professors who has done significant social reform work in this area of the world, [FN27] will speak on "Guardianship Reform Perspectives." Judge Ginger Lerner-Wren, of the Broward County Criminal Court in Florida, and the judge who sits on what is, by all accounts, the best Mental Health Court in the nation, [FN28] will discuss "Court Systems Perspectives." And finally, Professor Elizabeth Duquette, who teaches at both the University of Chicago and Northwestern Law Schools, [FN29] will place this in a greater political context, by speaking on "European Union Perspectives."

Now finally, a word about my title. As more than a few of you have already guessed, there's a Bob Dylan connection. My title comes, in part, from Dylan's all-too-rarely heard masterpiece, *Chimes of Freedom*, [FN30] a

composition that critic Robert Shelton has characterized as Dylan's 'most political song' and an expression of 'affinity' for a 'legion of the abused.' [\[FN31\]](#) The first verse of the song concludes:

Flashing for the warriors whose strength is not to fight,
Flashing for the refugees on the unarmed road of flight,
An' for each an' ev'ry underdog soldier in the night,
An' we gazed upon the chimes of freedom flashing. [\[FN32\]](#)

I cannot think of a finer way of characterizing what we are discussing here today.

Conclusion

This is not an easy effort. As you will learn from many of our upcoming speakers, there is much resistance, much opposition, and much more to do. But I am confident that, eventually, we will succeed; the importance of this *433 enterprise is too important to ignore. A revolution in mental disability law has changed the way we think about, treat, and empower those persons with mental disabilities. Trail-blazing NGOs, such as MDRI, have changed the way we think about the relationship between human rights and mental disability law across the globe. And, not coincidentally, a revolution in technology has changed the way we deliver, teach, and learn information.

We will hear today about developments in Central and Eastern Europe. I am confident that, if funding becomes available for our Internet project, we will be able to share information, ideas, and creative solutions with other mental disability activists in Central and Eastern Europe in a cost-efficient way that will dramatically increase the number of individuals who will have the capacity to provide grass roots advocacy in those nations and to restructure the practice of mental disability law and the delivery of mental health services in that region of the world.

I have been involved in mental disability law for thirty years. It is only in the past two years that I have been involved with international groups seeking solutions to international human rights-based issues. For the first time, I truly believe I have the capacity to "gaze upon the chimes of freedom flashing." [\[FN33\]](#)

[\[FN1\]](#). Bob Dylan, Chimes of Freedom, on Another Side Of Bob Dylan (Warner Bros. 1964).

[\[FNa1\]](#). Professor Michael L. Perlin is a Professor of Law at New York Law School. Rutgers University, B.A. 1966; Columbia University School of Law, J.D. 1969.

[\[FN2\]](#). See generally, Michael L. Perlin, *Mental Disability Law: Civil and Criminal* (1989); id. (2d ed. 1998-2001). Important cases include: [Board of Trustees of Univ. of Ala. v. Garrett](#), 531 U.S. 356 (2001); [Olmstead v. L.C.](#), 527 U.S. 581 (1999); [Sutton v. United Air Lines](#), 527 U.S. 471 (1999); [Kansas v. Hendricks](#), 521 U.S. 346 (1997); [Godinez v. Moran](#), 509 U.S. 389 (1993); [Heller v. Doe](#), 509 U.S. 312 (1993); [Riggins v. Nevada](#), 504 U.S. 127 (1992); [Washington v. Harper](#), 494 U.S. 210 (1990); [Zinermon v. Burch](#), 494 U.S. 113 (1990); [City of Cleburne v. Cleburne Living Ctr.](#), 473 U.S. 432 (1985); [Jones v. United States](#), 463 U.S. 354 (1983); [Mills v. Rogers](#), 457 U.S. 291 (1982); [Youngberg v. Romeo](#), 457 U.S. 307 (1982); [Vitek v. Jones](#), 445 U.S. 480 (1980); [Addington v. Texas](#), 441 U.S. 418 (1979); [Parham v. J.R.](#), 442 U.S. 584 (1979); [O'Connor v. Donaldson](#), 422 U.S. 563 (1975); [Jackson v. Indiana](#), 406 U.S. 715 (1972); [Rennie v. Klein](#), 653 F. 2d 836 (3d Cir. 1981); [Rogers v. Okin](#), 634 F. 2d 650 (1st Cir. 1980); [Wyatt v. Aderholt](#), 503 F. 2d 1305 (5th Cir. 1974); [Lessard v. Schmidt](#), 349 F. Supp. 1078 (E.D. Wis. 1972); [Wyatt v. Stickney](#), 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub. nom.*; [Rivers v. Katz](#), 504 N.Y.S. 2d 74 (1986).

[\[FN3\]](#). MDRI is a non-governmental advocacy organization dedicated to the recognition and enforcement of the rights of people with mental disabilities. See <http://www.mdri.org> (last visited Nov. 15, 2002).

[\[FN4\]](#). See Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. Rev. L. & Soc. Change 487, 507 (1999) (characterizing the conditions of the New York institution in the Willowbrook experience as "shockingly inhumane").

[\[FN5\]](#). In the fall of 2002, some six months after the conference at which this paper was originally delivered, New York Law School expanded its Internet course to offer a section in Nicaragua. We are currently seeking grant funding to expand that course to other Central American nations as well. Virtually all of the commentary in this paper on the

expansion of this course to other nations in Central and Eastern Europe applies equally to potential expansion in Central America.

[FN6]. Michael L. Perlin, *Mental Disability Law: Cases and Materials* (1999).

[FN7]. See Michael L. Perlin, *The Hidden Prejudice: Mental Disability on Trial* xvii-xix (2000) [hereinafter Perlin, *Hidden Prejudice*]. In this book, I discuss the sanist and pretextual roots of mental disability law. By "sanist," I mean the irrational prejudice that is 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.

[FN8]. The course that has been offered in the U.S. has lasted, variously, fourteen or sixteen weeks; this has been reduced to twelve for international iterations of the course.

[FN9]. I plan to team-teach the live seminars (on-site in C&EE) with Èva Szeli, one of the other participants in this Symposium, as well as a local advocate/human rights specialist/attorney (a resident of the nation in which the live seminars would be held).

[FN10]. 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, 207 (1996).

[FN11]. See Perlin, *supra* note 2, at ch. 2B (2d ed. 1998); Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 Law & Contemp. Probs. 161 (1982); Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 Law & Hum. Behav. 39 (1992).

[FN12]. See, e.g., Eric Rosenthal & Leonard S. Rubenstein, *International Human Rights Advocacy under the "Principles for the Protection of Persons with Mental Illness,"* 16 Int'l J. L. & Psychiatry 257 (1993).

[FN13]. Violations such as these are documented in the reports prepared by Mental Disability Rights International in its comprehensive and well-publicized studies of the systems in Uruguay, Hungary, and Mexico. *Mental Disability Rights Int'l, Human Rights and Mental Health: Mexico* (2000); *Mental Disability Rights Int'l, Human Rights and Mental Health: Hungary* (1997); *Mental Disability Rights Int'l, Human Rights and Mental Health: Uruguay* (1995), available at <http://www.mdri.org/publications/index.htm> [hereinafter MDRI Studies].

[FN14]. *Congo v. Ecuador*, Case No. 11.427, Inter-Am. C.H.R. 475 (1999) (citations omitted).

[FN15]. *Id.* at para. 54.

[FN16]. *Id.* at n.8; see also MDRI Studies, *supra* note 12; Eric Rosenthal, *International Human Rights Protections for Institutionalized People with Disabilities: An Agenda for International Action*, Annex B, *Delivered at Let the World Know: International Seminar on Human Rights and Disability* (Nov. 5-9, 2000) (prepared for U.N. Special Rapporteur Bengt Linqvist, suggests an agenda for international action based on MDRI's experience working with the MI Principles and the international convention).

[FN17]. See generally Perlin, *Hidden Prejudice*, *supra* note 6, at 59-76.

[FN18]. Grant 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).

[FN19]. Michael L. Perlin, "Their Promises of Paradise:" Will Olmstead v. L.C. Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?, 37 Houston L. Rev. 999, 1046-47 (2000) (citations omitted).

[FN20]. Michael S. Lottman, *Paper Victories and Hard Realities*, in *Paper Victories and Hard Realities: The Implementation of the Legal and Constitutional Rights of the Mentally Disabled* 93 (Valerie Bradley & Gary Clarke

eds., 1976). I discuss the implications of this concept in, *inter alia*, Perlin, *supra* note 19, at 1049.

[FN21]. David Hewitt, Do Human Rights Impact on Mental Health Law?, 151 New L. J. 1278, 1278 (2001).

[FN22]. *Herczegfalvy v. Austria*, 15 Eur. Ct. H.R. 437 (1993), discussed in Hewitt, *supra* note 21, at 1278.

[FN23]. *Dhoest v. Belgium*, 12 Eur. Ct. H.R. 135 (1987), discussed in Hewitt, *supra* note 21, at 1278.

[FN24]. See [Symposium, International Human Rights Law and the Institutional Treatment of Persons with Mental Disabilities: The Case of Hungary](#), 21 N.Y.L. Sch. J. Int'l & Comp. L. 339 (2002).

[FN25]. 406 U.S. 715 (1972).

[FN26]. See, e.g., David Wexler & Bruce Winick, *Law in a Therapeutic Key: Developments in therapeutic Jurisprudence* (Carolina Academic Press ed., 1996).

[FN27]. Professor Dinerstein serves on the board of directors of Mental Disabilities Rights International, and Institute Evros, the European Advocacy Information Centre, in Ljubljana, Slovenia. His international work, in disability and clinical legal education, has taken him to Chile, Columbia, Peru, Hungary, Poland, Montenegro, Japan, and Slovenia, among other places.

[FN28]. See, e.g., LeRoy Kondo, [Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders](#), 24 Seattle U. L. Rev. 373 (2000).

[FN29]. See, e.g., Elizabeth Duquette, [Human Rights in the European Union: Internal Versus External Objectives](#), 34 Cornell Int'l L.J. 363 (2001).

[FN30]. Dylan, *supra* note 1.

[FN31]. Robert Shelton, *No Direction Home: The Life and Music of Bob Dylan* 220 (1997). *Id.* at 197 (explaining use of phrase). I have used a quotation from this song in a title once before: Michael L. Perlin, "For the [Misdemeanor Outlaw](#):" [The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities](#), 52 Ala. L. Rev. 193 (2000).

[FN32]. Dylan, *supra* note 1.

[FN33]. *Id.*

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***65 STEPPING OUTSIDE THE BOX: VIEWING YOUR CLIENT IN A WHOLE NEW LIGHT**

[Michael L. Perlin](#) [\[FNa1\]](#)

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I. Introduction

I have been a professor for over sixteen years. For that entire time (and, indeed, for years before that) [\[FN1\]](#) legal education has been under attack for a variety of reasons, not the least of which is the allegation that it has led to the law becoming "divorced from society and life," and to the sever[ing of the] connections between the study of law and American political, social, and economic policies." [\[FN2\]](#) Legal education has been criticized for ignoring students' need for feedback, [\[FN3\]](#) for class size, [\[FN4\]](#) for "failing to teach students many *66 of the practical lawyering skills they will need in practice," [\[FN5\]](#) and for "warping personalities, undermining ethical and social values, and fostering cynicism in students." [\[FN6\]](#) Law school has also been criticized for inducing and increasing psychological distress in law students. [\[FN7\]](#) Research concludes that law students "are much more likely than the general population to experience emotional distress, depression, anxiety, addictions, and other related mental, physical and social problems." [\[FN8\]](#) A recent article presented this gloomy summary:

Students also report extreme self-punishing attitudes, obsessive self-doubt, apathy, withdrawal from normal activities, fear, apprehension, a sense of impending doom, and panic attacks. Some students report vivid, catastrophic images of, for example, losing control and running out of final examinations. Interpersonal relationships with family members or significant others often are strained, and relationships with other students are often characterized by enmity, hostility, and overt contempt. [\[FN9\]](#)

In response, observers have called for substantial changes in "core and elective curricula, legal writing programs, clinical and other 'skills'- training programs, instruction in values and ethics, admissions criteria, financial aid programs, faculty recruitment and evaluation policies, and other aspects of law school operation." [\[FN10\]](#)

There is, I agree, much merit to many of these charges. Yet, little attention *67 has been paid to another shortcoming of legal education that, in the long run, may be as serious as any of those that have been more frequently discussed: the academy's failure to think seriously about how the process of legal education leads students to make short-sighted, narrow, and even self-destructive assumptions about both the legal process and the act of lawyering.

Prior to becoming a professor, I spent thirteen years in public interest law, representing a variety of individuals [\[FN11\]](#) who fall-- globally--into the Carolene Products footnote four category of "discrete and insular minorities. . . [upon whom prejudice acts] . . . to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." [\[FN12\]](#) For my first six years of teaching, I directed New York Law School's Federal Litigation Clinic, and, in that role, supervised students

who represented persons with physical and mental disabilities in Supplemental Security Income, Supplemental Security Disability Income, and special education cases. [\[FN13\]](#) Since that time, I have biannually taught a course entitled Mental Disability Litigation Seminar and Workshop, through which students are assigned to a public agency or public interest law office and--under the aegis of a mentor-attorney--provide representation to persons with mental disabilities or to agencies that administer programs providing services to such persons. [\[FN14\]](#) I also regularly supervise students in externship programs in a wide variety of public and private law settings.

In addition, of course, I teach "regular" law school courses: Civil Procedure, Criminal Law, Criminal Procedure: Adjudication, and three other mental disability law courses (Mental Health Law, Criminal Law and Procedure: The Mentally Disabled Defendant, and Seminar in Therapeutic Jurisprudence). In these courses, I use a variety of teaching methods, [\[FN15\]](#) but the *68 majority of the class time is still spent talking about cases [\[FN16\]](#) in which I ask students lots of questions and they give me lots of answers, and, with that method, we both (hopefully) learn something more about the underlying material. I've come to a few conclusions about the teaching enterprise, and these conclusions are the focus of this article.

My thesis is as follows: We have, blindly, spent the past century locked into a method of legal education that may or may not have worked at Harvard in the 19th century, but which is increasingly irrelevant to the needs of lawyers and clients in 21st century America.

Our slavish adherence to the "case law method"--while doing a fine job in preparing a certain percentage of our students for becoming top-notch appellate litigators--fails miserably in most other ways. [\[FN17\]](#) Additionally, of specific moment in light of California Western's focus on creative problem solving, I believe that the dominance of the case method as a teaching mode has a subtle, but corrosive, impact on the way our students practice when they graduate. It also affects the quality and range of legal services these future lawyers provide, and, not unimportantly, their level of satisfaction or dissatisfaction with the practice of law.

*69 The case method--which, among other things, denies that we all have right brains as well as left brains [\[FN18\]](#)--allows us to (indeed, forces us to) ignore much of what is most important about legal education.

- First, it allows us--indeed, forces us--to ignore everything about a case other than that which the appellate court chooses to share with us.
- It allows us--indeed, forces us--to ignore everything about the parties before the court that happened before the "critical moment" that led to the litigation or happened after the court's judgment.
- It allows us--indeed, forces us--to ignore everything about other parties who may not have been part of the litigation but were of critical importance to the incident or event that led to the litigation.
- It allows us--indeed, forces us--to ignore everything about what impact the litigation actually had on the individuals who were subject to it.

And there's more: [\[FN19\]](#) the case method shows students how a collection of individual cases develops into a coherent body of law (allegedly), and how doctrines in criminal law, torts, or other first year courses emerge from the individual cases. Yet, the case method tells us nothing about the impact of the doctrine developed in case #1 on the parties in case #2, case #100, or case #n.

I expect that the reason why this is so is that much of the law continues to be based on the shaky house of cards that are called "neutral principles." [\[FN20\]](#) As I will discuss, I believe that this adherence is a sham. After thirteen years as a "real lawyer" [\[FN21\]](#)--at every level of court from the Trenton Municipal *70 Court to the United States Supreme Court--a few points are clear to me. Judges are not neutral. Jurors are not neutral. None of us is, truly, neutral. And our dogged insistence on retaining this doctrine of the case method as a major piece of legal education exposes the shallowness of much of our effort.

The case method presupposes that we are rational. It presupposes that lawyers are rational, that individual fact-finders are rational, that appellate judges are rational. At best, that's just plain silly; [\[FN22\]](#) at worst, it exposes the pretextual basis of much of the legal system. [\[FN23\]](#)

Finally, I want to offer an alternative approach--some creative problem solving, perhaps--to much of this. I want to focus

on therapeutic jurisprudence as a tool to inform classroom teaching and classroom discourse, and as, perhaps, a redemptive tool to help legal education prepare for the next century. For it is only through a new approach to legal education that lawyers--the current law students--will "get" what they must "get" in order to be complete lawyers. It is only in that way that these lawyers will be able to see their clients in a new light, and not simply as examples of "slip and falls" or "dart outs" (choose the shorthand of the substantive legal area of your choice), but as individuals who require the individualized presentation of creative and individualized legal services.

My article will thus proceed in this way. Part II continues my critique of the case method. Part III discusses the connection between what we learn (and how we learn it) and what we subsequently do. I will then, in Part IV, briefly apply some Creative Problem Solving (CPS) ideas to the teaching enterprise, as a means of "stepping outside of the box." [\[FN24\]](#) Finally, I will offer *71 some recommendations for the future.

II. Case Method Critique

In 1870, Dean Langdell envisioned the case method as a scientific means of using appellate cases to distill legal principles in a way that emphasized-- almost to the exclusion of all other modes of instruction--reasoning skills. He emphasized that a faculty experienced in practicing law was a sign of "law school poverty," [\[FN25\]](#) and was clear as to his biases: "What qualifies a person . . . to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law." [\[FN26\]](#)

I acknowledge that the "Socratic Method" does an excellent job of teaching analytical skills and of enabling students to synthesize multiple concepts. [\[FN27\]](#) I believe, however, as a method, it falls short--seriously short--in other areas. [\[FN28\]](#)

The Socratic Method has the potential to be aggressive, demeaning, emotionally destructive, authoritarian and brutal. It also wastes a lot of time. Beyond this--and perhaps just as importantly--it is simply unadaptable to do the job of preparing students for the practice of law in just about every other area except for case analysis (which it does well). The Method falls short in these areas: [\[FN29\]](#)

- teaching lawyering skills (fact-investigation, planning, drafting, research, trial strategy and tactics, and advocacy);
- teaching human relation skills (interviewing, counseling, negotiating, communications, and emotional understanding in general);
- teaching the ethical and social responsibilities of the profession;
- *72 - teaching the impact of other disciplines (e.g., psychology, economics, technology) on the practice of law; and
- teaching an understanding of the law as a social institution.

As a result of this awareness, it became clear to many--including Judge Jerome Frank, Karl Llewellyn, and former Chief Justice Warren Burger [\[FN30\]](#)--that law school training was going to have to be critically restructured to give students some sense of, in Llewellyn's words, "the problem of turning legal or human knowledge into action." [\[FN31\]](#)

Judge Frank's 1933 indictment of the Langdellian [\[FN32\]](#) method retains its vigor today:

The lawyer-client relation, the numerous non-rational factors involved in a trial, the face-to-face appeals to the emotions of juries, the elements that go to make up what is loosely known as the "atmosphere" of a case--everything that is undisclosed in upper-court opinions--was virtually unknown to (and was therefore all but meaningless) to Langdell. The greater part of the realities of the life of the average lawyer was unreal to him. [\[FN33\]](#)

To Frank, students trained under the Langdell system are like horticulturists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. [\[FN34\]](#) As he succinctly stated: "They resemble prospective dog breeders who never see anything but stuffed dogs ." [\[FN35\]](#)

In "real life," a practical lawyer has to be able to make reasonable decisions, often with little or no guidance from anyone else. She has to be able to depend on her own resources, and needs a vast number of practical skills at her command to utilize quickly and decisively on demand. Further, a lawyer must be able to interrelate her own values and emotions in appropriate

ways: a person cannot completely sever one's own personality from the context in which that person functions, but must be able to operate in this context as a practicing lawyer.

The case method forecloses almost totally the involvement of emotions, as it emphasizes an abstract and intellectualized approach, heavy on verbalization *73 and rationalization. [\[FN36\]](#) This avoidance of emotions provides no opportunity for the development of emotional strength to deal with stress and to deal with emotionally-significant situations. [\[FN37\]](#)

All attorney-client relationships involve, to some degree, human interaction and emotional crises. The handling of these crises, for better or worse, affects the relationship between the parties, the information-gathering process, the development of trial strategies, and the case's outcome. These simply cannot be taught through the sole use of the case method. In short, while the case approach can teach cognitive skills expertly, the learning process is incomplete until the student can synthesize substantive concepts and methods into her actual performance in a real-life context.

I believe that there are at least five goals to which we, as legal educators, should strive:

1. to teach legal skills development;
2. to share legal and extra-legal system knowledge;
3. to promote professional responsibility growth;
4. to inspire self-knowledge; and
5. to increase human relations understanding.

I believe that sole reliance--or even a predominant reliance--on the case method dooms us to failure in most of these enterprises.

I start with the assumption that a tremendously important portion of a lawyer's work involves dealing with other people: listening to clients, developing a rapport with them, and educating and persuading judges, jurors, and adversaries (and, in some public interest law cases, the public at large). Two lawyers may be equally skillful in the substantive law, but the one who is more skillful in interpersonal interactions will frequently be the true "success." [\[FN38\]](#) Being able to deal with other people requires an understanding of psychological skills, and of how to meet the emotional and psychological needs of others (including the client, the opponent, judges, jurors), and, not unimportantly, the lawyer herself. [\[FN39\]](#)

*74 Developing these skills requires several capacities: the capacity to be open to new experiences; the capacity to be able to adjust responses and anticipations on the basis of "new developments in an interaction"; [\[FN40\]](#) and the capacity to be able to understand one's own feelings and fears as a lawyer. [\[FN41\]](#) The best lawyer-counselors are those who recognize the elements of human interaction in counseling, who are open to their clients, who respond to the "whole person" of the client, and who help the client help herself. CPS speaks directly to this precise issue. All too often, law school selection, ethos, and training "trains out" these feelings and frequently suppresses humanistic qualities in lawyers. [\[FN42\]](#) The use of CPS methods, on the other hand, will help nurture these skills and raise awareness of the use of a humanistic approach to both legal education and the attorney-client relationship.

When the case method is unpacked, it reveals itself to be based on two other assumptions that we rarely critique: as I've already suggested, the assumption of neutral principles, and the assumption of rationality. Neither of these assumptions comports with anything we have learned in the past century from cognitive, social, or behavioral psychology, yet we slavishly repeat these shibboleths and we convince our students that this is "the way it is." [\[FN43\]](#)

My major area of scholarly interest is mental disability law. For the past several years, I've been writing mostly about what I call sanism and what I call pretextuality. [\[FN44\]](#) What do I mean by the terms "sanism" and "pretextuality" ? 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. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype,

myth, superstition and de-individualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic *75 reasoning in an unconscious response to events both in everyday life and in the legal process. [\[FN45\]](#)

"Pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." [\[FN46\]](#) 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, blase judging, and at times, perjurious and/or corrupt testifying. [\[FN47\]](#)

I believe it is impossible for mental disability law students to even begin to come to grips with these issues using a solely case-based teaching methodology. [\[FN48\]](#)

Professor Janeen Kerper's provocative and excellent recent article on the shortcomings of the case method (looking mostly through the lens of the Palsgraf case) explains how CPS--premised on a collaborative enterprise--can better allow lawyers to provide more effective solutions to client problems, and to help clients avoid conflict in the first instance. [\[FN49\]](#)

She notes perceptively that the case method--which teaches students to think like appellate judges [\[FN50\]](#)--blunts the abilities of students to understand that "their available options are greater, and therefore their own thought processes can be much broader" [\[FN51\]](#) if we use alternatives to a strictly case-based pedagogy. And I agree.

*76 In short, continued devotion to a solely (or disproportionately predominantly) case-method basis of legal education keeps us "in the box," and inhibits us from expanding our array of options in a way that would benefit our students, our clients, and ourselves.

III. The Connection Between How We Learn and What We Do

I think there's even more to all of this than simply a critique of teaching styles. I say that because I am convinced that the way we teach shapes not only the way that our students learn the law, but also how they practice law. Furthermore, I am persuaded that this connection has far-reaching results in terms of the quality of law that is practiced, the way the rest of the world perceives us, and, not insignificantly, the level of satisfaction that lawyers have with their profession and, ultimately, with their lives.

Intuitively, we know that the way we learn anything has a major impact on the way we do what it is we learn. Think about the way your sports coach coached you or the way your music instructor shaped the lessons. Then think about how that translated--for better or worse--into the kind of basketball player or clarinetist you turned into. More to the point: think about how therapists are trained and how that training affects--perhaps predetermines --the way that therapy is practiced. Think about the difference between a therapist who learns primarily the different chemical properties of the major phenothiazine drugs, and the one who is taught about a variety of therapeutic interventions. Then, finally, think about how that affects what goes on in the therapeutic session.

I was struck, in Professor Kerper's article, by her references to John Delaney's 1983 book. [\[FN52\]](#) Consider what Professor Delaney, who taught at NYU at the time he wrote this book, had to say by way of advice for first year law students:

To understand what you do in the first year of law school, it may help to know what you will not do.

You will not participate in lengthy class explorations of:

- justice and the requirements of a just society
- abstract philosophical and ethical questions
- economic and sociological theories
- social science research methods, reports and data
- political issues. [\[FN53\]](#)

Perhaps these areas are not discussed in Professor Delaney's classes, but they certainly are in mine. These subjects are explored not just in my Mental Health Law classes, but in my Civil Procedure classes, my Criminal Procedure classes, and my Criminal Law classes. For I believe that if we do not *77 discuss each of these broad themes, we are shortchanging our students as law students, as lawyers, and as societal decision-makers.

Professor Thomas Barton has articulated what he sees as the central theme of CPS:

Legal solutions traditionally are instrumental, relying on both power and truth to fashion rules that attempt to conform social environments to the purposes of a person or group. In part, the aim of creative problem solving is to make law a more sensitive and respectful shaper of the social, physical and relational environment. Further, however, creative problem solving seeks to give lawyers the understanding, skills, and attitudes needed to apply tools of persuasion and reconciliation where that may be more appropriate. [\[FN54\]](#)

Just as CPS is a tool to make the law "a more sensitive and respectful shaper of the social, physical and relational environment," so too can it be a tool to make legal education a more "sensitive and respectful shaper . . ." And, in this way, it will sensitize our students--and our colleagues--to the potential range of choices before us.

IV. Application of CPS to Teaching

So, how can CPS be applied to the teaching enterprise? Again, Professor Kerper has articulated some of the basic thoughts in her essay, but I have a few additional ideas that I believe are totally complimentary to what she has already set out. I believe CPS allows us--perhaps, forces us--to look at what happened before the "critical moment" that--purportedly--led to the filing of the law suit, what happened after the suit was concluded, and to consider "players" not on the "playing field" at the moment of litigation.

We know from thirty years of writing and research about class actions and public interest law that many of the most important legal disputes in our society are polycentric. The "Al v. Barbara" traffic accident that is at the heart of the methodology of the Federal Rules of Civil Procedure [\[FN55\]](#) in no way reflects the complexity of much modern litigation. [\[FN56\]](#) I supplement the class action materials in my Civil Procedure course, in fact, with the case of *Mendoza v. United States*, [\[FN57\]](#) the Tucson school district desegregation case. I do this in order to show my class how multiple interests--pitting white parents against African-American parents against Mexican-American parents (and then, subsequently, pitting one group of Mexican-American parents, incensed because the school in their neighborhood were targeted for closure, *78 against other Mexican-American parents who were originally members of the same class)--navigate the shoals of complex litigation. But the issue is not really the question of the test to be used in determining when sub-classes are appropriate under Federal Rule 23; the issue is the extent to which legal solutions--appellate legal solutions alone--can really meaningfully solve the underlying social, political, cultural and psychic issues.

When I directed the Federal Litigation Clinic, I used to present my students with what is called the "nine dot problem": [\[FN58\]](#) how many lines does it take to connect all the dots in this nine-dot puzzle?

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Clearly, it takes some CPS strategies to solve this one. It always seemed to me that those students who could use their right brain and go out of the box (literally, and that is the real reason for the title of my article) eventually adapted better to the non-case-based methodologies used in the clinical setting.

One of the courses I teach is Therapeutic Jurisprudence (TJ). [\[FN59\]](#) 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 anti-therapeutic consequences. In addition, TJ questions whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles. Therapeutic jurisprudence looks at a variety of mental disability *79 law issues--and other legal issues--in an effort to both shed new light on past developments and to offer new insights for future developments.

In an article that I have co-authored with Professor Keri Gould--"Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudence and Clinical Teaching--we spent some time thinking about how TJ could be used in the clinical or workshop teaching areas. [\[FN60\]](#) We concluded that there were at least four ways in which TJ could enrich clinical teaching: "TJ informs our teaching of skills, gives us a better understanding of the dynamics of clinical relationships, investigates ethical concerns and the effect on lawyering roles, and invigorates the way we as teachers and students question accepted legal practice." [\[FN61\]](#) Each of these is, I think, relevant to the thesis of this article.

Of course, we must be cognizant of the differing abilities inherent in our classroom audiences. Students "'get' clinical skills at very different levels of understanding: some appear born to it; some learn, absorb and eventually make these skills a part of their 'lawyering unconscious'; some learn enough to mechanistically spout the right words and express the right emotions (while internally resisting); and some will have none of it." [\[FN62\]](#) Utilizing TJ can help us understand why this is, why some students seem to be "unable" to learn certain lawyering skills and why some may require different teaching approaches. [\[FN63\]](#) It can also be a powerful tool for understanding the complicated interpersonal dynamics inherent in clinical relationships: those of student-client, student-professor, student-student, student-significant other, and student-predecessor/student-successor. [\[FN64\]](#) Additionally, TJ can be of great value as we try to understand the impact of intra-psycho and interpersonal stress on the enterprise of legal learning. [\[FN65\]](#)

Furthermore, TJ can be of tremendous worth in the way we weigh the multiple ethical issues we face in clinical education, issues that are inextricably intertwined with subissues of power, class, race, gender and difference. [\[FN66\]](#) It belabors the obvious to point out that the case method has no room for any of these. Therapeutic jurisprudence allows us--perhaps, it forces us--to take a hard look at the impact of these issues on students' well-being in their role as clinical participants. I believe its "fit" with CPS has the potential to "jump start" any future inquiries in this area. [\[FN67\]](#)

***80** In what I think is one of the most important law review pieces of the last several years, Professor Susan Daicoff ponders whether there is room for what she calls an "ethic of care" either in legal education or in law practice. [\[FN68\]](#) Her research tells us what some of us have intuitively assumed, and what talk show hosts on TV have had no doubt about for many years: [\[FN69\]](#) "That attorneys and persons choosing to attend law school have specific empirically-demonstrable personality characteristics, and that these characteristics are partially responsible for the current crisis in the legal profession." [\[FN70\]](#) I think if Professor Daicoff's work is re-read with one eye on the CPS literature, we can gain new insights into the relationship between lawyer dissatisfaction, client dissatisfaction, and the way we teach and learn in law school. [\[FN71\]](#)

Professor Ann Iijima has written recently about law school's interference with students' "maintenance and development of interconnections [and] their intra-connections--emotional, spiritual, and physical," and how law school leads students to "suppress their feelings and come to care less about others." [\[FN72\]](#) She concludes that the law school environment "encourages emotional dysfunction in students even as it isolates them from the people and activities that are essential to the maintenance of a healthy emotional state." [\[FN73\]](#) She focuses on the case method as a major culprit in all of this and offers a variety of prescriptive recommendations. [\[FN74\]](#) Every word Professor Iijima writes fits comfortably into the mode of CPS.

One of the basic principles of first-year Criminal Law is the concept of "willful blindness." A defendant may be guilty of a crime if he "suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge." [\[FN75\]](#) When I teach the principle to my class, I distribute a Herblock cartoon ***81** from the 1980's of Ronald Reagan. Reagan has his hands over his eyes, and while an advisor places in front of him the authorization for the arms-for-hostages deal to sign he says, "Let me guess--It's a proclamation for National Apple Pie Week?" [\[FN76\]](#) The students, by and large, get it, but I am not sure that "we" (the law school faculty) "get it" when the question before us is our continuing failure to think seriously about how the process of legal education leads our students into making assumptions (and misassumptions) about both the legal process and the act of lawyering. I believe that our collective willful blindness on this issue is toxic. It harms the teaching enterprise, the learning enterprise, and, ultimately, the way that law is practiced and clients represented. It is an issue that cries out for further attention.

Finally, I believe that the application of CPS methods in law school will help maximize the likelihood that students, when they actually practice law, will be able to adapt a more holistic role of lawyering, [\[FN77\]](#) and not see themselves as just part of an appellate case law mechanism. In his fascinating piece on law and architecture, Jamie Cooper talks about how holistic lawyering (along with TJ and other new approaches) all fit comfortably under the CPS umbrella. [\[FN78\]](#) I think his insights are absolutely right, and we need to take them very seriously as we continue with this enterprise.

V. Conclusion

In short, I think CPS is an extremely important tool, both for the practice of law and for the enterprise of teaching law. I believe that the methods we use in class have an impact far beyond whether our students can harmonize disparate holdings, shape legal appellate arguments, or "think like lawyers" (which really means, "think like we were taught to think when we were in law school being taught by professors who taught us how to think in the way they were taught to think when they were in law school, etc."). I also believe that the type and quality of law our students practice depends to a great extent on what we do in the classroom.

If CPS helps us to step outside the box and restructure the way we do that, then we truly will have taken major steps in the transformation of legal education, and that will have been a very good thing indeed.

[FN1]. Professor of Law, New York Law School. A.B., Rutgers University, J.D., Columbia University Law School. This article is an expanded version of a presentation made to the California Western School of Law faculty in February 1999, and has been further informed by the author's attendance at the Creative Problem Solving conference in February 2000.

[FN1]. See James Rowles, Toward Balancing the Goals of Legal Education, 31 J. Legal Educ. 375, 394 (1981) (tracing student criticism of legal education to the 1930s); see also Timothy Floyd, [Legal Education and the Vision Thing](#), 31 Ga. L. Rev. 853, 867 (1997) (arguing legal education has been criticized "for decades"). For an early critique of legal education in the United States, see Alfred Z. Reed, Training for the Public Profession of the Law 416-20 (1921). Of course, legal education has been criticized since Blackstone's time. See David Lemmings, [Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth-century England](#), 16 Law & Hist. Rev. 211, 213 (1998) ("Blackstone himself admitted that the 'usual entrance on the study of the law' provided the student with 'no public direction in what course to pursue his inquiries,' and complained, 'In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the law from a mass of undigested learning.'").

[FN2]. Paula Johnson, The [Social Construction of Identity in Criminal Cases: Cinema Verite and the Penology of Vincent Chin](#), 1 Mich. J. Race & L. 347, 403 (1996). For a sampling of the literature, see e.g., Gregory Crespi, [Comparing United States And New Zealand Legal Education: Are U.S. Law Schools Too Good?](#), 30 Vand. J. Transnat'l L. 31, 32, 32 n.1 (1997) (citing, inter alia, Symposium, [Legal Education](#), 91 Mich. L. Rev. 1921 (1993)); Symposium, Civic and [Legal Education](#), 45 Stan. L. Rev. 1525 (1993); Symposium, The Justice Mission of American Law Schools, 40 Clev. St. L. Rev. 277 (1992); Legal Education and Professional Development--An Educational Continuum, 1992 A.B.A. Sec. Legal Educ. & Admissions to the Bar [hereinafter MacCrata Report]).

[FN3]. See, e.g., B.A. Glessner, Fear and Loathing in the Law Schools, 23 Conn. L. Rev. 627, 646, 657-58 (1991).

[FN4]. See, e.g., Sarah E. Theimann, [Beyond Guinier: A Critique of Legal Pedagogy](#), 24 N.Y.U. Rev. L. & Soc. Change 17, 24-26 (1998).

[FN5]. James Eagar, The [Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education](#), 32 Gonz. L. Rev. 389, 392 (1996-97).

[FN6]. Suzanne Segerstrom, [Perceptions of Stress and Control in the First Semester of Law School](#), 32 Willamette L. Rev. 593, 593 (1996) (citing Ronald M. Pipkin, Legal Education: The Consumer's Perspective, Am. B. Found. Res. J., 1161, 1163 (Fall 1976)). See also James B. Taylor, Law School Stress and the "Deformation Professionelle," 27 J. Legal Educ. 251, 251 (1975).

[FN7]. See Segerstrom, supra note 6, at 593-96 (citing Glesner, supra note 3, at 628; Taylor, supra note 6, at 253; Stephen B. Shanfield & G. Andrew H. Benjamin, Psychiatric Distress in Law Students, 35 J. Legal Educ. 65, 65 (1985); G. Andrew H. Benjamin et al., The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers, Am. B. Found. Res. J., 225, 225-26 (Spring 1986); Faith Dickerson, Psychological Counseling for Law Students: One Law School's Experience, 37 J. Legal Educ. 82, 82 (1987)). See also Ann Iijima, [Lessons Learned: Legal Education and Law Student Dysfunction](#), 48 J. Legal Educ. 524, 525-26 (1998) (citing studies that revealed that law students were "within normal psychological ranges when they started law school but became disproportionately dysfunctional soon thereafter, and experienced increasing dysfunction as they progressed through their legal education.").

[FN8]. Lawrence Krieger, [What We're Not Telling Law Student--and Lawyers--That They Really Need to Know: Some](#)

[Thoughts-in-Action Toward Revitalizing the Profession from Its Roots, 13 J. L. & Health 1, 4 \(1998-99\).](#)

[FN9]. Sengstrom, *supra* note 6, at 594-95 (citing Barry B. Boyer & Roger C. Cramton, American Legal Education: An Agenda for Research and Reform, 59 Cornell L. Rev. 221, 264 (1974)).

[FN10]. MacCrate Report, *supra* note 2, at 266. See Crespi, *supra* note 2, at 32 (footnotes omitted).

[FN11]. I was for three years Deputy Public Defender in charge of the Mercer County (Trenton) NJ Office of the Public Defender, for eight, the Director of the Division of Mental Health Advocacy in the NJ Department of the Public Advocate, and for two Special Counsel to the Commissioner of the NJ Department of the Public Advocate.

[FN12]. [United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 \(1938\).](#) For a discussion on the impact this footnote had on the development of judicial activist protection of minorities (including mental disability law), see 1 Michael L. Perlin, Mental Disability Law: Civil and Criminal § 1-2.1, at 7-8 (2d ed. 1998), and Michael L. Perlin, On "[Sanism](#)", 46 SMU L. Rev. 373, 380-81 n.51 (1992).

[FN13]. For a sampling of cases, see, e.g., [Tirado v. Bowen, 705 F. Supp. 179 \(S.D.N.Y. 1989\)](#); [Alvarez v. Bowen, 704 F. Supp. 49 \(S.D.N.Y. 1989\)](#); [Baran v. Bowen, 710 F. Supp. 53 \(S.D.N.Y. 1989\)](#); [Mejia v. Bowen, 1988 WL 125678 \(S.D.N.Y. 1988\)](#); [Tirado v. Bowen, 842 F. 2d 595 \(2d Cir. 1988\).](#)

[FN14]. See Keri K. Gould & Michael L. Perlin, "Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudence and Clinical Teaching, 23 Seattle U. L. Rev. (forthcoming 2000) (manuscript at 5, on file with authors).

[FN15]. I use videotape simulations in Mental Health Law and in Criminal Law and Procedure: The Mentally Disabled Defendant that include counseling, trial and witness preparation vignettes. I regularly assign students to do oral trial and appellate arguments in both courses, and I also assign Gerald Stern, The Buffalo Creek Disaster (1976) to my Civil Procedure students, Stephen Phillips, No Heroes, No Villains: The Story of a Murder Trial (1978) to my Criminal Procedure students, and Paul Robinson, Would You Convict? (2000) to my Criminal Law students.

I now also teach an Internet-based distance learning course in Mental Disability Law under the auspices of New York Law School and Compass Knowledge, Inc. This is, to the best of my knowledge, the first online mental disability law course ever offered by an accredited law school. See Juris Alliance, Mental Disability Law Certificate Program (visited June, 2000) < <http://www.jurisalliance.com/mdl> >.

[FN16]. Not the Professor Kingsfield model of cinematic Paper Chase fame, of course. See Pamela Smith, [Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority, 6 Wm. & Mary J. Women & L. 53, 159-60 \(1999\)](#):

I attempt to eliminate as much fear as possible. I try to remove from students the fear that I will be a professor in the likeness of Professor Kingsfield from the movie The Paper Chase or that I am a Socratic Monster, i.e., one of those 'professors who don't actually teach. They instill fear. Armed with students' names and seating charts, they have the class at their mercy, and they love it. They can sense fear. Never ask these teachers a question; they will make you answer it.' Unlike the expected Socratic professorial Monster, I like to think my approach to teaching is more student-friendly; it is not designed or implemented to instill fear or to intimidate.

[FN17]. For an important early criticism, see Jerome Frank, What Constitutes a Good Legal Education? 19 A.B.A. J. 723 (1933). For more contemporary criticisms, see, e.g., Myron Moskowitz, [Beyond the Case Method It's Time to Teach with Problems, 42 J. Legal Educ. 241 \(1992\)](#); Russell Weaver, [Langdell's Legacy: Living with the Case Method, 36 Vill. L. Rev. 517, 561-66 \(1991\)](#). For a powerful critique of the pedagogical assumptions implicit in the Socratic method, see Susan H. Williams, [Legal Education, Feminist Epistemology, and the Socratic Method, 45 Stan L. Rev. 1571, 1573-75 \(1993\)](#). At least one critic has concluded that the Socratic method is not the only (and perhaps not the main) villain. See Segerstrom, *supra* note 6, at 596 ("However, law students experience a number of different stressors unrelated to the Socratic method (e.g., time pressure), and these other stressors may have more impact on law students than the Socratic method.").

[FN18]. See, e.g., Sally Springer & Georg Deutsch, Left Brain, Right Brain 184-87, 190-92 (1993).

[FN19]. See also David Barnhizer, [Princes of Darkness and Angels of Light: The Soul of the American Lawyer](#), 14 Notre Dame J.L. Ethics & Pub. Pol'y 371, 471 (2000) ("Nothing in legal education prepares the prospective law graduate for the responsible use of power or the need for accountability.").

[FN20]. Herbert Wechsler, [Toward Neutral Principles of Constitutional Law](#), 73 Harv. L. Rev. 1 (1959). I critique this assumption in, inter alia, Michael L. Perlin, ["Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization](#), 46 DePaul L. Rev. 947, 975-76 (1997):

This approach, of course, assumes a fact not in evidence: that judges and fact finders are able to approach cases analytically with the sort of 'reasoned elaboration' and 'neutrality' urged by Wechsler and his adherents. An examination of the development of mental disability law jurisprudence suggests that 'neutral principles' are simply not a factor in the case law in this area. Rather, the twin themes of 'sanism' and 'pretextuality' dominate the mental disability law landscape.

I discuss the meaning and significance of "sanism" and "pretextuality" in, inter alia, Michael L. Perlin, *The Hidden Prejudice: Mental Disability on Trial* (2000).

[FN21]. See Patrick Schiltz, [Legal Ethics in Decline: the Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney](#), 82 Minn. L. Rev. 705, 777 (1998) (quoting Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. Legal Educ. 3, 8 (1991)):

Over the next three years, the law student will spend literally hundreds of hours with her professors. Her professors will be the most important--perhaps the only--professional role models that she will have during this formative stage of her career. Her professors will influence her in the readings that they assign, in the hypotheticals that they invent, in the war stories that they tell, and in the comments that they make in class. In all these ways, we professors "convey notions of who we think the 'real lawyers' are."

In my 25 years of presenting CLE programs and workshops to forensic psychologists and psychiatrists, there has been one constant: when I point out to my audience that I spent 13 years as a "real lawyer," attendees begin to listen to me in a very different (and much more careful) way. The same thing frequently happens when I'm giving a job reference over the telephone.

[FN22]. See Perlin, *supra* note 12, at 374; see generally *The Passions of Law* (Susan Bandes ed., 1999) (asserting, through thirteen different essays, that emotions and passions--from disgust to a desire for revenge--pervade the law).

[FN23]. See generally Perlin, *supra* note 20 (arguing throughout book that pretextuality, and its maddening grasp on the legal system, has controlled--and continues to control--modern mental disability law). I define 'pretextuality' *infra* at text accompanying notes 46-47.

[FN24]. On how legal thinking is often "boxed in" by old paradigms, see, e.g., David Kennedy, [When Renewal Repeats: Thinking Against the Box](#), 32 N.Y.U. J. Int'l L. & Pol. 335, 456-57 (2000); Michaela Moore, [Thinking Outside the Box: A Negotiated Settlement Agreement for the Remediation of the General Electric/Housatonic River Site Ensures Environmental Health and Economic Prosperity for Pittsfield, Massachusetts](#), 26 B.C. Envtl. Aff. L. Rev. 577, 616-17 (1999).

[FN25]. George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. Legal Educ. 162, 164 (1974).

[FN26]. Christopher C. Langdell, *Harvard Celebration Speeches*, 3 L.Q.R. 123, 124 (1887); see also Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 38 (1983) (explaining that not only did Langdell feel that a case-driven teaching method must be insulated from practical experience, but also that any invasion of such experience into this method would "sully its purity").

[FN27]. On whether the phrase "Socratic method" even describes the style of classroom teaching reflected in the case method, see Richard Neumann, Jr., [A Preliminary Inquiry into the Art of Critique](#), 40 Hastings L.J. 725, 729-30 (1989) (concluding that this method is not Socratic).

[FN28]. For a full analysis, see Orin S. Kerr, [The Decline of the Socratic Method at Harvard](#), 78 Neb. L. Rev. 113, 118-22 (1999). On other alternative teaching methods, see, e.g., Steven Friedland, [How We Teach: A Survey of Teaching Techniques in American Law Schools](#), 20 Seattle U. L. Rev. 1 (1996).

[FN29]. On how it falls short in teaching professional judgment, see Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 Wash. L. Rev. 527 (1994).

[FN30]. See generally Frank, *supra* note 17; Jerome Frank, A Plea for Lawyer-Schools, 56 Yale L.J. 1303 (1947); Karl Llewellyn, On What Is Wrong with So-Called Legal Education, 35 Colum. L. Rev. 651 (1935); Warren Burger, Some Further Reflections on the Adequacy of Trial Counsel, 49 Fordham L. Rev. 1 (1980). On Chief Justice Burger's perspectives, see Jon S. Dubin, [Clinical Design for Social Justice Imperatives](#), 51 SMU L. Rev. 1461, 1467-68 n.34 (1998); William P. Quigley, [Introduction to Clinical Teaching for the New Clinical Law Professor: A View From the First Floor](#), 28 Akron L. Rev. 463, 469- 70 (1995).

[FN31]. Grossman, *supra* note 25, at 168 (citing Llewellyn, *supra* note 30, at 658).

[FN32]. This is the phrase that Professor Neumann prefers to "Socratic method." See Friedland, *supra* note 28, at 1 n.2 (quoting Neumann, *supra* note 27, at 728).

[FN33]. Jerome Frank, Courts on Trial, Myth and Reality in American Justice 225-26 (2d ed. 1963).

[FN34]. See *id.* at 227.

[FN35]. *Id.* Frank's insights in this context are discussed in Maureen Laflin, [Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report](#), 33 Gonz. L. Rev. 1, 29 (1997-98).

[FN36]. See, e.g., Marjorie Silver, [Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship](#), 6 Clinical L. Rev. 259, 280 n.99 (1999), quoting Bernard L. Diamond, Psychological Problems of Law Students, in Looking at Law School 69-70 (Stephen Gillers ed., 4th ed. 1997):

Certainly, if Anna Freud's principle of identification with the aggressor holds as true for the educational process as it does for the developmental process of the child, the Socratic method must provide the major source of the lawyer's notorious insensitivity to the fine points of human emotional relationships. The Socratic method is a marvelous device for the emphasis of the purely logical, abstract essence of the appellate case. The deductive precision of such Socratic dialogue can further the illusion, claimed by Langdell, that law is a true science.

[FN37]. See Gould & Perlin, *supra* note 14 (manuscript at 25, on file with authors).

[FN38]. By "success," I mean that she will be a better advocate and counselor, but I expect that she will also be more successful in the material sense of the word as well.

[FN39]. See Susan Daicoff, [Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism](#), 46 Am. U. L. Rev. 1337 (1997).

[FN40]. In football jargon, the ability to "call an audible."

[FN41]. I remember my shock when I was a boy and read that both the comedian Red Skelton and the hockey goalie Jacques Plante admitted to vomiting before every live performance/game.

[FN42]. See, e.g., Silver, *supra* note 36, at 288; James A. Elkins, A Humanistic Perspective in Legal Education, 62 Neb. L. Rev. 494, 505-08 (1983); Jack Himmelstein, Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law, 53 N.Y.U. L. Rev. 514, 546-47 (1978).

[FN43]. Cf. Michael L. Perlin, [Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence](#), 40 Case W. Res. L. Rev. 599, 731 (1989-90) ("[U]ntil we acknowledge the staying power and the universality of these myths [about the insanity defense], we are doomed to a jurisprudence that will proceed on the same blind path that we have followed for the past two hundred fifty years: one developed out of consciousness.").

[FN44]. See Perlin, *supra* note 20; Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did, 10 J. Contemp. Leg. Iss. 3 (1999); Michael L. Perlin, Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law, 20 N. Eng. J. on Crim. & Civ. Confinement 369 (1994).

[FN45]. See Michael L. Perlin, *supra* note 12, at 374-75. See generally Michael L. Perlin, [The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?](#) 8 J. L. & Health 15 (1993-94) (arguing that even in the best cases, the problems presented by pretextual decision-making affect social and legal discourse concerning mentally ill individuals); 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. 239 (1994).

[FN46]. Charles Sevilla, *The Exclusionary Rule and Police Perjury*, 11 San Diego L. Rev. 839, 840 (1974), cited in 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, 1252 n.35 (1998).

[FN47]. See Perlin, *supra* note 46, at 1252. See also generally Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency](#), 47 U. Miami L. Rev. 625, 627-30 (1993); 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 (1991).

[FN48]. See generally Gould & Perlin, *supra* note 14 (advocating the integration of Therapeutic Jurisprudence into a clinical legal education).

This is interesting: when I discuss the basic inability of students to grasp issues using case-based teaching with colleagues and friends who teach immigration law, or elder law, or sex discrimination law, or bankruptcy law, they often say, "That's exactly how it is in my field too." I expect that this is an insight worthy of further exploration.

[FN49]. See Janeen Kerper, [Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf](#), 34 Cal. W. L. Rev. 351 (1998).

[FN50]. See [id.](#) at 371.

[FN51]. *Id.*

[FN52]. See *id.* at 358.

[FN53]. *Id.* (quoting John Delaney, *How to Brief a Case, an Introduction to Legal Reasoning* 1-2 (1983)).

[FN54]. Thomas Barton, [Creative Problem Solving: Purpose, Meaning, and Values](#), 34 Cal. W. L. Rev. 273, 274 (1998).

[FN55]. See, e.g., Fed. R. [Civ. P., Form 9](#).

[FN56]. See, e.g., [Abram Chayes, The Role of the Judge in Public Law Litigation](#), 89 Harv. L. Rev. 1281, 1284, 1313-16 (1976) (discussing polycentricity of much public interest litigation).

[FN57]. [623 F.2d 1338](#) (9th Cir. 1980).

[FN58]. See Edward de Bono, *Lateral Thinking* 95-97 (1990). De Bono characterizes this as an "old problem." *Id.* at 95. I first remember seeing it on placemats during my many hours drinking bad coffee at all-night diners in central New Jersey in the early-mid 1960's. See also Brest & Krieger, *supra* note 29, at 538 ("Many people are unable to solve the puzzle because they unconsciously draw boundaries around the situation presented and thus limit the range of permissible solutions."); *The Puzzle of Sparking Inspiration* (visited April 29, 2000) <<http://www.creativelivingmagazine.com/96wi/solving.html>>; University of Oklahoma, *Course Description of Creative Problem Solving, Human Relations 5072-225* (visited April 29, 2000) <<http://www.ou.edu/ap/syllabi/summer99/DR5072SH.HTM>>.

[FN59]. See generally *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (David Wexler ed., 1990) (asserting that the study of law as a therapeutic agent can help shape the law and provoke insights in many fields of study besides the law, including public health, criminal justice, psychiatry, and philosophy); *Essays in Therapeutic Jurisprudence* (David Wexler & Bruce Winick eds. 1991); *Law in a Therapeutic Key: Recent Developments in Therapeutic Jurisprudence* (David Wexler & Bruce Winick eds. 1996); *Therapeutic Jurisprudence Applied: Essays on Mental Health Law* (Bruce Winick ed., 1998).

(examining therapeutic jurisprudence's goal of applying social science to study the effect of law on the physical and mental health of the people affected by the law); David Wexler, Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence, 16 Law & Hum. Behav. 27 (1992); David Wexler, Applying the Law Therapeutically, 5 App'l. & Preven. Psychol. 179 (1996); David Wexler, Reflections on the Scope of Therapeutic Jurisprudence, 1 Psychol., Pub. Pol'y & L. 220 (1995); 1 Perlin, *supra* note 12, § 2D-3, at 534-41; [Bibliography of Therapeutic Jurisprudence, 10 N.Y.L. Sch. J. Hum. Rts. 915 \(1993\)](#).

[\[FN60\]](#). Gould & Perlin, *supra* note 14.

[\[FN61\]](#). Id. (manuscript at 22, on file with authors).

[\[FN62\]](#). Id.

[\[FN63\]](#). See id. (manuscript at 23 & n.95, on file with authors).

[\[FN64\]](#). See id. (manuscript at 23-24 & nn.96-97, on file with authors).

[\[FN65\]](#). See id. (manuscript at 24, on file with authors). See also David Wexler, Reflections on the Scope of Therapeutic Jurisprudence, 1 Psychol., Pub. Pol'y & L. 220, 228 (1995); David Wexler, [Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies, 67 Rev. Jur. U.P.R. 317, 332 \(1998\)](#) (commenting on the relationship between TJ and lawyer stress).

[\[FN66\]](#). See Gould & Perlin, *supra* note 14 (manuscript at 27, on file with authors).

[\[FN67\]](#). On the relationship between TJ and CPS, see Thomas Barton, Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection, 5 Psychol., Pub. Pol'y & L. 921 (1999).

[\[FN68\]](#). See Daicoff, *supra* note 39, at 1401-02.

On the "ethic of care," see, e.g., Theresa Glennon, Lawyers and Caring: Building an Ethic of Care into Professional Responsibility, 43 Hastings L.J. 1176 (1992); Carrie Menkel-Meadow, [Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report--Of Skills, Legal Science and Being a Human Being, 69 Wash. L. Rev. 593, 620 \(1994\)](#). I believe the phrase was first used in Carol Gilligan, *In a Different Voice* (1982).

[\[FN69\]](#). See Michael L. Perlin, [A Law of Healing, 68 U. Cin. L. Rev. 407, 407 \(2000\)](#) ("Talk show hosts in need of a quick laugh can always rely on a lawyer-bashing story.").

[\[FN70\]](#). Daicoff, *supra* note 39, at 1342.

[\[FN71\]](#). See Perlin, *supra* note 69, at 410 (commenting on the crisis facing lawyers and their profession as discussed in Susan Daicoff, [Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems With Professionalism by Reference to Empirically-Derived Attorney Personality Attributes, 11 Geo. J. Legal Ethics 547, 547 \(1998\)](#)). Daicoff, to my mind, is one of the few academics who really has important and original thoughts about these questions.

[\[FN72\]](#). Iijima, *supra* note 7, at 529.

[\[FN73\]](#). Id. at 530.

[\[FN74\]](#). See id. at 532-38.

[\[FN75\]](#). [United States v. Jewell, 532 F.2d 697, 700 n.7](#) (9th Cir. 1976) (quoting Glanville Williams, *Criminal Law: The General Part*, § 57 at 159 (2d ed. 1961)).

[\[FN76\]](#). Michael L. Perlin, *Supplementary Materials for Criminal Law* (2000) (mimeographed).

[\[FN77\]](#). See Perlin, *supra* note 69, at 418 (discussing holistic law). See also id. n.74 (citing William van Zyverden, *Holistic Lawyering: A Comprehensive Approach to Dispute Resolution*, 3 B.U. Pub. Int. L.J. 5, 5 (1993)).

[FN78]. See James Cooper, [Towards a New Architecture: Creative Problem Solving and the Evolution of Law](#), 34 Cal. W. L. Rev. 297, 314 (1998).

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Lecture: A Law of Healing

*407 A LAW OF HEALING

Michael L. Perlin [\[FN1\]](#)

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I. Introduction

The idea of law as a healing agent may strike many as the ultimate oxymoron. The legal system, and lawyers, have been targeted in recent years as the prime example of what's wrong with this country: lawyers are, or so it's said, too contentious, too nit-picking, too quick to encourage the avoidance of responsibility, too formalistic, too money-hungry; the list goes on and on. [\[FN1\]](#) Since these are all stereotypes, it does not matter much that some of the depictions are inherently inconsistent. For example, lawyers are criticized for simultaneously being ACLU "bleeding heart liberals," and for being interested only in becoming richer and richer. [\[FN2\]](#) Talk show hosts in need of a quick laugh can always rely on a lawyer-bashing story. Hosts of cocktail parties in need of a conversation boost can count on a lawyer horror story to bring out the wallflowers. It sometimes seems that the only time, former Vice President Dan Quayle ever connected with the public was when he turned his attention to the evils of lawyers. [\[FN3\]](#)

The idea of the law as a healing agent might sound bizarre to many. How can a system that prides itself on adversariness heal? The profession that conjures up television images of, variously, F. Lee Bailey, Johnny Corcoran, Melvin Belli, hundreds of Wall Street plutocrats earning eight figures yearly, and pictures of poorly-toupeed guys on bus station placards advertising themselves as "the king of torts." How can this make sense?

One of the most interesting quiet revolutions in the law in the past decade has been the work of a handful of legal scholars, especially that of David Wexler and Bruce Winick, whose work has resulted in the creation of a new jurisprudence—a jurisprudence of healing. Wexler and Winick have created the term "therapeutic jurisprudence" to encompass their studies of law as a potentially therapeutic agent. Therapeutic jurisprudence presents a new model by which the ultimate *408 impact of case law and legislation that affects individuals with mental disabilities can be assessed. Therapeutic jurisprudence recognizes that substantive rules, legal procedures and lawyers' roles may have either therapeutic or anti-therapeutic consequences and questions whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while preserving due process principles. [\[FN4\]](#)

From its roots in the legal academy, [\[FN5\]](#) therapeutic jurisprudence has been embraced and endorsed by judges, [\[FN6\]](#) by practitioners, [\[FN7\]](#) and by mental health professionals. [\[FN8\]](#) It has led logically—either directly or indirectly—to such offshoots as preventive law, [\[FN9\]](#) holistic law, [\[FN10\]](#) creative problem solving [\[FN11\]](#) and others. Substantively, it has expanded far beyond its mental disability law roots into such areas as jury reform, [\[FN12\]](#) workers' compensation, [\[FN13\]](#) domestic violence, [\[FN14\]](#) and labor arbitration. [\[FN15\]](#)

Therapeutic jurisprudence offers the promise of creating a "law of healing." However, if this capacity to heal is to have a transformative *409 effect on mental disability law, [\[FN16\]](#) there are other forces that must be addressed. Mental disability law has been shaped by insidious and omnipresent forces-by "sanism," the irrational prejudices that cause, and are reflected in, prevailing social attitudes toward persons with mental disabilities, and those so perceived, [\[FN17\]](#) and by "pretextuality," the courts' acceptance-either implicit or explicit-of testimonial dishonesty and their decisions to engage in dishonest decisionmaking in mental disability law cases. [\[FN18\]](#) It is impossible to understand this area of the law without understanding the pernicious impact of these factors. [\[FN19\]](#) On the other hand, therapeutic jurisprudence offers a path by which sanism and pretextuality may, eventually, be neutralized, so that mental disability law may eventually become a law of healing. [\[FN20\]](#)

This article will proceed in this manner. First, I will look briefly at the state of how we think about the law and lawyers. Then, I will discuss therapeutic jurisprudence, explain its roots, and consider a flavor of some its most recent inquiries (both in and outside of mental disability law). Next, I will touch on its interconnectedness with other "new jurisprudences" (such as preventive law), and reflect on these relationships. After that, I will turn my attention to sanism and pretextuality, and will explain how their corrosive effects have poisoned much of mental disability law. Finally, I will offer some thoughts as to the importance of the creation of a law of healing.

*410 II. The State of the Profession

First, the bad news. [\[FN21\]](#) Writing recently in the Georgetown Journal of Legal Ethics, Professor Susan Daicoff reports:

The legal profession is at a crossroads. Public opinion of attorneys and the legal system is very low, dissatisfaction among lawyers both professionally and personally is widely known, substance abuse and other psychological problems are almost twice as frequent among attorneys as in the general population, attorney discipline cases and malpractice suits appear to be common, and the lack of civility and "professionalism" among attorneys is frequently discussed. Some say these problems have always been present and have not necessarily increased in recent years. However, others suggest that these phenomena are reaching crisis proportions. The problems seem to fall into three categories: professionalism, public opinion, and lawyer dissatisfaction. Together, these three problems form a "tripartite crisis" in today's legal profession. [\[FN22\]](#)

The legal profession has been stereotyped as "incompetent and unethical" for decades. [\[FN23\]](#) Lawyers are criticized for being too aggressive, [\[FN24\]](#) too "Rambo'- like," [\[FN25\]](#) too willing to exacerbate wounds and disrupt relationships, [\[FN26\]](#) not sufficiently public-minded [\[FN27\]](#) and lacking a sense of social responsibility, [\[FN28\]](#) "symbols of everything crass and dishonorable in American public life," [\[FN29\]](#) and, in my favorite metaphor, *411 "devil[s] in pinstripe suits." [\[FN30\]](#) And this doesn't even touch on the nightly Letterman/Leno monologues. [\[FN31\]](#) This is not a pretty picture, and is one that should concern lawyers and non-lawyers alike. [\[FN32\]](#)

III. The Role of Therapeutic Jurisprudence

Enter David Wexler and Bruce Winick. The most important and exciting new jurisprudential insights into mental disability law jurisprudence of the last two decades have come from their development of the construct of therapeutic jurisprudence.

Therapeutic jurisprudence stems from a variety of sources. [\[FN33\]](#) First, changes in the judicial temperament over the past two decades have created the appearance that the seemingly endless expansion of civil rights in earlier cases involving the constitutional and civil rights of mentally disabled persons had come to a stuttering halt, [\[FN34\]](#) and that federal courts could no longer be looked to as the last bastion of patients' rights. [\[FN35\]](#) Second, changes in the political and social climate-the residue of the Reagan years- eliminated any sort of political consensus that might have once supported the proposition that amelioration of the lives of mentally disabled individuals was a positive social goal. [\[FN36\]](#) Next, the development of more sophisticated behavioral and empirical research began to shed some important light on the roots of mental disability and the reasons for some previously misunderstood behavior of persons with mental disabilities. [\[FN37\]](#) Finally, other developing sophisticated schools of jurisprudence (e.g., law and economics, feminist jurisprudence, critical *412 legal studies, critical race studies) have begun to examine the entire legal system through a series of new and critical lenses and filters. Therapeutic jurisprudence may be seen as another alternative school in this intellectualist tradition.

(Cite as: 68 U. Cin. L. Rev. 407)

Recent therapeutic jurisprudence articles and essays have thus considered such matters as the insanity acquittee conditional release hearing, health care of mentally disabled prisoners, the psychotherapist-patient privilege, incompetency labeling, competency decision-making, juror decisionmaking in malpractice and negligent release litigation, competency to consent to treatment, competency to seek voluntary treatment, standards of psychotherapeutic tort liability, the effect of guilty pleas in sex offender cases, correctional law, health care delivery, "repressed memory" litigation, the impact of scientific discovery on substantive criminal law doctrine, and the competency to be executed. [\[FN38\]](#) Within the past few months, other articles have been published dealing with such questions as the treatment of prisoners with severe mental disorders, threats of violence from "obsessional harassers," the impact of mental health professionals testifying about their patients. [\[FN39\]](#) While these are fresh, stimulating and provocative ideas, at least six caveats need to be added to any therapeutic jurisprudence analysis.

First, and most important, it is clear that an inquiry into therapeutic outcomes does not mean that therapeutic concerns "trump" civil rights and civil liberties. David Wexler underscores this: the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns." [\[FN40\]](#) Therapeutic jurisprudence does not, cannot and must not be simply an elaborate academic justification for, in Nicholas Kittrie's famous phrase, "a return to the therapeutic state." [\[FN41\]](#) Consideration of therapeutic jurisprudence issues cannot be used as an excuse to return to the days of the 1950's when courts were comfortable simply with a "hands-off" policy toward mental hospitals and their residents. [\[FN42\]](#)

***413** Therapeutic jurisprudence has not developed as a means by which mental health professionals can avoid legal accountability or by which civil libertarian principles can be subverted. In a paper on the therapeutic jurisprudence implications of the right to refuse decision-making, for example, Deborah Dorfman, the one notable public interest law attorney who writes seriously and thoughtfully about all of this, emphasizes that a therapeutic jurisprudence inquiry will force us to step back from our treatment choices, and "assess . . . why we are making this choice" in an effort to determine if society is really being driven by purported therapeutic outcomes or as a means of "reliev[ing] . . . the] anxieties that the mentally ill instill within us." [\[FN43\]](#) In the same vein, a paper by Bruce Winick demonstrates how decisions such as *Riggins v. Nevada*, [\[FN44\]](#) expanding the right to refuse treatment by implicitly focusing on the nature of choice in the construction of a treatment refusal calculus, will set up "expectancies of positive outcomes that predictably will increase patient motivation and treatment compliance, enlarging the chances that treatment will be successful." [\[FN45\]](#)

Second, familiarity with therapeutic jurisprudence cannot be limited to the worlds of the small circle of law professors and academic psychologists writing in this area. [\[FN46\]](#) If therapeutic jurisprudence is to be meaningful, there must be a concentrated outreach to members of the practicing bar, frequent forensic witnesses, and to clinicians. Third, therapeutic jurisprudence must consider the perspective of clients and consumers of mental health services. In this way, those who are involved in, or are the subjects of, the litigation that deals with individuals with mental disabilities can share their insights into how the therapeutic, anti-therapeutic or atherapeutic aspects of the justice system actually play out. Those of us who write in this field can and must learn from them.

John Petrila has exposed the failure to explicitly incorporate the perspective of both the voluntary and involuntary consumer of mental health services in crafting a therapeutic jurisprudence perspective as a ***414** potentially serious gap in the therapeutic jurisprudence methodology. [\[FN47\]](#) Joel Haycock speaks to this directly: "the success of therapeutic jurisprudence will depend in part on the degree to which it empowers the objects of therapeutic and judicial attention." [\[FN48\]](#) This is a challenge that therapeutic jurisprudence can and must meet.

One of the most important, but all-too-often-hidden, developments of the past quarter-century has been the creation of a robust, vital, and important ex-patients' movement. Such groups represent all points on the political spectrum-from the conservative, family-focused, treatment-oriented branches of the National Alliance for the Mentally Ill to radical, anti-psychiatry groups such as Project Release or the Network Against Psychiatric Assault-but they share the common thread of highlighting and exposing the stigma, the prejudice and the mindless stereotyping that dominates so much of the mental health policy debates. [\[FN49\]](#) University of Cincinnati Professor John Steffen has suggested that the "recovery movement" [\[FN50\]](#) is premised on "responsibility, self-determination, hope and the quality of life." [\[FN51\]](#) If there is to be a law of healing, I can think of no better place to start.

Let me turn to the mental health law system with one example. Over 20 years ago, John Ensminger and Thomas

Liguori [\[FN52\]](#) wrote a piece on the therapeutic aspects of the civil commitment process, an essay reprinted in Professor Wexler's first collection of therapeutic jurisprudence essays. [\[FN53\]](#) Not until the present time, with Bruce Winick ^{*415} returning to this question, [\[FN54\]](#) has another author significantly built on their insights about how the commitment process actually works, the effect it has on the individuals subject to commitment, and how state hospital employees respond to the litigational process. [\[FN55\]](#) Additional involvement of both legal and mental health practitioners in the therapeutic jurisprudence enterprise would help insure that there are meaningful "real world" results from any academic efforts in this field.

It is essential that therapeutic jurisprudence incorporate the viewpoints and perspectives of the eventual consumers [\[FN56\]](#) of mental health services—those who involuntarily and voluntarily [\[FN57\]](#) enter the mental health system. Again, there is now a vibrant and growing body of literature [\[FN58\]](#) by former recipients of mental health services. For years, the mental health system and the judiciary have ignored this perspective [\[FN59\]](#)—a willful blindness that is even more perplexing in light of the findings of Professor Tom Tyler that perceptions of systemic fairness are driven, in large part, by "the degree to which people judge that they are treated with dignity and respect." [\[FN60\]](#) The next generation ^{*416} of therapeutic jurisprudence scholarship must incorporate these perspectives. [\[FN61\]](#)

Fourth, the recent literature shows how therapeutic jurisprudence can be employed as a servant of law reform, by illuminating the therapeutic and anti-therapeutic effects of rules that drive behavior in other institutional and litigational systems. By way of example, Daniel Shuman looks at the tort system, [\[FN62\]](#) and concludes that there is a "common agenda" shared by tort law and therapeutic jurisprudence, [\[FN63\]](#) raising a provocative list of questions that tort scholars need to consider in the continued development of tort-compensation jurisprudence. [\[FN64\]](#) A consistent pattern of association between reduction of post-accident pathology and "a shorter time between accident and settlement, a longer time after [the] settlement of the lawsuit, and having less severe symptomatology after the accident" [\[FN65\]](#) in and of itself suggests the importance of therapeutic jurisprudence to tort law.

Fifth, recent developments demonstrate how therapeutic jurisprudence can be a powerful interpretive tool to make vivid the "stories" of individuals in other areas of the law. Keri Gould's examination of the federal sentencing guidelines provision that permits departure from presumptive sentencing terms when the defendant "turns rat" [\[FN66\]](#) takes therapeutic jurisprudence into new and totally uncharted waters. The questions that she asks provides an important research agenda for sophisticated criminal law scholars and empiricists. [\[FN67\]](#) Similarly, Murray Levine's empirical analysis of the ^{*417} impact of mandatory child abuse reporting by therapists demonstrates the complexity and ambiguity of the underlying issues, and shows how a law written with an ostensibly therapeutic purpose [\[FN68\]](#) can result in feelings of anger and betrayal on the part of therapists and have significantly anti-therapeutic outcomes. [\[FN69\]](#)

Sixth, other important papers contextualize these developments in two very different but complimentary ways: within the world of forensic mental health law practice, and within the larger legal process. David Wexler provides another enticing menu of alternative legal and behavioral areas which cry out for therapeutic jurisprudence analysis. He explicitly calls for an "expan[sion of] the reach of therapeutic jurisprudence beyond the conventional contours of mental disability law" so as to serve as "an [eventual] instrument of law reform." [\[FN70\]](#) Robert Sadoff considers the entire school of therapeutic jurisprudence from the important perspective of a practicing forensic psychiatrist, although his insights are equally applicable to the other mental health professions as well, and demonstrates how therapeutic jurisprudence inquiries must extend far beyond the mental disability law borders. [\[FN71\]](#) This perspective forces us to consider a reality that is too often glossed over in legal scholarship: that therapeutic jurisprudence will also restructure the contours of forensic testimony and of the relationship between fact-finders and expert witnesses, a relationship already shaped to a large extent by constitutional dictates and statutory limitations as well as by self-imposed professional restrictions on expertise. [\[FN72\]](#)

IV. Other Jurisprudential Constructs

Therapeutic jurisprudence is not the only new jurisprudential construct that is likely to promote a law of healing. Preventive law is, according to Professor Wexler, a modality of law practice that involves careful client interviewing and counseling, and careful planning and drafting to avoid legal conflicts and disputes. It emphasizes the ^{*418} importance of "periodic legal checkups," and seeks to identify legal soft spots—potential trouble points. Preventive law thus seeks to develop strategies to avoid or minimize potential and sometimes anticipated legal problems. [\[FN73\]](#)

Holistic law, according to the movement's founder William van Zweryn, embodies "the understanding of our common Source, our undivided spirituality, the inter-connectedness of all things, and the differences between us that gives our uniqueness or individuality. Holism includes viewing the whole-the greater picture of people and events." [\[FN74\]](#) Finally, creative problem solving "combines law, sociology, social anthropology, and behavioral sciences (particularly cognitive psychology, group dynamics, and decision-making) in a holistic fashion," constructing problems as multidimensional with interconnected causes, often requiring non-legal or multidisciplinary solutions. [\[FN75\]](#)

There are other new approaches as well. Professor A.J. Stephani has informed me of the growing interest in the Cincinnati bar in "collaborative law," spearheaded by two federal judges. That interest was recently reflected in a two-day training session on how lawyers can work together to solve client problems "without prompting adversarial actions and reactions." [\[FN76\]](#)

Finally, healing can sometimes only come with apologies. In an absolutely fascinating new article, Professor Jonathan Cohen contrasts the advice we, as parents, give children when they, for instance, damage a neighbor's house playing baseball, and the advice we, as lawyers, give clients who inflict similar damage. [\[FN77\]](#) The contrast between the first set of prescriptions-apologize and make amends-and the second set of proscriptions-deny responsibility-is his launching pad for an analysis of when and why we should advise clients to apologize, a potentially *419 healing strategy that would certainly strike many trial lawyers with abject terror.

V. Sanism and Pretextuality

Each of these options offers new, provocative, exciting and innovative approaches toward the creation of a law of healing. And each is worthy of our careful attention and consideration. But I do not believe that any law of healing can serve to redeem mental disability law unless we take seriously the pernicious and corrosive effects of sanism and pretextuality. [\[FN78\]](#) 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, [\[FN79\]](#) and mental disability law is pretextual. [\[FN80\]](#) 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. 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. And, if we are to conceive of law as a "healing agent," we cannot do this unless we deal with the roots, the causes and the effects of sanism and pretextuality. [\[FN81\]](#)

A. Sanism and the Judicial Process

First, we need to think about sanism and the judicial process. Judges are not immune from the impact of sanism. "[E]mbedded in the cultural presuppositions that engulf us all," [\[FN82\]](#) judges express discomfort with social science [\[FN83\]](#)-or any other system that may appear to challenge *420 law's hegemony over society-and skepticism about new thinking. This discomfort and skepticism allows judges to take deeper refuge in heuristic thinking and flawed, non-reflective "ordinary common sense," [\[FN84\]](#) both of which continue the myths and stereotypes of sanism. [\[FN85\]](#)

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. [\[FN86\]](#) Their language demonstrates bias against individuals with mental disabilities [\[FN87\]](#) and contempt for the mental health professions. [\[FN88\]](#) Courts often appear impatient with mentally disabled litigants, ascribing their problems with 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." [\[FN89\]](#) 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 areas involving medical care)." [\[FN90\]](#)

Sanist thinking allows judges to avoid difficult choices in mental 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 *421 makes it even less likely that judicial decisions [\[FN91\]](#) in right to refuse treatment cases reflect the sort of "dignity" values essential for a fair hearing. [\[FN92\]](#) Some judges simply "rubber stamp" hospital treatment recommendations in right to refuse cases. [\[FN93\]](#) Other judges are often punitive in

cases involving mentally disabled litigants, [\[FN94\]](#) and their decisions frequently reflect "textbook" sanist attitudes. [\[FN95\]](#)

At its base, sanism is irrational. Any investigation of the roots or sources of mental disability jurisprudence must factor in society's irrational mechanisms that govern our dealings with mentally disabled individuals. [\[FN96\]](#) The entire legal system makes assumptions about persons with mental disabilities—who they are, how they got that way, what makes them different, what about them lets us treat them differently, and whether their conditions are immutable. [\[FN97\]](#) These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we may become mentally *422 disabled. [\[FN98\]](#) The most important question of all—why we feel the way we do about these people?—is rarely asked. [\[FN99\]](#)

These conflicts compel an inquiry into 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, [\[FN100\]](#) 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. [\[FN101\]](#) The steady publication stream of new, comprehensive research does not promise a change in society's attitudes. [\[FN102\]](#)

B. Pretextuality and the Forensic Mental Health System

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. [\[FN103\]](#) Experts frequently testify in *423 accordance with their own self-referential concepts of "morality" [\[FN104\]](#) and openly subvert statutory and caselaw criteria that impose rigorous behavioral standards as predicates for commitment [\[FN105\]](#) or that articulate functional standards as prerequisites for an incompetency to stand trial finding. [\[FN106\]](#) Often this testimony is further warped by a heuristic bias. Expert witnesses sometimes 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. [\[FN107\]](#)

This testimony is then weighed and evaluated by frequently-sanist fact-finders. [\[FN108\]](#) Judges and jurors, both consciously and unconsciously, frequently 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 types of heuristics as do expert witnesses further contaminate the process. [\[FN109\]](#)

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

C. The Illusions of Mental Disability Law

We must also ponder another reality: the fact that, in many ways, mental disability law is a giant *trompe l'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 much like the "cutting-edge" issues of other areas of constitutional law, including, for example, *424 allocations of burdens of proof, [\[FN110\]](#) scope of the liberty clause, [\[FN111\]](#) and categorizations for "heightened scrutiny" purposes. [\[FN112\]](#)

From another perspective, however, mental disability law 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. [\[FN113\]](#) From this perspective, mental disability law is often invisible, both to the general public and to the academy.

Furthermore, although Supreme Court doctrine and "high theory" give us needed building blocks, they do

not-cannot-describe what really happens in involuntary civil commitment cases, in competency to stand trial determinations, in recommitment hearings for insanity acquittees, 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.

In mental disability law, there is a wide gap between law-on-the-books and law-in-action. Such a gap probably exists in every area of the law. But in mental disability law, the omnipresence of sanism and pretextuality make the gap even more problematic.

Mental disability law suffers from both over- 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 as if they typify other cases involving the same issue, as well as cases involving other aspects of mental disability law. [\[FN114\]](#) Civil cases are *425 rarely the focus of so much interest, but court decisions in a handful of cases involving potential professional liability-Tarasoff v. Regents of the University of California [\[FN115\]](#) is, by far, the most famous-are disseminated widely to professional audiences. Their holdings-and concomitant significance for practitioners-are regularly over-exaggerated and distorted. [\[FN116\]](#)

On the other hand, the overwhelming number of cases involving mental disability law issues are "litigated" in pitch darkness. Involuntary civil commitment cases are routinely disposed of in minutes behind closed courtroom doors. [\[FN117\]](#) Right to refuse treatment hearings often honor the letter and spirit of decisions such as Rivers v. Katz [\[FN118\]](#)- articulating the broadest right-to-refuse treatment opinion ever decided in any American jurisdiction-with little more than lip service. [\[FN119\]](#) Nearly 90% of all insanity defense cases are "walkthroughs"-stipulated on the papers. [\[FN120\]](#) The complex issues of mental disability law are rarely raised in the garden variety tort case brought by a mentally disabled plaintiff. [\[FN121\]](#)

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. [\[FN122\]](#) Yet, in case after case, a patient's apparent desire to enforce or vindicate this constitutional right is relied upon as evidence *426 in support of the patient's involuntary civil commitment. [\[FN123\]](#) The Supreme Court has on several occasions held 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. [\[FN124\]](#) Yet, an examination of the universe of reported individual right to refuse treatment cases shows that side effects are rarely, if ever, mentioned. [\[FN125\]](#) The Supreme Court has stated, albeit in dicta, that "many psychiatric predictions of future violent behavior by the mentally ill are inaccurate." [\[FN126\]](#) 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. [\[FN127\]](#)

State legislatures craft elaborate commitment codes, often mandating the need for an "overt act" as a predicate to commitment. [\[FN128\]](#) Yet, the expression of wishes, desires or the recitation of fantasies has been relied upon as a basis for commitment in individual cases. [\[FN129\]](#) The right to counsel is provided for in virtually every state commitment statute. [\[FN130\]](#) 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." [\[FN131\]](#)

*427 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 1970's. [\[FN132\]](#) Yet, there has been virtually no follow-up litigation seeking to give life to, implement, or construe these laws. [\[FN133\]](#) Moreover, trial courts regularly refuse to consider right to treatment issues in the context of individual commitment cases. [\[FN134\]](#) And Congress has passed the Americans with Disabilities Act (ADA), 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. [\[FN135\]](#) Yet, the ultimate impact of the Supreme Court's recent decision in Olmstead v. L.C. [\[FN136\]](#)-finding a qualified right to community treatment for some persons institutionalized by reason of mental disability- is still far from clear. [\[FN137\]](#) In a series of papers, I have

begun to explore whether Olmstead will have a potentially transformative impact on the way that persons with mental disabilities, especially those who have been institutionalized, are treated; but it is certainly premature to come to even tentative conclusions at this time. [\[FN138\]](#) In addition, of all the other academics who write about the ADA, only Peter Blanck and Susan Stefan have made the link between the statute and the corrosive impact of sanist prejudice. [\[FN139\]](#)

*428 Supreme Court cases are also routinely ignored, sometimes for decades. In 1990, in *Zinerman v. Burch*, [\[FN140\]](#) the Court ruled that there must be some sort of a due process hearing, even if a modest one, before a patient's voluntary application for hospitalization could be accepted. Yet, only a few states have amended their court rules or voluntary admission statutes to comply with *Zinerman's* mandate and, again, there has been virtually no follow-up litigation. [\[FN141\]](#) Even more astonishingly, in 1972—a full quarter-century ago—the Court ruled in *Jackson v. Indiana* [\[FN142\]](#) that a criminal defendant who was incompetent to stand trial could not be housed indefinitely in a maximum security forensic facility because of that status unless it appeared likely that he would regain his competence to stand trial within the "foreseeable future." [\[FN143\]](#) Yet, twenty-five years later, nearly half the states have still not implemented *Jackson*. [\[FN144\]](#)

Criminal court prosecutors often 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." [\[FN145\]](#) 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. [\[FN146\]](#) In one study, California defendants found not guilty by reason of insanity in cases involving nonviolent offenses were confined for periods nine times as long as individuals found guilty of similar offenses. [\[FN147\]](#) The Supreme Court decision in *Shannon v. United States*, which held that, as a matter of federal criminal procedure, the defendant had no right to have the jury informed about the possible consequences of a not guilty by reason of insanity verdict, [\[FN148\]](#) will only increase the amount of pretextuality in *429 decisionmaking in this area of the law. [\[FN149\]](#) And insanity defense matters are but a small fraction of criminal cases in which sanism and pretextuality flourish. [\[FN150\]](#)

This area of the law is further infected by an excess of finger-pointing and blame-attribution. Some clinicians and hospital administrators are quick to blame "the law" to explain many of the failures of institutional mental health care. Staff at major inpatient psychiatric hospitals publicly state 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, their 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, such allegations 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. [\[FN151\]](#) 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 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). [\[FN152\]](#) Indeed, New York courts 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. [\[FN153\]](#) My caller was quite reasonably *430 perplexed as to why he had been given this misinformation. [\[FN154\]](#)

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, jurors, the press, the public—know very little about what really happens in most mental disability law cases. [\[FN155\]](#)

D. The Relationship Between Sanism, Pretextuality, and Therapeutic Jurisprudence

Finally, I need to emphasize that I do not believe that consideration of therapeutic jurisprudential values should end new inquiries into the behavior of the mental disability law system. While the therapeutic jurisprudence construct is an enormously useful one and an excellent organizing tool, it does not answer all the questions before us. In order to understand the motivations of the responses of judges, lawyers and litigators to the mental disability law system, it is

also necessary to look at the influence of sanism and pretextuality.

There has not yet been a systematic investigation into the reasons why some courts decide cases therapeutically and others anti-therapeutically. I believe that the answer may be found, in significant part, in sanism. Sanism is such a dominant psychological force that it (1) distorts "rational" decisionmaking, (2) encourages (on at least a partially-unconscious level) pretextuality and teleology, [\[FN156\]](#) and (3) prevents decisionmakers from intelligently and coherently focusing on questions that are meaningful to therapeutic jurisprudential inquiries.

The types of sanist decisions that I have discussed operate in an ostensibly atherapeutic world; although some decisions may be, in fact, therapeutic and others may be, in fact, anti-therapeutic, [\[FN157\]](#) these *431 outcomes seem to arise almost in spite of themselves. [\[FN158\]](#) In short, we cannot make any lasting progress in "putting mental health into mental health law" [\[FN159\]](#) until we confront the system's sanist biases and the ways that these sanist biases blunt our ability to intelligently weigh and assess social science data in the creation of a mental disability law jurisprudence.

These constructs need to be considered in the context of any therapeutic jurisprudence inquiry, since, unless we determine why the law has developed as it has, it will make little difference if we determine whether it is developing in a therapeutically correct manner. In short, even if the legal system were to come to grips with all therapeutic jurisprudence issues in all aspects of mental disability law, these additional inquiries would still be required. While I am thus convinced that therapeutic jurisprudence is an absolutely essential tool for the reconstruction of mental disability law, if it is to truly illuminate the underlying system, we must not fail to place it in the social and political context of why and how mental disability law has developed, including the conscious and unconscious motivations that have contributed to the law's development.

It is necessary to explicitly consider the relationship between therapeutic jurisprudence, sanism and pretextuality. I believe that it is only through these perspectives that the "doctrinal abyss" that appears to define mental disability law jurisprudence can be understood. [\[FN160\]](#) Therapeutic jurisprudence-by forcing us to focus consciously on the therapeutic and anti-therapeutic outcomes of court decisions, statutes, rules and roles-illuminates the way that pretextuality and sanism drive the mental disability law system. [\[FN161\]](#) Recent literature advances this on-going enterprise by reminding us that scholars and researchers in this area partially fulfill the role of systemic archaeologists who continue to *432 unearth new discoveries that explain how and why the mental disability law system operates as it does. [\[FN162\]](#)

Of course, no matter how closely we embrace therapeutic jurisprudence-or preventive law or holistic lawyering or creative problem solving-pain is often unavoidable. The late Professor Robert Cover began his brilliant essay, *Violence and the Word*, with these frightening words, "Legal interpretation takes place in a field of pain and death." [\[FN163\]](#) More recently, Marcus Dubber, in a sobering and provocative piece on capital punishment, explains the law's role in "the central problem of modern punishment since the enlightenment: justifying the infliction of punitive pain on a fellow human being." [\[FN164\]](#) And there is very little that therapeutic jurisprudence can do to assuage this pain (although the question of whether a currently-incompetent death row inmate can be given antipsychotic medication to make him competent to be executed [\[FN165\]](#) is a question that screams out for analysis using these interpretive tools). [\[FN166\]](#) But for virtually all other aspects of mental disability law, therapeutic jurisprudence must be used as an interpretive tool if a law of healing is ever to become a possibility.

VI. Conclusion

I began this article with some thoughts about the state of the legal profession, and how the public views lawyers and lawyering. And it was not a pretty picture that I painted. For those of us who take seriously the fact that a significant number of our fellow citizens view us this way, this is a sobering indictment, and, even conceding some hyperbole, there *433 are certain allegations that ring true. But I do not believe the situation is hopeless. For I believe that a law of healing is possible, that the phrase should not make anyone's list of favorite oxymorons, and that therapeutic jurisprudence is one of the key paths that we must take if we are to create such a body of law. And, beyond this, if we are to look at mental disability law, the use of therapeutic jurisprudence is the one way-in my mind, the only way-to eradicate the pain and the poison of sanism and pretextuality in the law. If we can start thinking about this, then we can make some true progress toward this important and mutual goal.

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[FN1]. A simple WESTLAW search in the database "JLR" of "'PUBLIC PERCEPTION' /S LAWYER ATTORNEY /S NEGATIVE" is illuminating.

[FN2]. See, e.g., Darren Lenard Hutchinson, [Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-racist Politics](#), 47 *Buff. L. Rev.* 1, 101-02 (1999).

[FN3]. See, e.g., Marc Galanter, An [Oil Strike in Hell: Contemporary Legends about the Civil Justice System](#), 40 *Ariz. L. Rev.* 717, 734 (1998).

[FN4]. See, e.g., Therapeutic Jurisprudence: The Law as a Therapeutic Agent (David B. Wexler ed., 1990) [hereinafter TJ]; Essays in Therapeutic Jurisprudence (David B. Wexler & Bruce J. Winick eds., 1991) [hereinafter Essays]; Law in a Therapeutic Key: Recent Developments in Therapeutic Jurisprudence (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter Key]; Therapeutic Jurisprudence Applied: Essays on Mental Health Law (Bruce B. Winick ed., 1998); David B. Wexler, Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence, 16 *Law & Hum. Behav.* 27 (1992) [hereinafter Wexler I]; David Wexler, Applying the Law Therapeutically, 5 *App'l. & Preven. Psychol.* 179 (1996); David Wexler, [Reflections on the Scope of Therapeutic Jurisprudence](#), 1 *Psychol. Pub. Pol'y & L.* 220 (1995); 1 Michael L. Perlin, Mental Disability Law: Civil and Criminal § 2D-3, at 534-41 (2d ed. 1998); [Bibliography of Therapeutic Jurisprudence](#), 10 *N.Y.L. Sch. J. Hum. Rts.* 915 (1993).

[FN5]. See, e.g., 1 Perlin, *supra* note 4, § 2D-3, at 536-38 nn. 85-113 (2d ed. 1998) (citing articles).

[FN6]. See, e.g., Peggy Fulton Hora et al., [Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America](#), 74 *Notre Dame L. Rev.* 439 (1999).

[FN7]. See, e.g., Deborah A. Dorfman, [Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law](#), 10 *N.Y.L. Sch. J. Hum. Rts.* 805 (1993).

[FN8]. See, e.g., Robert L. Sadoff, [Therapeutic Jurisprudence: A View From a Forensic Psychiatrist](#), 10 *N.Y.L. Sch. J. Hum. Rts.* 825 (1993).

[FN9]. See, e.g., Dennis Stolle, Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence, 14 *Behav. Sci. & L.* 257 (1996).

[FN10]. See, e.g., Warren Anderson, [Ecumenical Cosmology](#), 27 *Tex. Tech L. Rev.* 983, 1000 (1996).

[FN11]. See, e.g., James M. Cooper, [Towards a New Architecture: Creative Problem Solving and the Evolution of Law](#), 34 *Cal. West. L. Rev.* 297 (1998).

[FN12]. David B. Wexler & Robert F. Schopp, How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations, 7 *Behav. Sci. & L.* 485 (1989).

[FN13]. William Wilkinson, Therapeutic Jurisprudence and Workers' Compensation, 30 *Ariz. Attorney* 28 (Apr. 1994).

[FN14]. Leonore M.J. Simon, A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases, 1 *Psychol., Pub. Pol'y & L.* 43 (1995).

[FN15]. Roger I. Abrams, et al., [Arbitral Therapy](#), 46 *Rutgers L. Rev.* 1751 (1994).

[FN16]. Although TJ has expanded far beyond the borders of mental disability law, see, e.g., 1 Perlin, *supra* note 4, § 2D-3, at 540 (2d ed. 1998), this paper is limited solely to mental disability law issues.

[FN17]. See Michael L. Perlin, On "[Sanism](#)," 46 *SMU L. Rev.* 373 (1992); Michael L. Perlin & Deborah A. Dorfman,

Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence, 11 Behav. Sci. & L. 47 (1993).

[FN18]. See Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency](#), 47 U. Miami L. Rev. 625 (1993).

[FN19]. See generally Michael L. Perlin, *The Hidden Prejudice: Mental Disability on Trial* (forthcoming 2000).

[FN20]. See, e.g., 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). See e.g., Robert Benham & Ansley Barton, [Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration](#), 12 Ga. St. U. L. Rev. 623, 624 (1996) ("Law, along with medicine and theology, should be considered a healing profession"); Robert Yazzie, ["Hozho Nahasdlii"-We Are Now In Good Relations: Navajo Restorative Justice](#), 9 St. Thomas L. Rev. 117, 123-24 (1996) (describing how traditional Navajo justice "leads to healing of the body, the mind and the spirit"); Steven Keeva, [Re-Envisioning the Practice of Law](#), 63 Tex. B.J. 40, 40 (2000) (discussing law as a "healing profession"). On the significance of therapeutic jurisprudence in this regard, see Bruce Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 Psychol., Pub. Pol'y & L. 505, 506 (1998) ("Therapeutic jurisprudence is a field of social inquiry that focuses on law's healing potential"); Jeffrey Harrison, [Class, Personality, Contract, and Unconstitutionality](#), 35 Wm. & Mary L. Rev. 445, 495 (1994) ("[therapeutic jurisprudence asks] to what extent can law have a healing effect?").

[FN21]. There may not be much countervailing good news.

[FN22]. Susan Daicoff, [Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems With Professionalism by Reference to Empirically-derived Attorney Personality Attributes](#), 11 Geo. J. Legal Ethics 547, 547 (1998); Susan Daicoff, *Lawyer, Know Thyself* ch. 5 (forthcoming 2000).

[FN23]. David J. Fish, *The Use of the Illinois Rules of Professional Conduct to Establish The Standard of Care in Attorney Malpractice Litigation: An Illogical Practice*, 23 S. Ill. U. L. J. 65, 74 (1998). For a historical perspective, see Leonard Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 Seton Hall L. Rev. 1405 (1999).

[FN24]. See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 Mercer L. Rev. 443, 523 (1999). On the public's view of lawyers as "ambulance chasers," see Herbert M. Kritzer & Jayanth K. Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling*, 21 Law & Pol'y 347 (1999).

[FN25]. Susan Daicoff, [\(Oxymoron?\) Ethical Decisionmaking by Attorneys: An Empirical Study](#), 48 Fla. L. Rev. 197, 199 (1996). On the lawyer-as-gladiator metaphor, see Susan Sturm, [From Gladiators to Problem Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession](#), 4 Duke J. Gender L. & Pol'y 119 (1997).

[FN26]. See William F. May, *The Future of Callings-An Interdisciplinary Summit on the Public Obligations of Professionals Into the Next Millennium*, 25 Wm. Mitchell L. Rev. 75, 95-96 (1999).

[FN27]. See Samuel Reaves, *Recent Law Review Articles Concerning the Legal Profession*, 22 J. Leg. Prof. 387, 406 (1998).

[FN28]. See Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 Stan. L. Rev. 901, 927 (1995).

[FN29]. Daicoff, *supra* note 22, at 553.

[FN30]. Malini Majumdar, [Ethics in the International Arena: The Need for Clarification](#), 8 Geo. J. Legal Ethics 439, 452 (1994).

[FN31]. On the role of lawyer jokes, see, e.g., Thomas W. Overton, [Lawyers, Light Bulbs, and Dead Snakes: The Lawyer Joke as Societal Text](#), 42 UCLA L. Rev. 1069 (1995).

[FN32]. And it is a picture that I expect bothers those of us who-like me-made the call 30 years ago to devote our careers to public interest law practice even more, because, we think, "Damn, they can't be saying those awful things about us, can they?" But whether they are, or they're not, the point is that the law-at the turn of the century-is not seen by any significant segment of the public as being a law that heals. On the special dilemmas faced in this context by the lawyer whose practice reflects ideological commitment to political or social causes, see Yoav Dotan, Public Lawyers and Private Clients: An Empirical Observation on the Relative Success of Cause Lawyers, 21 Law & Pol'y 401 (1999).

[FN33]. This section is adapted from Perlin, *supra* note 19.

[FN34]. See Michael L. Perlin, State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?, 20 Loy. L.A. L. Rev. 1249 (1987).

[FN35]. See Wexler I, *supra* note 4, at 29-31; John Petrila, Redefining Mental Health Law: Thoughts on a New Agenda, 16 Law & Hum. Behav. 89, 89-92 (1992).

[FN36]. See, e.g., Michael L. Perlin, [Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization](#), 28 Hous. L. Rev. 63 (1991).

[FN37]. See, e.g., Michael L. Perlin, [Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence](#), 40 Case W. Res. L. Rev. 599 (1989- 90); Michael L. Perlin, The Jurisprudence of the Insanity Defense (1994).

[FN38]. See, e.g., articles cited in 1 Perlin, *supra* note 4, § 2D-3, at 535- 40 nn. 83-132 (2d ed. 1998).

[FN39]. See 1 Perlin, *supra* note 2, § 2D-3, at 29 (2d ed.) (1999 Supp.) (citing, inter alia, T. Howard Stone, [Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy](#), 24 Am. J. Crim. L. 283 (1997); Ronnie Harmon et al., Sex and Violence in a Forensic Population of Obsessional Harassers, 4 Psychol., Pub. Pol'y & L. 236 (1998); Daniel Shuman et al., An Immodest Proposal: Should Mental Health Professionals Be Barred from Testifying About Their Patients, 16 Behav. Sci. & L. 509 (1998)).

[FN40]. David B. Wexler, Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship, 11 Behav. Sci. & L. 17 (1993) [hereinafter Wexler, Changing Concepts]; David B. Wexler, New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law [Scholarship Outside the Conventional Context of Mental Health Law](#), 10 N.Y.L. Sch. J. Hum. Rts. 759 (1993) [hereinafter Wexler, New Directions].

[FN41]. See generally Nicholas N. Kittrie, The Right to Be Different: Deviance and Enforced Therapy (1971).

[FN42]. See generally 1 Perlin, *supra* note 4, § 1-2.1, at 7 (2d ed. 1998). For standard articulations of the doctrine, see, e.g., [Banning v. Looney](#), 213 F. 2d 771 (10th Cir. 1954), cert. den., 348 U.S. 854 (1954); [Siegel v. Ragen](#), 180 F.2d 785, 788 (7th Cir. 1950). Justice Thomas's dissent in [Helling v. McKinney](#), 509 U.S. 25 (1993) (questioning constitutional underpinnings of doctrine articulated in [Estelle v. Gamble](#), 429 U.S. 97 (1976), and right of incarcerated prisoners to medical care) appears to wistfully long for a return to this jurisprudence.

[FN43]. Dorfman, *supra* note 7, at 819.

[FN44]. [504 U.S. 127 \(1992\)](#).

[FN45]. Bruce J. Winick, [New Directions in the Right to Refuse Mental Health Treatment: The Implications of Riggins v. Nevada](#), 2 Wm. & Mary Bill Rts. J. 205, 234 (1993).

[FN46]. For the most recent important collection of TJ writings, see Key, *supra* note 4.

[FN47]. See John Petrila, [Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence](#), 10 N.Y.L.

[Sch. J. Hum. Rts. 877 \(1993\)](#) (reviewing Essays, *supra* note 4).

[FN48]. Joel Haycock, Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law, 20 New Eng. J. on Civ. & Crim. Confinement 301, 317 (1993) (emphasis added) ("the success of therapeutic jurisprudence will depend in part on the degree to which it empowers the objects of therapeutic and judicial attention").

[FN49]. See, e.g., Final Report: Task Force on Stigma and Discrimination (N.Y. State Office of Mental Health, Mar. 6, 1990). "In many ways, the mental health system itself is based on discriminatory premises which reinforce negative stereotypes, thus denying service recipients their basic civil and human rights." *Id.* at 10.

[FN50]. A caveat: I expect that some of the most articulate spokespersons for groups on the political left such as Judi Chamberlin or Rae Unzicker would take issue with the descriptor as implicitly conceding the existence of an illness from which "recovery" was possible. See, e.g., Rae E. Unzicker, From The Inside, in *Beyond Bedlam: Contemporary Women Psychiatric Survivors Speak Out* 13 (Jeanine Grobe ed., 1995).

[FN51]. E-mail from Professor John Steffen, University of Cincinnati Department of Psychology, to Michael L. Perlin (Sept. 24, 1999) (on file with author).

[FN52]. At the time Ensminger and Liguori wrote this article, they were colleagues of mine in the NJ Department of Public Advocate's Division of Mental Health Advocacy. See Michael L. Perlin, Mental Patient Advocacy by a Patient Advocate, 54 *Psychiatric Q.* 169 (1982).

[FN53]. See John J. Ensminger & Thomas Liguori, The Therapeutic Significance of the Civil Commitment Hearing, 6 *J. Psychiatry & L.* 5 (1978), reprinted in TJ, *supra* note 4, at 245.

[FN54]. See Bruce J. Winick, Therapeutic Jurisprudence and the Civil Commitment Hearing, 10 *J. Contemp. Leg. Issues* 37 (1999).

[FN55]. For two other important perspectives on the question, compare Paul S. Appelbaum, Civil Commitment from a Systems Perspective, 16 *Law & Hum. Behav.* 61 (1992) (suggesting new functionally independent system to assume all civil commitment responsibilities now shared by mental health and judicial systems), with Joel Haycock, et al., Thinking About Alternatives to the Current Practice of Civil Commitment, 20 *N. Eng. J. on Civ. & Crim. Confinement* 265 (1994) (suggesting mediation as an alternative means of resolving involuntary civil commitment cases).

[FN56]. See, e.g., James Dudley et al., A Consumer Satisfaction Survey of People with Mental Retardation and Mental Illness, 48 *Psychiatric Serv.* 1075 (1997); David A. Rochefort, Mental Health Reform and Inclusion of the Mentally Ill: Dilemmas of U.S. Policy-making, 19 *Int'l J. L. & Psychiatry* 223 (1996).

[FN57]. See, e.g., [Zinerman v. Burch](#), 494 U.S. 113 (1990) (holding that a voluntary patient could proceed with § 1983 damages action against state hospital officials for allowing him to sign voluntary admissions forms at a time when they should have known he was incompetent to do so).

[FN58]. See generally 1 Perlin, *supra* note 4, § 1-2.1, at 10-11 n.43 (2d ed. 1998), and 1 *id.*, § 1-21, 1, at 1 (2d ed.) (1999 Supp.); Symposium, Challenging the Therapeutic State: Critical Perspectives of Psychiatry and the Mental Health System, 11 *J. Mind & Behav.* 1-318 (1990).

[FN59]. See, e.g., Perlin, *supra* note 17; Perlin, *supra* note 18; Eric Turkheimer & Charles D. H. Parry, Why The Gap? Practice and Policy in Civil Commitment Hearings, 47 *Am. Psychologist* 646 (1992); Charles D. H. Parry et al., A Comparison of Commitment and Recommitment Hearings: Legal and Policy Implications, 15 *Int'l J. L. & Psychiatry* 25 (1992). For a rare judicial exception, see [Rennie v. Klein](#), 476 F. Supp. 1294, 1306 (D.N.J. 1979) (other citations omitted) (citing Theodore Van Putten & Phillip Ray, Subjective Response as a Predictor of Outcome in Pharmacotherapy, 35 *Arch. Gen. Psychiatry* 477, 480 (1978) ("[S]chizophrenics have been asked every question except, 'How does the medication agree with you?' Their response is worth listening to.")).

[FN60]. Tom R. Tyler, [The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings](#), 46 SMU L. Rev. 433, 442 (1992). See also [id. at 444](#) (noting that these findings "have especially important implications for the study of commitment hearings"). For other important related readings on procedural justice in this context, see, e.g., Norman G. Poythress, *Procedural Preferences, Perceptions of Fairness, and Compliance with Outcomes*, 18 Law & Hum. Behav. 361 (1994); P. Christopher Earley & E. Allan Lind, *Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments*, 52 J. Personal. & Soc'l Psychol. 1148 (1987); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. Personal. & Soc'l Psychol. 72 (1985); Raymond Paternoster et al., [Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault](#), 31 Law & Soc'y Rev. 163 (1997). Cf. James H. Liu & Gerald H. Shure, *Due Process Orientation Does Not Always Mean Political Liberalism*, 17 Law & Hum. Behav. 343 (1993).

[FN61]. See Petrila, *supra* note 47, at 903-04; Haycock, *supra* note 48, at 317.

[FN62]. See Michael L. Perlin, [Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's](#), 16 Law & Psychol. Rev. 29 (1992).

[FN63]. See Daniel W. Shuman, [Making the World a Better Place Through Tort Law?: Through the Therapeutic Looking Glass](#), 10 N.Y.L. Sch. J. Hum. Rts. 739, 758 (1993).

[FN64]. See [id. at 755-57](#).

[FN65]. [Id. at 757](#) (quoting Ren19 ee L. Binder et al., *Is Money a Cure? A Follow-Up of Litigants in England*, 19 Bull. Am. Acad. Psychiatry & L. 151, 152 (1991)).

[FN66]. The phrase "turns rat" refers to the individual informing on others. See [U.S. Sentencing Guidelines § 5K1.1; 18 U.S.C. § 3553\(e\)](#). On the relationship between the Guidelines and a defendant's mental disability, see Perlin, *supra* note 4, § 16.18A, at 499-509 (1999 Cum. Supp.).

[FN67]. See Keri A. Gould, [Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?](#) 10 N.Y.L. Sch. J. Hum. Rts. 835, 869-70 (1993) ("[D]o accused and/or convicted federal offenders perceive the Federal Sentencing Guidelines provisions as unjust? . . . [A]re federal defendants and inmates sophisticated enough to differentiate between their overall feelings of disempowerment within the system and their specific response to treatment under Guideline provisions? . . . [C]an an empirical instrument be designed to test such an inquiry?").

[FN68]. See, e.g., N.Y. Soc'l Servs. Law § 413.1; see generally Margaret H. Meriwether, [Child Abuse Reporting Laws: Time for a Change](#), 20 Fam. L.Q. 141 (1986).

[FN69]. See Murray Levine et al., [A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists](#), 10 N.Y.L. Sch. J. Hum. Rts. 711, 726-33 (1993).

[FN70]. Wexler, *New Directions*, *supra* note 40, at 776.

[FN71]. See Sadoff, *supra* note 8, at 825-26.

[FN72]. See, e.g., Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 Behav. Sci. & L. 111 (1992); *Specialty Guidelines for Forensic Psychologists*, 15 Law & Hum. Behav. 655 (1991). On the application of therapeutic jurisprudence in clinical practice, see David B. Wexler, *Therapeutic Jurisprudence in Clinical Practice*, 153 Am. J. Psychiatry 453 (1996) (editorial) (discussing Paul S. Appelbaum & Rose Zoltek-Jick, *Psychotherapists' Duties to Third Parties: Ramona and Beyond*, 153 Am. J. Psychiatry 457 (1996)).

[FN73]. See David J. Wexler, [The Development of Therapeutic Jurisprudence: From Theory to Practice](#), 68 Rev. Jur. U.P.R. 691 (1999) (relying on, inter alia, Robert M. Hardaway, *Preventive Law: Materials on a Nonadversarial Legal Process* 189-92 (1997), and Stolle, *supra* note 9).

[FN74]. William van Zyverden, *Holistic Lawyering: A Comprehensive Approach to Dispute Resolution*, 3 B.U. Pub. Int. L.J. 5, 5 (1993).

[FN75]. Janet Weinstein, [Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice](#), 74 Wash. L. Rev. 319, 322 n.9 (1999) (quoting James M. Cooper, [Towards a New Architecture: Creative Problem Solving and the Evolution of Law](#), 34 Cal. W. L. Rev. 297, 312 (1998)). Professor Carrie Menkel-Meadow titles her recent thoughtful article, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. Leg. Education 14 (1999). In this article, she sets out an agenda to incorporate such problem-solving skills into all three years of the law school curriculum. Happily, her piece was published in the *Journal of Legal Education*, the only journal sent to every American law professor. I hope that Professor Menkel-Meadow's article is read widely and taken seriously.

[FN76]. E-mail from A.J. Stephani, Director of Glenn M. Weaver Institute of Law and Psychiatry and Adjunct Professor University of Cincinnati College of Law, to Michael L. Perlin (Sept. 3, 1999) (on file with author).

[FN77]. See Jonathan Cohen, [Advising Clients to Apologize](#), 72 S. Cal. L. Rev. 1009 (1999).

[FN78]. See generally Perlin, *supra* note 19.

[FN79]. See *supra* note 17 and accompanying text; see also Perlin, *supra* note 16; Perlin & Dorfman, *supra* note 17; 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) [hereinafter Perlin, *Sanist Attitudes*].

[FN80]. See *supra* note 18 and accompanying text; Perlin, *supra* note 20.

[FN81]. The following section is largely adapted from Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did, 10 J. Contemp. Leg. Issues. 3 (1999).

[FN82]. Anthony D'Amato, [Harmful Speech and the Culture of Indeterminacy](#), 32 Wm. & Mary L. Rev. 329, 332 (1991).

[FN83]. 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 Questions of Competency? Stripping the Facade From United States v. Charters*, 38 U. Kan. L. Rev. 957, 991 (1990) (court's characterization in [United States v. Charters](#), 863 F.2d 302, 310 (4th Cir. 1988) (en banc), cert. den., [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").

[FN84]. Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 Neb. L. Rev. 3 (1990).

[FN85]. See *id.*; Perlin, *supra* note 37, at 618-30.

[FN86]. See Perlin, *supra* note 17, at 400-04.

[FN87]. See, e.g., [Corn v. Zant](#), 708 F.2d 549, 569 (11th Cir. 1983), reh. den., [714 F.2d 159 \(11th Cir. 1983\)](#), cert. den., [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 (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?"); [Pyles v. Boles](#), 250 F. Supp. 285, 289 (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").

[FN88]. See, e.g., [Commonwealth v. Musolino, 467 A.2d 605 \(Pa. Super. Ct. 1983\)](#) (reversible error for trial judge to refer to expert witnesses as "headshrinkers"); compare [State v. Percy, 507 A.2d 955, 956 \(Vt. 1986\)](#) (reversing a conviction where the prosecutor, in closing argument, referred to expert testimony as "psycho-babble"), with [Commonwealth v. Cosme, 575 N.E.2d 726, 731 \(Mass. 1991\)](#) (holding no error where prosecutor referred to defendant's expert witnesses as "a little head specialist" and a "wizard").

[FN89]. Perlin, supra note 17, 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 \(La. Ct. App. 1986\)](#) (no error) (juror who felt defendant would be responsible for actions as long as he "wanted to do them" not excused for cause).

[FN90]. Perlin, supra note 17, at 394.

[FN91]. 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-fact-finders more likely to take paternalistic positions in right to refuse cases).

[FN92]. See generally 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). 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, 337 \(8th Cir. 1995\)](#) (Bright, J., dissenting) ("[T]he forced ingestion of mild-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 More Salt With That Wound? Post-Sentence Victim Allocution in Texas, 26 St. Mary's L.J. 1103, 1129 \(1995\)](#) (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"); see also Tyler, supra note 60, at 444 (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).

[FN93]. See Bruce J. Winick, [Competency to Consent to Treatment: The Distinction Between Assent and Objection, 28 Hous. L. Rev. 15, 59 \(1991\)](#); id. n.148 (citing studies).

[FN94]. Cf. Perlin, supra note 17, at 401 n. 203. None is perhaps as chilling as the following story: Sometime after the trial court's decision in [Rennie v. Klein, 462 F. Supp. 1131 \(D.N.J. 1978\)](#) (granting involuntarily committed mental patients a limited right to refuse medication), 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."

[FN95]. See, e.g., Perlin, *Sanist Lives*, supra note 79, at 277-78 (discussing the sanist nature of Justice Thomas's dissent in [Riggins v. Nevada, 504 U.S. 127 \(1992\)](#)); Perlin & Dorfman, supra note 17, at 58-61 (same).

[FN96]. See generally Perlin, supra note 37; Perlin, supra note 38.

[FN97]. See generally Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (1990); Sander L. Gilman, *Difference and Pathology: Stereotypes of Sexuality, Race and Madness* (1985).

[FN98]. See, e.g., Joseph Goldstein & Jay Katz, Abolish the "Insanity Defense"-Why Not? 72 *Yale L.J.* 853, 868-69 (1963); Perlin, supra note 36, at 108 (on society's fears of mentally disabled persons); 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") (emphasis in original). 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." John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 *Am. Psychologist* 511, 511

(1992).

[FN99]. See Perlin, *supra* note 37, 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 contaminated.").

[FN100]. On the Supreme Court's confusion over the meaning of "mental disorder," see 1 Perlin, *supra* note 4, § 2A-3.3, at 75-92 (2d ed. 1998), discussing [Kansas v. Hendricks, 521 U.S. 346 \(1997\)](#) (upholding Kansas' Sexually Violent Predator Act). See also 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 \(1998\).](#)

[FN101]. See generally J. Alexander Tanford, The [Limits of a Scientific Jurisprudence: The Supreme Court and Psychology, 66 Ind. L.J. 137 \(1990\).](#)

[FN102]. 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 to 7-2.4, at 300 (David Faigman et al. eds., 1997).

[FN103]. 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 \(1991-92\).](#)

[FN104]. See, e.g., Cassia Spohn & Julie 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).

[FN105]. See, e.g., 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, 135-36 (1991).

[FN106]. See, e.g., [People v. Doan, 366 N.W.2d 593, 598 \(Mich. App. 1985\)](#), app'l den. (1985) (expert testified that defendant was "out in left field" and went "bananas").

[FN107]. See generally Perlin, *supra* note 83.

[FN108]. See generally Perlin, *supra* note 17; Perlin & Dorfman, *supra* note 17.

[FN109]. See generally Perlin, *supra* note 84.

[FN110]. 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).

[FN111]. See, e.g., [Washington v. Harper, 494 U.S. 210 \(1990\)](#) (right of prisoners to refuse antipsychotic medication).

[FN112]. 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 protections 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).

[FN113]. 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 Social Probs. 458 (1988).

[FN114]. See generally Perlin, *supra* note 37; 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"]].

[FN115]. [551 P.2d 334 \(Cal. 1976\)](#).

[FN116]. 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 David 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 Perlin, *supra* note 62, at 54.

[FN117]. See, e.g., Holstein, *supra* note 113. The Supreme Court has 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 \(1979\)](#).

[FN118]. [495 N.E.2d 337 \(N.Y. 1986\)](#) (state constitutional right to refuse treatment).

[FN119]. See, e.g., cases discussed in 2 Perlin, *supra* note 4, § 3B-7.2c, at 283-84 n.990 (2d ed. 1999) (citing cases).

[FN120]. On the average, there is examiner agreement in 81% of all insanity cases. See Jeffery L. Rogers et al., Insanity Defenses: Contested or Conceded? 141 Am. J. Psychiatry 885, 886 (1984); Kenneth Fukunaga et al., Insanity Plea: Interexaminer Agreement and Concordance of Psychiatric Opinion and Court Verdict, 5 Law & Hum. Behav. 325, 326 (1981). See also Perlin, Political World, *supra* note 114, at 12.

[FN121]. For important exceptions, see, e.g., [Moore v. Wyoming Med. Ctr., 825 F. Supp. 1531 \(D. Wyo. 1993\)](#) (improper involuntary civil commitment case); [Fair Oaks Hospital v. Pocrass, 628 A.2d 829 \(N.J. Law Div. 1993\)](#) (same).

[FN122]. See, e.g., [Mills v. Rogers, 457 U.S. 291, 299 \(1982\)](#); [Washington v. Harper, 494 U.S. 210, 221 \(1990\)](#).

[FN123]. 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 Psychology, Pub. Pol'y & L. 114, 133-34 (1996), see also 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. Forens. Psychiatry 37, 52-59 (1991).

[FN124]. [Riggins v. Nevada, 504 U.S. 127, 133-35 \(1992\)](#); [Harper, 494 U.S. at 229-30](#).

[FN125]. See, e.g., 2 Perlin, *supra* note 4, § § 3B-7.2b to 7.2c (2d ed. 1999) (citing cases).

[FN126]. [Heller v. Doe, 509 U.S. 312, 323-24 \(1993\)](#) (emphasis added). Remarkably, this language has remained virtually unnoticed to this day, the only reference in the literature being Joelle Anne Moreno, "Whoever Fights Monsters Should See To It That in the Process He [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, 549 n.252 \(1997\)](#).

[FN127]. See, e.g., 1 Perlin, *supra* note 4, § 2C-5.2, at 414-15 (2d ed. 1998).

[FN128]. See *id.* § 2A-4.5, at 152-57 (2d ed. 1998) (citing cases).

[FN129]. See, e.g., [People v. Stevens, 761 P.2d 768, 775 n.12 \(Colo. 1988\)](#) (en banc) (relying on presumed sexually inappropriate dress and manner-"pos[ing] 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 her 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 state Sexual Offenders Act).

[FN130]. See Robert Levy & Leonard Rubenstein, *The Rights of People with mental Disabilities* 74 (1996); see generally 1 Perlin, *supra* note 4, § 2B-3.1, at 197-201 (2d ed. 1998) (citing cases).

[FN131]. 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).

[FN132]. See generally Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?* 1 Psychol., Pub. Pol'y & L. 80 (1995); see 2 Perlin, *supra* note 4, § 3A-14.2, at 128-31 (2d ed. 1999) (citing statutes).

[FN133]. Note the paucity of recent developments in 2 Perlin, § 3A-14.4 to 14.5a, at 135-47 (2d ed. 1999).

[FN134]. See 1 Perlin, § 2C-8.1, at 507-09 (2d ed. 1998), and 1 *id.*, § 2C-8.1, at 27 (2d ed.) (1999 Supp.) (citing cases).

[FN135]. See e.g., Perlin, *Sanist Attitudes*, *supra* note 81; Michael L. Perlin, "[Make Promises by the Hour](#)": [Sex, Drugs, the ADA, and Psychiatric Hospitalization](#), 46 DePaul L. Rev. 947 (1997).

[FN136]. [119 S. Ct. 2176 \(1999\)](#).

[FN137]. See Perlin, *supra* note 19.

[FN138]. See Michael L. Perlin, "I Ain't Gonna Work on Maggie's Farm No More": Institutional Segregation, Community Treatment, the ADA, and the Promise of *Olmstead v. L.C.*, *Thomas Cooley L. Rev.* (forthcoming 2000); Michael L. Perlin, "For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities, *U. Ala. L. Rev.* (forthcoming 2000) [hereinafter Perlin, *Misdemeanor Outlaw*]; Michael L. Perlin, "Their Promises of Paradise": Institutional Segregation, Community Treatment, the ADA, and *Olmstead v. L.C.*, *Houston L. Rev.* (forthcoming 2000).

[FN139]. See Peter David Blanck, *The Americans with Disabilities Act and the Emerging Workforce: Employment of People with Mental Retardation* 59-60 (1998); Peter David Blanck, *Civil Rights, Learning Disability, and Academic Standards*, 2 J. Gender, Race & Just. 33, 53-54 (1998); Peter David Blanck, *Students with Learning Disabilities, Reasonable Accommodations, and the Rights of Colleges and Universities to Enforce Academic Standards*, 21 Ment. & Phys. Dis. L. Rep. 679, 684 (1997); Peter David Blanck & Mollie Weijhner Marti, [Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act](#), 42 Vill. L. Rev. 345, 391-92 (1997) (specifically linking sanism to ADA inquiries); see also, Susan Stefan, *The Americans with Disabilities Act and Mental Health Law: Issues for the Twenty-first Century*, 10 J. Contemp. Legal Iss. 131, 158, 178-79 (1999).

[FN140]. [494 U.S. 113 \(1990\)](#).

[FN141]. See 1 Perlin, *supra* note 4, § 2C-7.2a, at 490 n.1373 (2d ed. 1998) (citing cases).

[FN142]. [406 U.S. 715 \(1972\)](#).

[FN143]. *Id.* at 738.

[FN144]. See Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 Law & Hum. Behav. 39, 47 (1992) (citing, *inter alia*, Bruce J. Winick, [Restructuring Competency to Stand Trial](#), 32 UCLA L. Rev. 921, 940 (1985)). See also, 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) (same). I

discuss the sanist implications of this in Perlin, Misdemeanor Outlaw, *supra* note 138.

[FN145]. Perlin, *supra* note 84, at 24 (discussing, *inter alia*, [People v. Aliwoli](#), 606 N.E.2d 347, 352 (Ill. App. Ct. 1992)).

[FN146]. See Perlin, *supra* note 37, at 110 (citing, *inter alia*, Joseph Rodriguez, Laura LeWinn & Michael L. Perlin, The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders, 14 Rutgers L.J. 397, 403-04 (1983)).

[FN147]. See Perlin, *supra* note 37, at 110-11 (citing Henry Steadman et al., Reforming the Insanity Defense: An Analysis of Pre- and Post-Hinckley Reforms 58-61 (1993)).

[FN148]. See [Shannon v. United States](#), 512 U.S. 573 (1994).

[FN149]. For recent cases, see Perlin, *supra* note 4, § 15.16A, at 413 n.372.42 (1999 Cum Supp.). In the recent notorious murder trial of Andrew Goldstein (the so-called "New York Subway Pusher"), a holdout juror, a former social worker who had mentally ill clients, accused those favoring conviction of basing their votes on fears that a mental hospital would quickly release Mr. Goldstein if he was found to be insane and by a desire to avenge the death of the victim, Kendra Webdale. See David Rohde, Subway Jury Deadlocks; Mistrial Ruled, N.Y. Times, Nov. 3, 1999, at B1.

[FN150]. 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) ("[i]n 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 131, at 216-21; Perlin, Sanist Lives, *supra* note 79, at 260-65.

[FN151]. See [Seltzer v. Hogue](#), 594 N.Y.S.2d 781 (N.Y. App. Div. 1993).

[FN152]. See, e.g., [In re Scopes](#), 398 N.Y.S.2d 911, 913 (N.Y. App. Div. 1977).

[FN153]. [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).

[FN154]. I discuss the implications of this interchange extensively in Michael L. Perlin, Back to the Past: Why Mental Disability Law "Reforms" Don't Reform (reviewing John Q. La Fond & Mary L. Durham, Back to the Asylum: The Future of Mental Health Law and Policy in the United States (1992) 4 Crim. L. Forum 403, 403-05 (1993)).

[FN155]. For a recent thoughtful evaluation of these issues in a mediation context, see Sharon Flower, Resolving Voluntary Mental Health Treatment Disputes in the Community Setting: Benefits of and Barriers to Effective Mediation, 14 Ohio St. J. on Dispute Res. 881 (1999).

[FN156]. I discuss the relationship between sanism, pretextuality and teleology in, *inter alia*, Perlin, "The Borderline," *supra* note 114, at 1419, and Perlin, Sanist Lives, *supra* note 79, at 261-65.

[FN157]. For example, I believe that the decision in [State v. Krol](#), 344 A.2d 289 (N.J. 1975) (expanding procedural due process protection rights at the post-insanity acquittal commitment hearing) is therapeutic and the decision in [Jones v. United States](#), 463 U.S. 354 (1983) (restricting such rights) is anti-therapeutic. See Perlin, *supra* note 37.

[FN158]. See, e.g., David B. Wexler & Bruce J. Winick, Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research, 45 U. Miami L. Rev. 979, 990-92 (1991); *id.* at 992-97 (treatment of incompetent death row inmates), and 997-1001 (treatment of incompetency to stand trial); David B. Wexler & Bruce J.

Winick, [Therapeutic Jurisprudence and Criminal Justice Mental Health Issues](#), 16 *Mental & Physical Disability L. Rep.* 225, 229-30 (1992) (sex offender guilty pleas); Bruce J. Winick, [Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis](#), 4 *Psychol. Pub. Pol'y & L.* 505 (1998) (same); see also, Perlin, supra note 62 (duty to protect in tort law); Perlin, supra note 123 (right to refuse treatment); Perlin & Dorfman, supra note 125 (same); Michael L. Perlin, [Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?](#) 20 *N.Y.U. Rev. L. & Soc. Change* 517 (1993-94) (right of institutionalized patients to sexual autonomy).

[FN159]. See Wexler I, supra note 4.

[FN160]. See, e.g., Michael L. Perlin, The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss"? 29 *Ariz. L. Rev.* 1 (1987).

[FN161]. For an especially rich example of the integration of therapeutic jurisprudence and pretextuality theory, see Dorfman, supra note 7, and Dorfman, supra note 92.

[FN162]. See supra text accompanying notes 4-15.

[FN163]. Robert M. Cover, [Violence and the Word](#), 95 *Yale L.J.* 1601, 1601 (1986).

[FN164]. Marcus Dirk Dubber, The [Pain of Punishment](#), 44 *Buff. L. Rev.* 545, 545 (1996).

[FN165]. See [Perry v. Louisiana](#), 498 U.S. 38 (1990), on remand, [State v. Perry](#), 610 So.2d 746 (La. 1992); see, e.g., Alfred M. Freedman & Abraham L. Halpern, The [Erosion of Ethics and Morality in Medicine: Physician Participation in Legal Executions in the United States](#), 41 *N.Y.L. Sch. L. Rev.* 169 (1996).

[FN166]. See Bruce J. Winick, Competency To Be Executed: A Therapeutic Jurisprudence Perspective, 10 *Behav. Sci. & L.* 317, 328-37 (1992). The Supreme Court once granted certiorari to resolve the question of whether the Eighth Amendment prohibits states from forcibly medicating death row inmates to make them competent to be executed but eventually remanded that case in light of its decision in [Washington v. Harper](#), 494 U.S. 210 (1990). See [Perry v. Louisiana](#), 498 U.S. 38 (1990); see generally 3 Perlin, supra note 4, § 17.06B, at 536 n. 192.64 (1999 Cum. Supp.) (discussing [Singleton v. Norris](#), 964 S.W.2d 366 (1998), order denying rehearing (1998) (stay of execution ordered on question of whether state could mandatorily medicate defendant with antipsychotic drugs in order to keep him from being danger to himself and others when collateral effect was to render him competent to be executed), following stay, [992 S.W.2d 768 \(1999\)](#) (state had burden to administer antipsychotic medication as long as prisoner was alive and was either a potential danger to himself or others; collateral effect of the involuntary medication-rendering him competent to understand the nature and reason for his execution-did not violate due process)).

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Symposium

Rethinking Mental Disability Law: Resolving Old Issues in a New Millennium

*3 "HALF-WRACKED PREJUDICE LEAPED FORTH":
SANISM, PRETEXTUALITY, AND WHY AND HOW MENTAL DISABILITY LAW DEVELOPED AS IT
DID

[MICHAEL L. PERLIN](#) [\[FN1\]](#)

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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. [\[FN1\]](#) The papers in this symposium issue--about how we construct "craziness," [\[FN2\]](#) the therapeutic potential of the civil commitment hearing, [\[FN3\]](#) the meaning of "dangerousness," [\[FN4\]](#) how we construct competence, [\[FN5\]](#) the application of the Americans with Disabilities Act to persons with mental disabilities, [\[FN6\]](#) the *4 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, [\[FN7\]](#) deceptions in forensic testimony, [\[FN8\]](#) the transfer of juvenile cases to "adult court," [\[FN9\]](#) the use of psychiatry as a tool of governmental oppression, [\[FN10\]](#) and the legal relationship between the diagnosis of antisocial personality disorder and the death penalty [\[FN11\]](#)--all reflect, in both explicit and implicit ways, [\[FN12\]](#) 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. [\[FN13\]](#)

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. [\[FN14\]](#) It infects both our juris-prudence and our lawyering practices. [\[FN15\]](#) Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividuation, 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 *5 everyday life and in the legal process. [\[FN16\]](#)

"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." [\[FN17\]](#) 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. [\[FN18\]](#) 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. . . . [\[FN19\]](#) *6 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 "dropsy" 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 "dropsy" cases in Chicago), reporting that eighty-six percent of judges, public defenders and prosecutors questioned (including *7 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." [\[FN20\]](#) Although I did not know it at the time, this was my first introduction to pretextuality in law. [\[FN21\]](#)

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. [\[FN22\]](#)

*8 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. [\[FN23\]](#)

Again, at about the same time, I read a short article by Morton *9 Birnbaum [\[FN24\]](#) 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" [\[FN25\]](#)-- 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 *10 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, [\[FN26\]](#) a right to refuse treatment hearing, [\[FN27\]](#) an interpretation of the Americans with Disabilities Act's ban on discrimination against persons with mental disabilities, [\[FN28\]](#) the competence of a criminal defendant to waive counsel, [\[FN29\]](#) or the aftermath of a "successful" insanity defense. [\[FN30\]](#) 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." [\[FN31\]](#)

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. [\[FN32\]](#) *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 *11 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. [\[FN33\]](#)

The principles established in *Jackson* (and in *Lessard v. Schmidt*, [\[FN34\]](#) 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. [\[FN35\]](#)

Trial judges hearing individual cases were not necessarily enthusiastic about these developments. Decisions such as *Jackson*, *Lessard*, and *O'Connor v. Donaldson* [\[FN36\]](#) (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, [\[FN37\]](#) and certain other federal courts, [\[FN38\]](#) appeared to be taking seriously--for the first time--"how they [institutionalized mental *12 patients] are treated as human beings." [\[FN39\]](#)

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. [\[FN40\]](#) 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. [\[FN41\]](#) 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. [\[FN42\]](#) 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. [\[FN43\]](#)

Finally, Congress was no longer dormant. After adopting a flurry of mostly-hortatory laws, [\[FN44\]](#) it enacted the Americans with Disabilities Act, [\[FN45\]](#) legislation characterized--perhaps a tad overambitiously--as "the *13 'Emancipation Proclamation for those with disabilities.'" [\[FN46\]](#) The ADA, which, on its face, bars disability-based discrimination in virtually every aspect of private and public life, [\[FN47\]](#) appears to offer great promise to persons with mental disabilities. However, the case law has been spotty, [\[FN48\]](#) and it is not at all clear that this promise will be fulfilled. [\[FN49\]](#) The Supreme Court's recent decision in *Olmstead v. L.C.*, [\[FN50\]](#) finding that "unjustified [institutional] isolation . . . is properly regarded as discrimination based on disability," [\[FN51\]](#) and that patients had a

qualified right to community-based treatment, [\[FN52\]](#) "implicitly acknowledges the corrosive impact of sanist behavior." [\[FN53\]](#) 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. [\[FN54\]](#)

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 [\[FN55\]](#) and *14 hortatory federal statutes [\[FN56\]](#)--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, [\[FN57\]](#) and mental disability law is pretextual. [\[FN58\]](#) 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," [\[FN59\]](#) judges express discomfort with social science [\[FN60\]](#) (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. [\[FN61\]](#)

*15 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. [\[FN62\]](#) Their language demonstrates bias against mentally disabled individuals [\[FN63\]](#) and contempt for the mental health professions. [\[FN64\]](#) 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." [\[FN65\]](#) 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)" [\[FN66\]](#)

Sanist thinking allows judges to avoid difficult choices in mental *16 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 [\[FN67\]](#) in right to refuse treatment cases reflect the sort of "dignity" values essential for a fair hearing. [\[FN68\]](#) Some judges simply "rubber stamp" hospital treatment recommendations in right to refuse cases. [\[FN69\]](#) Other judges are often punitive in cases involving mentally disabled litigants, [\[FN70\]](#) and their decisions frequently reflect "textbook" sanist attitudes. [\[FN71\]](#)

At its base, sanism is irrational. Any investigation of the roots or sources of mental disability jurisprudence must factor in society's *17 irrational mechanisms that govern our dealings with mentally disabled individuals. [\[FN72\]](#) 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. [\[FN73\]](#) These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we may become mentally disabled. [\[FN74\]](#) The most important question of all--why do we feel the way we do about these people?--is rarely asked. [\[FN75\]](#)

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), [\[FN76\]](#) 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. [\[FN77\]](#) The *18 steady stream of new, comprehensive research does not promise any change in society's attitudes. [\[FN78\]](#)

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. [\[FN79\]](#) Experts frequently testify in accordance with their own self-referential concepts of "morality" [\[FN80\]](#) and openly subvert statutory and caselaw criteria that impose rigorous behavioral standards as predicates for commitment [\[FN81\]](#) or that articulate functional standards as prerequisites for an incompetency to stand trial finding. [\[FN82\]](#) 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. [\[FN83\]](#)

This testimony is then weighed and evaluated by frequently-sanist fact-finders. [\[FN84\]](#) 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. [\[FN85\]](#)

*19 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, [\[FN86\]](#) scope of the liberty clause, [\[FN87\]](#) and categorizations for "heightened scrutiny" purposes, [\[FN88\]](#) 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. [\[FN89\]](#) 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 *20 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. [\[FN90\]](#) 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* [\[FN91\]](#) 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. [\[FN92\]](#)

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. [\[FN93\]](#) Right to refuse treatment hearings often honor the *21 letter and spirit of decisions such as *Rivers v. Katz* [\[FN94\]](#) with little more than lip service. [\[FN95\]](#) Nearly ninety percent of all insanity defense cases are "walkthroughs" (i.e., stipulated on the papers). [\[FN96\]](#) The complex textures of mental disability law are rarely raised in the garden variety tort case brought by a mentally disabled plaintiff. [\[FN97\]](#)

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. [\[FN98\]](#) 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. [\[FN99\]](#) 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. [\[FN100\]](#) Yet, an examination of the universe of reported individual right to refuse treatment cases shows that side effects are rarely, if ever, mentioned. [\[FN101\]](#) The Supreme Court has stated, albeit in dicta, that "many psychiatric *22 predictions of dangerousness are inaccurate." [\[FN102\]](#) 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. [\[FN103\]](#)

State legislatures craft elaborate commitment codes, often mandating the need for an "overt act" as a predicate to commitment. [\[FN104\]](#) Yet, the expression of wishes, desires or the recitation of fantasies has been relied upon as a basis for commitment in individual cases. [\[FN105\]](#) The right to counsel is provided for in virtually every state commitment statute. [\[FN106\]](#) 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." [\[FN107\]](#)

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. [\[FN108\]](#) Yet, there has been virtually *23 no follow-up litigation seeking to give life to, implement, or construe these laws. [\[FN109\]](#) Moreover, trial courts regularly refuse to consider right to treatment issues in the context of individual commitment cases. [\[FN110\]](#) 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. [\[FN111\]](#) 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. [\[FN112\]](#) 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." [\[FN113\]](#)

Supreme Court cases are also routinely ignored, sometimes for decades. In 1990, in *Zinerman 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. [\[FN114\]](#) Yet, only a few states have amended their court rules or voluntary admission statutes to comply with *Zinerman's* mandate and, again, there has been virtually no follow-up litigation. [\[FN115\]](#) Even more astonishingly, in 1972--a full quarter-century ago--the Court ruled in *Jackson v. Indiana* [\[FN116\]](#) 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." [\[FN117\]](#) Yet, twenty-five years later, nearly half the states had still not implemented *24 *Jackson*. [\[FN118\]](#) 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. [\[FN119\]](#)

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." [\[FN120\]](#) 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. [\[FN121\]](#) 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. [\[FN122\]](#) 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 [\[FN123\]](#)--will only increase the amount of pretextuality in decisionmaking in this area of the law. [\[FN124\]](#) And insanity defense matters are but a small fraction of criminal cases in which sanism and pretextuality flourish. [\[FN125\]](#)

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 *25 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. [\[FN126\]](#) 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). [\[FN127\]](#) 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. [\[FN128\]](#) My caller was quite reasonably perplexed as to why he had been given this misinformation. [\[FN129\]](#)

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, *26 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. [\[FN130\]](#) 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?", [\[FN131\]](#) 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." [\[FN132\]](#) 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." [\[FN133\]](#) 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" [\[FN134\]](#)--but also points out how state mental health systems continue to be founded on pretexts (about the availability of treatment to persons *27 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. [\[FN135\]](#)

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, [\[FN136\]](#) 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, [\[FN137\]](#) and offers the "right brain" suggestion that our "culture of critique" [\[FN138\]](#) 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 [\[FN139\]](#)--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 [\[FN140\]](#)--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 *28 pretextual, [\[FN141\]](#) looking specifically at the testimony of the infamous Dr. Grigson (the so-called "killer shrink") as an example of pretextual testimony. [\[FN142\]](#) Professors Bonnie and Polubinskaya offer dramatic proof that politicized state psychiatry in the Soviet Union was "pathological[ly]" pretextual [\[FN143\]](#) in its misuse of the diagnostic power, its misuse of the commitment power, and its misuse of antipsychotic medications, [\[FN144\]](#) 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. [\[FN145\]](#) 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, [\[FN146\]](#) and concludes: "[T]he courts' application of the factors that are considered relevant to the amenability determination is often pretextual." [\[FN147\]](#)

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. [\[FN148\]](#) 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. [\[FN149\]](#) 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 *29 vividly on the heuristic of the statistically-exceptional but graphically-compelling case of the person with major mental disorder who is randomly violent, [\[FN150\]](#) 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") [\[FN151\]](#) and that teleologically "cherry picks" social science evidence so as to justify such decisions. [\[FN152\]](#)

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. [\[FN153\]](#) Sanist assumptions about the relationship between deinstitutionalization and homelessness reflect the demand for pretextual recommitment testimony. [\[FN154\]](#) Sanist attitudes towards patient sex may lead to pretextual constructions of the Americans with Disabilities Act. [\[FN155\]](#) And sanism in each and every aspect of the criminal trial process leads to pretextuality at all stages of such litigation. [\[FN156\]](#)

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. [\[FN157\]](#) Untrammelled discretion vested in police officers leads to inexplicable disjunctions in

mental *30 disability law developments. [\[FN158\]](#) 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 *31 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. [\[FN159\]](#)

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. [\[FN160\]](#) 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. [\[FN161\]](#) 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 *32 sick." [\[FN162\]](#) 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." [\[FN163\]](#) 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. [\[FN164\]](#) 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. [\[FN165\]](#) 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. [\[FN166\]](#)

*33 My final recommendation in the insanity defense book was that "we need to integrate insanity defense insights into all aspects of mental disability law." [\[FN167\]](#) 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. [\[FN168\]](#) 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." [\[FN169\]](#)

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." [\[FN170\]](#) And a local businesswoman added, "Sixty percent of my customers are whacked . . . and are either on some kind of medication or not taking it." [\[FN171\]](#) 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 *34 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, [\[FN172\]](#) 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." [\[FN173\]](#)

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." [\[FN174\]](#) Judge Harry *35 Edwards argued that there are "too many 'law and' scholars," a category that presumably includes those who write about mental disability law. [\[FN175\]](#) 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. [\[FN176\]](#) The public press is crowded with stories about vivid examples of violent behavior by persons with mental disabilities. [\[FN177\]](#) And the Supreme Court, like the moth to the flame, [\[FN178\]](#) 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. [\[FN179\]](#)

The threat of sanism and pretextuality is not "abstract," it is real. Mental disability law is "too noble to neglect." Our reliance on prejudice *36 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."

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[\[FN1\]](#). See generally Michael L. Perlin, *The Hidden Prejudice: Mental Disability on Trial* (forthcoming 1999).

[\[FN2\]](#). Stephen J. Morse, [Crazy Reasons](#), 10 J. Contemp. Legal Issues 189 (1999).

[\[FN3\]](#). Bruce J. Winick, [Therapeutic Jurisprudence and the Civil Commitment Hearing](#), 10 J. Contemp. Legal Issues 37 (1999).

[\[FN4\]](#). Grant H. Morris, [Defining Dangerousness: Risking a Dangerous Definition](#), 10 J. Contemp. Legal Issues 61 (1999).

[\[FN5\]](#). Elyn R. Saks & Stephen Behnke, [Competency to Decide on Treatment and Research: MacArthur and Beyond](#), 10 J. Contemp. Legal Issues 103 (1999).

[\[FN6\]](#). Susan Stefan, [The Americans with Disabilities Act and Mental Health Law: Issues for the Twenty-first Century](#), 10 J. Contemp. Legal Issues 131 (1999).

[\[FN7\]](#). David B. Wexler, [Therapeutic Jurisprudence and the Culture of Critique](#), 10 J. Contemp. Legal Issues 263 (1999).

[FN8]. Ansar Haroun & Grant H. Morris, [Weaving a Tangled Web: The Deceptions of Psychiatrists](#), 10 J. Contemp. Legal Issues 227 (1999).

[FN9]. Christopher Slobogin, [Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept](#), 10 J. Contemp. Legal Issues 299 (1999).

[FN10]. Richard J. Bonnie & Svetlana V. Polubinskaya, [Unraveling Soviet Psychiatry](#), 10 J. Contemp. Legal Issues 279 (1999).

[FN11]. Charles M. Sevilla, [Anti-Social Personality Disorder: Justification for the Death Penalty?](#), 10 J. Contemp. Legal Issues 247 (1999).

[FN12]. See infra text accompanying notes 131-47.

[FN13]. See Perlin, supra note 1, ch. 5.

[FN14]. 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).

[FN15]. 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).

[FN16]. See, e.g., Michael L. Perlin, *The Jurisprudence of the Insanity Defense* (1994).

[FN17]. 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).

[FN18]. 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.

[FN19]. Bob Dylan, *Lyrics, 1962-1985* (1985), at 139.

[FN20]. 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).

[FN21]. 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.

[FN22]. 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).

[FN23]. 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).

[FN24]. 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).

[FN25]. Birnbaum, *Comments*, *supra* note 15, at 107 (quoting civil rights leader Florynce Kennedy).

[FN26]. Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency, 47 U. Miami L. Rev. 625 \(1993\)](#).

[FN27]. Michael L. Perlin, *Decoding Right to Refuse Treatment Law*, 16 *Int'l J.L. & Psychiatry* 151 (1993).

[FN28]. Michael L. Perlin, ["Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization, 46 DePaul L. Rev. 947 \(1997\)](#).

[FN29]. 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).

[FN30]. Perlin, *supra* note 16.

[FN31]. [Jackson v. Indiana, 406 U.S. 715, 737 \(1972\)](#) (footnotes omitted) (emphasis added).

[FN32]. *Id.* at 727-31. See generally 1 Perlin, *supra* note 22, § 2A-4.4, at 122-25 (2d ed. 1998).

[FN33]. [Jackson, 406 U.S. at 738](#).

[FN34]. [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).

[FN35]. See generally 1 Perlin, *supra* note 22, chs. 2A, 2C-2D (2d ed. 1998); Michael L. Perlin, *Law and Mental Disability*, ch. 1 (1994).

[FN36]. [422 U.S. 563 \(1975\)](#).

[FN37]. 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).

[FN38]. 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).

[FN39]. [Falter v. Veterans Administration, 502 F. Supp. 1178, 1185 \(D.N.J. 1980\)](#).

[FN40]. See generally Perlin, *supra* note 16.

[FN41]. Perlin, *supra* note 22, § 15.04, at 286-94.

[FN42]. *Id.* § § 15.35-15.40, at 389-404.

[FN43]. See generally Michael L. Perlin, "No Direction Home:" The Law and Criminal Defendants with Mental Disabilities, 20 *Mental & Physical Disability L. Rep.* 605 (1996).

[FN44]. 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.

[FN45]. [42 U.S.C. § § 12101-12213](#).

[FN46]. 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).

[FN47]. 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).

[FN48]. 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).

[FN49]. Perlin, *supra* note 28, at 955-57, 984-85.

[FN50]. [119 S. Ct. 2176 \(1999\)](#).

[FN51]. [Id. at 2185](#).

[FN52]. [Id. at 2185-88](#).

[FN53]. Perlin, *supra* note 1, ch. 8.

[FN54]. [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).

[FN55]. 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).

[FN56]. Perlin, *supra* note 28, at 958-60.

[FN57]. 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).

[FN58]. 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).

[FN59]. Anthony D'Amato, [Harmful Speech and the Culture of Indeterminacy](#), 32 *Wm. & Mary L. Rev.* 329, 332 (1991).

[FN60]. 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.").

[FN61]. Michael L. Perlin, Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning, 69 *Neb. L. Rev.* 3 (1990) [[hereinafter Perlin, 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].

[FN62]. See Perlin, *supra* note 14, at 400-04.

[FN63]. 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").

[FN64]. 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).

[FN65]. 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).

[FN66]. Perlin, *supra* note 14, at 394.

[FN67]. 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-fact-finders more likely to take paternalistic positions in right to refuse cases).

[FN68]. 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).

[FN69]. 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).

[FN70]. 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).

[FN71]. 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).

[FN72]. See generally Perlin, *Myths*, *supra* note 61.

[FN73]. 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).

[FN74]. 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).

[FN75]. 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.").

[FN76]. On the Supreme Court's confusion over the meaning of "mental disorder," see 1 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).

[FN77]. See generally [J. Alexander Tanford, The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology](#), 66 Ind. L.J. 137 (1990).

[FN78]. 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).

[FN79]. 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).

[FN80]. 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.)."

[FN81]. See, e.g., Perlin, *supra* note 17, at 135-36.

[FN82]. 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").

[FN83]. See generally Perlin, *Psychodynamics*, *supra* note 61.

[FN84]. See generally Perlin, *supra* note 14; Perlin & Dorfman, *supra* note 57.

[FN85]. See generally Perlin, *supra* note 26; Perlin, *supra* note 60.

[FN86]. 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).

[FN87]. See, e.g., [Washington v. Harper](#), 494 U.S. 210 (1990) (right of prisoners to refuse antipsychotic medication).

[FN88]. 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).

[FN89]. 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).

[FN90]. 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*].

[FN91]. [551 P.2d 334 \(Cal. 1976\)](#).

[FN92]. 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)).

[FN93]. 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 \(1979\)](#).

[FN94]. [495 N.E.2d 337 \(N.Y. 1986\)](#) (state constitutional right to refuse treatment).

[FN95]. See, e.g., cases discussed in 2 Perlin, *supra* note 24, § 3B-7.2e, at 290-92 (2d ed. forthcoming 1999).

[FN96]. 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.

[FN97]. 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).

[FN98]. See, e.g., [Mills v. Rogers, 457 U.S. 291, 299 \(1982\)](#); [Washington v. Harper, 494 U.S. 210, 221 \(1990\)](#).

[FN99]. 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).

[FN100]. [Riggins v. Nevada, 504 U.S. 127, 133-35 \(1992\)](#); [Harper, 494 U.S. at 229-30](#).

[FN101]. See, e.g., 2 Perlin, *supra* note 22, § 3B-7.2c, at 278-86, § 3B-7.2e, at 290-92 (2d ed. forthcoming 1999).

[FN102]. [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.

[FN103]. See, e.g., 1 Perlin, *supra* note 22, § 2C-5.2, at 414-15 (2d ed. 1998).

[FN104]. See *id.*, § 2A-4.5, at 152-57 (citing cases).

[FN105]. 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).

[FN106]. 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).

[FN107]. 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).

[FN108]. See generally Michael L. Perlin et al., [Therapeutic Jurisprudence and the Civil 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).

[FN109]. Note the paucity of subsequent developments in 2 Perlin, supra note 22, § 11.03 at 283 (1998 Cum. Supp.).

[FN110]. See 1 Perlin, supra note 22, 2C-8.1, at 507-09 (2d ed. 1998) (citing cases).

[FN111]. Perlin, supra note 28, at 948-49. Cf. [Olmstead v. L.C.](#), 119 S. Ct. 2176 (1999), discussed supra text accompanying notes 50-54.

[FN112]. 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).

[FN113]. Perlin, supra note 1, ch. 8 (forthcoming 1999) (manuscript at 54, on file with author).

[FN114]. [494 U.S. 113 \(1990\)](#).

[FN115]. See 1 Perlin, supra note 22, § 2C-7.2a, at 490 n.1373 (2d ed. 1998) (citing cases).

[FN116]. [406 U.S. 715 \(1972\)](#).

[FN117]. [Id. at 738](#).

[FN118]. 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)).

[FN119]. See Meloy & Morris, supra note 22; Perlin, supra note 118; Winick, supra note 118.

[FN120]. 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)).

[FN121]. 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)).

[FN122]. 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)).

[FN123]. [512 U.S. 573 \(1994\)](#).

[FN124]. For recent cases, see 3 Perlin, supra note 22, § 15.16A, at 510-11 n.372.42 (1998 Cum. Supp.).

[FN125]. 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.

[FN126]. See [Seltzer v. Hogue](#), 594 N.Y.S.2d 781 (App. Div. 1993).

[FN127]. See, e.g., [In re Scopes, 398 N.Y.S.2d 911, 913 \(App. Div. 1977\)](#).

[FN128]. [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 \(2d Cir. 1983\)](#).

[FN129]. 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)).

[FN130]. See generally Perlin *supra* note 1.

[FN131]. Morris, *supra* note 4, at 97.

[FN132]. Id. at 98.

[FN133]. Winick, *supra* note 3, at 41.

[FN134]. Stefan, *supra* note 6, at 136.

[FN135]. Id. at 145.

[FN136]. Saks & Behnke, *supra* note 5, at 111.

[FN137]. 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)).

[FN138]. Id. at 264-67.

[FN139]. Morse, *supra* note 2, at 203.

[FN140]. Haroun & Morris, *supra* note 8, 242-44.

[FN141]. Sevilla, *supra* note 12, at 259-61.

[FN142]. Id. at 253 n.26.

[FN143]. Bonnie & Polubinskaya, *supra* note 10, at 286.

[FN144]. Id. at 280-83.

[FN145]. Id. at 298.

[FN146]. Slobogin, *supra* note 9, at 301-02.

[FN147]. Id. at 330.

[FN148]. 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).

[FN149]. See *infra* text accompanying notes 160-63.

[FN150]. 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).

[FN151]. See, e.g., Paul Chodoff, Involuntary Hospitalization of the Mentally Ill as a Moral Issue, 141 Am. J. Psychiatry 384, 388 (1984).

[FN152]. 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.

[FN153]. See, e.g., 1 Perlin, supra note 22, § 2D-2.1, at 530-33 (2d ed. 1998).

[FN154]. See, e.g., Perlin, supra note 15, at 128-31.

[FN155]. 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).

[FN156]. 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).

[FN157]. 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).

[FN158]. 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.

[FN159]. Perlin, supra note 16, at 440-44 (footnotes omitted).

[FN160]. [State v. Wilson, 700 A.2d 633, 649-50 \(Conn. 1997\)](#) (Katz, J., concurring).

[FN161]. [United States v. Denny-Shaffer, 2 F.3d 999, 1009, 1021 n.30 \(10th Cir. 1993\)](#).

[FN162]. [State Farm Fire & Casualty Co. v. Wicks, 474 N.W.2d 324, 327 \(Minn. 1991\)](#).

[FN163]. [Waters v. Thomas, 46 F.3d 1506, 1535 \(11th Cir. 1995\)](#) (Clark, J., concurring in part and dissenting in part).

[FN164]. See Perlin, supra note 17; Perlin, supra note 60; Perlin, Psychodynamics, supra note 61.

[FN165]. 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).

[FN166]. 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, *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)).

[FN167]. Perlin, supra note 16, at 443.

[FN168]. 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.

[FN169]. Id.

[FN170]. Id.

[FN171]. Id.

[FN172]. *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.

[FN173]. Id. at 4B.

[FN174]. 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 Schools (May 16-21, 1987)).

[FN175]. 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.

[FN176]. Compare Perlin, supra note 22 (1997 Cum. Supp.) with id. (1998 Cum. Supp.).

[FN177]. See, e.g., Perlin, *Political World*, supra note 90, at 14-15 (reporting on searches of NEXIS NEWS databases).

[FN178]. See Perlin, supra note 43, at 605.

[FN179]. Dylan, supra note 19, at 139.

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Special Theme: Therapeutic Jurisprudence

*80 THERAPEUTIC JURISPRUDENCE AND THE CIVIL RIGHTS OF INSTITUTIONALIZED MENTALLY DISABLED PERSONS: HOPELESS OXYMORON OR PATH TO REDEMPTION?

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This article examines, from a therapeutic jurisprudence (TJ) perspective, the rights of institutionalized mentally disabled persons to determine whether TJ is compatible with positions advancing civil rights and liberties, and whether lawyers for such individuals should look more closely to TJ as a source of rights. It concludes (a) that despite harsh criticisms of mental disability law reform, most of the important decisions in the areas of involuntary civil commitment, right to treatment, and right to refuse treatment law have a strong TJ component and (b) that TJ analyses may be the appropriate tool to reinvigorate this area of mental disability law.

I. Introduction

Therapeutic jurisprudence began with the charge of "putting mental health back in mental health law." [\[FN1\]](#) Most of the early writings dealt with "traditional" mental health law topics [\[FN2\]](#); recent literature has begun to look more closely at other areas of the legal system. [\[FN3\]](#) This expansion-- which we applaud and in which we participate [\[FN4\]](#)--*81 should not lead the observer to conclude, however, that therapeutic jurisprudence has explored exhaustively "traditional" mental health law. In fact, recent therapeutic jurisprudence literature [\[FN5\]](#) reveals that, proportionately, little is being written about the staples of institutional mental disability law: the day-to-day practice of involuntary civil commitment, institutional rights, and right-to-refuse-treatment law. [\[FN6\]](#)

We are not sure why this is. Perhaps authors have taken too seriously David Wexler's earlier charge regarding the developing "sterility" of mental disability law [\[FN7\]](#) or John Petrila's earlier conclusion that a "nearly exclusive emphasis upon constitutional questions" fails to provide "an adequate base for scholars and practitioners to address many of the issues at the core of mental health policy and practice today." [\[FN8\]](#) Perhaps David Wexler has convinced them that traditional mental disability law scholarship is dead [\[FN9\]](#); perhaps the U.S. Supreme Court's generic hostility to institutional rights litigation [\[FN10\]](#) has created a kind of intellectual entropy or ennui in this area. [\[FN11\]](#) Perhaps the perceived death of mental disability law scholarship is another example of displaced sanism. [\[FN12\]](#)

The reality is that these questions remain terribly important: More than 227,000 *82 individuals remain institutionalized in inpatient psychiatric hospitals, [\[FN13\]](#) more than 5 million are admitted to such facilities each year,

[FN14] and thousands of involuntary civil commitment cases are contested annually. [FN15] Class action litigation and patients' bills of rights in almost all states [FN16] have established baseline civil rights governing the substantive and procedural limitations on the involuntary civil commitment process, [FN17] the right to treatment, [FN18] and the right to refuse treatment. [FN19] These questions have been important both to courts [FN20] and to commentators [FN21] since mental disability law began.

Mental disability law is constantly in flux. In the more than two decades since the first decisions applying the panoply of procedural due process protections at an involuntary civil commitment hearing, [FN22] since the first articulation of a constitutionally based right to treatment, [FN23] and since the U.S. Supreme Court's first recognition that the Due Process Clause applies to all aspects of institutionalization decision making, [FN24] the "pendulum" has swung frequently, and mightily, in many directions. [FN25] Professors LaFond and Durham have characterized this shift in attitudes as a move from a "Liberal Era" to a "Neoconservative Era." [FN26] Recent U.S. Supreme Court decisions have confounded commentators and have made finite categorizations virtually impossible. [FN27]

*83 However, to the best of our knowledge, there have been no systemic investigations of these case law developments from a therapeutic jurisprudence perspective. If therapeutic jurisprudence is truly to "inform doctrinal and constitutional approaches," will it do so in a way that "deepen[s] rights-based perspectives" or will it augur "a shift from . . . rights-based perspectives"? [FN28] This article is part of a preliminary inquiry into this issue.

Indeed, one of the most important controversies that has emerged from the first generation of therapeutic jurisprudence scholarship [FN29] is the question of whether, as a result of therapeutic jurisprudence, mental disability law will be more "therapeutic" or more "jurisprudential." [FN30] Some of the most important criticism of therapeutic jurisprudence flows from what is perceived as its willingness to subordinate civil libertarian concerns to therapeutic interests [FN31]; at the same time, some of the enthusiasm that therapeutic jurisprudence has engendered may flow implicitly from the same assumption. [FN32] On the other hand, Wexler and Winick recognize explicitly that therapeutic jurisprudence cannot and must not trump civil libertarian interests. [FN33] Other therapeutic jurisprudence "fellow travelers" (including the authors of this article) write from what is clearly a civil rights-expanding perspective. [FN34]

We reconsider from a therapeutic jurisprudence perspective the rights of institutionalized mentally disabled persons (and persons subject to the civil commitment process) in an effort to determine both whether therapeutic jurisprudence truly *84 is compatible with a civil rights perspective, and if it is, whether litigants representing mentally disabled individuals should look more closely to therapeutic jurisprudence as a source for their clients' legal rights. [FN35]

Our tentative thesis is that both these propositions are true. In other words, all of the important mental disability law civil rights decisions (especially some of those that prominent critics of mental disability law reform, e.g., E. Fuller Torrey, H. Richard Lamb, and Samuel Jan Brakel, criticize most severely) [FN36] have a strong therapeutic jurisprudence component. Furthermore, as judges become (generally) more disinterested in and/or hostile toward Fourteenth Amendment arguments, [FN37] it is essential that litigators representing mentally disabled litigants familiarize themselves with therapeutic jurisprudence and couch their arguments in therapeutic jurisprudence perspectives. The track record here has been mixed, [FN38] but we believe that this strategy promises more than any other alternative that has been offered. In summary, we believe that a "therapeutic" civil rights jurisprudence is not an oxymoron; rather, we believe that therapeutic jurisprudence analyses may be a strategy to redeem civil rights litigation in this area and to reinvigorate this body of mental disability law.

The article proceeds as follows. First, we present a brief explanation of the development of therapeutic jurisprudence as an interpretive tool in mental disability law and examine the questions that therapeutic jurisprudence seeks to ask about mental disability law matters. Next, we consider three discrete areas of mental disability law from three differing therapeutic jurisprudence perspectives [FN39]: the *85 involuntary civil commitment process (where we look most closely at the text of the case law), the right to treatment (where we look most closely at the filings and pleadings of plaintiff's counsel), and the right to refuse treatment (where we look more at the subsequent empirical research). We then offer some modest conclusions.

II. Involuntary Civil Commitment

A. Introduction

We contend that therapeutic jurisprudence encourages mental health lawyers to engage in appropriate civil rights lawyering. [\[FN40\]](#) A practice that is based on the tenets of therapeutic jurisprudence forces such lawyers to adopt a multidisciplinary investigation and evaluation of the therapeutic effects of the lawyering process and the case's ultimate disposition. In therapeutic jurisprudence, the client's perspective should determine the therapeutic worth or impact of a particular course of events. As a scholarly matter, we find it useful to use therapeutic jurisprudence as a framework within which to investigate and reformulate areas of law reform aimed at resolving difficult societal dilemmas. [\[FN41\]](#) As a practical legal tool, we believe that therapeutic jurisprudence has far-reaching potential. [\[FN42\]](#)

B. Before the Civil Rights Revolution

Since the mid-1960s, civil commitment--the power of the state to involuntarily confine someone on the basis of a finding of mental illness and related factors--has remained at the center of mental disability litigation. [\[FN43\]](#) Prior to that time, civilly committed persons generally found themselves involuntarily detained in locked mental institutions for indefinite periods of time with little or no recourse to legal process. [\[FN44\]](#) The lengthy period of commitment often effectively translated into the equivalent of a "life sentence." [\[FN45\]](#) Civil commitment procedures had not been closely scrutinized by courts, [\[FN46\]](#) and the Supreme Court of at least one state simply found that *86 involuntary civil commitment was not the sort of liberty loss protected by the Due Process Clause of the Fourteenth Amendment. [\[FN47\]](#)

Lawyers or advocates of any sort were rarely involved in release or retention decisions. [\[FN48\]](#) Hospital personnel generally had exclusive control over all administrative decisions, with few incentives to terminate custody. [\[FN49\]](#) Hospitals were traditionally "closed" institutions, and courts abided by the hands-off policy in rejecting requests for judicial oversight. [\[FN50\]](#)

New treatment modalities developed in the 1950s--specifically, the creation of antipsychotic drugs such as Thorazine [\[FN51\]](#)--combined with the changing political climate of the 1960s to bring dramatic changes to the way psychiatric facilities were run. Perhaps even more important, press exposés led to public perceptions that psychiatric facilities were often exploitative "snake pits." [\[FN52\]](#) In addition, funding became available on a larger scale for the first time through the passage of the Community Mental Health Centers Act of 1963. [\[FN53\]](#) As a result of these factors, psychiatric facility censuses were dramatically decreased. [\[FN54\]](#)

C. The Civil Rights Revolution

David Wexler has clearly and concisely set out the impact of the civil rights revolution on involuntary civil commitment law:

In the very late 1960s, a revolution began in civil commitment legislation. From then until the mid or late 1970s, nearly every state revised its mental health code. . . . The revolution, motivated by civil libertarian concerns, prompted a rethinking of such questions as who should be forcibly committed, on what grounds, for how long, and with what sort of procedural safeguards. The result was a setting of durational limits on the length of commitment, a massive increase in procedural protections and, substantively, stricter and more explicit commitment criteria. [\[FN55\]](#)

Not incidentally, the initiation of more formal hearings forced medical personnel to alter the manner in which they testified. [\[FN56\]](#) For the first time, psychiatrists were *87 subjected to rigorous cross-examination [\[FN57\]](#) and were required to substantiate their medical opinions rather than merely make medical conclusions. At the same time, psychiatric diagnostic and predictive skills were more closely scrutinized. [\[FN58\]](#) Lawyers were often successful in convincing courts that psychiatric diagnoses and predictions of dangerousness were inaccurate. [\[FN59\]](#) The meaning of dangerousness also became an important area of litigation. [\[FN60\]](#) Critics charged that the concept was "vague" and "amorphous," and its "elasticity" has made it "one of the most problematic and elusive concepts in mental health law." [\[FN61\]](#)

It was against this backdrop that many of the seminal cases litigating the boundaries of involuntary commitment of persons considered to be mentally ill were decided. We contend that the formalization of mental health law advocacy was patient centered, rights driven, and therapeutic in outcome. [\[FN62\]](#) These early cases were calculated to restore a modicum of dignity to those institutionalized pursuant to what were (almost without exception) archaic, paternalistic, and ultimately antitherapeutic laws. It is also not coincidental that the majority of those subjected to involuntary civil commitment are poor, elderly, uneducated, or female. [\[FN63\]](#) They are the people society renders the most visible within the community, and they are virtually invisible when expelled from the community.

Therapeutic jurisprudence proposes that we be sensitive to the consequences of governmental action and that it asks whether the law's antitherapeutic consequences can be reduced and its therapeutic consequences enhanced without subordinating due process and justice values. [\[FN64\]](#) In civil commitment case law, rarely is any reference ^{*88} made to the patient's perceived therapeutic response to the legal procedures or terms and conditions of the commitment. [\[FN65\]](#)

D. The Case Law

By the mid-1970s, it was universally accepted that some finding of mental illness was a prerequisite to involuntary commitment, following the U.S. Supreme Court's decision in *Jackson v. Indiana* [\[FN66\]](#) that "at the least, due process requires that the nature and duration of commitment must bear some reasonable relationship to the purpose for which the individual is committed." [\[FN67\]](#) Jackson's principles were first given importance in an involuntary civil commitment context in *Lessard v. Schmidt*. [\[FN68\]](#) *Lessard* struck down Wisconsin's involuntary civil commitment scheme and established guidelines as to the meaning of dangerousness that served as the model for the first generation of such challenges. [\[FN69\]](#)

1. *Lessard v. Schmidt*. *Lessard* was a class action brought on behalf of all adults then being held involuntarily pursuant to any emergency, temporary, or permanent provision of Wisconsin's involuntary civil commitment statutes. [\[FN70\]](#) It challenged a state statute that allowed for commitment of an individual if the hearing court was "satisfied that he is mentally ill or infirm or deficient and that he is a proper subject for custody and treatment." [\[FN71\]](#) According to plaintiffs, the law failed to "describe the standard for commitment so that persons may be able to ascertain the standard of conduct under which they may be detained with reasonable certainty." [\[FN72\]](#)

In approaching the case, the court looked carefully at the common-law and historical roots of the state involuntary civil commitment power. [\[FN73\]](#) In involuntary civil commitment proceedings, it found that the same "fundamental liberties" as are in criminal cases are at stake [\[FN74\]](#); the police power must thus similarly be "tempered with stringent procedural safeguards designed to protect the rights of one" subject to such ^{*89} power. [\[FN75\]](#) However, its review of the pertinent history suggested that, traditionally, involuntary civil commitment procedures have not "assured the due process safeguards against unjustified deprivation of liberty that are accorded those accused of crime." [\[FN76\]](#)

The court then examined the state's statutory definition of "mental illness" [\[FN77\]](#) in light of the U.S. Supreme Court's decision in *Humphrey v. Cady*, [\[FN78\]](#) which, in dicta, had interpreted the section in question to require that a person's "potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." [\[FN79\]](#) The *Lessard* court construed this statement to mean that "the statute itself requires a finding of 'dangerousness' to self or others in order to deprive an individual of his or her freedom." [\[FN80\]](#)

The use by the *Humphrey* court of the phrase "great enough" and its description of commitment as such a "massive curtailment" of liberty implied "a balancing test in which the state must bear the burden of proving that there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others." [\[FN81\]](#) Although predictions of future conduct are "always difficult" and confinement based on such predictions "must always be viewed with suspicion," [\[FN82\]](#) civil confinement could be justified if the "proper" burden of proof were to be satisfied, and "dangerousness" were to be based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another." [\[FN83\]](#)

Lessard was the forerunner of a generation of involuntary civil commitment cases, [\[FN84\]](#) all making some sort of finding that there must be a "real and present danger of doing significant harm" to show dangerousness sufficient to

support such a commitment. [\[FN85\]](#) The cases were not unanimous (e.g., as to the need for an actual overt ***90** act). [\[FN86\]](#) Nevertheless, they reflected a clear "break with a century-old tradition that 'civil' commitment of the mentally ill, whether for their own good or that of society, demands fewer procedural protections than does incarceration for punishment." [\[FN87\]](#) More than 20 years after the case was decided, Lessard remains the "high-water mark in 'dangerousness' law." [\[FN88\]](#)

We contend that much of the Lessard court's opinion was based on a therapeutic jurisprudence perspective. In evaluating Wisconsin's commitment statutes, the court chose to look at the effects of civil commitment on those committed. [\[FN89\]](#) The court considered evidence that lengthy hospitalization, particularly involuntary hospitalization, may greatly increase the symptoms of mental illness and make adjustment to society more difficult. [\[FN90\]](#)

In addition, the court considered the substantial loss of substantive civil rights suffered by persons adjudicated mentally ill and unable to care for themselves or in need of hospitalization. [\[FN91\]](#) On the other hand, the court gave little credence to the state's contention that notice and an evidentiary hearing within the first few days of confinement may be psychologically harmful to the patient. [\[FN92\]](#) In fact, the Lessard opinion contains at least one explanatory passage that seems to qualify as one of the true judicial forerunners of therapeutic jurisprudence:

[The] conclusion [that due process is mandated at involuntary civil commitment hearings] is fortified by medical evidence that indicates that patients respond more favorably to treatment when they feel they are being treated fairly and are treated as intelligent, aware, human beings. In [the named plaintiff's] case, for example, Dr. Kennedy testified that her improvement had occurred "following a period of involvement with not only hospital individuals and hospital staff influence, but an involvement with other environmental influences that have included a number of judicial involvements, legal involvements." [\[FN93\]](#)

In using a therapeutic jurisprudence perspective, the court was able to fashion a workable standard that took into account the concerns of the state to protect society, [\[FN94\]](#) provide appropriate care and treatment to its mentally ill citizens, [\[FN95\]](#) and protect the dignity and civil rights of persons thought to be in need of involuntary civil commitment.

***91** 2. O'Connor v. Donaldson. When the U.S. Supreme Court next turned to mental disability law in 1975 in O'Connor v. Donaldson, [\[FN96\]](#) it considered the liberty interests of an involuntarily committed psychiatric patient. It reasoned, per Justice Stewart, along with the Lessard court, that because involuntary commitment is a "massive curtailment of liberty," [\[FN97\]](#) "a state cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." [\[FN98\]](#) Although the case had begun as a right-to-treatment claim (and the jury had awarded the plaintiff damages for violation of that right), [\[FN99\]](#) that claim was abandoned at the U.S. Supreme Court level. [\[FN100\]](#) Chief Justice Burger concurred, writing that he could "discern no basis for equating an involuntarily committed mental patient's unquestioned right not to be confined without due process of law with a constitutional right to treatment." [\[FN101\]](#)

A therapeutic jurisprudence analysis underscores the difference between the majority and concurring opinions and highlights the discord between the two. The majority opinion positioned the court as legitimately involved in what was previously considered solely the domain of the state's mental health professionals. Wrote Justice Stewart:

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement . . . there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom. [\[FN102\]](#)

It also flatly rejected the state's argument that the questions before the court were not justiciable: "Where 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present." [\[FN103\]](#)

The opinion went on to recognize the importance of the committed person's view of what may be most therapeutic, by acknowledging that the "mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution." [\[FN104\]](#) The opinion then balanced the individual's rights with the ***92** public's interest

in being free from living with mentally disabled persons in its midst: "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." [\[FN105\]](#)

Chief Justice Burger's concurrence, on the other hand, is, at its core, antitherapeutic. First, he appears to retreat from the majority's acceptance of the court's role in deciding issues involving psychiatric testimony: "It is not for us to say in the baffling field of psychiatry that 'milieu' therapy is always a pretense." [\[FN106\]](#) This observation rings hollow in light of the record that showed that "milieu therapy" in this case was nothing more than "a euphemism for confinement in the 'milieu' of the mental hospital." [\[FN107\]](#) Furthermore, Burger insisted that there was no evidence that Donaldson had been mistreated while hospitalized [\[FN108\]](#); a defendant testified, however, that although the hospital did not have sufficient staff, an individualized treatment program, or treatment goals for the patient, he would have retained Donaldson in the hospital for the remainder of his life. [\[FN109\]](#)

Subsequently, Burger's statement (on an issue no longer before the court) that he could discern "no basis to support a patient's right to treatment" [\[FN110\]](#) presages the Chief Justice's later position in *Youngberg v. Romeo* that he would hold "flatly" that there is no such constitutional right. [\[FN111\]](#) As we demonstrate below, [\[FN112\]](#) the constitutional right to treatment is explicitly a therapeutic right, and Burger's legalistic objections to it sows the seeds of an antitherapeutic jurisprudence.

3. *Parham v. J.R.* By the next time the Court returned to mental disability issues, the Chief Justice's position had become more influential. In *Parham v. J.R.*, [\[FN113\]](#) the Court reversed federal district court cases striking down Georgia and Pennsylvania statutory schemes that had permitted juvenile commitments on the basis of less stringent procedural and substantive due process protections than applied to cases involving adults. [\[FN114\]](#) According to state practices, children could be "institutionalized without a hearing or other procedural safeguards;...hospitalized without initial or periodic consideration of placement in the least drastic environment necessary for treatment; and...not afforded a hearing at any time for the determination of an appropriate, required time for a discharge." [\[FN115\]](#) The Court held that such practices were both reasonable and consistent with constitutional guarantees. [\[FN116\]](#)

*93 In the course of his opinion for the Court, Chief Justice Burger set out a very specific vision of the application of the commitment process to juveniles. First, he discussed the state's interest "in not imposing procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance." [\[FN117\]](#) This observation "simultaneously assumes (1) the persons at risk are genuinely mentally ill, (2) they are in need of psychiatric assistance and (3) such psychiatric assistance is available at the institutions in question." [\[FN118\]](#)

Next, he focused on the "embarrassment" potential of the contested, interfamilial juvenile commitment process:

The *parens patriae* interest in helping parents care for the mental health of their children cannot be fulfilled if the parents are unwilling to take advantage of the opportunities because the admission process is too onerous, too embarrassing or too contentious. It is surely not idle to speculate as to how many parents who believe they are acting in good faith would forego state-provided hospital care if such care is contingent on participation in an adversary proceeding designed to probe their motives and other private family matters in seeking the voluntary admission.

The state also has a genuine interest in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming procedural minuets before the admission. One factor that must be considered is the utilization of the time of psychiatrists, psychologists and other behavioral specialists in preparing for and participating in hearings rather than performing the task for which their special training has fitted them. Behavioral experts in courtrooms and hearings are of little help to patients. [\[FN119\]](#)

There is no explanation offered as to how the process is "too onerous, too embarrassing, or too contentious," nor is there any basis suggested for the speculation that a significant percentage of patients would forego state-provided hospital care if it is "contingent on participation in an adversary proceeding." [\[FN120\]](#) Similarly, neither data nor theory is offered regarding why such hearings would be "time-consuming procedural minuets." [\[FN121\]](#)

The Chief Justice characterized the questions in juvenile admission matters as being "essentially medical in character," [\[FN122\]](#) and, whereas he acknowledged the "fallibility of medical and psychiatric diagnosis"--citing his own concurring opinion in *O'Connor v. Donaldson* [\[FN123\]](#)--he added (without supporting reference) that he did not "accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained

specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type *94 hearing." [\[FN124\]](#) Finally, the opinion stated its major philosophical premise: that hearings would intrude into the parent-child relationship:

Another problem with requiring a formalized, factfinding hearing lies in the danger it poses for significant intrusion into the parent-child relationship. Pitting the parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child. It is one thing to require a neutral physician to make a careful review of the parents' decision in order to make sure it is proper from a medical standpoint; it is a wholly different matter to employ an adversary contest to ascertain whether the parents' motivation is consistent with the child's interests. [\[FN125\]](#)

No supporting citation, behavioral research, or reference to the court record is offered to bolster these assertions. [\[FN126\]](#)

No modern U.S. Supreme Court civil case dealing with the rights of people with mental disabilities has been criticized as consistently or as thoroughly as have been *Parham* and *Institutionalized Juveniles*. [\[FN127\]](#) The decisions have been criticized for helping to create "a greased runway leading to the incarceration of handicapped children in institutions," [\[FN128\]](#) for their "confusing and inaccurate" interpretations of the lower court decisions, for "misstatements" of the factual record of the cases, [\[FN129\]](#) and for "accord[ing] little weight to the juveniles' interest in self respect." [\[FN130\]](#)

Perry and Melton similarly argued that the opinion improperly relied on the technique of judicial notice "to carve rather elaborate, if one-sided, images of the functioning of American families, mental hospitals and judicial proceedings," [\[FN131\]](#) charging that, without supporting evidence, the Chief Justice "made no fewer than fifteen empirical assumptions, many of them directly contrary to existing social-science research, about the psychology and sociology of juvenile mental institutions." *95 [\[FN132\]](#) They concluded

The *Parham* case is an example of the Supreme Court's taking advantage of the free rein on social facts to promulgate a dozen or so of its own by employing one tentacle of the judicial notice doctrine. The Court's opinion is filled with social facts of questionable veracity, accompanied by the authority to propel these facts into subsequent case law and, therefore, a spiral of less than rational legal policy making. [\[FN133\]](#)

4. Conclusion. An examination of these decisions reveals a profound difference between those that are therapeutic (Jackson; Lessard; the majority in *O'Connor*) and those that are antitherapeutic (Burger's concurrence in *O'Connor*; *Parham*). [\[FN134\]](#) It is ironic, of course, that the therapeutic ones are among those that have been painted as examples of the law's excessive preoccupation with civil liberties and its failure to equally consider clinical needs. [\[FN135\]](#) This picture is a distortion: those cases expand autonomy and honor civil liberties and therefore are therapeutic; it is Chief Justice Burger's vision of mental disability law, rather, that is antitherapeutic.

E. Pretextuality and Involuntary Civil Commitment Law [\[FN136\]](#)

We have argued elsewhere that mental disability law is often pretextual. [\[FN137\]](#) The District of Columbia Code contains a provision that patients can invoke seeking either periodic review of their commitment or an independent psychiatric evaluation, but not a single patient exercised the right to statutory review in the first 22 years following the law's passage. [\[FN138\]](#) It is assumed that vigorous, independent, advocacy-focused counsel is now made available to all mentally disabled litigants. In almost every jurisdiction, however, the empirical reality is totally to the contrary. [\[FN139\]](#)

As length of proposed hospitalizations increase, hearings become shorter and *96 less adversarial. [\[FN140\]](#) At patients' initial hearings, fewer than one third of judges told them of their right to counsel, fewer than one fourth of judges told them of their right to seek voluntary commitment status, and only about two fifths of judges told them of their right to appeal. These percentages dropped precipitously further by the time of the patient's second review hearing. [\[FN141\]](#)

Elsewhere, one of us has argued that expert witnesses in civil commitment cases often seek to impose their own self-referential concept of morality to ensure that patients who "really need treatment" are not released [\[FN142\]](#); this testimony is accepted in light of trial judges' own "instrumental, functional, normative and philosophical"

dissatisfaction with decisions such as O'Connor, Jackson, and Lessard. Judges routinely express astonishment at the assertion that expert testimony in involuntary civil commitment cases may be factually inaccurate. [\[FN143\]](#)

How does this fit with therapeutic jurisprudence and the development of involuntary civil commitment law? Certainly, the practices just described appear antitherapeutic by any measure of analysis. When read in the context of the O'Connor concurrence and the Parham majority, they suggest the extent to which pretextuality drives this area of the law. [\[FN144\]](#) We believe that the use of therapeutic jurisprudence to expose such pretextuality will become a powerful tool that will serve as a means of attacking and uprooting "the we/they distinction that has traditionally plagued and stigmatized the mentally disabled." [\[FN145\]](#)

III. The Right to Treatment

A. Introduction

The area of right-to-treatment law is perhaps the best fit between therapeutic jurisprudence and patients' civil rights. The right-to-treatment movement grew consciously out of dissatisfaction in the 1950s and 1960s with the nontherapeutic and antitherapeutic condition of large public state institutions for mentally disabled persons. [\[FN146\]](#) The earliest cases--especially Wyatt v. Stickney--made the overt link between therapeutic rights and constitutional rights. [\[FN147\]](#) Early cases that flowed from *97 Wyatt--both right-to-treatment cases and "other institutional rights" cases--often relied specifically on therapeutic justifications for constitutional holdings. [\[FN148\]](#)

As has been well-documented, the course of right-to-treatment litigation changed significantly following the U.S. Supreme Court's 1982 decision in Youngberg v. Romeo. [\[FN149\]](#) Although the Court acknowledged that institutionalized persons retained certain constitutional rights--to food, shelter, clothing, and medical care [\[FN150\]](#)--it stopped short of finding a constitutional right to treatment. [\[FN151\]](#) Post-Youngberg cases have split sharply in their readings of the case's ultimate scope, some building on Justice Blackmun's concurrence, [\[FN152\]](#) and others adopting a far narrower interpretation. [\[FN153\]](#)

In this section, we (a) trace the background of the Wyatt case and demonstrate how therapeutic ends were consciously and overtly in the minds both of counsel and the courts in Wyatt and its progeny, (b) show how the U.S. Supreme Court's decision in Youngberg largely halted that movement, and (c) demonstrate how the standard charges leveled against the mental disability law "movement" (and the lawyers largely responsible for its early development) are simply all wrong.

B. Wyatt and Its Progeny

By 1960, social reformers had become a major voice in the call to restructure state public mental hospitals. The president of the American Psychiatric Association called the facilities "bankrupt beyond remedy" [\[FN154\]](#); the social critic Albert Deutsch testified before Congress regarding his earlier investigations of state hospitals with these chilling words:

Some physicians I interviewed frankly admitted that the animals of nearby piggeries were better housed, fed and treated than many of the patients on their wards. I saw hundreds of sick people shackled, strapped, straitjacketed, and bound to their beds. I saw mental patients forced to eat meals with their hands because there were not enough spoons and other tableware to go around-- not because they couldn't be trusted to eat like humans....I found evidence of physical brutality, but that paled into insignificance when compared with the excruciating suffering stemming from prolonged, enforced idleness, herdlike crowding, lack of privacy, depersonalization, and the overall atmosphere of neglect. The fault lay... with the general community that not only tolerated but enforced these subhuman conditions through financial penury, ignorance, fear and indifference. [\[FN155\]](#)

At about the same time, Morton Birnbaum (a physician and attorney) published his seminal article in the American Bar Association Journal calling for a declaration of *98 "the recognition and enforcement of the legal right of a mentally ill inmate of a public mental institution to adequate medical treatment for his mental illness" [\[FN156\]](#) and for courts to openly consider the question of whether "the institutionalized mentally ill person receives adequate medical treatment so that he may regain his health, and therefore his liberty, as soon as possible." [\[FN157\]](#) Birnbaum

located the constitutional basis of this right to treatment in the Due Process Clause: "Substantive due process of law does not allow a mentally ill person who has committed no crime to be deprived of his liberty by indefinitely institutionalizing him in a mental prison." [\[FN158\]](#) This article was widely acknowledged as "supplying much of the theoretical support for the subsequent development of the right-to-treatment litigation." [\[FN159\]](#)

The existence of a statutory [\[FN160\]](#) right to treatment was first judicially recognized by the District of Columbia Circuit Court of Appeals in the unlikely setting of a habeas corpus case brought by an insanity acquittee. There, in *Rouse v. Cameron*, [\[FN161\]](#) the court found that a District of Columbia hospitalization law established such a statutory right, reasoning that "the purpose of involuntary hospitalization is treatment, not punishment," quoting a statement by the act's sponsor that when a person is deprived of liberty because of need of treatment, and that treatment is not supplied, such deprivation is "tantamount to a denial of due process." [\[FN162\]](#) The hospital thus needed to demonstrate that it had made a "bona fide effort" to "cure or improve" the patient, that inquiries into the patient's needs and conditions be renewed periodically, and that the program provided be suited to the patient's "particular needs." [\[FN163\]](#)

Rouse was the subject of considerable academic and scholarly commentary--most of which was favorable [\[FN164\]](#)--but was nonetheless criticized sharply by the American Psychiatric Association for interfering with medical practice: "The definition of treatment and the appraisal of its adequacy are matters for medical determination." [\[FN165\]](#) This position, to be sure, was not unanimously held by the psychiatric establishment--Alan Stone, for instance, referred to it as a "monument to bureaucratic myopia" [\[FN166\]](#)--but it provides a context through which some of the incessant criticisms of the mental health advocacy movement can be reexamined: that the trade association for the service providers most closely linked with inpatient mental health care took the position that the hands-off doctrine [\[FN167\]](#) required a policy of judicial nonintervention in the relationship between institutionalization and constitutional rights.

*99 The most important case finding a constitutional right to treatment was, without doubt, *Wyatt v. Stickney*. Wyatt was clear:

The purposes of involuntary hospitalization for treatment purposes is treatment and not mere custodial care or punishment. This is the only justification from a constitutional standpoint, that allows civil commitment to [a state hospital].... To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process. [\[FN168\]](#)

It subsequently found three "fundamental conditions for adequate and effective treatment": (a) a humane psychological and physical environment, (b) qualified staff in numbers sufficient to administer adequate treatment, and (c) individualized treatment plans. [\[FN169\]](#) Following a hearing (to which the court had invited a broad cross-section of interested professional associations to participate), the court issued supplemental orders detailing the "medical and constitutional minimums ... mandatory for a constitutionally acceptable minimum treatment program." [\[FN170\]](#) These standards covered the full range of hospital conditions, including environmental standards, civil rights, medical treatment criteria, staff qualifications, nutritional requirements, and need for compliance with Life Safety Code provisions. [\[FN171\]](#)

On what sources did Wyatt draw? An examination of the transcript, briefs, and court documents in Wyatt (and in *NYSARC v. Rockefeller*, a parallel suit brought in federal court in New York on behalf of residents of the Willowbrook facility for mentally retarded individuals [the Willowbrook case]) [\[FN172\]](#) reveals that therapeutic motivations drove each and every important aspect of the litigation in question.

The complaint in Willowbrook, for instance, specifically articulated therapeutic ends:

32. Care, treatment, education and training are all included within a broader concept referred to by mental retardation professionals as "habilitation." The goal of habilitation is to assist each mentally retarded person to lead a life as close to normal as is possible.

...

35. Defendants, however, have created, fostered, and condoned conditions, policies and practices at Willowbrook that are directly contrary to professionally accepted concepts of habilitation. As a consequence, Willowbrook is not a therapeutic institution. It more closely resembles a prison, and the residents confined therein

have therefore been denied due process of law.

...

37. A...prerequisite to an adequate habilitation program is a humane physical and psychological environment. The environment at Willowbrook is inhumane and psychologically destructive. Examples of the anti-therapeutic environment include...

[listing examples].

***100** ...

54. Because of the foregoing, the vast majority of residents at Willowbrook have actually regressed and deteriorated since their admission...

55. Because of the foregoing, residents have been deprived of the habilitation necessary to enable them to speak, read, communicate, mix and assemble with others...

56. Because of the foregoing, residents have been deprived of their rights to privacy and dignity protected by the Fourteenth Amendment.

...

59. Because of the foregoing, residents have been denied due process and equal protection of the law, in violation of the Fourteenth Amendment. [\[FN173\]](#)

At trial, experts and even defendants' witnesses testified as to the regression suffered by Willowbrook residents. [\[FN174\]](#) The consent order eventually entered in this case [\[FN175\]](#) was overtly premised on therapeutic ends:

[The] conditions [at Willowbrook] are hazardous to the health, safety, and sanity of the residents. They do not conform with the standards published by the American Association of Mental Health Deficiency in 1964, or with the proposed standards published on May 5, 1973 by the United States Department of Health, Education and Welfare. [\[FN176\]](#)

Under the court's analysis, residents were entitled to, inter alia, "protection from assaults by fellow inmates or by staff," to "correction of conditions which violate 'basic standards of human decency'," to medical care, to exercise and outdoor recreation, to adequate heat during cold weather, and to the "necessary elements of basic hygiene." [\[FN177\]](#)

The conditions that faced the court in Wyatt were, to be charitable, abysmal. During the course of trial, the following uncontradicted facts were found:

A resident was scalded to death by hydrant water,...a resident was restrained in a strait jacket for nine years in order to prevent hand and finger sucking,...and a resident died from the insertion by another resident of a running water hose into his rectum. [\[FN178\]](#)

***101** In each instance, the court noted that the incidents could have been avoided "had adequate staff and facilities been available." [\[FN179\]](#)

In the pretrial aspects of Wyatt, an expert testified as to the way that the operation of the Partlow facility "foster[ed] dehumanization" and reflected a "long-term warehousing operation" [\[FN180\]](#) and a "deprived environment" [\[FN181\]](#) in which staff had "little understanding as to the nature of the residents' disabilities" [\[FN182\]](#) and exhibited a "self-defeatist attitude" that "generates deterioration in the residents," [\[FN183\]](#) and conditions on wards reflected "massive evidence of deprivation--emotional, social,... physical." [\[FN184\]](#) Briefs filed with the court relied on behavioral and medical experts to support arguments that institutional settings such as were present in Alabama "encourage disability rather than overcome it," that such hospitalization is inevitably a "regressive experience with far reaching destructive repercussions," that such hospitalization is "anti-therapeutic" and "negative," and that continued exposure to such conditions "has severely debilitating effects on the social and psychological condition of patients." [\[FN185\]](#)

The court's original orders in Wyatt [\[FN186\]](#) drew specifically on many of the sources in coming to the conclusion that conditions at Alabama facilities violated the Due Process Clause. [\[FN187\]](#) Even that aspect of Wyatt that appears to be the most purely legal--its invocation of the least restrictive analysis doctrine for institutional decision making [\[FN188\]](#)--is premised on therapeutic ends. [\[FN189\]](#)

***102** On appeal, amici supporting Wyatt plaintiffs stressed the precise link between therapeutic outcome and

constitutional rights, calling the court's attention to the fact-finding made below:

[T]he dormitories are barn-like structures with no privacy for the patients. For most patients there is not even a space provided which he can think of as his own. The toilets in the restrooms seldom have partitions between them. There are dehumanizing factors which degenerate the patients' self-esteem. Also contributing to the poor psychological environment are the shoddy wearing apparel furnished the patients, the non-therapeutic work assigned to patients, and the degrading and humiliating admissions procedures which creates in the patient an impression of the hospital as a prison or as a crazy house. [\[FN190\]](#)

In the same brief, amici stressed findings made by defendants' experts:

[The hospital] impressed me as a depressing and dehumanizing environment, reminding me of graveyard lots where the patients are essentially living out their lives without the rights of privacy (or ownership). [\[FN191\]](#)

Quoting further testimony:

Residents with open wounds and inadequately treated skin diseases were in immediate danger of infection because of the unsanitary conditions existing in the wards, including urine and feces on the floor.... There was evidence of insect infestation, including cockroaches in the kitchens and dining rooms. [\[FN192\]](#)

Not only are inmates of Alabama's mental institutions deprived of treatment, they are deprived of even the most minimal stimulation and activity, with the result that their condition seriously deteriorates. [\[FN193\]](#)

On appeal, the Fifth Circuit substantially affirmed. It noted that there was "no significant dispute" about the level of conditions in the Alabama facilities in question, [\[FN194\]](#) relying on its recent decision in *Donaldson v. O'Connor* [\[FN195\]](#):

In *Donaldson*, we held that civilly committed mental patients have a constitutional right to such individual treatment as will help each of them to be cured or to improve his or her mental condition. We reasoned that the only permissible justifications for civil commitment, and for the massive abridgments of constitutionally protected liberties it entails, were the danger posed by the individual committed to himself or others, or the individual's need for treatment and care. We held that where the *103 justification for commitment was treatment, it offended the fundamentals of due process if treatment were not in fact provided; and we held that where the justification was the danger to self or to others, then treatment had to be provided as the quid pro quo society had to pay as the price of the extra safety it derived from the denial of individuals' liberty. [\[FN196\]](#)

Wyatt was characterized as "the most significant case in the history of forensic psychiatry" and "the foundation of modern psychiatric jurisprudence." [\[FN197\]](#) Furthermore, it crystallized the issue: The right to treatment was consciously intended to achieve therapeutic gains. [\[FN198\]](#) Post-Wyatt cases endorsed the link, both in "pure" right-to-treatment cases, [\[FN199\]](#) in institutional rights cases that focused on one or more aspect of Wyatt—for example, the right to be paid for institutional labor [\[FN200\]](#) or the right to freedom in religious practice, [\[FN201\]](#) and in early deinstitutionalization cases. [\[FN202\]](#)

C. A Turn Away From a Therapeutic Jurisprudence

The scope of the right to treatment took a significant turn several years later in *Youngberg v. Romeo*. [\[FN203\]](#) There, the U.S. Supreme Court granted certiorari to review a Third Circuit decision that had held that the Fourteenth Amendment's Due Process Clause [\[FN204\]](#) was the proper source for determining the constitutional basis for the rights asserted by the plaintiff, a severely mentally retarded, involuntary resident of a Pennsylvania state institution who had suffered 63 significant injuries, both self-inflicted and inflicted by other facility residents. [\[FN205\]](#)

In applying this clause, the Third Circuit had found that involuntarily committed mentally disabled persons had "fundamental" [\[FN206\]](#) liberty interests in freedom of movement and in personal security that could be limited only by an "overriding, non-punitive" state interest, [\[FN207\]](#) as well as a "liberty interest in habilitation designed *104 to 'treat' their mental retardation." [\[FN208\]](#) In assessing whether a resident's treatment rights had been violated, the circuit found that the defendants would be held liable only if the plaintiff's treatments were not "acceptable in the light of present medical or other scientific knowledge." [\[FN209\]](#)

The U.S. Supreme Court vacated and remanded, [\[FN210\]](#) holding that, in addition to the rights to "adequate food,

shelter, clothing and medical care," [\[FN211\]](#) the plaintiff had a constitutionally protected Fourteenth Amendment [\[FN212\]](#) liberty interest in "conditions of reasonable care and safety," [\[FN213\]](#) "freedom from bodily restraint," [\[FN214\]](#) and "such minimally adequate or reasonable training to ensure safety and freedom from undue restraint." [\[FN215\]](#) In determining whether an individual plaintiff's constitutional rights have been violated, these liberty interests must be balanced against relevant state interests. [\[FN216\]](#)

The standard for making this determination is whether professional judgment has been exercised. [\[FN217\]](#) A decision made by a professional is "presumably valid" [\[FN218\]](#): "Liability may only be imposed when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." [\[FN219\]](#)

The U.S. Supreme Court also abandoned the Third Circuit's "least intrusive" means methodology [\[FN220\]](#) and instead found that plaintiff was entitled to "reasonably *105 non-restrictive confinement conditions." [\[FN221\]](#) This phrase was neither defined nor elaborated on, yet it appears to be the Court's first acknowledgment that some calibration of restrictivity of treatment is essential in any case construing substantive treatment rights. [\[FN222\]](#)

Justice Blackmun--writing for himself, Justice Brennan, and Justice O'Connor-- stated that he would grant the plaintiff an additional right beyond those articulated in the majority's opinion: the right to "such training as is reasonably necessary to prevent a person's pre-existing self-care skills from deteriorating because of his commitment." [\[FN223\]](#) In Justice Blackmun's view, an institutional resident's interest in not losing such skills "alleged a loss of liberty quite distinct from--and as serious as--the loss of safety and freedom from unreasonable restraints" [\[FN224\]](#):

For many mentally retarded people, the difference between the ability to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they will ever know. [\[FN225\]](#)

However, because Justice Blackmun agreed with the majority that, on the record before the Court, it was unclear whether plaintiff "[in fact] seeks any 'habilitation' or training unrelated to safety and freedom from bodily restraints," [\[FN226\]](#) he "accept ed its decision not to address plaintiff's additional claim." [\[FN227\]](#)

Chief Justice Burger wrote a separate concurring opinion to articulate one theme: "I would hold flatly that [plaintiff] has no constitutional right to training, or 'habilitation', per se." [\[FN228\]](#) Although he agreed with the majority that "some amount of self-care instruction may be necessary to avoid unreasonable infringement of a mentally retarded person's interest in safety and freedom from restraint," [\[FN229\]](#) it was also "clear" to the Chief Justice that the Constitution "does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation--even such as might be encompassed under the essentially standardless rubric 'minimally adequate training' to which the Court refers." [\[FN230\]](#)

Youngberg is profoundly antitherapeutic. First, its adoption of a "substantial professional judgment" standard sharply limits the need to inquire into the adequacy of a patient's treatment. [\[FN231\]](#) The presumption of validity given to institutional decision *106 making, in effect, signals lower courts to ignore the landscape on which Wyatt was litigated as well as the history of American public psychiatric institutions. Furthermore, it serves as a brake on creative lawyering by civil rights lawyers seeking to vindicate claims of institutionalized patients in a variety of areas. [\[FN232\]](#)

Second, its abandonment of the "least restrictive alternative" construction (and its embrace of the "reasonably non-restrictive confinement conditions" standard) is, at best, curious. This phrase appeared nowhere in the case law, nor was it ever discussed at oral argument. Although it might appear that the phrase is, at best, a shaggy dog--in the 12 years since Youngberg was decided, this phraseology has been used rarely by other courts, and its contours have never truly fleshed out [\[FN233\]](#)--its use as a replacement for the other standard, again, sends a crystal-clear message that the therapeutic values that underlay the application of the "least restrictive alternative" test to mental disability law cases have been abandoned.

Finally, the court's empirical rationale for limiting the right to habilitation is bizarre. In supporting this conclusion, it stated that professionals in mental retardation "disagree strongly on the question whether effective training of all severely or profoundly retarded individuals is even possible," citing four articles from the journal *Analysis and Intervention in Disabilities*. [\[FN234\]](#) However, a reading of the very articles cited by the court--articles never cited

previously or subsequently by any other court in any reported opinion--shows that they considered only the "small fraction" of persons with mental retardation who were "permanently nonambulatory" and "extremely debilitated," [\[FN235\]](#) a grouping that is a tiny percentage of all institutionalized persons. Here, the court's selection of social science data appears pretextual as well. [\[FN236\]](#)

D. Post-Youngberg Developments

1. Broad readings. At least one case has used Justice Blackmun's concurrence as a point of embarkation to craft a broader reading of the right to treatment in the wake of Youngberg. [\[FN237\]](#) In a case involving conditions at the Suffolk Developmental Center (SDC) [\[FN238\]](#)--an inpatient facility for mentally retarded persons located in a *107 New York suburb--the Second Circuit found that institutionalized, mentally retarded persons had "a due process right to training sufficient to prevent basic self-care skills from deteriorating." [\[FN239\]](#)

The court ruled that institutional officials cannot "deprive the mentally retarded residents of their liberty interest in a humane and decent existence" [\[FN240\]](#):

We conclude that such deprivation exists when institution officials fail to exercise professional judgment in devising programs that seek to allow patients to live as humanely and decently as when they entered the school, i.e., when there is no individually oriented, professionally devised program to help SDC residents maintain the fundamental self-care skills with which they entered the Center. [\[FN241\]](#)

The holding in this case did not go so far as to include a "right to such training as will improve a resident's basic self-care skills beyond those with which he or she entered SDC and does not encompass skills that are not basic to self-care." [\[FN242\]](#) Such a claim, the court reasoned, went substantially further than what was constitutionally required to "safeguard basic liberty interests" or to "forbid deprivations of liberty without due process of law." [\[FN243\]](#)

In other cases, various aspects of Youngberg have been broadly interpreted-- allowing the administrator of the estate of a patient who had committed suicide to maintain her suit, [\[FN244\]](#) finding "an affirmative obligation on the state to provide adequate medical care for involuntarily committed patients of state mental institutions," [\[FN245\]](#) and holding that a decision will not be characterized as "professional" where "it is not based on a view as to how best to operate a mental health facility." [\[FN246\]](#) Yet other cases have extended Youngberg's language to cases involving chemical restraints, [\[FN247\]](#) have applied its standards to the therapeutic implications of a facility's "no-communication" policy [\[FN248\]](#) and to the adequacy of another facility's fire safety measures, [\[FN249\]](#) have ruled that an assessment of "professional judgment" can be made only on a fully developed factual record, [\[FN250\]](#) and have rejected defendants' arguments that the appointment of a special master to oversee certain aspects of decree monitoring, [\[FN251\]](#) or the ordered reduction of a specific institutional population [\[FN252\]](#) usurped state functions.

*108 In perhaps the broadest reading of Youngberg, a district court in North Carolina extended its holding to apply to cases of noninstitutionalized mentally retarded persons. In *Thomas S. by Brooks v. Morrow*, [\[FN253\]](#) the plaintiff--a 19-year-old who had been shuffled through 40 foster homes and institutions since his having been given up for adoption at birth--was housed in a community placement "because there is no place else for him to go." [\[FN254\]](#) However, the court found the Youngberg standards "appropriate." [\[FN255\]](#)

[The parties] agree that [plaintiff] suffers from mental impairments which prevent him from living independently and which necessitated the appointment of a guardian. [Plaintiff] is not now institutionalized, but he was so placed at the time the suit was filed, and, as a ward of the state, [he] may be required to return to [the mental retardation unit of a state hospital], if his guardian so directs. Therefore, [plaintiff] is like the plaintiff in *Youngberg* insofar as the state has control over [his] liberty and care. [\[FN256\]](#)

The same case also interpreted Youngberg's liability standard expansively. Although defendants had filed affidavits asserting that the plaintiff's "behavioral problem ... makes it difficult to treat him," [\[FN257\]](#) the court found that these assertions were outweighed by the "overwhelming weight of professional opinion concerning the plaintiff's appropriate treatment needs including placement in a group home, participation in social situations outside of the institutional environment, and training in a specific trade." [\[FN258\]](#) This weighing appears to go considerably beyond what Youngberg characterized as the "presumption of correctness" that must attach to professional decision making. [\[FN259\]](#)

On appeal, the Fourth Circuit substantially affirmed the district court's decision. The liberty interests protected by Youngberg were not limited to cases involving "institutional confinement," the court of appeals found; an incompetent person does not "shed [his] basic liberty interests ... when state officials and his guardian move him from one facility to another." [\[FN260\]](#) On the facts of the case, it found that Thomas's placement was improperly "based on expediency and a decision to save money." [\[FN261\]](#) These actions did not involve "a professional's judgment concerning the appropriate treatment for a specific individual." [\[FN262\]](#)

***109** On remand, the trial court subsequently found that class members established that their due process rights had been violated by defendants and that they were entitled to a wide range of prospective relief, including orders to ensure protection from aggression and self-abuse; safe drugging practices; no unnecessary reliance on shackles, solitary confinement, and other forms of bodily restraint; and habilitation. [\[FN263\]](#) Although the court noted that Youngberg only mandated "minimally adequate treatment consistent with professional judgment to protect plaintiffs' constitutional liberty interests," it underscored that class members who had been harmed by defendants' past failures to provide such treatment are "entitled to much broader relief if necessary to cure the lingering effects of historic mistreatment." [\[FN264\]](#) On appeal, this district court order was affirmed, the Fourth Circuit finding that the evidence adduced at trial supported the conclusion that the defendants substantially departed from professional judgment in treating mentally retarded individuals institutionalized at a state psychiatric hospital. [\[FN265\]](#)

2. Restrictive interpretations. In other decisions, Youngberg has been construed more narrowly. [\[FN266\]](#) For example, one court relied, in part, on Youngberg to reject the plaintiffs' argument that confinement in a mental hospital is unconstitutional "unless the individual's mental illness is treatable" [\[FN267\]](#); a second court used it to reject the argument that accreditation of a public institution for the mentally disabled by the Joint Commission on the Accreditation of Hospitals [\[FN268\]](#) did not necessarily imply adequacy of treatment. [\[FN269\]](#) A third court used Youngberg to reject the plaintiffs' argument that the sleeping and dayroom arrangements in the defendants' facilities were unconstitutional. [\[FN270\]](#) and another relied on it to sustain the defendants' plan for closing a facility for people with mental disabilities. [\[FN271\]](#)

Most significantly, Youngberg has been used to deny plaintiffs' arguments that they were entitled to a right to a least restrictive alternative placement in a community setting. In one case, the Seventh Circuit rejected this claim on the theory that, in this context, the Due Process Clause question only applied to whether, "under the conditions in the institutions in which the class members were cared for, they were deprived of a constitutional right of liberty of movement and training." [\[FN272\]](#) ***110** In another, the Second Circuit construed Youngberg as limiting its inquiry to "whether a decision to keep residents at defendant state school for the developmentally disabled is a rational decision based on professional judgment." [\[FN273\]](#) Because "experts appear to disagree on the appropriateness of institutionalization, we cannot say that it is professionally unacceptable." [\[FN274\]](#) Thus, retaining residents at such a facility is not a "substantial departure from professional judgment" [\[FN275\]](#) under the teachings of Youngberg and satisfies "minimum professional standards." [\[FN276\]](#)

E. Conclusion

An analysis of the right-to-treatment litigation reveals some fairly clear results. Wyatt v. Stickney was a therapeutic case, perhaps the most therapeutically focused case in the history of American mental disability law. Cases that adhered to the spirit of Wyatt similarly advanced therapeutic ends. Youngberg v. Romeo, on the other hand, was profoundly antitherapeutic, and cases that have followed it are equally antitherapeutic. [\[FN277\]](#)

Not all post-Youngberg cases embrace the narrow vision posited by that court's majority or by Chief Justice Burger; some, in adhering to the broader read of Justice Blackmun in his concurrence, endorse therapeutic values. Other post-Youngberg cases continue to endorse both the spirit and letter of Wyatt. [\[FN278\]](#)

In summary, the history of right-to-treatment litigation is about a therapeutic jurisprudence. Again, as with the involuntary civil commitment cases, the cases that reflect "civil rights lawyering" [\[FN279\]](#) are, in fact, therapeutic and reflective of a therapeutic jurisprudence.

IV. The Right to Refuse Treatment

A. Introduction

The right to refuse treatment has a strong therapeutic jurisprudence component. Although public attention has been focused primarily on what is often seen as the *111 antitherapeutic aspect of this right, [\[FN280\]](#) we believe that there are significant benefits here as well: due process rights for the mentally disabled, better checks on doctors and clinical staff to ensure that medication and other treatment are not being administered as a means of punishment or convenience, and improved protection from administration of inappropriate medications or medications causing severe side effects, among others.

In this section, we examine both the therapeutic and antitherapeutic jurisprudence values of right-to-refuse-treatment doctrine. First, we provide a brief overview of the development of case law on right to refuse mental health treatment. Next, we examine empirical research done on the effects of right to refuse treatment on mental health consumers and the enforcement of this right. Then, we look at implementation of right-to-refuse-treatment laws. In this analysis, we focus on the problems with this implementation, which has the capacity to compromise mental health patients' civil rights.

B. Historical Developments [\[FN281\]](#)

The question of the right to refuse antipsychotic medication remains the most important and volatile aspect of the legal regulation of mental health practice. [\[FN282\]](#) It raises issues of the autonomy of institutionalized mentally disabled individuals to refuse the imposition of treatment that is designed (at least in part) to ameliorate their symptomatology, the degree to which individuals subjected to such drugging are in danger of developing irreversible neurological side effects, the evanescence of terms such as "informed consent" or "competency," and the practical and administrative considerations of implementing such a right in an institutional setting. These issues mark the litigation that has led to the articulation of the right to refuse treatment as "a turning point in institutional psychiatry" [\[FN283\]](#) and "the most controversial issue in forensic psychiatry today." [\[FN284\]](#) Perhaps the most compelling issues raised by the right to refuse antipsychotic medication are the potential infringement of individuals' constitutional rights, including the First Amendment rights to privacy and mentation, the Sixth Amendment right to a fair trial, the Eighth Amendment right to freedom from cruel and unusual punishment, and the Fourteenth Amendment's due process guarantee. Given the multiplicity and gravity of the issues involved in these cases, their significance frequently transcends the narrow focus of a "mental disability law" case.

The conceptual, social, moral, legal, and medical difficulties inherent in the *112 articulation of a coherent doctrine on right to refuse treatment have been made even more complicated by the U.S. Supreme Court's reluctance to confront most of the underlying issues in cases arising in civil settings. [\[FN285\]](#) As a result of the Court's decision in *Mills v. Rogers* to sidestep the core constitutional questions [\[FN286\]](#) and its concomitant articulation of the doctrine that a state is always free to grant more rights under its constitution than might be minimally mandated by the U.S. Supreme Court under the federal Constitution, [\[FN287\]](#) two parallel sets of cases have emerged.

In one, state courts have generally entered broad decrees in accordance with an "expanded due process" model, in which the right to refuse treatment has been read broadly and elaborately, generally interpreting procedural due process protections liberally on behalf of the complaining patient. These cases have frequently mandated premedication judicial hearings and heavily relied on social science data focusing on the potential impact of drug side effects, especially tardive dyskinesia. [\[FN288\]](#) In the other, federal courts have generally entered more narrow decrees in accordance with a "limited due process model." These provided narrower administrative review and rejected broad readings of the Fourteenth Amendment's substantive and procedural due process protections, relying less on social science data (which was frequently ignored or dismissed as part of an incomprehensible system allegedly beyond the courts' self-professed limited competency). [\[FN289\]](#) Generally (but not always), the state cases involved civil patients; more frequently, the federal cases dealt with individuals originally institutionalized because of involvement in the criminal trial process. [\[FN290\]](#)

This division has become somewhat more hazy, however, since the U.S. Supreme Court's 1992 decision in *Riggins v. Nevada*. [\[FN291\]](#) *Riggins* reversed a death sentence in the case of a competent insanity defense pleader

who sought to refuse the administration of antipsychotic medications during the pendency of his trial, the court finding a violation of the defendant's right to a fair trial. [\[FN292\]](#) In *Riggins*, although the court did not set down a bright line test articulating the state's burden in sustaining forced drugging of a detainee at trial, it found that this burden would be met had the state demonstrated medical appropriateness and, either (a) considering less intrusive alternatives, that antipsychotic drugs were "essential for the sake of *Riggins*' own safety or the safety of others"; or (b) a lack of less intrusive means by which to obtain an adjudication of the defendant's guilt or innocence. [\[FN293\]](#)

*113 This resurrection of the "less intrusive alternatives" doctrine [\[FN294\]](#) may have a jurisdictional significance. It may serve, in part, to stop the exodus of drug refusal litigation from federal to state court systems that began with *Rivers v. Katz* [\[FN295\]](#) and peaked in *United States v. Charters*. [\[FN296\]](#) At this point, less than 3 years after the *Riggins* decision, it is simply too early to tell if this will, in fact, happen. [\[FN297\]](#)

C. Empirical Research

1. Introduction. Much of the empirical research in the area of the right to refuse treatment for mentally disabled persons has focused on such areas as numbers, characteristics and treatment outcomes of medication refusers, and comparisons of clinical and judicial review regarding petitions for involuntary medication. [\[FN298\]](#) The results of these studies shed a great deal of light on the therapeutic jurisprudence value of the right to refuse mental health treatment and the current implementation of this law. In this section, we examine the empirical research on the right to refuse treatment and how well this right is being enforced.

2. The therapeutic jurisprudence effect of the right to refuse treatment. [\[FN299\]](#) Empirical research shows that the right to refuse medication often has therapeutic value. [\[FN300\]](#) One therapeutic benefit is that it expands the due process rights of mentally disabled individuals by providing them a judicial or administrative hearing on the issue of their capacity to refuse treatment.

This expansion of rights is therapeutic on several levels. First, studies comparing clinical and judicial review of involuntary mental health treatment show that there are therapeutic jurisprudence benefits of judicial review in that it affords mentally disabled persons the opportunity to present their case in a more formal legal setting. [\[FN301\]](#) A study by John Ensminger and Thomas Liguori, for example, found that more formal court proceedings may have therapeutic value. Ensminger and Liguori explain the therapeutic value of formal hearings in the civil commitment process, arguing that such hearings are therapeutic because they force the individual to face *114 reality and also give them an opportunity to present and hear evidence in a meaningful court procedure. [\[FN302\]](#) These same benefits can be attributed to medication hearings, particularly as these hearings are, in some jurisdictions, more formal than commitment hearings. [\[FN303\]](#)

Another benefit of due process is that it provides the appearance of fairness. The perception of receiving a fair hearing is therapeutic because it contributes to the individual's sense of dignity and conveys that he or she is being taken seriously. [\[FN304\]](#) Other studies show that medication judicial-administrative proceedings can be therapeutic because they allow patients the opportunity to discuss thoroughly the medications and their benefits and risks with their doctors. [\[FN305\]](#) By holding medication hearings, doctors must again discuss the medications, their purpose, and potential side effects. [\[FN306\]](#) At the same time, patients have the opportunity to explain the reasons they do not want the medication and ask questions about the drugs. [\[FN307\]](#) This may be therapeutic because the patients' medication concerns can be better considered in making medication determinations, thus enhancing the efficacy of medication decisions. [\[FN308\]](#) This benefit is particularly important at large public hospitals where doctors, because of large caseloads, often have less time to spend with their patients on a day-to-day basis. Furthermore, when doctors know that patients do not have to agree with their prescribed regimen, one can expect that doctors will better explain to patients why they believe a certain medication is appropriate, thus further enhancing the therapeutic relationship. [\[FN309\]](#)

The research also shows that the right to refuse treatment and the legal procedures surrounding these rights also help to prevent the inappropriate use of psychiatric medication, such as using it as a means of punishment or convenience. [\[FN310\]](#) Misuse of psychotropic medication has been recognized as a significant concern justifying the need for checks on doctors and staff by courts as well as social scientists. [\[FN311\]](#)

***115** Similarly, medication hearings serve as a check to ensure that doctors are not prescribing the wrong medications or the wrong dosages or ignoring patients' concerns regarding side effects. [\[FN312\]](#) A 1986 study, for example, comparing medical and judicial perceptions of the problem of side effects of psychiatric medication indicated that, whereas both groups valued such treatment, judges were concerned more about the risk of side effects than were the doctors. [\[FN313\]](#) This check is important as psychiatric medication can be antitherapeutic--even where administered in good faith--if there is a misdiagnosis, a failure to monitor the patient after the drugs are given, or if the beneficial effects of the medications are outweighed by the side effects. [\[FN314\]](#)

Despite the therapeutic components of the right to refuse treatment, there are arguments that this right has antitherapeutic aspects. For example, some argue that allowing mental health patients the right to refuse treatment will cause them to remain involuntarily committed for a longer period of time. Some researchers argue that treatment refusers stay hospitalized up to twice as long as those who consent to treatment. [\[FN315\]](#) However, other studies have shown that it is not necessarily the case that refusers are hospitalized longer than those who consent. [\[FN316\]](#)

A 1986 study by Julie Zito and her colleagues, for example, found that in fact there was no significant difference between refusers and consenters in length of hospital stay. [\[FN317\]](#) Rather, the study found that the difference in length of stay related to the diagnosis of the patient. Specifically, they found that schizophrenic patients tended to consent more often than those with bipolar and schizoaffective disorder. Because of their diagnosis, however, schizophrenic patients were hospitalized for longer periods of time, although they tended to consent to medications. [\[FN318\]](#)

Another concern regarding the therapeutic value of the right to refuse treatment for mental health patients is that patients will become less compliant with medications overall. [\[FN319\]](#) However, in a study comparing patients refusing drugs, mental health diagnosis, and length of hospital stay, Zito and her colleagues found ***116** that the rate of medication noncompliance was no different before due process requirements were established than afterward. [\[FN320\]](#)

Although some argue that the right to refuse treatment has a number of disadvantages, the empirical research on this issue demonstrates that there is a significant therapeutic value in affording mental health patients the right to refuse treatment.

3. Antitherapeutic results of the current means of implementing the right to refuse treatment. Although empirical evidence indicates that the right to refuse treatment does have therapeutic jurisprudence value, research shows that the manner in which this right is enforced is not always as therapeutic. For example, research indicates that whereas the purpose of judicial review for patients wishing to refuse psychiatric treatment is meant to ensure that mental health patients are afforded due process protections, this is not always the case. Judges regularly defer to experts, [\[FN321\]](#) almost always approving involuntary medication applications. [\[FN322\]](#) Whereas such deference may be appropriate in instances where the physician has met the burden of proving that the patient lacks the capacity to refuse antipsychotic medication, automatic deference without a careful assessment of the evidence presented can render the right to refuse treatment meaningless and antitherapeutic.

Another problem is the general lack of interest of judges, lawyers, and society in mental disability law, a lack of interest often exacerbated in cases seeking to vindicate the civil rights of institutionalized mentally disabled persons. [\[FN323\]](#) Such disinterest conveys the message that patients' rights, including the right to refuse treatment, are not important.

The prevalence of ineffective assistance of counsel in mental disability cases, including medication hearings, further hampers the adequate implementation of the right to refuse treatment. [\[FN324\]](#) For those with mental disabilities, there is a dearth of competent counsel. [\[FN325\]](#) This problem results from a variety of factors, including mere ignorance of the law, [\[FN326\]](#) attorneys' fear of their own clients, [\[FN327\]](#) and a feeling of ***117** responsibility or blameworthiness for the acts of their clients. [\[FN328\]](#) As a result, advocates and attorneys run the risk of compromising their client's civil rights by either not zealously representing their client or not choosing to represent their client's expressed interest and instead representing what they--the attorneys and the advocates--feel is the client's

best interest or in society's best interest. In the context of the right to refuse treatment, this lack of zealous advocacy can lead to unnecessary forced medication as well as an increased perception (and potential reality) by doctors, courts, and patients that the right to refuse treatment is illusory.

With the many difficulties in implementing the right to refuse treatment, many patients have grown to doubt the value of their own civil rights. Many patients view the right to refuse and the hearings as a sham. [\[FN329\]](#) They are leery of the entire process and thus are often deterred from exercising their rights. When patients feel that it is useless or meaningless to exercise their right to refuse treatment, not only may they get unwanted treatment, but they also cannot get the therapeutic benefits of having the right to refuse treatment, as discussed above.

Finally, a significant problem with the implementation of judicial review is that of frequent delays. [\[FN330\]](#) Such delay causes unnecessarily long involuntary commitment that compromises the liberty interests of patients to be free from involuntary confinement.

Much of the research done on the implementation of due process procedures for mental health patients wishing to refuse medications indicates that there is no significant difference in results obtained before and after right to refuse laws were enacted. [\[FN331\]](#) This evidence and the other implementation problems suggested by research results indicates a need to review the means of enforcing the right to refuse treatment.

D. Conclusion

The empirical research done regarding the right to refuse treatment for mental health patients coupled with a survey of the practical implementation of this right indicates that patients' rights advocates and attorneys, in enforcing the right to refuse treatment, could benefit from using therapeutic jurisprudence. Therapeutic jurisprudence provides a tool to allow counsel representing persons with mental disabilities to identify antitherapeutic problems and to attempt to resolve these issues so as to enhance patients' civil rights in a therapeutic manner. Finally, therapeutic jurisprudence is a potential means for attorneys and advocates representing medication *118 refusers to see how they can improve the quality of their advocacy to ensure that the expressed interest of their clients is represented.

V. Conclusion

Three years ago, one of us reviewed Ann Braden Johnson's masterful (yet largely unsung) book, *Out of Bedlam: The Truth About Deinstitutionalization*, and discussed what the public saw as the causal link between constitutionally based mental disability law decision making and homelessness:

Nurtured by radical psychiatrists (such as Thomas Szasz and R. D. Laing), spurred on by politically-activist organizations pushing egalitarian social agendas (such as the ACLU), a cadre of brilliant but diabolical patients' rights lawyers dazzled sympathetic and out-of-touch judges with their legal legerdemain--abetted by wooly-headed social theories, inapposite constitutional arguments, some oh-my-god worst-case anecdotes about institutional conditions, and a smattering of "heartwarming, successful [deinstitutionalization] case [studies]"--as a result of which courts entered orders "emptying out the mental institutions" so that patients could "die with their rights on." When cynical bureaucrats read the judicial handwriting on the hospital walls, they then joined the stampede, and the hospitals were thus emptied. Ergo deinstitutionalization. Ergo homelessness. Endgame. [\[FN332\]](#)

For years, social critics--H. Richard Lamb, E. Fuller Torrey, Rael Isaac, and Virginia Armat--have scapegoated patients' rights lawyers as the true villains in the development of mental disability law. [\[FN333\]](#) A reexamination of the key cases in question--including specifically ones that these critics list as the true bete noires [\[FN334\]](#)--suggests that this analysis is simply "dead wrong." [\[FN335\]](#) Therapeutic jurisprudence helps illuminate why and how the analysis is wrong.

A reexamination of involuntary civil commitment, right to treatment, and right-to-refuse-treatment law from a therapeutic jurisprudence perspective provides some important insights. First, it is clear that therapeutic jurisprudence is compatible with an expanded rights-based perspective in all three areas. This is clearest in the right-to-treatment area but is also substantially present in the others as well. Second, it is clear that the antitherapeutic effects often associated with these areas of civil rights law (especially with the right to refuse treatment) are often attributable to antitherapeutic aspects of the judicial process (e.g., unnecessarily delayed hearings) [\[FN336\]](#) and to economic

externalities (e.g., the lack of treatment alternatives that confront indigent persons). [\[FN337\]](#) Third, it is clear that, whereas early right-to-treatment cases were litigated using clearly articulated therapeutic principles, the shift in *119 methodology that necessarily followed the U.S. Supreme Court's decision in *Youngberg v. Romeo* [\[FN338\]](#) made it less important for courts to weigh such principles.

Next, contemporaneous mental disability law is not as "sterile" or as in danger of "dying on the vine" as David Wexler pessimistically predicted a few years ago. [\[FN339\]](#) Although much of the energy of the right to treatment area has dissipated in the 12 years since the *Youngberg* decision, individual rights-based cases focusing on adequacy of treatment continue to be litigated, and each of these has the potential for an infusion of therapeutic jurisprudence. Whereas there have been fewer new class action cases challenging state involuntary civil commitment statutes, there are literally hundreds of reported decisions yearly on all aspects of this process. Each of these--almost all appeals from individual commitment orders--carries with it the potential for a therapeutic jurisprudence analysis. [\[FN340\]](#) In nearly every state, there have been some judicial developments delineating the extent of the right to refuse treatment [\[FN341\]](#); furthermore, the U.S. Supreme Court's 1992 decision in *Riggins v. Nevada* [\[FN342\]](#) promises to invigorate this entire area of the law as well. [\[FN343\]](#) Again, this area is a potential laboratory for new therapeutic jurisprudence explorations.

Joel Haycock and John Petrila have recently expressed concern that therapeutic jurisprudence may lead to a diminution of rights-based interests in mental disability law. [\[FN344\]](#) Elsewhere, we have articulated our visions of a sanist-based and pretexts-ridden mental disability law system. [\[FN345\]](#) We have previously attempted to combine these concerns by looking to therapeutic jurisprudence as a means of exposing the sanist and pretextual bases of that system. [\[FN346\]](#) The legal research that we have conducted for this article has confirmed our intuitive feelings: that therapeutic jurisprudence analyses largely support a rights-based perspective in mental disability law; that therapeutic jurisprudence can be an effective tool for ferreting out the law's sanist and pretextual bases; that it is not oxymoronic to characterize a constitutionally grounded jurisprudence as "therapeutic"; and that, finally, as the pendulum continues to swing (and as public ire grows over the perceived rights-based excesses of mental disability law), [\[FN347\]](#) therapeutic jurisprudence may indeed offer a path to redemption for a constitutionally based mental disability law jurisprudence.

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[\[FN1\]](#). See generally David Wexler, Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence, 16 LAW & HUM. BEHAV. 27 (1992).

[\[FN2\]](#). Thus, the articles reprinted in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David Wexler ed., 1990) [hereinafter TJ], dealt, inter alia, with civil commitment codes, refusal of medication, the Tarasoff case, counsel assignment systems, juvenile civil commitments, and insanity defense developments. The articles reprinted in ESSAYS IN THERAPEUTIC JURISPRUDENCE (David Wexler & Bruce Winick eds., 1991) [hereinafter ESSAYS], dealt, inter alia, also with consent to treatment, hospitalization, tort regulation, and voluntary hospitalization.

[\[FN3\]](#). See, e.g., Keri K. Gould, [Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?](#) 10 N. Y. L. SCH. J. HUM. RTS. 835 (1993) (Federal Sentencing Guidelines); Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, AM. J. CRIM. L. (1995) (same); David Wexler, [New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Scholarship](#), 10 N.Y.L. SCH. J. HUM. RTS. 759, 767-75 (1993) (urging therapeutic jurisprudence considerations of questions about criminal probation, parental rights

termination, sexual battery litigation, and workers' compensation).

[FN4]. See Wexler, *supra* note 3, at 767 (discussing Gould, *supra* note 3, in this precise context).

[FN5]. See, generally, [Bibliography of Therapeutic Jurisprudence](#), 10 N. Y. L. SCH. J. HUM. RTS. 915-26 (1993); 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (1989), § 1.05 A (1994 Supp.); MICHAEL L. PERLIN, LAW AND MENTAL DISABILITY § 5.01 (1994) (hereinafter PERLIN, LAW AND DISABILITY).

[FN6]. One exception is the continuing work of Professor Bruce Winick. See, e.g., Bruce Winick, [Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of Medina v. California and the Supreme Court's New Due Process Methodology in Criminal Cases](#), 47 U. MIAMI L. REV. 817 (1993); Bruce Winick, Ambiguities in the Legal Meaning and Significance of Mental Illness: A Therapeutic Jurisprudence Analysis of Foucha v. Louisiana (PSYCHOL., PUB. POL'Y, & L., forthcoming) [hereinafter Winick, Foucha]; [Bruce Winick, Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of Riggins v. Nevada](#), 10 N. Y. L. SCH. J. HUM. RTS. 637 (1993) [hereinafter Winick, Riggins]. See also *infra* Part III, discussing, *inter alia*, Francine Cournos et al., A Comparison of Clinical and Judicial Procedures for Reviewing Requests for Involuntary Medication in New York, 39 HOSP. & COMMUNITY PSYCHIATRY 851 (1988), and Julie Zito et al., Drug Treatment Refusal, Diagnosis, and Length of Hospitalization in Involuntary Psychiatric Patients, 4 BEHAV. SCI. & L. 327 (1986).

[FN7]. Wexler, *supra* note 1, at 29.

[FN8]. John Petrila, Redefining Mental Health Law: Thoughts on a New Agenda, 16 LAW & HUM. BEHAV. 89, 90 (1992).

[FN9]. Wexler, *supra* note 1, at 29 (exclusively rights-based scholarship "is likely to die on the vine").

[FN10]. See, e.g., 1 PERLIN, *supra* note 5, § 1.04, at 17-18; Michael L. Perlin, Law and the Delivery of Mental Health Services in the Community, 64 AM. J. ORTHOPSYCHIATRY 194 (1994); John La Fond, Law and the Delivery of Involuntary Mental Health Services, 64 AM. J. ORTHOPSYCHIATRY 209 (1994).

[FN11]. "Traditional" legal scholars and adherents to alternative jurisprudential approaches (such as Critical Legal Studies) both ignore the vitality of all aspects of mental disability law scholarship. See Michael L. Perlin & Deborah A. Dorfman, The Invisible Renaissance of Mental Disability Law Scholarship: A Case Study of Subordination (manuscript in progress), manuscript at 2-6; David Wexler, [Therapeutic Jurisprudence and the Criminal Courts](#), 35 WM. & MARY L. REV. 279, 279-80 (1994).

[FN12]. By sanism, we refer to 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. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly on stereotype, myth, superstition, and deindividuation 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 everyday life and in the legal process. See Michael L. Perlin. On "[Sanism](#)," 46 SMU L. REV. 373 (1992) [hereinafter Perlin, Sanism]; Michael L. Perlin & Deborah A. Dorfman, Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence, 11 BEHAV. SCI. & L. 47 (1993) [hereinafter Perlin & Dorfman, Sanism]; Michael L. Perlin, Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 369 (1994) [hereinafter Perlin, Pretextual Bases].

[FN13]. CENTER FOR MENTAL HEALTH SERVICES, MENTAL HEALTH, UNITED STATES, 1992 (1993), at 26, 288 (as of 1988).

[FN14]. *Id.*

[FN15]. In California alone, there were 8,100 involuntary civil commitment filings and 1,069 contested cases in fiscal

1991-92. JUDICIAL CONFERENCE OF CALIFORNIA, ANNUAL DATA REFERENCE 30 (1993) (Table 9).

[FN16]. See generally 2 PERLIN, *supra* note 5, § 11.03-11.05, at 953-64.

[FN17]. 1 PERLIN, *supra* note 5, chapters 2-3; PERLIN, LAW AND DISABILITY, *supra* note 5, chapter 1.

[FN18]. 2 PERLIN, *supra* note 5, chapter 4; PERLIN, LAW AND DISABILITY, *supra* note 5, § 2.02-2.07.

[FN19]. 2 PERLIN, *supra* note 5, chapter 5; PERLIN, LAW AND DISABILITY, *supra* note 5, § 2.08-2.31.

[FN20]. See [Lessard v. Schmidt, 349 F. Supp. 1078, 1101-1102 \(E.D. Wis. 1971\)](#), vacated and remanded on other gds, [414 U.S. 473 \(1974\)](#).

[The] conclusion [that due process is mandated at involuntary civil commitment hearings] is fortified by medical evidence that indicates that patients respond more favorably to treatment when they feel they are being treated fairly and are treated as intelligent, aware, human beings.

See also [Wyatt v. Stickney, 325 F. Supp. 781, 785 \(M.D. Ala. 1971\)](#), *aff'd sub. nom.* [Wyatt v. Anderholt, 503 F.2d 1305 \(5th Cir. 1974\)](#) ("To deprive any citizen of his or her liberty upon the altruistic theory that confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process"); [Rennie v. Klein, 476 F. Supp. 1294, 1306 \(D.N.J. 1979\)](#), modified and, remanded, [653 F.2d 836 \(3rd Cir. 1981\)](#), vacated and remanded, [458 U.S. 1119 \(1982\)](#). ("Schizophrenics have been asked every question except, 'How does the medicine agree with you?' Their response is worth listening to," quoting Van Putten & Roy, Subjective Response as a Predictor of Outcome in Pharmacotherapy, 35 ARCH. GEN. PSYCHIATRY 477, 478-80 (1978)); [Falter v. Veterans Administration, 502 F. Supp. 1178, 1184 \(D.N.J. 1980\)](#) ("When I say that they are treated differently I am not referring to the substance of their medical or psychiatric treatment, I am referring to how they are treated as human beings").

[FN21]. The constitutional roots of the right to treatment doctrine, for example, can be traced precisely to the writings of Morton Birnbaum, who first advanced this theory in a law review article. See Morton Birnbaum, The Right to Treatment, 46 A. B. A. J. 499 (1960), discussed extensively in 2 PERLIN, *supra* note 5, § 4.03, and see generally *infra* Part II.

[FN22]. See, e.g., Lessard; see generally *infra* Part I.

[FN23]. See, e.g., Wyatt; see generally *infra* Part II.

[FN24]. [Jackson v. Indiana, 406 U.S. 715, 738 \(1972\)](#).

[FN25]. See 1 PERLIN, *supra* note 5, § 1.04 at 24 n.134 (collecting articles using this metaphor).

[FN26]. JOHN LAFOND & MARY DURHAM, BACK TO THE ASYLUM, 136-52 (1992).

[FN27]. See, e.g., 2 PERLIN, *supra* note 5, § 5.65A at 88-97 (1994 Supp.), discussing [Riggins v. Nevada, 112 S. Ct. 1810 \(1992\)](#) (expanding right of insanity-pleading defendants to refuse antipsychotic medication at trial), and [Washington v. Harper, 494 U.S. 210 \(1990\)](#) (limiting right of prisoners to refuse such medication), and characterizing Riggins as "somewhat surprising."

[FN28]. Joel Haycock, [Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law, 20 NEW ENG. J. CRIM. & CIV. CONFINEMENT 301, 315 \(1994\)](#) ("if therapeutic jurisprudence is construed as a shift from, or an alternative to, rights-based perspectives, then real risks exist").

[FN29]. See, e.g., TJ, *supra* note 2; ESSAYS, *supra* note 2; Wexler, *supra* note 1; David Wexler, Justice, Mental Health, and Therapeutic Jurisprudence, 40 CLEV. ST. L. REV. 517 (1992); Wexler, *supra* note 3; Michael L. Perlin, [What Is Therapeutic Jurisprudence? 10 N.Y.L. SCH. J. HUM. RTS. 623 \(1993\)](#); see generally Bibliography of Therapeutic Jurisprudence, *supra* note 5; 1 PERLIN, *supra* note 5, § 1.05A (1994 Supp.).

[FN30]. For the sharpest criticism of therapeutic jurisprudence, see John Petrila, *Paternalism and the Unfulfilled Promise of ESSAYS IN THERAPEUTIC JURISPRUDENCE*, 10 N.Y.L. SCH. J. HUM. RTS. 897 (1993).

[FN31]. See Petrila, *supra* note 30, at 893 (ESSAYS, *supra* note 2, is premised on "the assumption that in virtually all circumstances the legal system should defer to the prescriptions of treaters"). But compare [David Wexler & Bruce Winick, Patients, Professionals, and the Path of Therapeutic Jurisprudence: A Response to Petrila](#), 10 N.Y.L. SCH. J. HUM. RTS. 907, 914 (1993) (therapeutic jurisprudence calls for a "healthy skepticism toward claims of clinical expertise"), quoting David Wexler & Bruce Winick, Introduction, in ESSAYS, *supra* note 2, at XI.

[FN32]. See, e.g., Petrila, *supra* note 30, at 878-89 n. 7 (quoting Paul Appelbaum's claim that "therapeutic jurisprudence is a tonic for what ails mental health law").

[FN33]. Wexler, *supra* note 3, at 762:

Therapeutic jurisprudence in no way supports paternalism, coercion, or a therapeutic state. It in no way suggests that therapeutic considerations should trump other considerations...

[FN34]. The authors locate themselves in that mode. See, e.g., Michael L. Perlin, [Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?](#) 20 N.Y.U. REV. L. & SOC. CHANGE 517 (1993-94); Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992) [hereinafter Perlin, *Fatal Assumption*]; Perlin & Dorfman, *Sanism*, *supra* note 12; Perlin & Dorfman, *supra* note 11; Perlin & Gould, *supra* note 3; Gould, *supra* note 3; Deborah A. Dorfman, [Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law](#), 10 N.Y.L. SCH. J. HUM. RTS. 805 (1993) [hereinafter Dorfman, *Fear and Pretextuality*]; Deborah A. Dorfman, *Effectively Implementing Title I of the Americans With Disabilities Act: A Therapeutic Jurisprudence Analysis*, 8 J.L. & HEALTH (1994) (in press).

[FN35]. Many years before therapeutic jurisprudence was conceived of, one of us (then a litigator) did exactly this in arguing that one aspect of a constitutional right to treatment was a right to participate in voluntary, therapeutic compensated work programs. See Michael L. Perlin, *The Right to Voluntary, Compensated, Therapeutic Work as Part of the Right to Treatment: A New Theory in the Aftermath of Souder*, 7 SETON HALL L. REV. 298 (1976). This effort was at least partially successful. Compare [Davis v. Balson](#), 461 F. Supp. 842, 853 (N.D. Ohio 1978) (citing Perlin, *supra*, but rejecting plaintiffs' constitutional argument based on that theory), with *Schindenwolf v. Klein*, No. L41293-75 P.W. (N.J. Super. Ct., Law Div. 1979), reprinted in 2 PERLIN, *supra* note 5, § 6.23 (mandating that 25% of all New Jersey patients participate in such programs) (consent order).

[FN36]. See, e.g., Perlin, *supra* note 10; Michael L. Perlin, Book Review, 8 N.Y.L. SCH. J. HUM. RTS. 557, 558-61 (1991) (reviewing ANN BRADEN JOHNSON, *OUT OF BEDLAM: THE TRUTH ABOUT DEINSTITUTIONALIZATION* (1990)).

[FN37]. See Perlin, *Pretextual Bases*, *supra* note 12. "Pretextuality" refers to courts' acceptance (either implicit or explicit) of testimonial dishonesty and their decisions to engage in dishonest (frequently meretricious) decisionmaking in mental disability law cases. This pretextuality infects all participants in the system, breeds cynicism and disrespect for the law, demeans participants and reinforces shoddy lawyering, blase judging and, at times, perjurious testimony. See generally 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 (1991) [hereinafter Perlin, *Morality*]; Michael L. Perlin, [Pretexts and Mental Disability Law: The Case of Competency](#), 47 U. MIAMI L. REV. 625 (1993) [hereinafter Perlin, *Pretexts*].

[FN38]. See, e.g., Michael L. Perlin, *Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger's "Time-Consuming Procedural Minuets" Theory in Parham v. J. R.*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 149 (1981) (discussing Supreme Court's failure to acknowledge amicus brief of NJ Division of Mental Health Advocacy offering an empirical perspective in [Parham v. J.R.](#), 442 U.S. 584 (1979) (allowing for looser involuntary civil commitment criteria in juvenile commitment cases)).

[FN39]. We have not undertaken a therapeutic jurisprudence analysis of all of the case law in this area. Rather, we

have chosen to look at these three areas of mental disability/civil rights law from three alternative therapeutic jurisprudence perspectives to see how these differing perspectives illuminate the questions we are addressing.

[FN40]. In this context, civil rights lawyering refers to the work done by public interest lawyers--a group that includes attorneys representing people institutionalized in psychiatric facilities--in their efforts to secure civil rights for members of groups that fall into the category generally defined in [United States v. Carolene Products Co.](#), 304 U.S. 144, 152 n.4 (1938); see generally 1 PERLIN, supra note 5, § 1.03 at 5-7. On the role of lawyers representing public agencies in this context, see David Wexler, Inappropriate Patient Confinement and Appropriate State Advocacy, in TJ, supra note 2, at 347.

[FN41]. Gould, supra note 3; Keri A. Gould, Therapeutic Jurisprudence and the Arraignment Process; The Defense Attorney's Dilemma: Whether to Request a Competency Evaluation? in MENTAL HEALTH LAW AND PRACTICE THROUGH THE LIFE CYCLE 67 (S. Verdun-Jones & M. Layton eds., 1994); John Enslinger & Thomas Liguori, The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential, in TJ, supra note 2, at 245.

[FN42]. Deborah A. Dorfman is currently representing mentally disabled persons through her work with the Legal Center for People With Disabilities in Salt Lake City, Utah. Keri K. Gould was formerly a senior attorney for New York's Mental Hygiene Legal Service. Michael L. Perlin was director of the Division of Mental Health Advocacy in the NJ Department of the Public Advocate.

[FN43]. See, e.g., 1 PERLIN, supra note 5, § 2.06-2.08, 2.14-2.15; PERLIN, LAW AND DISABILITY, supra note 5, § 1.03. For recent cases, see e.g., 1 PERLIN, supra note 5, § 3.45 at 95-100 (1994 Supp.).

[FN44]. See PERLIN, LAW AND DISABILITY, supra note 5, § 1.01. For a recent comprehensive overview, see [Thomas Hafemeister & John Petrila, Treating the Mentally Disordered Offender: Society's Uncertain, Conflicted, and Changing Views](#), 21 FLA. ST. U. L. REV. 729 (1994).

[FN45]. See [Jackson v. Indiana](#), 406 U.S. 715, 719 (1972).

[FN46]. See Hafemeister & Petrila, supra note 44, at 733; see generally 1 PERLIN, supra note 5, § 2.03-2.04.

[FN47]. [Prochaska v. Brinegar](#), 102 N.W. 2d 870, 872 (Iowa 1960).

[FN48]. Perlin, Fatal Assumption, supra note 34.

[FN49]. Hafemeister & Petrila, supra note 44, at 733.

[FN50]. PERLIN, LAW AND DISABILITY, supra note 5, § 2.08 at 218 n.32 (discussing [Banning v. Looney](#), 213 F.2d 771 (10th Cir. 1954), cert. denied, 348 U.S. 859 (1954)).

[FN51]. PERLIN, LAW AND DISABILITY, supra note 5, § 2.08 at 214; see generally Sheldon Gelman, Mental Hospital Drugs: Professionalism and the Constitution, 72 GEO. L. J. 1725 (1984); Bruce Winick, The [Right to Refuse Mental Health Treatment: A First Amendment Perspective](#), 44 U. MIAMI L. REV. 1 (1989).

[FN52]. Geraldo Rivera's stark videotape depiction of the Willowbrook facility was the most influential of these. See DAVID ROTHMAN & SHEILA ROTHMAN, THE WILLOWBROOK WARS (1984); see generally Teresa Harvey Paredes, The Killing Words? How the Quality-of-Life Ethic Affects Persons With Severe Disabilities. SMU L. REV. 805, 808 n.28 (1992).

[FN53]. Michael L. Perlin, [Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization](#) 28 HOUS. L. REV. 63 (1991).

[FN54]. PERLIN, LAW AND DISABILITY, supra note 5, § 2.52, at 379-81, and sources cited supra notes 2-13.

[FN55]. David Wexler, Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian

Commitment Codes, in TJ, *supra* note 2, at 165.

[FN56]. However, there may be hidden effects as well. A study comparing prereform and postreform commitment decision making in Dane County, Wisconsin (the county of origin for the case of *Lessard v. Schmidt* discussed extensively *infra* part I.D.1), found that there were fewer final hearings postreform than a significant proportion of detainees still evidenced behavior leading to emergency detention involved no actual harm. Michael Leiber & Sean Anderson, A Comparison of Pre-Reform and Post-Reform Civil Commitment Decisionmaking in Dane County, Wisconsin, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 1 (1993).

[FN57]. This of course assumes a fact never in evidence: that the lawyers assigned to represent mentally disabled individuals were able (or cared) to do a competent job of such cross-examination. See generally Perlin, *Fatal Assumption*, *supra* note 34.

[FN58]. Joseph Coccozza & Henry Steadman, The Failure of Psychiatric Predications of Dangerousness: Clear and Convincing Evidence, 29 RUTGERS L. REV. 1084 (1976); Alan Dershowitz, The Law of Dangerousness: Some Fiction About Predictions, 23 J. LEGAL EDUC. 24 (1970); Bruce Ennis & Thomas Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 CAL. L. REV. 693 (1974). This battle still rages. Compare Richard Rogers et al., Can Ziskin Withstand His Own Criticisms? Problems With His Model of Cross-Examination, 11 BEHAV. SCI. & L. 223 (1993), to Jay Ziskin, Ziskin Can Withstand His Own Criticisms: A Response to Rogers, Bagby and Perera, 15 AM. J. FORENSIC PSYCHIATRY 41 (1994).

[FN59]. E.g., [People v. Murtishaw](#), 631 P.2d 446 (Cal. 1981), cert. denied, 455 U.S. 922 (1982).

[FN60]. 1 PERLIN, *supra* note 5, § 2.07.

[FN61]. *Id.* at 71 (citing sources), and at 73 (COMMENT to section).

[FN62]. See generally LAFOND & DURHAM, *supra* note 26, at 82-99 (setting out historical and political perspective).

[FN63]. See, e.g., Leiber & Anderson, *supra* note 56, at 20 (females and those who lack support in the community remained committed for longer terms than younger individuals, males, and those who had an external support network). See generally Susan Stefan, The [Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law](#); 88 NW. U. L. REV. 1271 (1994) (discussing statistically significant number of institutionalized women who have suffered from sexual abuse and violence, and discussing ways in which involuntary commitment leads to treatment that often exacerbates conditions that caused their suffering in the first place--silencing, infantilization, lack of control, forcible physical intrusion and restraint against their will, and an inability to escape. *Id.* at 1312-19). See also [Susan Stefan, Silencing the Different Voice: Competence, Feminist Theory and Law](#), 47 U. MIAMI L. REV. 763, 764 (1993).

[FN64]. Wexler, *supra* note 3, at 762.

[FN65]. See generally, e.g., cases discussed in 1 PERLIN, *supra* note 5, chapters 2, 3; and in PERLIN, LAW AND DISABILITY, *supra* note 5, chapter 1.

[FN66]. [406 U.S. 715 \(1972\)](#).

[FN67]. *Id.* at 738. See generally PERLIN, LAW AND DISABILITY, *supra* note 5, § 1.03; 3 PERLIN, *supra* note 5, § 2.08.

[FN68]. [349 F. Supp. 1078 \(E.D. Wis. 1972\)](#), vacated and remanded, [414 U.S. 473](#), on remand, [379 F. Supp. 1376 \(E.D. Wis. 1974\)](#), vacated and remanded, [421 U.S. 957 \(1975\)](#), reinstated, [413 F. Supp. 1318 \(E.D. Wis. 1976\)](#).

Text accompanying footnotes 69-88 is generally adapted from PERLIN, LAW AND DISABILITY, *supra* note 5, § 1.04 at 25-28.

[FN69]. Professor Dix is clear: "Judicial activism began in 1972 ... in *Lessard v. Schmidt*." George Dix, Major Current Issues Concerning Civil Commitment Criteria, 45 LAW & CONTEMP. PROBS. 137 (Summer 1982). Compare *Fhagen v. Miller*, 278 N.E. 2d 615, 617-18 (N.Y. 1972), cert. denied, 409 U.S. 845 (1972) (rejecting similar challenge to New York state law) (decided nine months before *Lessard*).

[FN70]. *Lessard*, 349 F. Supp. at 1082.

[FN71]. WIS. STAT. ANN. § 51.02(5)(c) (West 1957).

[FN72]. *Lessard*, 349 F. Supp. at 1082.

[FN73]. The court began with the principle that the state's power to deprive a person of "the fundamental liberty to go unimpeded about his or her affairs" must be based on a "compelling" state interest in such a deprivation, *Id.* at 1084 (citing *J. S. MILL, ON LIBERTY* 18 (Gateway, Inc. ed., 1962)); compare Jonas Robitscher, Legal Standards and Their Implications Regarding Civil Commitment Procedures, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 61, 69-70 (C. J. Frederick ed., 1974) (criticizing this citation to Mill as a "bludgeon of reason" and an incomplete statement of Mill's philosophy).

[FN74]. *Lessard*, 349 F. Supp. at 1084.

[FN75]. *Id.*

[FN76]. *Id.*

[FN77]. Mental illness was defined as "mental disease to such extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community." WIS. STAT. ANN. § 51.75, art. II(f) (West 1971).

[FN78]. 405 U.S. 504 (1972).

[FN79]. *Lessard*, 349 F. Supp. at 1093 (quoting *Humphrey*, 405 U.S. at 509).

[FN80]. *Lessard*, 349 F. Supp. at 1093.

[FN81]. *Id.*

[FN82]. *Id.*

[FN83]. *Lessard*, 349 F. Supp. at 1093. The court added that even an overt attempt to harm oneself substantially cannot be the proper foundation for a commitment unless the person in question is found to be mentally ill and an immediate danger at the time of the hearing of doing further harm to his or herself, *id.* at 1093 n.24, noting that the considerations that permit society to detain those likely to harm others because of mental illness "do not necessarily apply to potential harm to oneself." *Id.*

[FN84]. See Comment, Progress in Involuntary Commitment, 49 WASH. L. REV. 617, 618 (1974) (*Lessard* was "the most sweeping judicial change to date"), and *id.* at n.4 ("*Lessard* opinion seems destined to be a classic"); John Myers, Involuntary Civil Commitment of the Mentally Ill: A System in Need of a Change, 29 VILL. L. REV. 367, 378-79 (1983-84) (*Lessard* was a "landmark case" that articulated standards that have been "widely followed by courts and legislatures throughout the country"); Thomas Zander, Civil Commitment in Wisconsin: The Impact of *Lessard v. Schmidt*, 1976 WIS. L. REV. 503, 559 ("The *Lessard* decision will find its place in history not merely as the first comprehensive federal court decision on the constitutionality of civil commitment, but also as one of the first major judicial recognitions of civil commitment as more than a court authorized medical decision").

[FN85]. See, e.g., *Doremus v. Farrell*, 407 F. Supp. 509, 514-15 (D. Neb. 1975) (commitment standards must be "(a) that the person is mentally ill and poses a serious threat of substantial harm to himself or to others; and (b) that this

threat of harm has been evidenced by a recent overt act or threat").

[FN86]. See generally PERLIN, LAW AND DISABILITY, supra note 5, § 1.05 (citing cases).

[FN87]. Robitscher, supra note 73, at 69.

[FN88]. Alexander Brooks, Notes on Defining the "Dangerousness" of the Mentally Ill, in Frederick, supra note 73, at 49.

For an analysis of case law rejecting Lessard's expansive construction of both substantive and procedural due process protections in the involuntary civil commitment context, see e.g., 1 PERLIN, supra note 5, § 2.13 (discussing cases rejecting "overt act" requirement), §§ 3.09, 3.13 (discussing cases rejecting Lessard's mandate of an immediate preliminary hearing, and its strict reading of time limitations between hospitalization and final commitment hearings).

[FN89]. Lessard, 349 F. Supp. at 1084.

[FN90]. Id. at 1087.

[FN91]. Id. at 1090-91.

[FN92]. Id. at 1091 ("Those who argue that notice and a hearing at this time may be harmful to the patient ignore the fact that there has been no finding that the person is in need of hospitalization").

[FN93]. Id. at 1101-1102.

[FN94]. Through its acknowledgement of the state's police powers. Id. at 1084-85.

[FN95]. Through its acknowledgement of the state's parens patriae powers. Id.

[FN96]. 422 U.S. 563 (1975).

[FN97]. Humphrey v. Cady, 405 U.S. 504 (1972).

[FN98]. O'Connor, 422 U.S. at 575. Kenneth Donaldson was civilly committed to a psychiatric institution in Florida. He was kept in confinement against his will for almost 15 years. During that time, he made many requests for release and treatment within the facility. All his requests were denied. Donaldson filed a section 1983 action alleging violations of his constitutional right to liberty. At the trial level, a verdict was returned assessing compensatory and punitive damages against the director of the hospital and a codefendant. The Court of Appeals for the Fifth Circuit affirmed the judgment finding that there is no justification for involuntary commitment of a nondangerous person unless he or she is receiving such treatment as will give a realistic opportunity to be cured or to improve the mental condition. Donaldson v. O'Connor, 493 F. 2d 507, 520 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975).

[FN99]. Donaldson, 493 F. 2d at 530-31.

[FN100]. As a tactical matter, the case was argued at the U.S. Supreme Court level as a narrow liberty interest issue, bypassing the broader question of a right to treatment. See Grant, Donaldson, Dangerousness, and the Right to Treatment, 3 HASTINGS CONST. L.Q. 599, 608 n.41 (1976).

[FN101]. O'Connor, 422 U.S. at 587-88.

[FN102]. Id. at 575.

[FN103]. Id. at 574 n.10 (emphasis added).

[FN104]. Id. at 575.

[\[FN105\]](#). Id.

[\[FN106\]](#). Id. at 579 n.2.

[\[FN107\]](#). Id. at 569.

[\[FN108\]](#). Id. at 588 n.9.

[\[FN109\]](#). BRUCE J. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS AND THE LAW 96 (1972) (Ennis was Donaldson's appellate counsel) (quoting from depositions).

[\[FN110\]](#). See supra text accompanying note 101.

[\[FN111\]](#). [457 U.S. 307, 329 \(1982\)](#) (Burger, C. J., concurring).

[\[FN112\]](#). See infra Part II.

[\[FN113\]](#). [442 U.S. 584 \(1979\)](#). This section is largely adapted from PERLIN, LAW AND DISABILITY, supra note 5, § 1.35.

[\[FN114\]](#). [Bartley v. Kremens](#), 402 F. Supp. 1039 (E.D. Pa. 1975), vacated, [431 U.S. 119 \(1977\)](#), on remand sub nom. [Institutionalized Juveniles v. Secretary, Public Welfare](#), 459 F. Supp. 30 (E.D. Pa. 1978), rev'd, [442 U.S. 640 \(1979\)](#); [J. L. v. Parham](#), 412 F. Supp. 112 (M.D. Ga. 1976), rev'd sub nom. [Parham v. J. R.](#), [442 U.S. 584 \(1979\)](#).

[\[FN115\]](#). [J. L.](#), 412 F. Supp. at 133-36.

[\[FN116\]](#). [Parham](#), 442 U.S. at 620-21. On the other hand, it ruled that (a) the risk of error inherent in parental decision making on the question of institutionalizing a child was sufficiently great to mandate an independent inquiry by a "neutral factfinder" to determine whether statutory admission requirements were met; (b) although the hearing need not be formal nor conducted by a judicial officer, the inquiry must "carefully probe the child's background using all available services, including, but not limited to, parents, schools and other social agencies"; (c) the decision maker has the authority to refuse to admit a child who does not meet the medical standards for admission; and (d) the need for continued commitment must be periodically reviewed by a similarly independent procedure. [Id.](#) at 606-607.

[\[FN117\]](#). [Id.](#) at 605.

[\[FN118\]](#). Perlin, supra note 38, at 151.

[\[FN119\]](#). [Parham](#), 442 U.S. at 605-606 (footnote omitted).

[\[FN120\]](#). Perlin, supra note 38, at 151.

[\[FN121\]](#). Id. at 152.

[\[FN122\]](#). Id. at 609.

[\[FN123\]](#). [422 U.S. 563, 584 \(1975\)](#) (Burger, C. J., concurring).

[\[FN124\]](#). [Parham](#), 442 U.S. at 609.

[\[FN125\]](#). [Id.](#) at 610 (footnote omitted).

This opinion was sharply criticized by Justice Brennan in a three-justice opinion, concurring in part and dissenting in part. This opinion charged that the majority "ignore[d] reality [when it] assume[d] blindly that parents act in their children's best interests when making commitment decisions." [Id.](#) at 625, 632. Whereas the minority agreed

that preadmission adversarial hearings "might traumatize both parent and child and make the child's eventual return to his family more difficult," it recommended the institution of postadmission commitment hearings:

[T]he interest in avoiding family discord would be less significant at this stage, since the family autonomy already will have been fractured by the institutionalization of the child. In any event, post-admission hearings are unlikely to disrupt family relationships.

Id. at 635. Brennan's opinion is, on all levels, far more sensitive to therapeutic jurisprudence issues. See 1 PERLIN, *supra* note 5, § 3.72 at 427-28.

[FN126]. See 1 PERLIN, *supra* note 5, § 3.72 at 426.

[FN127]. See id. at 428-29 n.1220 (citing articles), and id. at 121- 22 (1994 Supp.) (same).

[FN128]. Allen Schoenberger, "Voluntary" Commitment of Mentally Ill or Retarded Children: Child Abuse by the Supreme Court, 7 U. DAYTON L. REV. 1, 30-31 (1981).

[FN129]. See id. at 4-7.

[FN130]. Id. at 30.

[FN131]. Gail Perry & Gary Melton, Precedential Value of Judicial Notice of Social Facts: Parham as an Example, 22 J. FAM. L. 633, 634 (1983-84). See also Gary Melton, Family and Mental Hospitals as Myths: Civil Commitment of Minors, in CHILDREN, MENTAL HEALTH AND THE LAW 151, 155 (N.D. Reppucci et al. eds. 1984); Gary Melton, The Significance of Law in the Everyday Lives of Children and Families, 22 GA. L. REV. 851 (1988).

[FN132]. Perry & Melton, *supra* note 131, at 635.

[FN133]. Id. at 645. See also, e.g., Winsor Schmidt, Considerations of Social Science in a Reconsideration of Parham v. J.R. and the Commitment of Children to Public Mental Institutions, 13 J. PSYCHIATRY & L. 339 (1985) (court used behavioral science in an "unsophisticated and non-comprehensive manner for support of specific value positions"); Perlin, *supra* note 38, at 161-62:

In summary, in spite of the Chief Justice's assertions, the credible--and uncontroverted--evidence before the Court could only lead to the inescapable conclusion that counseled due process hearings for juveniles are necessary, effective and ameliorative; the suggestion that they are merely "time-consuming procedural minuets" distorts the fact, the law and reality.

For a further critique of the Parham opinion, see generally 1 PERLIN, *supra* note 5, § 3.72, at 432-34; see generally for a thoughtful and comprehensive consideration of juvenile commitment issues, Lois Weithorn, Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates, 40 STAN. L. REV. 773, 774 (1988) (hospitalization increasingly used inappropriately as means of managing "troublesome" youth who do not suffer from severe mental disorders).

[FN134]. Burger, of course, argued that his vision in Parham was ultimately the therapeutic one. Compare Perlin, *supra* note 38 (critiquing Burger's opinion on these grounds).

[FN135]. See Perlin, *supra* note 53, at 87-88 (discussing, inter alia, E. FULLER TORREY, NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL (1988), and discussing Torrey's allegation that the actions of "civil liberties lawyers" filing suits such as Lessard "compound[ed the disaster of homelessness.]").

[FN136]. This section is generally adapted from Perlin, *Pretexts*, *supra* note 37, at 636-39.

[FN137]. See Perlin, *Pretexts*, *supra* note 37; Perlin, *Morality*, *supra* note 37; Dorfman, *Fear and Pretextuality*, *supra* note 34.

[FN138]. Streicher v. Prescott, 663 F. Supp. 335, 343 (D.D.C. 1987).

[FN139]. Perlin, Fatal Assumption, *supra* note 34.

[FN140]. Charles Parry & Eric Turkheimer, Length of Hospitalization and Outcome of Commitment and Recommitment Hearings, 43 HOSP. & COMMUNITY PSYCHIATRY 65 (1992).

[FN141]. *Id.* at 66.

[FN142]. Perlin, Morality, *supra* note 37, at 134; see generally William McCormick, Involuntary Commitment in Ontario: Some Barriers to the Provision of Proper Care, 124 CAN. MED. ASS'N J. 715, 717 (1981).

[FN143]. See [Marilyn Hammond, Predictions of Dangerousness in Texas: Psychotherapists' Conflicting Duties, Their Potential Liability, and Possible Solutions](#), 12 ST. MARY'S L.J. 141, 150 n.71 (1980); see also [In re Melton](#), 597 A. 2d 892, 902-903 (D.C. 1991).

[FN144]. This is not to say that all involuntary civil commitment cases are pretextual. See e.g., [Matter of Elaine B.](#), 569 N.Y.S. 2d 559 (N.Y. Sup. Ct. 1991) (trial judge involved patient in disposition conference and in the structuring of an acceptable treatment and release plan); [In re Long](#), 599 N.E. 2d 90 (Ill. App. Ct. 1992) (retention case remanded where hospital staff unwilling to ascertain why patient sought to refuse to take prescribed drug; testimony revealed that patient had previously suffered toxic reaction to same drug).

[FN145]. Wexler, *supra* note 3, at 17, quoted in Perlin, Pretextual Bases, *supra* note 12, at 382-83.

[FN146]. See 2 PERLIN, *supra* note 5, § 4.04.

[FN147]. 325 F. Supp. 781 (M.D. Ala. 1971), *suppl.*, 334 F. Supp. 1341 (M.D. Ala. 1972), 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub. nom.* [Wyatt v. Aderholt](#), 503 F. 2d 1305 (5th Cir. 1974).

[FN148]. See generally *infra* Part II. C.

[FN149]. 457 U.S. 307 (1982).

[FN150]. *Id.* at 315.

[FN151]. See generally *id.* at 316-17.

[FN152]. *Id.* at 327-31; see generally 2 PERLIN, *supra* note 5, § 4.40 at 196-98.

[FN153]. See 2 PERLIN, *supra* note 5, § 4.44. See generally *infra* Part II.D.

[FN154]. Harry Solomon, Presidential Address: The American Psychiatric Association in Relation to American Psychiatry, 115 AM. J. PSYCHIATRY 1, 7 (1958).

[FN155]. Constitutional Rights of the Mentally Ill, Hearing Before the Senate Subcomm. on Constitutional Rights of the Judiciary, 87th Cong., 2d Sess. 40-42 (1961) (statement of Albert Deutsch), quoted in 2 PERLIN, *supra* note 5, § 4.04 at 14-15.

[FN156]. Birnbaum, *supra* note 21.

[FN157]. *Id.* at 502.

[FN158]. *Id.* at 502-503.

[FN159]. 2 PERLIN, *supra* note 5, § 4.03 at 12-13.

[FN160]. D. C. CODE § 21-562 (1966); see generally 2 PERLIN, *supra* note 5, § 4.04 at 15-19.

[FN161]. [373 F. 2d 451 \(D.C. Cir. 1966\)](#).

[FN162]. [Id. at 455](#).

[FN163]. [Id.](#)

[FN164]. See generally 2 PERLIN, *supra* note 5, § 4.05 at 19-24.

[FN165]. Council of the American Psychiatric Association. Position Statement on the Question of the Adequacy of Treatment, 123 AM. J. PSYCHIATRY 1458 (1967).

[FN166]. Alan Stone, The Right to Treatment and the Medical Establishment, 2 BULL. AM. ACAD. PSYCHIATRY & L. 159, 161 (1974).

[FN167]. See, e.g., [Banning v. Looney](#), 213 F. 2d 771 (10th Cir. 1954), cert. denied, 348 U.S. 859 (1954).

[FN168]. [325 F. Supp. 781, 784-85 \(M.D. Ala. 1971\)](#), suppl., [334 F. Supp. 1341 \(M.D. Ala. 1972\)](#), [344 F. Supp. 373 \(M.D. Ala. 1972\)](#), [344 F. Supp. 387 \(M.D. Ala. 1972\)](#), *aff'd sub. nom. Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974).

[FN169]. [334 F. Supp. at 1343](#).

[FN170]. [Id.](#), [344 F. Supp. at 376](#).

[FN171]. [Id. at 379-86](#); see generally 2 PERLIN, *supra* note 5, § 4.07, at 34-35.

[FN172]. [New York State Ass'n for Retarded Children, Inc. v. Rockefeller](#), 357 F. Supp. 752 (E.D.N.Y. 1973) [hereinafter Willowbrook].

[FN173]. Excerpts from Complaint in New York State Association for Retarded Children v. Rockefeller, 1 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 591 (B. Ennis & P. Friedman eds. 1973) [hereinafter LEGAL RIGHTS].

[FN174]. See, e.g., Excerpt from Plaintiffs' Post-Trial Memorandum in New York State Association for Retarded Children v. Rockefeller, in 2 LEGAL RIGHTS, *supra* note 173, at 747 (1973) (defendant Grunberg testified that patient records revealed "regression after institutionalization at Willowbrook"; expert witness Clements testified Willowbrook failed to provide even a "minimal level of custodial care"; expert witness Roos testified that condition of Willowbrook residents was largely function of "long exposure to noxious debilitating environmental conditions"); see also *id.* at 770 ("It is obvious that there were many children who could possibly have walked if they had proper [physical] therapy from the beginning. It is questionable whether they could ever walk now. Their chances will definitely decrease as the time passes without proper developmental therapy") (emphasis in original) (quoting from posttrial memorandum, relying on case record).

[FN175]. 2 PERLIN, *supra* note 5, § 4.28, at 136 (reprinting New York State Association for Retarded Citizens v. Carey, No. 72-C-356/357 (E.D.N.Y. 1975), approved, [393 F. Supp. 715 \(E.D.N.Y. 1975\)](#)).

[FN176]. Willowbrook, 393 F. Supp. at 755-56.

[FN177]. [Id.](#) at 764-65.

[FN178]. [Wyatt](#), 344 F. Supp. at 394 n.13.

[FN179]. [Id.](#) For an even more graphic description of the way that Alabama state residents were fed in the facilities that were the subject of the Wyatt suit, see James Folsom, The Early Constructive Approach to Wyatt by the

Department of Mental Health, in WYATT V. STICKNEY: RETROSPECT AND PROSPECT 41 (L. R. Jones & R. Parlour eds., 1981) [hereinafter RETROSPECT AND PROSPECT] (describing process as "patients being slopped like hogs").

[FN180]. See 2 PERLIN, *supra* note 5, § 4.18, at 75, 80-81 (reprinting deposition testimony of Philip Roos).

[FN181]. *Id.* at 87.

[FN182]. *Id.* at 89.

[FN183]. *Id.* at 94.

[FN184]. *Id.* at 95. Compare Philip Roos, Basic Facts About Mental Retardation, in 1 LEGAL RIGHTS, *supra* note 173, at 17, 23 ("Retarded persons should be viewed developmentally, capable of growth or learning, regardless of level of retardation or age").

[FN185]. The Right to a Durational Limitation on Involuntary Commitment, in 1 LEGAL RIGHTS, *supra* note 173, at 437, 442-43 (excerpt from posttrial memorandum in Wyatt).

[FN186]. For an analysis of subsequent litigation, see 2 PERLIN, *supra* note 5, § 4.17 at 5-6 n.317.1 (1994 Supp.).

[FN187]. See, e.g., [Wyatt, 344 F. Supp. at 376-86](#); see also 2 PERLIN, *supra* note 5, § 4.07 at 34-35:

The standards ranged in subject matter from the global (e.g., "Patients have a right to privacy and dignity") to the specific (e.g., "Thermostatically controlled hot water shall be maintained [at 180° > >>] for mechanical dishwashing").... They covered the full range of hospital conditions, including environmental standards, civil rights, medical treatment criteria, staff qualifications, nutritional requirements, and need for compliance with Life Safety Code provisions.

On the question of the therapeutic jurisprudence aspects of the privacy standards, see Joseph O'Reilly & Bruce Sales, Setting Physical Standards for Mental Hospitals: To Whom Should the Courts Listen, 8 INT'L J. L. & PSYCHIATRY 301 (1986), and Joseph O'Reilly & Bruce Sales, Privacy for the Institutionalized Mentally Ill: Are Court-Ordered Standards Effective? 11 LAW & HUM. BEHAV. 41 (1987).

[FN188]. *Id.*

[FN189]. See, e.g., David Chambers, Right to the Least Restrictive Alternative Setting for Treatment, in 2 LEGAL RIGHTS, *supra* note 173, at 991, 1011 (theoretical support for application of least restrictive alternative principle to mental disability litigation, focusing on harms that often befall patients in large mental institutions, including "physical deterioration (loss of speech, inertia, passivity, etc.).... psychological deterioration (loss of social skills, loss of self-esteem, loss of identity, withdrawal, extreme dependency).... loss of liberty and dignity (lack of privacy, lack of movement, exposure to violence, extreme regimentation). Professor Chambers's work has been influential in the development of the least restrictive alternative doctrine. See David Chambers, Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives, 70 MICH. L. REV. 1107 (1972). See e.g., [Morales v. Turman](#), 383 F. Supp. 53, 125 (E.D. Tex. 1974), rev'd, [535 F.2d 864 \(5th Cir. 1976\)](#), rev'd [430 U.S. 322 \(1977\)](#); [Scott v. Plante](#), 641 F.2d 117, 131 (3d Cir. 1981), vacated, [458 U.S. 1101 \(1982\)](#); [In re W. H.](#) 481 A.2d 22, 25 (Vt. 1984); [Matter of Stokes](#), 546 A.2d 356, 360 (D.C. 1988) (all citing Chambers, *supra*).

[FN190]. Brief of Amicus Curiae on Appeal to the Fifth Circuit in Wyatt v. Stickney, in 1 LEGAL RIGHTS, *supra* note 173, at 333, 354.

[FN191]. *Id.* at 367.

[FN192]. *Id.* at 367-68.

[FN193]. *Id.* at 377.

[FN194]. [Wyatt, 503 F. 2d at 1310.](#)

[FN195]. [493 F.2d 507 \(5th Cir. 1974\)](#), vacated, [422 U.S. 563 \(1975\)](#). See generally *infra* Part I.

[FN196]. [Wyatt, 503 F.2d at 1312.](#)

[FN197]. Milton Greenblatt, Foreword, in *RETROSPECT AND PROSPECT*, *supra* note 179, at ix, x.

[FN198]. See David Wexler, An Introduction to Therapeutic Jurisprudence, in *TJ*, *supra* note 2, at 3, 9 (citing Perlin, *supra* note 35).

[FN199]. E.g., [Davis v. Watkins, 384 F. Supp. 1196 \(N.D. Ohio 1974\)](#); [Rone v. Fireman, 473 F. Supp. 92 \(N.D. Ohio 1979\)](#).

[FN200]. *Schindenwolf v. Klein*, No. L41293-75P.W. (N.J. Super Ct., Law Div. 1979), order reprinted in 2 *PERLIN*, *supra* note 5, § 6.23 at 509-19. For the complaint in *Schindenwolf* (setting out this link), see *id.*, § 6.22, at 495- 509.

[FN201]. *Falter v. Veteran's Administration*, No. 79-2284 (D.N.J. 1979) (complaint), reprinted in *id.*, § 6.05, at 446-66.

[FN202]. [Halderman v. Pennhurst State School & Hospital, 446 F. Supp. 1295 \(E.D. Pa. 1978\)](#), modified, [612 F.2d 84 \(3d Cir. 1979\)](#), rev'd, [451 U.S. 1 \(1981\)](#), reinstated, [673 F.2d 647 \(3d Cir. 1982\)](#), rev'd, [465 U.S. 89 \(1984\)](#) (*Pennhurst*), discussed extensively in *PERLIN, LAW AND DISABILITY*, *supra* note 5, § 2.48. See e.g., Excerpt from Original Plaintiff's Brief in *Halderman*, reprinted in 2 *LEGAL RIGHTS OF MENTALLY DISABLED PERSONS* 715, 725 (P. Friedman ed., 1979) (arguing that isolation and confinement "are counterproductive in the habilitation of the retarded").

[FN203]. [457 U.S. 307 \(1982\)](#). This section is generally adapted from *PERLIN, LAW AND DISABILITY*, *supra* note 5, § 2.06.

[FN204]. [Romeo v. Youngberg, 644 F.2d 147, 156 \(3d Cir. 1980\)](#), vacated, [457 U.S. 307 \(1982\)](#).

[FN205]. [Youngberg, 457 U.S. at 310](#). His mother, as next friend, filed a civil rights damages action, alleging that the defendants, administrators of the facility where the plaintiff resided, knew or should have known that the plaintiff was suffering such injuries and that their failure to protect him appropriately and prevent injuries violated the Eighth and Fourteenth Amendments. *Id.*

[FN206]. [Romeo, 644 F.2d at 157-58.](#)

[FN207]. [Id. at 158](#) (footnote omitted).

[FN208]. [Youngberg, 457 U.S. at 313](#). See *id.* at n.120 (court of appeals used "habilitation" and "treatment" synonymously).

[FN209]. [Romeo, 644 F.2d at 173](#). Cf. [id. 173-81](#) (Seitz, J., concurring).

[FN210]. [Youngberg, 457 U.S. at 325.](#)

[FN211]. [Id. at 315](#). The existence of these rights--characterized by the court as "substantive liberty interests under the Fourteenth Amendment," *id.*--were conceded by the defendants. *Id.*

[FN212]. At the Supreme Court level, the plaintiff no longer relied on the Eighth Amendment as a direct source of constitutional rights. [Youngberg, 457 U.S. at 314 n.16.](#)

[FN213]. [Id. at 324.](#)

[FN214]. [Id. at 319.](#)

[FN215]. [Id.](#)

[FN216]. [Id. at 321.](#)

[FN217]. [Id. at 322.](#)

[FN218]. [Id. at 323.](#) The term professional is defined at [id. n.30](#):

By professional decisionmaker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care--including decisions that must be made without delay--necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons.

For a comprehensive and critical reading of the Youngberg standard, see Susan Stefan, [Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard](#), 102 YALE L. J. 639 (1992).

[FN219]. [Youngberg, 457 U.S. at 323.](#) In an action for damages against a professional in his individual capacity, there will be no liability if the professional "was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability." [Id.](#)

[FN220]. [Romeo, 644 F.2d at 166.](#) This argument had been ultimately abandoned at the U.S. Supreme Court level by plaintiff's counsel, who conceded that the issue was no longer present in the case. [Youngberg, 457 U.S. at 313.](#)

[FN221]. [Id. at 324.](#)

[FN222]. The Court, of course, had applied the similar concept of the "least drastic means" many times in entirely different fact contexts. See, e.g., [Aptheker v. Secretary of State, 378 U.S. 500 \(1964\)](#); [Sherbert v. Verner, 374 U.S. 398 \(1963\)](#); [Shelton v. Tucker, 364 U.S. 479 \(1960\)](#). More recently, the Court has returned to this latter standard in its analysis of the right of criminal defendants to resist the imposition of antipsychotic medication at trial. See [Riggins v. Nevada, 112 S. Ct. 1810 \(1992\)](#); see, e.g., Perlin & Dorfman, *Sanism*, *supra* note 12; Winick, *Riggins*, *supra* note 6.

[FN223]. [Youngberg, 457 U.S. at 327](#) (emphasis in original).

[FN224]. [Id. Cf. Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239 \(2d Cir. 1984\).](#)

[FN225]. [Youngberg, 457 U.S. at 327.](#)

[FN226]. [Id. at 327-28](#), and see [id. at 328 n.3.](#)

[FN227]. He added, though, that if plaintiff sought to maintain basic self-care skills "necessary to his personal autonomy within Pennhurst [the institution where plaintiff resided, see [id. at 310](#)]," plaintiff should be free to assert such claims on remand. [Id. at 328.](#)

[FN228]. [Id. at 329](#) (Burger, C. J., concurring). Cf. [O'Connor v. Donaldson, 422 U.S. 563, 578 \(1975\)](#) (Burger, C. J., concurring).

[FN229]. [Youngberg, 457 U.S. at 330.](#)

[FN230]. [Id.](#)

[FN231]. See Stefan, *supra* note 218.

[FN232]. 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 (1990).

[FN233]. But see [Hicks v. Feeney](#), 596 F. Supp. 1504, 1513 (D. Del. 1984), vacated, 770 F.2d 375 (3rd Cir. 1985); [Petition of Thompson](#), 476 N.E.2d 216, 219 (Mass. 1985). In [re R.A.](#), 501 A.2d 743, 744 (Vt. 1985), the Vermont Supreme Court underscored that the state's statutory scheme, see [VT. STAT. ANN. tit. 18, § 7617\(e\)](#) (mandating treatment "adequate and appropriate to [the patient's] condition"), might require "something more" than the "reasonably nonrestrictive confinement conditions" which the Fourteenth Amendment requires."

[FN234]. [Youngberg](#), 457 U.S. at 316-17 n.20.

[FN235]. See David Ferleger, Anti-Institutionalization and the Supreme Court, 14 RUTGERS L.J. 595, 628-29 (1983), discussed in 2 PERLIN, supra note 5, § 4.33 at 184 n. 636.

[FN236]. See Perlin & Dorfman, Sanism, supra note 12; Perlin, Pretexts, supra note 37; Perlin, Morality, supra note 37.

[FN237]. For further developments in the Youngberg case itself, see generally 2 PERLIN, supra note 5, § 4.41.

[FN238]. [Society for Good Will to Retarded Children, Inc. v. Cuomo](#), 737 F.2d 1239 (2d Cir. 1984) [hereinafter SGW]. See also [Association for Retarded Citizens of N. D. v. Olson](#), 561 F. Supp. 473, 487 (D.N.D. 1982), aff'd on the merits, 713 F.2d 1384 (8th Cir. 1983), after remand, 942 F. 2d 1235 (8th Cir. 1991) (construing right to minimum training to include such training as enables a facility resident "to acquire or maintain minimum self-care skills--skills in feeding, bathing, dressing, self-control and toilet training") (emphasis in original).

[FN239]. SGW, supra note 238, at 1250. See also [Armstead v. Pingree](#), 629 F. Supp. 273, 276 (M.D. Fla. 1986) (adopting Society for Good Will analysis in denying defendants' motion to dismiss); [Griffith by Griffith v. Ledbetter](#), 711 F. Supp. 1108, 1110-12 (N.D. Ga. 1989) (same).

[FN240]. SGW, supra note 238, at 1250.

[FN241]. Id. (citation omitted).

[FN242]. Id. (emphasis added).

[FN243]. Id. (emphasis in original).

[FN244]. [Gann v. Delaware State Hosp.](#), 543 F. Supp. 268, 273-74 (D. Del. 1982).

[FN245]. [Lombard v. Eunice Kennedy Shriver Center](#), 556 F. Supp. 677, 678- 79 (D. Mass. 1983). Cf. [SGW](#), 737 F.2d at 1245-46.

[FN246]. [Johnson by Johnson v. Brelje](#), 701 F.2d 1201, 1209 n.9 (7th Cir. 1983).

[FN247]. [Sabo v. O'Bannon](#), 586 F. Supp. 1132, 1140 (E.D. Pa. 1984).

[FN248]. [Doe By and Through Doe v. Public Health Trust of Dade County](#), 696 F.2d 901, 904 n.1 (11th Cir. 1983).

[FN249]. [Santana v. Collazo](#), 714 F.2d 1172, 1183 (1st Cir. 1983), cert. denied, 466 U.S. 974 (1984).

[FN250]. [Gann v. Schramm](#), 606 F. Supp. 1442, 1448-49 (D. Del. 1985); [Wilder v. City of New York](#), 568 F. Supp. 1132, 1137 (E.D.N.Y. 1983).

[FN251]. [New York State Ass'n for Retarded Children, Inc. v. Carey](#), 706 F.2d 956, 961-65 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983).

[FN252]. [Association for Retarded Citizens of N. D. v. Olson](#), 713 F.2d 1384, 1391 (9th Cir. 1983), aff'd on the merits, 713 F.2d 1384 (8th Cir. 1983), after remand, 942 F.2d 1235 (8th Cir. 1991).

[FN253]. 601 F. Supp. 1055, 1057 (W.D.N.C. 1984), aff'd, 781 F.2d 367 (4th Cir.), cert. denied sub nom. [Kirk v. Thomas S.](#), 476 U.S. 1124 (1986), cert. denied sub nom. [Childress v. Thomas S.](#), 479 U.S. 889 (1986). See also [Clark v. Cohen](#), 613 F. Supp. 684 (E.D. Pa. 1985), aff'd, 794 F.2d 79 (3d Cir. 1986), cert. denied, 479 U.S. 962 (1986).

[FN254]. [Thomas S.](#), 601 F. Supp. at 1057.

[FN255]. [Id.](#) at 1058.

[FN256]. [Id.](#)

[FN257]. [Id.](#) The court noted dryly: "The court fails to see how that fact can excuse defendants from providing the treatment to which plaintiff is entitled. People with problems are rarely easy to deal with. If plaintiff were 'normal,' then he would not need the treatment the professionals say he needs." [Id.](#)

[FN258]. [Id.](#) at 1058-59.

[FN259]. [Youngberg](#), 457 U.S. at 324.

[FN260]. [Thomas S.](#), 781 F.2d at 374.

[FN261]. [Id.](#) at 375. Whereas lack of funds is an absolute defense to a damages action under [Youngberg](#), 457 U.S. at 323, this holding does not apply to applications for prospective injunctive relief. [Thomas S.](#), 781 F.2d at 375, especially where, as in the case before the court, there was not evidence that the evaluation team did not take costs into consideration. [Id.](#)

[FN262]. [Id.](#) at 375-76 (emphasis added).

[FN263]. [Thomas S. by Brooks v. Flaherty](#), 699 F. Supp. 1178, 1204 (W.D.N.C. 1988), aff'd, 902 F.2d 250 (4th Cir. 1990), cert. denied, 498 U.S. 951 (1990).

[FN264]. [Id.](#) at 1204-1205.

[FN265]. [Thomas S. by Brooks v. Flaherty](#), 902 F.2d 250.

[FN266]. For a full range of cases interpreting [Youngberg](#) restrictively, see generally 2 PERLIN, supra note 5, § 4.44, at 19-20 n. 820.1 (Supp. 1994).

[FN267]. [Project Release v. Prevost](#), 551 F. Supp. 1298, 1305-1306 (E.D.N.Y. 1982), aff'd, 722 F.2d 960 (2d Cir. 1983).

[FN268]. See [Cospito v. Heckler](#), 742 F.2d 72 (3d Cir. 1984), cert. denied, 471 U.S. 1131 (1985), for an analysis of the significance of Joint Commission Accreditation in institutional litigation.

[FN269]. [Woe v. Cuomo](#), 559 F. Supp. 1158, 1162-63 (E.D.N.Y. 1983), modified, 729 F.2d 96 (2d Cir.), cert. denied, 469 U.S. 936 (1984). For more recent developments, see [Foe v. Cuomo](#), 700 F. Supp. 107 (E.D.N.Y. 1988), aff'd, 892 F.2d 196 (2d Cir. 1989), cert. denied, 498 U.S. 972 (1990). Cf. [Gann v. Schramm](#), 606 F. Supp. 1442, 1448 n.2 (D. Del. 1985) ("[JCAH] accreditation might provide prima facie proof of adequacy, but plaintiffs' affidavit stating that professional judgment was not exercised is sufficient to rebut such a showing").

[FN270]. [Barrows v. State](#), 684 P.2d 303, 305 (Idaho 1984), cert. denied, 469 U.S. 1074 (1984).

[FN271]. [Dixon v. Ass'n for Retarded Citizens v. Thompson](#), 440 N.E.2d 117 (Ill. 1982).

[FN272]. [Phillips v. Thompson](#), 715 F.2d 365, 367 (7th Cir. 1983). See also [S.H. v. Edwards](#), 860 F.2d 1045 (11th Cir. 1988) (same); [P. C. v. McLaughlin](#), 913 F.2d 1033, 1042 (2d Cir. 1990) (same); [K. C. v. State](#), 771 P.2d 774, 780-81 (Wyo. 1989) (same); compare [Goebel v. Colorado Dep't of Insts.](#), 764 P.2d 785, 809 (Colo. 1988) on appeal after remand, suppl., 830 P.2d 995 (Colo. 1992), suppl., 830 P.2d 1036 (D. Colo. 1992) (Youngberg-based claims to constitutional right to community mental health services "premature" in litigation context).

[FN273]. SGW, supra note 138, at 1249.

[FN274]. Id.

[FN275]. Compare [Clift by Clift v. Fincannon](#), 657 F. Supp. 1535, 1546-47 (E.D. Tex. 1987) (Youngberg presumption of professional judgment validity "furtheres the policy of limited judicial intervention in the internal operations of [state facilities for the mentally handicapped]").

[FN276]. SGW, supra note 138, at 1249. For subsequent developments in SGW, see [Society for Good Will for Retarded Children, Inc. v. Cuomo](#), 718 F. Supp. 139 (E.D.N.Y. 1989), reversed and remanded, 902 F.2d 1085, 1091 (2d Cir. 1990) (ordering district court to tailor its relief "narrowly" so as to cure constitutional violations rather than to "optimiz[e] conditions" at the facility subject to the court's order), on remand, 745 F. Supp. 879 (E.D.N.Y. 1990) (approving settlement agreement).

[FN277]. See, e.g., Perlin, supra note 232 (discussing [United States v. Charters](#), 829 F. 2d 479 (4th Cir. 1987), on reh'g, 863 F. 2d 302 (4th Cir. 1988) (en banc), cert. den., 494 U.S. 1016 (1990)).

[FN278]. See, e.g., [Dolihite v. Videon](#), 847 F. Supp. 918, 936 (M.D. Ala. 1994):

Most importantly ... the continuing deficiencies reflect a non-compliance with the Wyatt standards. In the case at bar, the failure to comply with the spirit and letter of Wyatt allegedly created an anti-therapeutic environment which was a proximate cause of [plaintiff's] injuries.

[FN279]. See supra note 39.

[FN280]. See, e.g., Stephen Rachlin, One Right Too Many, 3 BULL. AM. ACAD. PSYCHIATRY & L. 99 (1975); Darryl Treffert, Dying With Their Rights On, 130 AM. J. PSYCHIATRY 1041 (1973); Thomas Gutheil, The Boston State Hospital Case: "Involuntary Mind Control," the Constitution, and the "Right to Rot," 137 AM. J. PSYCHIATRY 720 (1980).

[FN281]. This section is largely adapted from Michael L. Perlin, Decoding Right to Refuse Treatment Law, 16 INT'L J. L. & PSYCHIATRY 151 (1993). See generally 2 PERLIN, supra note 5, chapter 5.

[FN282]. See generally Alexander Brooks, The Right to Refuse Antipsychotic Medications: Law and Policy, 39 RUTGERS L. REV. 339 (1987); Sheldon Gelman, Mental Hospital Drugging: Atomistic and Structural Remedies, 32 CLEV. ST. L. REV. 221 (1983-84); Robert Plotkin, Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment, 72 NW. U. L. REV. 461 (1977).

[FN283]. See generally Nancy Rhoden, The Right to Refuse Psychotropic Drugs, 15 HARV. C. R.-C. L. L. REV. 363, 365 (1980).

[FN284]. See generally Jonathan Brant, Pennhurst, Romeo and Rogers: The Burger Court and Mental Health Law Reform Litigation, 4 J. LEG. MED. 323, 345 (1983).

[FN285]. [Mills v. Rogers](#), 457 U.S. 291 (1982). But compare, [Washington v. Harper](#), 494 U.S. 210 (1990) and [Riggins v. Nevada](#), 112 S.Ct. 1810 (1992) discussed in Perlin & Dorfman, Sanism, supra note 12.

[FN286]. 2 PERLIN, supra note 5, § 5.33 at 309-12; David Wexler, Seclusion and Restraint: Lessons for Law,

Psychiatry and Psychology, 5 INT'L J. L. & PSYCHIATRY 285, 290 (1982).

[FN287]. [Mills, 457 U.S. at 300](#); see generally Michael L. Perlin, State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier? 20 LOY. L. A. L. REV. 1249 (1987).

[FN288]. See, e.g., [Rivers v. Katz, 495 N.E.2d 337 \(N.Y. 1986\)](#); [Riese v. St. Mary's Hospital & Medical Center, 243 Cal. Rptr. 2431 \(App. 1 Dist. 1987\)](#), withdrawn by publisher and republished as [271 Cal. Rptr. 199 \(App. 1 Dist. 1987\)](#), app'l. dismissed, [774 P.2d 698, 259 \(Cal. 1989\)](#); see generally 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 39 (1991).

[FN289]. See generally [United States v. Charters, 863 F.2d 302 \(4th Cir. 1988\)](#) (en banc) cert. denied, [494 U.S. 1016 \(1990\)](#); Perlin, supra note 232. On the significance of courts' refusal to seriously consider social science data in this context, see generally Perlin & Dorfman, Sanism, supra note 12.

[FN290]. See generally Perlin, supra note 288.

[FN291]. [112 S. Ct. 1810 \(1992\)](#).

[FN292]. See PERLIN, LAW AND DISABILITY, supra note 5, § 2.18 at 258-64; Winick, Riggins, supra note 6.

[FN293]. [Riggins, 112 S. Ct. at 1815](#).

[FN294]. See generally supra Part II.

[FN295]. [67 F. 2d 485, 495 N.E. 2d 337, 504 N.Y.S. 2d 74 \(1986\)](#).

[FN296]. [863 F.2d 302 \(4th Cir. 1988\)](#) (en banc) cert. denied, [494 U.S. 1016 \(1990\)](#).

[FN297]. For post-Riggins cases, see 2 PERLIN, supra note 5, § 5.65A n.1088.60 at 96-97 (1994 Supp.). On the potential therapeutic jurisprudence of Riggins, see also Perlin & Dorfman, Sanism, supra note 12; Perlin, Pretextual Bases, supra note 12; Winick, Riggins, supra note 6.

[FN298]. A seriously underdiscussed issue is that of the economic status of state hospital patients, especially chronic patients. On the impoverished economic status of such persons in general, see Hendrik Wagenaar & Dan Lewis, Ironies of Inclusion: Social Class and Deinstitutionalization, 14 J. HEALTH POL. POL'Y & L. 503 (1989).

[FN299]. For an excellent and comprehensive overview of these issues, see Bruce Winick, The Right to Refuse Treatment: A Therapeutic Jurisprudence Analysis, 17 INT'L J. L. & PSYCHIATRY 99 (1994).

[FN300]. See generally id. at 100-111 (on the relationship between therapeutic jurisprudence and the psychology of choice in the right to refuse treatment context); id. at 111-16 (effective implementation of the right to refuse treatment enhances the therapeutic relationship, making it into "a tool that is both more humane and more effective"; implementation of the right to refuse treatment best insures that therapeutic relationship will be "characterized by voluntariness rather than coercion").

[FN301]. See Cournos et al., supra note 6, at 854; see also Paul Sauvayre, The Relationship Between the Court and the Doctor on the Issue of an Inpatient's Refusal of Psychotropic Medication, 36 J. FORENSIC SCI. 219, 221 (1991) (citing Irwin Hasenfeld and Barbara Grumet, A Study of the Right to Refuse Treatment, 12 BULL. AM. ACAD. PSYCHIATRY & L. 65 (1984) (patients who initially refuse treatment and complete a judicial hearing as to their capacity to refuse treatment did better after discharge than those who complied with treatment)).

[FN302]. Ensminger & Liguori, supra note 41 at 243, 245.

[FN303]. In California, for example, the burden of proof to show doctor that a mental health patient lacks capacity to

refuse medication is higher than to civilly commit that same patient. In an administrative capacity hearing, the burden of proof is clear and convincing evidence; in an administrative civil commitment hearing for a "14-day hold," the burden of proof is only probable cause. [CAL. WELFARE & INSTITUTIONS CODE § 5256.6](#). Compare [Heller v. Doe, 113 S. Ct. 2637 \(1993\)](#) (two-tier commitment system allowing for commitment of mentally retarded persons on a lesser standard of proof (clear and convincing evidence) that for mentally ill persons (beyond a reasonable doubt) is not violative of the equal protection clause).

[FN304]. See Note, The Role of Counsel in the Civil Commitment Process: A Theoretical Framework, in TJ, *supra* note 2, at 309, 323 n.83; see also Tom R. Tyler, The [Psychological Consequences of Judicial Procedures: Implications For Civil Commitment Hearings](#), 46 SMU L. REV. 433, 444 (1992) (discussing therapeutic value of judicial civil commitment hearings, and stressing that individuals benefit from hearings in which they can take part, are treated with dignity, and are "fair").

[FN305]. Cournos et al., *supra* note 6, at 854; see also Zito et al., *supra* note 6, at 336.

[FN306]. Cournos et al., *supra* note 6, at 854.

[FN307]. *Id.*

[FN308]. Zito et al., *supra* note 6, at 336.

[FN309]. See Winick, *supra* note 299.

[FN310]. [Davis v. Hubbard, 506 F. Supp. 915, 926-27 \(N.D. Ohio 1980\)](#); see also Mary C. McCarron, The Right to Refuse Antipsychotic Drugs: Safeguarding the Mentally Incompetent Patient's Right to Procedural Due Process, 73 MARO. L. REV. 477, 484 (1990).

[FN311]. See, e.g., [Washington v. Harper, 494 U.S. 210, 242-43 \(1990\)](#) (Stevens, J., dissenting); [Riggins v. Nevada, 112 S. Ct. 1810, 1817 \(1992\)](#) (Kennedy, J., concurring); [Heller v. Doe, 113 S. Ct. 2637, 2650 \(1993\)](#) (Souter, J., dissenting). In Harper, Justice Stevens expressed his concerns that the failure to require that medication decisions be made by an independent party could lead to the improper use of medication for control purposes rather than for treatment. *Id.* at 245-46; see also, e.g., [Rennie v. Klein, 476 F. Supp. 1294, 1299 \(D.N.J. 1979\)](#) (evidence at trial indicated that psychiatric medications were being used routinely as a means of patient control and as a substitute for treatment); modified and remanded, [653 F.2d 836 \(3rd Cir. 1981\)](#), vacated and remanded, [458 U.S. 1119 \(1982\)](#).

[FN312]. [Rennie, 476 F. Supp. at 1305-1306](#).

[FN313]. Harold Bursztajn et al., Medical and Judicial Perceptions of the Risks Associated With the Use of Antipsychotic Medication, 19 BULL. AM. ACAD. PSYCHIATRY & L. 271, 273-74 (1991).

[FN314]. Dorfman, Fear and Pretextuality, *supra* note 34, at 816-19 (citing McCarron, *supra* note 307, at 481-82); [Delila M. J. Ledwith, Jones v. Gerhardstein: The Involuntarily Committed Mental Patient's Right to Refuse Treatment With Antipsychotic Drugs, 1990 WIS. L. REV. 1367, 1373 \(1990\)](#).

[FN315]. See Steven K. Hoge et al., A Prospective, Multicenter Study of Patient's Refusal of Antipsychotic Medication, 47 ARCH. GEN. PSYCHIATRY 949 (1990); Shelly Levin et al., A Controlled Comparison of Involuntarily Hospitalized Medication Refusers and Acceptors, 19 BULL. AM. ACAD. PSYCHIATRY & L. 161, 169 (1991).

[FN316]. On the competency of patients with schizophrenia to engage in such decisionmaking, see e.g., Barry Rosenfeld et al., Decision Making in a Schizophrenic Population, 16 LAW & HUM. BEHAV. 651, 660 (1992) (after differences in verbal functioning controlled for, no differences remained between abilities of schizophrenic patients and nonpatients to consistently weigh risks, benefits and probabilities).

[FN317]. Zito et al., *supra* note 6, at 328.

[\[FN318\]](#). Id.

[\[FN319\]](#). Id. at 334.

[\[FN320\]](#). Id.

[\[FN321\]](#). Cournos et al., supra note 12; see also Michael G. Farnsworth, The Impact of Judicial Review of Patients' Refusal to Accept Antipsychotic Medications at the Minnesota Security Hospital, 19 BULL. AM. ACAD. PSYCHIATRY & L. 33, 40 (1991); Perlin, Morality, supra note 18; see also Stefan, supra note 218 (discussing the inappropriate reliance on the professional judgment standard by courts in "negative rights" claims such as the right to refuse treatment, and the problems of excessive expert deference).

[\[FN322\]](#). Sauvayre, supra note 301, at 221 (citing studies indicating that most medication hearings are decided in favor of the physician). These studies include one by Cournos et al., supra note 6 (petition for involuntary medication granted in 95% contested cases), and by Jorge Veliz and William James, Medicine Court: Rogers In Practice, 14 AM. J. PSYCHIATRY 62 (1987) (in 100% of the cases of involuntary medication studied, the court ruled in favor of medicating the patient).

[\[FN323\]](#). Perlin & Dorfman, Renaissance, supra note 11; see generally Joel Haycock et al., Mediating the Gap: Thinking About Alternatives to the Current Practice of Civil Commitment, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 265, 272 (1994), quoting Perlin & Dorfman, Sanism, supra note 12 ("Mental disability law generally regulates powerless individuals represented by passive counsel in invisible court proceedings conducted by bored or irritated judges").

[\[FN324\]](#). See Perlin, Fatal Assumption, supra note 34 (on inadequate role of counsel in involuntary civil commitment cases).

[\[FN325\]](#). Id. at 42.

[\[FN326\]](#). Dorfman, Fear and Pretextuality, supra note 34, at 815 (citing [Matter of Brazleton](#), 604 N.E. 2d 376, 376-377 (Ill. App. 1992)). In *Brazleton*, counsel, who had been appointed to appeal an involuntary commitment order sought leave to withdraw, on the basis of the conclusion that counsel made that the appeal lacked merit and would be frivolous. The appellate court denied the motion as the attorney failed to present any issues which could be raised to support his client or any potential arguments that could be made. Furthermore, the appointed counsel incorrectly believed that the burden on the state was preponderance of the evidence; in 1979, some thirteen years before, the United States Supreme Court had ruled in [Addington v. Texas](#), 441 U.S. 418 (1979), that the burden was at least clear and convincing evidence.

[\[FN327\]](#). Perlin, Fatal Assumption, supra note 34, at 42.

[\[FN328\]](#). Eric Turkheimer & Charles D. H. Parry, Why the Gap? Practice and Policy in Civil Commitment Hearings, 47 AM. PSYCHOLOGIST 646, 650 (1992).

[\[FN329\]](#). Lisa A. Callahan, Challenging Mental Health Law: Butting Heads With a Billygoat, 4 BEHAV. SCI. & L. 305, 313 (1986) (patient interviews regarding the value of due process procedures used to determine whether a patient could be involuntarily medicated indicated that many were dissatisfied with the process and found it to be a sham).

[\[FN330\]](#). Farnsworth, supra note 318, at 40.

[\[FN331\]](#). See Paul S. Appelbaum and Steven K. Hoge, The Right to Refuse Treatment: What the Research Reveals, 4 BEHAV. SCI. & L. 279 (1986).

[\[FN332\]](#). Perlin, supra note 36, at 559-60 (footnotes omitted).

[FN333]. See, e.g., TORREY, *supra* note 135, at 156-59; H. Richard Lamb, Deinstitutionalization and the Homeless Mentally Ill, 35 HOSP. & COMMUNITY PSYCHIATRY 899, 902 (1984); RAELE ISAAC & VIRGINIA ARMAT, MADNESS IN THE STREETS: HOW PSYCHIATRY AND THE LAW ABANDONED THE MENTALLY ILL 107-60 (1990).

[FN334]. See Perlin, *supra* note 53, at 87-88 (discussing Torrey's criticisms of *Lessard v. Schmidt*, *O'Connor v. Donaldson*, and *Wyatt v. Stickney*).

[FN335]. Perlin, *supra* note 36, at 560.

[FN336]. See *supra* Part III.

[FN337]. See Wagenaar & Lewis, *supra* note 298.

[FN338]. 457 U.S. 307 (1982); see *supra* Part II.

[FN339]. Wexler, *supra* note 1, at 29.

[FN340]. E.g., U.S. Supreme Court's decision in *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992) (due process bars retention of nonmentally ill insanity acquittee in mental hospital); see generally PERLIN, LAW AND DISABILITY, *supra* note 5, § 4.38; Winick, *Foucha*, *supra* note 12.

[FN341]. See 2 PERLIN, *supra* note 5, § 5.43A at 41-44 (1994 Supp.) (listing cases).

[FN342]. 112 S. Ct. 1810 (1992).

[FN343]. See generally Winick, *Riggins*, *supra* note 6.

[FN344]. See *Petrila*, *supra* note 30; *Haycock*, *supra* note 28.

[FN345]. See *supra* note 34, citing sources.

[FN346]. See especially PERLIN, LAW AND DISABILITY, *supra* note 5; Perlin, *Pretextual Bases*, *supra* note 12; Dorfman, *Fear and Pretextuality*, *supra* note 34.

[FN347]. See Michael L. Perlin, "Tea Leaves Here, Tea Leaves There: The Supreme Court's Mental Disability Law Docket, the Legislatures, the Public, and You" (paper presented to National State Mental Health Program Directors' annual Forensic Directors conference, Sept. 1994, Tampa, FL); on the pendulum metaphor, see e.g., 1 PERLIN, *supra* note 5, § 1.04 at 24 n.134 (citing sources).

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SMU Law Review
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Psychological Jurisprudence: Another Perspective***373 ON "SANISM"**[Michael L. Perlin \[FN1\]](#)

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I. INTRODUCTION

IMAGINE the uproar if a published appellate court decision in 1974 referred to an adult person of color as a "boy." Imagine the fallout if the New York Times stated in 1964 that *Plessy v. Ferguson* was the lead case on the question of "separate but equal" accommodations. Imagine if, ten years after *Roe v. Wade*, a Congressman had been complimented for his "thoughtful" remarks when he stated that, not only was it still legal to criminalize first-trimester abortions, but that a state could also lawfully bar all women from using contraception. Imagine if left-liberal candidates in one of the most progressive legislative districts in the country ran for office on a platform of excluding racial minorities from living in that district.

These acts would quickly, and correctly, be labelled either as racist, sexist or bizarre, and would be decried by well-meaning citizens at virtually all points on the political spectrum. Yet, when we substitute "mentally disabled person" for "person of color" or "racial minority" or "woman," we let such acts pass without notice or comment. [\[FN1\]](#) In fact, when a sitting state trial court judge recently endorsed Judge Oliver Wendell Holmes' infamous dictum from *Buck v. Bell*, that "three generations of imbeciles are enough," [\[FN2\]](#) his endorsement was greeted with total silence. [\[FN3\]](#)

***374** These examples are not exceptional. They reflect, rather, an irrational prejudice, an "ism," of the same quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry [\[FN4\]](#) that have been reflected both in our legal system and in the ways that lawyers represent clients. This prejudice, which I will call "sanism," similarly infects both our jurisprudence and our lawyering practices. [\[FN5\]](#) It reflects what civil rights lawyer Florynce Kennedy has characterized as "the pathology of oppression." [\[FN6\]](#)

Sanism is as insidious as other "isms" and is, in some ways, more troubling, since it is largely invisible and largely socially acceptable. Further, sanism is frequently practiced, consciously or unconsciously, by individuals who regularly take liberal or progressive positions decrying similar biases and prejudices that involve sex, race, ethnicity or sexual orientation. [\[FN7\]](#) Sanism is a ***375** form of bigotry that "respectable people can express in public." [\[FN8\]](#) Like other "isms," sanism is based largely upon stereotype, myth, superstition, and deindividuation. To sustain and perpetuate sanism, we use pre-reflective "ordinary common sense" (OCS) and other cognitive-simplifying devices

such as heuristic reasoning [\[FN9\]](#) in an unconscious response to events both in everyday life and in the legal process. The way that some members of the Senate Judiciary Committee obsessively focused on Anita Hill's alleged psychiatric disorders in an effort to discredit her testimony charging Judge Clarence Thomas with sexual harassment reflects this stereotyping at its most insidious level. [\[FN10\]](#)

The practicing bar, courts, legislatures, professional psychiatric and psychological associations, and the academic community are all largely silent about sanism. A handful of practitioners, lawmakers, scholars, and judges have raised lonely voices, [\[FN11\]](#) but the topic is simply off the agenda for most of these groups. As a result, mentally disabled individuals, [\[FN12\]](#) "the voiceless, those persons traditionally isolated from the majoritarian democratic political *376 system," are frequently marginalized to an even greater extent than are others who fit within the Carolene Products [\[FN13\]](#) definition of "discrete and insular minorities." [\[FN14\]](#)

This article argues that we must confront our system's sanist biases, [\[FN15\]](#) identify sanist practices, and articulate the roots of sanist behavior. We must enter into a dialogue with the final group of unempowered clients, those individuals institutionalized because of mental disability, and those individuals in the community who have been subject to sanist prejudices. We can then collaboratively educate legislators, judges, litigators, and scholars as to the dimensions of the problem in question.

This article will proceed as follows: I will initially discuss the meaning of stereotypes and the concomitant historical development of other "isms" (racism, sexism, etc.). Then, I will explore issues surrounding sanism. First, I will consider sanism's historic roots and explain its development and how public attitudes regularly reflect and perpetuate sanism. Then, I will focus briefly on how sanist behavior permeates both statutory and case law as well as the actual lawyering process in a way that further marginalizes the clientele in question. [\[FN16\]](#) Next, I will discuss the implications of the reality that these sanist patterns have escaped the notice of virtually all commentators and policymakers in the field.

I will conclude by offering some modest recommendations for change. First, we must openly discuss, among ourselves and with all other players in this arena, the underlying issues. We must create a new research and scholarship agenda that includes inquiry into the way that sanist behaviors permeate case and statutory law, judicial behavior and public discourse, and the reasons we allow it to do so. [\[FN17\]](#) We must restructure the provision of counsel *377 to mentally disabled persons, reeducate such counsel, both substantively and attitudinally, and empower mentally disabled clients. Finally, we must educate judges and legislators to confront sanist biases that infect the drafting of statutes or the writing of opinions.

II. THE DEVELOPMENT OF OTHER "ISMS"

A. "ISMIC" BEHAVIOR

1. On Stereotyping

Stereotypes are the "attribution of general psychological characteristics to large human groups." [\[FN18\]](#) According to the social psychologist Gordon Allport, stereotypes are attitudes that result in "gross oversimplification of experience and in prejudgments." [\[FN19\]](#) The first step of forming stereotypes is categorization: in order for us to be able to single out and treat members of a social group in a discriminatory way, we must be able to attribute some identifiable features that classify them as group members. [\[FN20\]](#) The separation of others into categorized groups is enough to trigger psychological processes leading to intergroup prejudice, [\[FN21\]](#) which Allport defines as "an antipathy based upon a faulty and inflexible generalization." [\[FN22\]](#) This act of separation is frequently at the basis of what can be called "ismic" behavior. [\[FN23\]](#)

Operating as "relatively rigid and oversimplified or biased perception [[[s] . . . of an aspect of reality," [\[FN24\]](#) stereotypes efficiently, however inaccurately, *378 generalize in ways that have little basis in individual fact or practical experience. These generalizations, based upon preconceived and misinformed opinions about the nature of difference, make little reference to actual information, and imply cause-and-effect relationships that do not exist. [\[FN25\]](#) They operate in the same way as do other fundamental cognitive errors that frequently lead to distorted and systematically erroneous decisions, [\[FN26\]](#) relying on exaggeration, emotionally-toned intergroup labels,

dichotomization and over generalization. [\[FN27\]](#)

Ironically, stereotypes also help us restructure and impose order upon the world in ways that reduce anxiety and lend an appearance of legitimacy and "self-evident truth to what we have invented." [\[FN28\]](#) "Our internal, mental representation of the world become the world. We act as if this world were real, external to ourselves" [\[FN29\]](#)

Labels accompany stereotypes. These labels stigmatize, assign negative associations to outsiders, complicate "any effort to resist the denigration implied by difference," [\[FN30\]](#) and prevent the labeler from understanding the perspective of the outsider. [\[FN31\]](#) Labels are especially pernicious, for they frequently lead labeled individuals to internalize negative expectations and social practices that majoritarian society identifies as characteristically endemic to the labeled group. [\[FN32\]](#) From these labels, "categorizations assume a life of their own." [\[FN33\]](#)

***379** Through the use of stereotypes and labels, any act that fails to follow standards set by a dominant group becomes a deviation. [\[FN34\]](#) We structure polarized and dichotomized categories: if a positive image is of an industrious, intelligent, knowledgeable, law-abiding and responsible self, the correlative negative image is of a lazy, unintelligent, immoral, ignorant, criminal, shiftless other. [\[FN35\]](#) Thus, historically, we have negatively stereotyped blacks, women, Asians, Jews, Catholics, gays and lesbians, Indians, physically disabled persons, physically unattractive persons and others. These stereotypes have often been premised upon political, scientific, religious and cultural theories that, in turn, relied on other distorted stereotypes and characterizations. [\[FN36\]](#)

These historical stereotypes, often brought together in a "web," [\[FN37\]](#) came to serve as the basis of a legitimating ideology that perpetrated the mythology and rationalized racial, sexual and religious oppression. [\[FN38\]](#) These stereotypes led to yet others: the separated and stigmatized others were seen as "different, deviant and morally weak" [\[FN39\]](#) or as individuals "without hope or dignity." [\[FN40\]](#)

Judges have consistently employed these stereotypical assumptions. The Supreme Court's decision in *City of New York v. Miln*, [\[FN41\]](#) which upheld a statute requiring shipmasters to report their passengers' occupations, specifically equated the potential "moral pestilence of paupers" with the potential "physical pestilence" that could arise from "infectious articles" or crewmembers "laboring under an infectious disease." [\[FN42\]](#) Stereotypes such as ***380** these have led to widespread feelings of both social and judicial helplessness, a fear that the social problems we face are somehow beyond remediation. [\[FN43\]](#)

The use of stereotypes precludes empathic behavior. We think of the stereotyped as "'them' and not 'us' [and we are therefore] less likely to share in their pain and humiliation." [\[FN44\]](#) Lynne Henderson defines empathy as encompassing three interrelated phenomena:

- (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion). [\[FN45\]](#)

We are more likely to empathize in an unreflective way with people like ourselves; [\[FN46\]](#) yet, because empathic understanding involves the "recognition of and regard for the other," [\[FN47\]](#) empathy can operate to blunt stereotyped thinking that fails to imagine another's alternative perspectives. [\[FN48\]](#)

No one is immune from the use of stereotypes, least of all lawyers. According to Stanley Brodsky and his colleagues:

Trial lawyers recognize that jury selection in both civil and criminal actions is typically based on long-standing stereotypes, assumed to identify preexisting attitudes and biases. Women are said to be empathic; men are not. Accountants, engineers, and military officers are thought of as punitive and not people-oriented. Social workers, teachers, liberal Protestants, and most Jews are described as good jurors for the defense in criminal case and for the plaintiffs in civil cases. Catholics, fundamental Christians, and Orthodox Jews are not . . . [T]rial lawyers who represent the state in criminal cases, and the defense in civil cases . . . should pick jurors with the "six Rs": religious, racist, rigid, righteous, Republican, and repressed. [\[FN49\]](#)

The law's treatment [\[FN50\]](#) of minority groups, giving that phrase its broadest ***381** possible *Carolene Products*

"Footnote 4" reading, [\[FN51\]](#) has frequently been based on the most inflexible generalizations and the most polarized categories. As will be discussed next, inappropriate stereotypes and categorizations have led historically to discriminatory legislation, judicial decisions and lawyering practices. [\[FN52\]](#) As Professor Sheri Lynn Johnson has argued, either prejudice or discrimination may be present without the other, and official discrimination may be inhibited despite virulent prejudice. "Where discrimination is not legally or socially approved, social scientists predict it will be practiced only when it is possible to do so covertly and indirectly. On the other hand, discrimination may be engaged in without the presence of prejudiced attitudes when it will lead to social approval." [\[FN53\]](#)

Although "isms" such as racism, sexism, and anti-Semitism have since been officially repudiated, the distorted categorizations still frequently dominate our thought processes and decisionmaking. These same distorted thought processes and socially-approved prejudices still dominate our discourse when the subject deals with mental disability.

B. ON SPECIFIC "ISMS"

1. Introduction

American legal history reflects a persistent and unrelenting pattern of statutes and court decisions that are based on racial, sexual, sexual orientation and ethnic stereotypes. This section will discuss issues of race in the legal setting, and then briefly refer to biases faced by other stereotyped and marginalized groups. The common thread of this discussion is the way that "ismic" behavior regularly pervades the law.

2. Race Stereotypes in the Legal Setting

All components of the legal system, especially the courts, "must bear a heavy share of the burden of American racism." [\[FN54\]](#) To an "outrageous and humiliating extent, . . . American lawyers, judges and legislators created, *382 perpetuated, and defended racist American institutions." [\[FN55\]](#) Historically, racist laws enforced segregation in education, accommodations, transportation and social organizations, [\[FN56\]](#) and enforced two-tiered citizenship in the courts in such areas as testimonial exclusion, [\[FN57\]](#) jury selection, [\[FN58\]](#) bar membership, [\[FN59\]](#) and intermarriage. [\[FN60\]](#)

In the past, supporters of segregationist and racist laws drew regularly on pseudoscientific theories to buttress their arguments. [\[FN61\]](#) Narrow and distorted stereotypes regularly grounded both the legal arguments and the underlying explanatory theories offered in support of such laws. [\[FN62\]](#) In all cases, the "ismic" behavior, frequently operative on an unconscious level, [\[FN63\]](#) legitimized the ideology, perpetuating the mythology and rationalizing the oppression. [\[FN64\]](#)

Remnants of the segregated, two-tiered system remain today in such areas as selective criminal prosecution [\[FN65\]](#) and susceptibility to the death penalty, [\[FN66\]](#) *383 as well as in other aspects of the criminal justice system. [\[FN67\]](#) While civil rights reforms have eliminated much of the formal and symbolic subordination to which blacks were previously subjected, much of the material subordination remains. [\[FN68\]](#) Today's on-going debate on affirmative action, race consciousness, and quotas, therefore, makes it impossible for us to ignore race, because the debate underscores the incontrovertible fact that many whites refuse to see blacks as "full members and equal partners in society." [\[FN69\]](#) George Bush's cynical and vicious manipulation of the Willie Horton image in the 1988 Presidential election, David Duke's strong showing in the 1991 gubernatorial election in Louisiana, and Pat Buchanan's recent comments about the specter of one million immigrant "Zulus" suggest that these stereotypes remain dangerously near the surface today.

3. Other "Isms" in the Legal Setting

Our legal history reveals similar patterns of court decisions, statutes and lawyering practices reflecting sexist, [\[FN70\]](#) anti-Semitic, [\[FN71\]](#) anti-Catholic, [\[FN72\]](#) anti-*384 Asian, [\[FN73\]](#) anti-Native American, [\[FN74\]](#) homophobic, [\[FN75\]](#) disability based, [\[FN76\]](#) and ageist [\[FN77\]](#) attitudes. [\[FN78\]](#) In each instance, reliance on pseudoscience, culture and stereotypes reifies the ultimate subordination of the group targeted by the "ism". [\[FN79\]](#) In some cases, the subordinating practices are aimed at those subject *385 to multiple stereotypes; [\[FN80\]](#) often, classism [\[FN81\]](#) further contaminates the process. [\[FN82\]](#) Although more recent legislation and court decisions have

blunted the symbolic weight of some of these patterns, evidence of material subordination remains, [\[FN83\]](#) and many stereotypes continue to dominate both legal and political discourse. [\[FN84\]](#)

C. THE RESPONSE OF THE LEGAL SYSTEM

1. Introduction

After a time, all components of the legal system respond, however slowly, to "isms" and stereotypes. Frequently jolted by a cataclysmic, conscience-shocking event, [\[FN85\]](#) and bolstered by both analytic scholarship and moving, personal stories, [\[FN86\]](#) legislation is passed in an effort to ameliorate some of the most wretched excesses of the underlying behavior. [\[FN87\]](#) Courts may then respond *386 in activist ways (if they perceive themselves as minoritarian), or in conservative ways (if they view themselves as majoritarian). [\[FN88\]](#) Some lawyers pay no attention to such responses; others change their behavior either directly or indirectly. Direct changes may include articulating codes and standards that prohibit "ismic" behavior, [\[FN89\]](#) while indirect changes may involve adopting more empathic modes of interpersonal connections and attempting to "put themselves in the shoes" of the stereotyped-other. [\[FN90\]](#) The Supreme Court now concedes that private bias may be "outside the reach of the law," but warns that "the law cannot, directly or indirectly, give [such bias] effect." [\[FN91\]](#) These belated responses, however, cannot extinguish the residue of "ismic" behavior on the parts of the various actors in the legal system, including legislators who write statutes, judges who try cases and hear appeals, and lawyers who represent clients. Such actors reflect "dominant, conventional morality" [\[FN92\]](#) and their preexisting social values can "taint their perceptions" during consideration of cases involving "ismic" biases. [\[FN93\]](#)

2. Judicial Bias [\[FN94\]](#)

Judges most frequently come from the middle and upper classes. They are disproportionately male, white, Protestant, middle-aged and well-educated. [\[FN95\]](#) This more privileged background has been looked upon as one of *387 the reasons that such judges are more likely to believe police officers than criminal defendants, [\[FN96\]](#) are slow to take discrimination claims by a variety of ethnic groups seriously, [\[FN97\]](#) and are less likely to show empathy in cases involving sexual minorities. [\[FN98\]](#) Similarly judges ignore a range of voices and narratives of subordinated groups, [\[FN99\]](#) fail to acknowledge the significance of their own perspective, [\[FN100\]](#) and readily accept a model of an economically-efficient, rational man. [\[FN101\]](#) Reported cases offer countless examples of racial, sexual and religious bias, [\[FN102\]](#) that raise questions concerning "cost to public confidence" if we would be "willing to be honest about the possible racial biases of our judges." [\[FN103\]](#)

This is not to say that there are no constraints on "ismic" behavior in the legal system. Some appellate judges have "struck out against the inhumanities of existing law" [\[FN104\]](#) in ways that have led to systemic law reform. [\[FN105\]](#) Other judges have sensitively dismantled some of the older and more pernicious stereotypes and limited the impact of "ismic" behavior in individual *388 cases. [\[FN106\]](#) Scholars are now turning to narrative to highlight prejudice and bias and to analyze experience and culture through individual stories. [\[FN107\]](#)

In short, in many areas of the law where stereotypes and "ismic" behavior have long dominated legal discourse, there is now a substantial counterweight. This counterweight, however, is largely missing in the area of "sanism," [\[FN108\]](#) and the "pathology of oppression" still dominates legal discourse involving mental disability.

III. SANISM

A. ROOTS

The roots of sanism are deep. From the beginning of recorded history, mental illness has been inextricably linked to sin, evil, God's punishment, crime, and demons. [\[FN109\]](#) Evil spirits were commonly relied upon to explain abnormal behavior. [\[FN110\]](#) The "face of madness . . . haunts our imagination." [\[FN111\]](#) People with mental illness were considered beasts; a person who lost his capacity to reason was seen as having lost his claim "to be treated as *389 a human being." [\[FN112\]](#)

Mental illness is a dominant model of pathology. According to Sander Gilman:

(Cite as: 46 SMU L. Rev. 373)

[T]he most elementally frightening possibility is the loss of control over the self, and loss of control is associated with loss of language and thought perhaps even more than with physical illness. Often associated with violence (including aggressive sexual acts), the mad are perceived as the antitheses to the control and reason that define the self. Again, what is perceived is in large part a projection: for within everyone's fantasy life there exists . . . an incipient madness that we control with more or less success. [\[FN113\]](#)

These profound images allow us to see the mentally ill individual as "the Other." They animate our "keen . . . desire to separate 'us' and 'them'"; [\[FN114\]](#) they allow us to use the label of "sickness" as reassurance that the "Other," seen as "both ill and infectious, both damaged and damaging," [\[FN115\]](#) is not like us. [\[FN116\]](#)

We respond to these images by perpetuating reductionist symbolic stereotypes of mental illness that reify social, cultural, medical, behavioral and political myths. These stereotypes color the way we treat people with mental illness and the way we think about mental illness. [\[FN117\]](#) Such stereotypes are encouraged by media distortions [\[FN118\]](#) and exacerbated by our reliance on cognitive heuristics and "ordinary common sense" (OCS). [\[FN119\]](#)

***390** Stereotypes of mental illness are frequently conflated with stereotypes of race, sex and ethnicity. Disorder and the loss of control is associated with outsider groups such as racial and religious minorities. [\[FN120\]](#) Gilman thus locates the "structural relationship between madness and blackness . . . in antiquity," [\[FN121\]](#) and traces the historical roots of the belief that Jews, like women, "possessed a basic biological predisposition to specific forms of mental illness." [\[FN122\]](#)

Sanist, racist and sexist stereotypes remain frequently grounded in similar sorts of eugenic and cultural pseudoscience [\[FN123\]](#) in ways that reflect broader sets of public attitudes. [\[FN124\]](#) For example, black students have historically been more readily assigned to special education classes than have white students. [\[FN125\]](#) In the past, all post-natal women were seen as mentally impaired. [\[FN126\]](#) Still other studies show that decisions to hospitalize are positively related to behavioral stereotypes of race and sex. [\[FN127\]](#) These confluences suggest ***391** the power of the underlying stereotypes and force us to reconsider mental disability law developments in their context.

B. PUBLIC ATTITUDES

Society fears, victimizes and brutalizes people with mental illness. Mentally disabled individuals have been subject to "[a] regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excess of Jim Crow." [\[FN128\]](#) Persons labeled as mentally ill or mentally retarded face pervasive prejudice and discrimination. The stigmatic label of "ex-patient" makes obtaining housing and employment significantly more difficult. [\[FN129\]](#) The public is now convinced, despite an impressive array of evidence to the contrary, that homelessness is largely a problem of mental illness, and that, if mental patients had never been granted their modest amount of civil rights, homelessness would largely disappear as a social phenomenon. [\[FN130\]](#) People with mental disabilities are seen as individuals with an "immutable difference that set them apart from the rest of society, and thus warrant different legal treatment." [\[FN131\]](#)

People with mental disabilities have largely been invisible and without political power. [\[FN132\]](#) Hidden for decades in large, remote institutions, their stories have never been incorporated into our social fabric or consciousness. [\[FN133\]](#) While there are now "black seats" in Congress (and a "gay seat" in the New York City council), the idea of an "ex-patient's seat" in any generally ***392** elected public body is beyond comprehension to most of us. [\[FN134\]](#) Frequently deprived of the vote [\[FN135\]](#) or the right to be parents, [\[FN136\]](#) removed from political discourse, [\[FN137\]](#) and often invisible to their own attorneys, [\[FN138\]](#) people with mental disabilities remain a largely hidden, [\[FN139\]](#) fragmented, [\[FN140\]](#) and disenfranchised minority. When they are depicted in the news or entertainment media, it is inevitably in a negative or distorted manner. [\[FN141\]](#)

This marginalization has served as a Petri dish for sanist social attitudes, which in turn have led to sanist myths, behaviors, and a sanist environment. [\[FN142\]](#) As with other stereotypic myths, sanism is the result of rigid categorization ***393** and overgeneralization, created to "localize our anxiety, to prove to ourselves that what we fear does not lie within." [\[FN143\]](#) Sanist myths are unlike other myths, though, in a critical way; whereas most other myths deal with populations that possess fairly immutable qualities (e.g., race, sex), all of us could become mentally ill. This, as much as any other reason, may account for the level of public virulence experienced in this area.

These are a few of the sanist myths that dominate our social discourse:

1. Mentally ill individuals are "different," and, perhaps, less than human. [\[FN144\]](#) They are erratic, deviant, morally weak, sexually uncontrollable, emotionally unstable, superstitious, lazy, ignorant and demonstrate a primitive morality. [\[FN145\]](#) They lack the capacity to show love or affection. [\[FN146\]](#) They smell different from "normal" individuals, [\[FN147\]](#) and are somehow worth *394 less. [\[FN148\]](#)

2. Most mentally ill individuals are dangerous and frightening. [\[FN149\]](#) They are invariably more dangerous than non-mentally ill persons, and such dangerousness is easily and accurately identified by experts. [\[FN150\]](#) At best, people with mental disabilities are simple and content, like children. [\[FN151\]](#) Either parens patriae or police power supply a rationale for the institutionalization of all such individuals. [\[FN152\]](#)

3. Mentally ill individuals are presumptively incompetent to participate in "normal" activities, to make autonomous decisions about their lives (especially in areas involving medical care), and to participate in the political arena. [\[FN153\]](#)

*395 4. If a person in treatment for mental illness declines to take prescribed antipsychotic medication, that decision is an excellent predictor of (1) future dangerousness and (2) need for involuntary institutionalization. [\[FN154\]](#)

5. Mental illness can easily be identified by lay persons and matches up closely to popular media depictions. It comports with our common sense notion of crazy behavior. [\[FN155\]](#)

6. It is, and should be, socially acceptable to use pejorative labels to describe and single out people who are mentally ill; this singling out is not problematic in the way that the use of pejorative labels to describe women, blacks, Jews or gays and lesbians might be. [\[FN156\]](#)

7. Mentally ill individuals should be segregated in large, distant institutions because their presence threatens the economic and social stability of residential communities. [\[FN157\]](#)

*396 8. The mentally disabled person charged with crime is presumptively the most dangerous potential offender, as well as the most morally repugnant one. [\[FN158\]](#) The insanity defense is used frequently and improperly as a way for such individuals to beat the rap; [\[FN159\]](#) insanity tests are so lenient that virtually any mentally ill offender gets a free ticket through which to evade criminal and personal responsibility. [\[FN160\]](#) The insanity defense should be considered only when the mentally ill person demonstrates objective evidence of mental illness. [\[FN161\]](#)

9. Mentally disabled individuals simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint. [\[FN162\]](#)

10. If do-gooder, activist attorneys had not meddled in the lives of people with mental disabilities, such individuals would be where they belong (in institutions), and all of us would be better off. [\[FN163\]](#) In fact, there's no reason *397 for courts to involve themselves in all mental disability cases. [\[FN164\]](#)

While I have described these attitudes as public attitudes, it is clear that they pervade all components of the legal system as well. Judges "are embedded in the cultural presuppositions that engulf us all." [\[FN165\]](#) Their discomfort with social science, [\[FN166\]](#) or with any other system that may appear to challenge law's hegemony over society, makes them skeptical of new thinking and allows them to take deeper refuge in heuristic thinking and flawed, non-reflective "ordinary common sense," both of which reflect the myths and stereotypes of sanism. [\[FN167\]](#) Legislators respond, and, according to some, pander to constituent outcry. [\[FN168\]](#) Lawyers and jurors clearly are the public, and their views are often identical with those expressed in the myths. [\[FN169\]](#) Neither expert witness nor mental health professionals are immune from the myths' powers and sway. [\[FN170\]](#)

*398 Most astonishingly, even when we are informed that our views are biased and based upon myths, we simply demur, and say, in effect, "It doesn't matter. This is still the way I feel." [\[FN171\]](#) It is no wonder that these sanist

attitudes pervade statutes, court decisions, and lawyering practices and thus infect all aspects of mental disability law.

C. THE SANIST LEGAL SYSTEM

1. Sanist Legislators

Legislators have traditionally responded to socially-expressed fears by enacting laws that focus on the perceived differentness of people with mental disabilities in almost all aspects of social intercourse. In the community, mentally disabled individuals have been treated differently in matters of political participation, [\[FN172\]](#) interpersonal relationships, [\[FN173\]](#) economic freedom, [\[FN174\]](#) and other civil rights. [\[FN175\]](#) In the institutionalization process, mentally disabled individuals were regularly denied counsel, hearings, and the full panoply of due process rights that accompany other processes through which liberty could be lost, and were subject to commitment on a variety of paternalistic bases. [\[FN176\]](#)

Historically, once mentally disabled individuals were institutionalized, they were regularly deprived of virtually all civil rights, [\[FN177\]](#) most notably their right to autonomy in medication decisionmaking. [\[FN178\]](#) In the criminal justice system, the mentally disabled were doubly cursed as "mad" and "bad", [\[FN179\]](#) and were regularly consigned to lifetime commitments in maximum *399 security facilities. [\[FN180\]](#) These facilities were generally the worst available institutions in the state. [\[FN181\]](#)

I speak here in the mostly-past tense. After the civil rights revolution of the '50s and '60s reached people with mental disabilities in the 1970s, lawmakers belatedly began to recognize the grotesque conditions to which mentally ill patients were subjected in institutional settings. Following decisions such as *Wyatt v. Stickney*, [\[FN182\]](#) *O'Conn v. Donalson* [\[FN183\]](#) and *Jackson v. Indiana*, [\[FN184\]](#) most states narrowed civil commitment standards [\[FN185\]](#) and enacted Patients' Bills of Rights to provide some level of civil rights to those still institutionalized. [\[FN186\]](#) Federal legislation [\[FN187\]](#) mandated a modest level of access to counsel for those institutionalized, [\[FN188\]](#) and more recently, the Americans with Disabilities Act (ADA) forbade discrimination against mentally disabled persons in a wide variety of employment, educational, civic, medical and social settings. [\[FN189\]](#)

Yet, sanism still pervades the legislative process. Debates on charged issues such as former mental patient's right to purchase a firearm, or the appropriate substantive and procedural standards for the insanity defense are sanist texts; all the myths referred to earlier are repeated, reified and relegitimated. [\[FN190\]](#) Soon after states revised their civil commitment laws to comport with constitutional requirements, legislators indicated that the "pendulum had swung too far," [\[FN191\]](#) and new "reform" laws, once again widening the *400 commitment net, were passed. [\[FN192\]](#) When expert witnesses openly subverted stricter laws in light of their own self-referential concepts of morality, [\[FN193\]](#) the legislatures remained largely silent.

In the months after John Hinckley's insanity acquittal, Congress returned the federal insanity defense to a more restrictive version of the M'Naghten right-and-wrong test, one that was seen as outdated at the time of its original promulgation in 1843. [\[FN194\]](#) At the same time, states endorsed the guilty but mentally ill verdict, despite nearly unanimous criticism that the defense was little more than a meretricious sham. [\[FN195\]](#)

Reports of the substandard level of counsel available to patients facing institutionalization were met with thundering silence. [\[FN196\]](#) When patients were deinstitutionalized without access to community mental health services, legislators failed to rewrite funding statutes to ensure such patients had access to such services. [\[FN197\]](#) Even the ADA contains certain limitations specifically excluding individuals with certain psychological or physiological conditions from coverage. [\[FN198\]](#)

In short, just as Kimberlé Crenshaw found in her study of laws and stereotypes affecting racial attitudes and behaviors, [\[FN199\]](#) while much of the formal and symbolic subordination to which mentally disabled individuals have been subjected has been eliminated, the material subordination largely remains. The legislature serves as a mirror for the public, and, in doing so, perpetuates myth and stereotypes.

2. Sanist Courts

As I have previously argued, judges reflect and project the conventional morality of the community. Like the rest of society, judges take refuge in ***401** flawed "ordinary common sense," heuristic reasoning [\[FN200\]](#) and biased stereotypes to justify their sanist decisions. While Justice Holmes' infamous and florid language in *Buck v. Bell* [\[FN201\]](#) is rarely repeated, [\[FN202\]](#) judicial decisions in all areas of mental disability law continue to reflect and perpetuate sanist stereotypes. [\[FN203\]](#) The myths are cherished by trial judges, appellate judges, Supreme Court justices, and, especially, by the Chief Justice of the United States. [\[FN204\]](#)

Individuals labelled incompetent for one purpose are presumed incompetent for all other purposes, and many judges question whether it is even possible to distinguish between different kinds of incompetencies. [\[FN205\]](#) If a person subject to civil commitment refuses to take medication, a constitutional right in most jurisdictions, that refusal is often seen as a presumptive indicator of dangerous behavior and the need for institutionalization. [\[FN206\]](#) Adherence to involuntary civil commitment statutory criteria is subverted by fears that strict construction of those laws will lead inexorably to homelessness. [\[FN207\]](#) ***402** The minimalist "substantial professional judgment" test [\[FN208\]](#) is endorsed in a wide variety of institutional cases so that only the most arbitrary and baseless decisionmaking can be successfully challenged. [\[FN209\]](#) Even when court decisions reject sanist myths and stereotypes, the enforcement of such decisions is frequently only sporadic. [\[FN210\]](#)

Criminal trial process caselaw is riddled with sanist stereotypes and myths. [\[FN211\]](#) Examples include the following:

- reliance on a fixed vision of popular, concrete, visual images of "craziness"; [\[FN212\]](#)
- an obsessive fear of feigned mental states; [\[FN213\]](#)
- a presumed absolute linkage between mental illness and dangerousness; [\[FN214\]](#)
- sanctioning of the death penalty in the case of mentally retarded defendants, some defendants who are "substantially mentally impaired," or defendants who have been found guilty but mentally ill (GBMI); [\[FN215\]](#)
- *403** • the incessant confusion and conflation of substantive mental status tests; [\[FN216\]](#)
- the determination that an insanity acquittee's need for medication renders him not "fully recovered" so as to be eligible for outpatient care or conditional release; [\[FN217\]](#)
- the appropriateness of continuing an insanity acquittee's mental hospital confinement when he is no longer mentally ill but remains dangerous to others; [\[FN218\]](#)
- the use of language such as "lunatic" in recent published opinions; [\[FN219\]](#)
- the refusal in insanity cases to provide jury instructions that NGRI defendants face long-term post-acquittal commitment; [\[FN220\]](#) and
- the characterization of the allocation of treatment resources for GBMI defendants as "not . . . helpful" or a "waste." [\[FN221\]](#)

Perhaps just as troubling is judicial ignorance about laws that affect mentally disabled persons. A Louisiana commitment order was reversed where a trial court judge was unaware that state mental health advocacy services were available to provide representation to indigent individuals facing involuntary civil commitment. [\[FN222\]](#) A Texas study revealed that a significant number of judges did not know of a state statutory patient-psychotherapist privilege. [\[FN223\]](#) Other courts with little public attention, have regularly entered commitment orders without any precedent statutory authority. [\[FN224\]](#)

To be sure, not all judges write in this voice. Some nonsanist opinions such as Judge Johnson's *Wyatt v. Stickney*

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[\[FN225\]](#) decision are firmly rooted in a rights and empowerment model. [\[FN226\]](#) Others like Justice Blackmun's dissent in *Barefoot v. Estelle*, [\[FN227\]](#) Justice Stevens' partial dissent in *Washington v. Harper*, [\[FN228\]](#) and the New Jersey Supreme Court's opinion in *State v. Krol* [\[FN229\]](#) specifically rebut sanist myths. Still, others, such as Justice Stevens' dissent in *Pennhurst II*, [\[FN230\]](#) Justice Stevens' and Marshall's separate opinions in *Cleburne*, [\[FN231\]](#) and Judge Kaufman's use of a "Gulag archipelago" metaphor in a Second Circuit case involving a mentally disabled prisoner, [\[FN232\]](#) express eloquent outrage at institutional conditions flowing inevitably from our sanist society. Yet others, such Judge Brotman's class action opinion in *Rennie v. Klein*, [\[FN233\]](#) express true empathy and understanding about the plight of institutionalized mentally disabled persons. A handful of judges, of whom David Bazelon is the finest example, have spent their careers rooting out sanist myths and stereotypes, and raising the legal system's consciousness about sanism's impact on all of society. [\[FN234\]](#) Judges in less known cases have also shown real sensitivity to the underlying issues. [\[FN235\]](#)

These examples, however, are clearly the minority. Sanism regularly and relentlessly infects the courts in the same ways that it infects the public discourse.

3. Sanist Lawyers

Surveying the role of counsel in cases involving mentally disabled individuals a decade ago, Dr. Robert L. Sadoff and I observed:

Traditionally, sporadically-appointed counsel . . . were unwilling to pursue necessary investigations, lacked . . . expertise in mental health problems, and suffered from "rolelessness," stemming from near total capitulation to experts, hazily defined concepts of success/failure, inability to generate professional or personal interest in the patient's dilemma, and lack of a clear definition of the proper advocacy function. As a result, counsel . . . functioned "as no more than a clerk, ratifying the events that transpired, rather than influencing them." [\[FN236\]](#)

Commitment hearings were meaningless rituals, serving only to provide a false coating of respectability to illegitimate proceedings. [\[FN237\]](#) In one famous survey, representation by attorneys was so bad that a patient had a better [*405](#) chance to be released at a commitment hearing if he appeared pro se. [\[FN238\]](#) Merely educating lawyers about psychiatric techniques and psychological nomenclature did not materially improve lawyers' performances because attitudes did not change. [\[FN239\]](#) Counsel was especially substandard in cases involving mentally disabled criminal defendants. [\[FN240\]](#)

In the past ten years, the myth has developed that organized, specialized and aggressive counsel is now available to mentally disabled individuals in commitment, institutionalization and release matters. The availability of such counsel is largely illusory, and in many jurisdictions, the level of representation remains almost uniformly substandard. [\[FN241\]](#) This representation of mentally disabled individuals falls far short of even the most minimal model of "client-centered counseling." [\[FN242\]](#) What is worse, few courts seem even to notice. [\[FN243\]](#)

Counsel's failure here is inevitable, given the bar's abject disregard of both consumer groups (made up predominately of former recipients, voluntary and involuntary, of mental disability services) and mentally disabled individuals, many of whom have written carefully, thoughtfully and sensitively about these issues. [\[FN244\]](#) This inadequacy further reflects sanist practices on the parts of the lawyers representing mentally disabled individuals, as well as the political entities vested with the authority to hire such counsel. Although a handful of articulate scholars are beginning to take this issue seriously, [\[FN245\]](#) [*406](#) the questions raised here do not appear to be a priority agenda item for litigators or for most academics writing in this area. [\[FN246\]](#)

4. Sanist Scholars

The legal academy is not immune from sanist criticisms. While scholars writing from a wide variety of perspectives have begun to look at stories and personal narratives told by women, racial and sexual minorities and other disenfranchised individuals, the stories of mentally disabled individuals rarely are told in the pages of law reviews. [\[FN247\]](#) Traditional constitutional law courses rarely include the study of cases involving constitutional rights of mentally disabled individuals. [\[FN248\]](#)

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Articles discussing the "continuing revolution in . . . the structure of the curriculum" at American law schools do not even mention mental disability law. [\[FN249\]](#) Tenure-track professors know that articles about mental disability law topics do not augur a fast path to tenure. Most law reviews are mildly interested in, but far from eager to solicit and publish, mental disability law scholarship. [\[FN250\]](#) In short, the study and teaching of mental disability law are marginalized in the same way that mentally disabled individuals are marginalized. The news here is not that the academy is sanist (for why should professors be immune from the pernicious impact of bias and stereotypes), but that, with some major and important exceptions, [\[FN251\]](#) very little attention is being paid to mental disability law.

IV. SOME CONCLUDING RECOMMENDATIONS

First, the underlying issues must be discussed openly. Jan Costello's wonderful story about her exasperation at coming under attack at cocktail parties*[407](#) when other guests find out that, in her pre-professorial life, she was a patients' rights litigator [\[FN252\]](#) should serve as a prod to all of us to bear witness to sanist acts by colleagues, other professionals, the legal system, and the public at large. Her story and others like it should cause us to speak up -- at the faculty lunch table, on the train, at the bait and tackle shop -- wherever and whenever sanist stereotypes are employed. [\[FN253\]](#) Second, a new scholarship agenda that critically examines the questions in this paper must be developed. In it, we should explore the potential application of Martha Minow's social relations approach to a wide variety of sanist issues as well as the application of therapeutic jurisprudence constructs to these questions. [\[FN254\]](#) Third, we must listen to the voices of the institutionalized and others who have been involuntary consumers of mental health services, and their stories must be integrated into our consciousness. [\[FN255\]](#) We must include them in this dialogue that directly affects their lives. [\[FN256\]](#) We should consider the perspective of families of the mentally disabled and carefully weigh what role they should have in our attempting to create this new dialogue. [\[FN257\]](#)

Fourth, we must find ways to attitudinally educate counsel for people with mental disabilities so that representation becomes more than the hollow shell that it now all too frequently is. We must restructure the provision of counsel to insure that mentally disabled individuals are no longer represented by, in Judge Bazelon's famous phrase, "walking violations of the Sixth Amendment." [\[FN258\]](#) Finally we must educate judges, legislators and other policy makers about the roots of sanism, the malignancy of stereotypes and the need to emphatically consider alternative perspectives.

This prescriptive list is brief, but it is a necessary first step if we are to make any headway in fighting the "pathology of oppression" faced by all individuals seen as mentally disabled. [\[FN259\]](#)

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[\[FN1\]](#). See, e.g., [State v. Johnson](#), 527 P.2d 1310, 1312 (Wash. 1974) (defendant was a thirty-year-old college graduate; defense counsel asserted to trial court that he was "a highly intelligent boy"); Ira Mickenberg, [A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Succeeded In Its Own Right and Successfully Preserved the Insanity Defense](#), 55 U. CIN. L. REV. 943, 946-47 n.14 (1987) (quoting Stephen Roberts, High U.S. Officials Express Outrage, Asking for New Law and Insanity Plea, N.Y. TIMES, June 23, 1982, at B6, col. 3, which asserted that [Durham v. United States](#), 214 F.2d 862 (D.C. Cir. 1954), overruled, [United States v. Brawner](#), 471 F.2d 969, 981 (D.C. Cir. 1972), was the operative insanity test at the time of the Hinckley acquittal); Insanity Defense in Federal Courts: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess. at 151, 153 (1982)(statement of Cong. Lagomarsino; responsive comment by Cong. Conyers; same assertion as to operative test; also asserting that, under the Durham test, the insanity defense was expanded to include "heartburn and itching"); Michael L. Perlin, [Competency, Deinstitutionalization and Homelessness: A Story of Marginalization](#), 28 HOUS. L. REV. 63, 93 n.173 (1991) (citing examples of demands for residential exclusion).

[\[FN2\]](#). 274 U.S. 200, 207 (1927).

[\[FN3\]](#). Robertson, Letter to the Editor, 11 DEV. IN MENTAL HEALTH LAW 4 (Jan.-June 1991).

[FN4]. The classic study is GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1955).

[FN5]. The phrase "sanism" was, to the best of the author's knowledge, coined by Dr. Morton Birnbaum. See Morton Birnbaum, *The Right to Treatment: Some Comments on its Development*, in *MEDICAL, MORAL AND LEGAL ISSUES IN HEALTH CARE* 97, 106-07 (Frank Ayd, Jr. ed., 1974); [Koe v. Califano](#), 573 F.2d 761, 764 n.12 (2d Cir. 1978). Birnbaum's insight is discussed in Perlin, *supra* note 1, at 92-93. Dr. Birnbaum is universally regarded as having first developed and articulated the constitutional basis of the right to treatment doctrine for institutionalized mental patients.

I recognize that the use of the word "sanism" (based on the root "sane" or "sanity") is troubling from another perspective: the notion of "sanity" or "insanity" is a legal construct that has been rejected by psychiatrists, psychologists, and other behavioralists for about 150 years. Nevertheless it is used here, in part, to reflect the way that inaccurate, outdated and distorted language has confounded the underlying political and social issues, and to demonstrate, ironically, how ignorance continues to contribute to this bias. See Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960).

[FN6]. Birnbaum, *supra* note 5, at 107 (quoting Kennedy); See also *id.* at 106 ("It should be clearly understood that sanists are bigots.").

[FN7]. See, e.g., DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS 188-89* (1984) (discussing role of paradigmatically liberal Congresswoman Elizabeth Holtzman in attempting to block group homes for the mentally retarded from opening in her district).

Sanism is also demonstrated by those attempting to illuminate how "political correctness" can inappropriately stereotype other groups. Thus, in the course of Douglas Laycock's criticism of Wendy Brown's purportedly biased depictions of beer-drinking, men's magazine-reading, hunting club members, Laycock implicitly exempts "psychopaths" from his proscription: "There are indeed people in our society who have no more respect for humans than for animals. We call them psychopaths and when they act on their impulses and we catch them, we lock them up." Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONST'L COMMENTARY 395, 399 (1991) (criticizing Wendy Brown, [Guns, Cowboys, Philadelphia Mayors, and Civil Republicanism: On Sanford Levinson's The Embarrassing Second Amendment](#), 99 YALE L.J. 661, 666-67 (1989)).

On the impossibility of using "sociopathy" or "psychopathy" as a meaningful diagnostic category, see [Barefoot v. Estelle](#), 463 U.S. 880, 918-24 (1983) (Blackmun, J., dissenting); Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss?"*, 29 ARIZ. L. REV. 1, 24 n.215, 43-44 n.407 (1987). On the specific behavioral criteria that must be found to support a diagnosis of "anti-social personality disorder" (the diagnostic category closest to public concepts of sociopathy or psychopathy), see Emily Campbell, [The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?](#), 69 NEB. L. REV. 190, 198-206 (1990). See generally ROBERT D. HARE, *PSYCHOPATHY: THEORY AND RESEARCH* (1970); Robert D. Hare, *Comparison of Procedures for the Assessment of Psychopathy*, 53 J. CONSULTING & CLIN. PSYCHOLOGY 7 (1985); Robert D. Hare et al., *Male Psychopaths and Their Criminal Careers*, 56 J. CONSULTING & CLIN. PSYCHOL. 710 (1988); Phillip Raskin & Robert D. Hare, *Psychopathy and Detection of Deception in a Prison Population*, 15 PSYCHOPHYSIOLOGY 126 (1978). There is no database of studies that examines violent recidivism in such individuals. See also Grant J. Harris et al., *Psychopathy and Violent Recidivism*, 15 LAW & HUM. BEHAV. 625, 626 (1991).

[FN8]. Cf. J. Michael Bailey & Richard Pillard, *Are Some People Born Gay?*, N.Y. TIMES, Dec. 17, 1991, at A21 (arguing that homophobia is the only form of bigotry that can be so expressed).

[FN9]. I explain how these approaches have distorted our insanity defense policies in Michael L. Perlin, [Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence](#), 40 CASE W. RES. L. REV. 599 (1990) [[hereinafter Perlin, Myths], and Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990) [hereinafter Perlin, OCS].

[FN10]. See Alessandra Stanley, *Erotomania: A Rare Disorder Runs Riot -- In Men's Minds*, N.Y. TIMES, Nov. 10, 1991, at 2; Steve Wick, *Psychoanalysis Via TV: She's Not Crazy*, NEWSDAY, Oct. 16, 1991, at 21; Rupert Cornwell,

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Out of the West: Mysteries of Sex Too Much for America, *THE INDEPENDENT*, Oct. 6, 1991, at 11; To The Witness, *N.Y. TIMES*, Oct. 17, 1991, at A26 (editorial); Stanley Greenspan & Nancy Thorndike Greenspan, Lies, Delusions and Truths: The Abuse of Psychiatry in the Thomas Hearings, *WASH. POST*, Oct. 29, 1991, at 6; Peter Breggin, Abuse of Privilege, 7 *TIKKUN*, Jan.-Feb. 1992 at 17. The Hill/Thomas case is not the only recent example. See [Goldwater v. Ginsberg](#), 414 F.2d 324, 328-30 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) (on Barry Goldwater); Psychologists Cleared in Remarks on Dukakis, *WASH. TIMES*, Dec. 11, 1989, at A6; Anthony Flint, Boards Ends Inquiry of Psychologists, *BOSTON GLOBE*, Dec. 9, 1989, at 29 (on Kitty Dukakis).

[FN11]. See, e.g., Martha Minow, When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference, 22 *HARV. C.R.-C.L. L. REV.* 22 (1987); David L. Bazelon, Institutionalization, Deinstitutionalization, and the Adversary Process, 75 *COLUM. L. REV.* 897 (1975); [City of Cleburne v. Cleburne Living Center](#), 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (mentally retarded individuals subjected to "history of unfair and often grotesque mistreatment"); *Id.* at 462 (Marshall, J., concurring in part and dissenting in part) ("virulence and bigotry" of state-mandated segregation of the institutionalized mentally retarded "rivaled, and indeed paralleled, the worst excesses of Jim Crow").

By this article, I hope to join these voices. This paper is also partially located in the psychology of jurisprudence described in Gary B. Melton, [The Significance of Law in the Everyday Lives of Children and Families](#), 22 *GA. L. REV.* 851 (1988).

[FN12]. The question of whether "mental illness" exists as a discrete disability is bypassed here. See THOMAS SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961). For the purposes of this article, what is important is that individuals are treated differently because of others' perceptions that they are "different" based on their mental status. On the role of difference in this area in general, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

[FN13]. [United States v. Carolene Prod. Co.](#), 304 U.S. 144, 152 n.4 (1938).

[FN14]. Michael L. Perlin, Institutionalization and the Law, in *PSYCHIATRIC SERVICES IN INSTITUTIONAL SETTINGS* 75, 77 (American Hosp. Ass'n ed., 1978) [hereinafter Perlin, Institutionalization]. See generally Aviam Soifer, Listening and the Voiceless, 4 *MISS. C. L. REV.* 319 (1984) (reasoning that the legal system remains unaware of the particular concerns of people with mental disabilities). Carolene Products is discussed more broadly in Michael L. Perlin, State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?, 20 *LOY. L.A. L. REV.* 1249, 1250-51 (1987) [hereinafter Perlin, Last Frontier].

[FN15]. For one important example of this recognition, see Final Report: Task Force on Stigma and Discrimination (N.Y. State Office of Mental Health, Mar. 6, 1990) [hereinafter Stigma Task Force]. "In many ways, the mental health system itself is based on discriminatory premises which reinforce negative stereotypes, thus denying service recipients their basic civil and human rights." *Id.* at 10 (emphasis added).

[FN16]. Here, the article will consider the ethical issues involved in the representation of mentally disabled persons and discuss judicial attitudes toward vigorous advocacy on behalf of such persons. See e.g., 2 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § § 8.20-23, at 805-22 (1989) [hereinafter 2 PERLIN]; Michael L. Perlin & Robert Sadoff, Ethical Issues in the Representation of Individuals in the Commitment Process, 45 *LAW & CONTEMP. PROBS.* 161 (1982); Michael L. Perlin, Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases, 16 *LAW & HUM. BEHAV.* 39 (1992) [hereinafter Perlin, Fatal Assumption].

[FN17]. Cf., Perlin, Fatal Assumption, *supra* note 16, at 58-59 (calling for similar scholarly inquiries into the effectiveness and role of counsel in the representation of mentally disabled individuals, and relying upon Ingo Keilitz, Researching and Reforming the Insanity Defense, 39 *RUTGERS L. REV.* 47 (1987) and Henry J. Steadman, Mental Health Law and the Criminal Offender: Research Directions of the 1990's, 39 *RUTGERS L. REV.* 323 (1987)).

[FN18]. Henri Tajfel, Cognitive Aspects of Prejudice, 25 *J. SOC. ISSUES* 79, 81-82 (1969).

[FN19]. Gordon W. Allport, Attitudes, in *HANDBOOK OF SOCIAL PSYCHOLOGY*, 798, 809 (Carl Murchison ed., 1967).

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Although this article stresses the social psychological view of stereotyping, that is by no means the only helpful theoretical construct of prejudice. "Authorizationism" and the "authoritarian personality" are discussed in this context in Richard Delgado et al., [Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution](#), 1985 WIS. L. REV. 1359, 1375-77 (1985) [hereinafter Delgado, Fairness]; Richard Delgado, [Campus Antiracism Rules: Constitutional Narratives in Collision](#), 85 NW. U. L. REV. 343, 372 (1991). See generally T. W. Adorno et al., THE AUTHORITARIAN PERSONALITY (1964); Michael L. Perlin, Authoritarianism, The Mystique of Ronald Reagan and the Future of the Insanity Defense (unpublished manuscript on file with the author). On Allport's break with this school of thought, see Thomas F. Pettigrew, The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice, in READING ABOUT THE SOCIAL ANIMAL 283, 285 (Elliot Aronson ed., 1984). Regardless of the terminology or the academic discourse, "all subfields document the existence and prevalence of the same phenomenon." Theodore Eisenberg & Sheri Lynn Johnson, The [Effects of Intent: Do We Know How Legal Standards Work?](#), 76 CORNELL L. REV. 1151, 1161 n.70 (1991).

[FN20]. David L. Hamilton, Cognitive Biases in the Perception of Social Groups, in COGNITION AND SOCIAL BEHAVIOR, 81, 83 (John S. Carroll & John W. Payne eds., 1976); see also Michael Billig & Henri Tajfel, Social Categorization and Similarity in Intergroup Behavior, 3 EUR. J. SOC. PSYCHOL. 27 (1973); Willem Doise & Anne Sinclair, The Categorization Process in Intergroup Relations, 3 EUR. J. SOC. PSYCHOL. 145 (1973).

[FN21]. ALLPORT, supra note 4, at 20. On the significance of categorization in this context, see MINOW, supra note 12, at 21.

[FN22]. ALLPORT, supra note 4, at 9. For earlier formulations, see WALTER LIPPMAN, PUBLIC OPINION (1922); Daniel Katz & Kenneth Brady, Racial Stereotypes in One Hundred College Students, 28 J. ABNORMAL & SOC. PSYCHOL. 280 (1933).

[FN23]. See Ann E. Freedman, [Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School](#), 24 GA. L. REV. 849 (1990).

[FN24]. Arthur G. Miller, Historical and Contemporary Perspectives on Stereotyping, in IN THE EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING 1, 4 (Arthur G. Miller ed., 1982).

[FN25]. Id.; Gary Minda, [The Jurisprudential Movements of the 1980s](#), 50 OHIO ST. L.J. 599, 602 n.12 (1988); Anita Cava, [The Judicial Notice of Sexual Stereotyping](#), 43 ARK. L. REV. 27, 32 (1990); Joshua A. Fishman, An Examination of the Process and Function of Social Stereotyping, 43 J. SOC. PSYCH. 27, 31 (1956).

[FN26]. See Perlin, OCS, supra note 9, at 12-22; Michael J. Saks & Robert F. Kidd, Human Information Processing and Adjudication: Trial By Heuristics, 15 LAW & SOC'Y REV. 123 (1981).

[FN27]. ALLPORT, supra note 4, at 178, 191, 400-08; Pettigrew, supra note 19, at 286.

[FN28]. MINOW, supra note 12, at 179.

[FN29]. SANDER L. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS 240 (1985). On the role of the unconscious in the creation of stereotypes, see Sheri Lynn Johnson, [Unconscious Racism and the Criminal Law](#), 73 CORNELL L. REV. 1016, 1027-29 (1988); Charles R. Lawrence, [The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism](#), 39 STAN. L. REV. 317 (1986). On the role of the unconscious in the development of the criminal law, see Perlin, Myths, supra note 9; Michael L. Perlin, Mental Illness, Crime, and the Culture of Punishment (unpublished manuscript on file with author).

[FN30]. Martha Minow, [1984 Forward: Justice Engendered](#), 101 Harv. L. Rev. 10, 38 (1987); Gilman, supra note 29, at 12, 18-35.

[FN31]. Minow, supra note 30, at 51 n.201; Stigma Task Force, supra note 15, at 1-2.

[FN32]. Note, [Teaching Inequality: The Problem of Public School Tracking](#), 102 HARV. L. REV. 1318, 1333 (1989);

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Barry Glassner, Labeling Theory, in *THE SOCIOLOGY OF DEVIANCE* 71 (Michael Rosenberg et al. eds, 1982); LAMAR TAYLOR EMPEY, *AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION* 341-68 (1978); Lois A. Weithorn, [Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates](#), 40 *STAN. L. REV.* 773, 805-07, 820-26 (1988); Robert W. Sweet, [Deinstitutionalization of Status Offenders: In Perspective](#), 18 *PEPP. L. REV.* 389 (1991).

[FN33]. Delgado, Fairness, *supra* note 19, at 1381. "[W]hat enables people to reject members of other races is the supportive (unconscious and automatic) bias elicited by categorization." *Id.* (quoting Knud S. Larson, Social Categorization and Attitude Change, 111 *J. SOC. PSYCH.* 113, 114 (1980)).

[FN34]. C. Ronald Chester, Perceived Relative Deprivation as a Cause of Property Crime, 22 *CRIME & DELINQ.* 17, 22 (1976), cited in Christine L. Wilson, [Urban Homesteading: A Compromise Between Squatters and the Law](#), 35 *N.Y.L. SCH. L. REV.* 709, 714-15 n.38 (1990).

[FN35]. Kimberlé W. Crenshaw, [Race Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law](#), 101 *HARV. L. REV.* 1331, 1372 (1988); Peggy C. Davis, [Law as Microaggression](#), 98 *YALE L.J.* 1559, 1561 (1989); Sheri Lynn Johnson, [Black Innocence and the White Jury](#), 83 *MICH. L. REV.* 1611, 1645 (1985).

[FN36]. See generally STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 20-145 (1981) (study of the history of intelligence tests, personality tests, craniometry, and ability-testing); see also Herbert Hovenkamp, [Social Science and Segregation Before Brown](#), 1985 *DUKE L.J.* 624; Steven Hartwell, Understanding and Dealing with Deception in Legal Negotiation, 6 *OHIO ST. J. ON DISP. RESOL.* 171, 175 n.15 (1991); Nicole H. Rafter, The Social Construction of Crime and Crime Control, 27 *J. RES. CRIME & DELINQ.* 376, 379 (1990).

[FN37]. GILMAN, *supra* note 29, at 240. This "web" leads individuals to conflate negative stereotypes of different "others" in a way that further perpetuates exclusion discrimination. See Note, [Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance](#), 100 *HARV. L. REV.* 2035, 2051-52 (1987); Katherine T. Bartlett, [Feminist Legal Methods](#), 103 *HARV. L. REV.* 829, 847 (1990) (questioning whether some feminist writing attributes to all women "the interests and experiences of a particular group of women -- namely white, and otherwise privileged women").

[FN38]. See Crenshaw, *supra* note 35, at 1370-71 & 1370-71 nn.147-51; Johnson, *supra* note 35, at 1637 ("bias against black defendants is based upon subconscious stereotypes").

[FN39]. Thomas Ross, [The Rhetoric of Poverty: Their Immorality, Our Helplessness](#), 79 *GEO. L.J.* 1499, 1503 (1991); see also, Perlin, *supra* note 1, at 72 (discussing popular images of homeless persons as "lazy, degenerate bums," or "crazy, possibly dangerous people who ought to be put away"); see generally MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989); HARRELL R. RODGERS, *POVERTY AMID PLENTY: A POLITICAL AND ECONOMIC ANALYSIS* (1979).

[FN40]. Ross, *supra* note 39, at 1507.

[FN41]. [36 U.S. \(11 Pet.\) 102 \(1837\)](#).

[FN42]. [Id. at 142-43](#).

[FN43]. Ross, *supra* note 39, at 1509-13.

[FN44]. *Id.* at 1542; see also Minow, *supra* note 11, at 3-4:

Sometimes, classifications express and implement prejudice, [and] intolerance for difference. [W]hen we respond to persons' traits rather than their conduct, we may treat a given trait as a justification for excluding someone we think is "different." We feel no need for further justification: we attribute the consequences to the differences we see.

Id.

[FN45]. Lynne E. Henderson, [Legality and Empathy](#), 85 MICH. L. REV. 1574, 1579 (1987); see also [id. at 1580 n.29](#).

[FN46]. [Id. at 1581 n.35, 1584](#). On the way that much "common sensical" thinking is prereflective and self-referential, see Richard K. Sherwin, [Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions](#), 136 U. PA. L. REV. 729, 737 (1988); Perlin, OCS, *supra* note 9, at 22-38.

[FN47]. Henderson, *supra* note 45, at 1586.

[FN48]. Minow, *supra* note 30, at 51 n.201. On our faulty and unstated assumptions about difference, see MINOW, *supra* note 12, at 50-74 (difference is intrinsic, not a comparison; the norm need not be stated; the observer can see without a perspective; other perspectives are irrelevant; the status quo is natural, uncoerced, and good).

[FN49]. Stanley L. Brodsky et al., Jury Selection in Malpractice Suits: An Investigation of Community Attitudes Toward Malpractice and Physicians, 14 INT'L J.L. & PSYCHIATRY 215, 215 (1991).

[FN50]. The acts of judges, legislators, jurors, lawyers, and, in some cases, forensic expert witnesses are included. The role of those law enforcement agencies vested with specific power to protect the rights of institutionalized mentally disabled individuals is beyond the scope of this article. See Robert D. Dinerstein, The Absence of Justice, 63 NEB. L. REV. 680 (1984).

[FN51]. For important contemporary perspectives on *Caroline Products*, see Bruce R. Ackerman, [Beyond Caroline Products](#), 98 HARV. L. REV. 713 (1985); Robert M. Cover, [The Origins of Judicial Activism in the Protection of Minorities](#), 91 YALE L.J. 1287 (1982); Louis Lusky, [Footnote Redux: A Caroline Products Reminiscence](#), 82 COLUM. L. REV. 1093 (1982); J.M. Balkin, [The Footnote](#), 83 NW. U. L. REV. 275 (1989); Daniel A. Farber & Phillip P. Frickey, [Is Caroline Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation](#), 79 CAL. L. REV. 685 (1991); Bradley P. Hogin, Equal Protection, Democratic Theory, and the Case of the Poor, 21 RUTGERS L.J. 1 (1989). For a fascinating and relevant historical reading by the drafter of the footnote (Professor Louis Lusky, then Justice Stone's law clerk), see Louis Lusky, Minority Rights and the Public Interest, 52 YALE L.J. 1 (1942) (discussing how, in the context of the World War II war effort, discrimination against and stereotyping of racial and religious minorities was harmful to the national interest).

[FN52]. See MINOW, *supra* note 12, at 7-11. "Law has failed to resolve the meaning of equality for people defined as different by the society." *Id.* at 9.

[FN53]. Johnson, *supra* note 35, at 1650.

[FN54]. Hovencamp, *supra* note 36, at 624.

[FN55]. *Id.*

[FN56]. *Id.* at 624-25; see also Henderson, *supra* note 45, at 1593-1609; GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 (1971); GILBERT T. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW (1910); Harold H. Horowitz, Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing, 52 CAL. L. REV. 1 (1964).

[FN57]. J.A.C. Grant, Testimonial Exclusion Because of Race: A Chapter in the History of Intolerance in California, 17 UCLA L. REV. 192 (1969).

[FN58]. S.W. Tucker, Racial Discrimination in Jury Selection in Virginia, 52 VA. L. REV. 736 (1966).

[FN59]. Michael Rustad & Thomas Koenig, The Impact of History on Contemporary Prestige Images of Boston's Law Schools, 24 SUFFOLK U. L. REV. 621, 634-35 (1990).

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[FN60]. Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421 (1988).

[FN61]. See generally GILMAN, *supra* note 29; GOULD, *supra* note 36, at 30-72, 174-234. See also Lawrence, *supra* note 29, at 374, citing, J. BLUM, *PSEUDOSCIENCE AND MENTAL ABILITY* 30-72, 99-103 (1978); THOMAS GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 5, 62-63 (1963); RICHARD KLUGER, *SIMPLE JUSTICE* 84-86 (1976).

On the other hand, the question has been raised to whether racially-motivated fear may be seen as a legitimating defense in criminal law. See Michael A. Tesner, Note, [Racial Paranoia as a Defense to Crimes of Violence: An Emerging Theory of Self-Defense or Insanity?](#), 11 B.C. THIRD WORLD L.J. 307 (1991); cf. Stephen L. Carter, [When Victims Happen to be Black](#), 97 YALE L.J. 420 (1988). On the relationship between this sort of fear and media/entertainment stereotypes, see Allen S. Hammond, *Diversity and Equal Protection in the Marketplace: The Metro Broadcasting Case in Context*, 44 ARK. L. REV. 1063, 1086-87 (1991).

[FN62]. See Henderson, *supra* note 45, at 1607 (partially quoting KLUGER, *supra* note 61, at 595), discussing response of Supreme Court Justice Reed to [District of Columbia v. John R. Thompson Co.](#), 346 U.S. 100 (1953), which held segregation of restaurants in the District of Columbia unlawful. "[Mr. Justice Reed] had difficulty with [the John R. Thompson case] because he did not like the notion that 'a nigra [sic] can walk into the restaurant at the Mayflower Hotel and sit down . . . right next to Mrs. Reed.'"

On the specific roots of the linkage between sexual stereotypes and racial stereotypes, see GILMAN, *supra* note 29 at 109-27. On the prejudice associated with an equally odious stereotype (that non-whites possess an "offensive odor") and its place in the justification of segregationist practices, see [Stevens v. Dobs, Inc.](#), 483 F.2d 82, 82-88 (4th Cir. 1973) (minority individual seeking to rent apartment turned down purportedly because of "peculiar odor").

[FN63]. See Johnson, *supra* note 29, at 1017.

[FN64]. Crenshaw, *supra* note 35, at 1370-71.

[FN65]. [McClesky v. Kemp](#), 481 U.S. 279 (1987); Samuel Cameron, *Race and Prosecution Expenditures*, 19 REV. BLACK POL. ECON. 79 (1990); Tonya K. Hernandez, Note, [Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"](#), 99 YALE L.J. 845 (1990); Johnson, *supra* note 29.

[FN66]. Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991); Anthony Amsterdam, *Race and the Death Penalty*, 7 CRIM. JUST. ETHICS 2 (1988).

[FN67]. See, e.g., Ronald L. Poulson, *Mock Juror Attribution of Criminal Responsibility: Effects of Race and the Guilty But Mentally Ill (GBMI) Verdict Option*, 20 J. APPLIED SOC. PSYCHOL. 1596 (1990); Patricia Van Voorhis et al., *The Impact of Race and Gender on Criminal Officers' Orientation to the Integrated Environment*, 28 J. RES. CRIM. & DELINQ. 472 (1991).

[FN68]. See Robert J. Cottrol, *A Tale of Two Cultures: On Making the Proper Connections Between Law, Social History and the Political Economy of Despair*, 25 SAN DIEGO L. REV. 989 (1988); Crenshaw, *supra* note 35, at 1377. On the related question of racial discrimination as an animator of juror bias, see Johnson, *supra* note 35, at 1637. On the way that visibility can "lock" racial minorities to stereotypes, see [Otey v. Common Council of Milwaukee](#), 281 F. Supp. 264, 270 n.8 (E.D. Wis. 1968).

[FN69]. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COL. L. REV. 1061, 1125 (1991).

[FN70]. See, e.g., *GENDER DIFFERENCES: THEIR IMPACT ON PUBLIC POLICY* (Mary Lou Kendrigan ed., 1991); CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* (1989); Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOL. 1049 (1991); Susan M. Okin, *Justice and Gender*, 16 PHIL. & PUB. AFF. 42 (1987); Judith Resnik, [On the Bias Feminist Reconsideration of the Aspirations for Our Judges](#), 61 S. CAL. L. REV. 1877 (1988); Elizabeth M. Schneider, [The Dialectic of Rights and Politics' Perspectives From the Women's Movement](#), 61 N.Y.U. L. REV. 589 (1986).

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[FN71]. See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 99-100 (1976); Harry First, *Competition in the Legal Education Industry*, 53 N.Y.U. L. REV. 311 (1978) Rustad & Koenig, *supra* note 59, at 635. For case law examples, see [United States v. Lane](#), 883 F.2d 1484, 1499-1500 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990) (anti-Semitic comments by co-defendant); [State v. Millstein](#), 513 A.2d 1253, 1256- 58, cert. denied, 518 A.2d 72 (1986) (defendant not deprived of fair trial when prosecutor referred to arson as "Jewish lightning"); [State v. Levitt](#), 176 A.2d 465, 466-67 (1961) (anti-Semitic comment by jurors).

[FN72]. Barbara A. Perry, *The Life and Death of the "Catholic Seat" on the United States Supreme Court*, 6 J.L. & POL. 55 (1989) (discussing [Pierce v. Society of Sisters](#), 286 U.S. 510 (1925)); Dale E. Carpenter, Note, [Free Exercise and Dress Codes: Toward a More Consistent Protection of a Fundamental Right](#), 63 IND. L.J. 601, 617, n.112 (1988).

[FN73]. See, e.g., [Arneja v. Gildar](#), 541 A.2d 621, 622 (D.C. 1988) (anti-Asian comments by lawyer to adversary); Richard Delgado & Jean Stefancic, [Norms and Narratives: Can Judges Avoid Serious Moral Error?](#), 69 TEX. L. REV. 1929, 1943-47 (1991) (discussing Chinese exclusion cases and Japanese internment cases); Charles McClain, *Of Medicine, Race and American Law: The Bubonic Plague Outbreak of 1900*, 13 LAW & SOC. INQUIRY 447 (1988).

[FN74]. Yasuhide Kawashima, *Forced Conformity: Puritan Criminal Justice and Indians*, 25 KAN. L. REV. 361 (1977); Jill Norgren, [Protection of What Rights they Have: Original Principles of Federal Indian Law](#), 64 N.D. L. REV. 73 (1988); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249 (1987); Jeanette Wolfley, Jim Crow, Indian Style: The Disenfranchisement of Native Americans, 16 AM. INDIAN L. REV. 167 (1991).

[FN75]. David Bernstein, [From Penthouses to AIDS Hospices: Neighbors' Irrational Fears of Treatment Facilities for Contagious Diseases](#), 22 COLUM. HUM. RTS. L. REV. 1 (1990); John E. Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus And Its Impact on Minorities*, 1 YALE J.L. & HUMAN. 205 (1989); Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 CIV. LIBERTIES REV. 19 (1979); Arthur Leonard, *From Law: Homophobia, Hetrosexism and Judicial Decision Making*, 1 J. GAY & LESBIAN PSYCHOTHERAPY 65 (1991); Anne B. Goldstein, Comment, [History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick](#), 97 YALE L.J. 1073 (1988). Compare [State v. Dunne](#), 590 A.2d 1144 (1991) (defendant's request for nonjury trial premised on desire to present insanity defense involving "abnormal homosexual fantasies") with *Man On Crime Spree Kills Gay Man*, THE TRENTONIAN, Nov. 7, 1991, at 18 (defendant claimed he killed victim "because he hates homosexuals").

[FN76]. See [Chiari v. League City](#), 920 F.2d 311, 313 (5th Cir. 1991) (employee with Parkinson's Disease); see also David M. Engel & Alfred S. Konefsky, *Law Students With Disabilities: Removing Barriers in the Law School Community*, 38 BUFF. L. REV. 551 (1990); Martha T. McCluskey, [Rethinking Equality and Difference: Disability Discrimination in Public Transportation](#), 97 YALE L.J. 863 (1988).

[FN77]. William S. Geimer, [Juvenileness: A Single-Edged Constitutional Sword](#), 22 GA. L. REV. 949 (1988); Howard B. Gelt, *Psychological Considerations in Representing the Aged Client*, 17 ARIZ. L. REV. 293 (1974); Jessica D. Silver, [From Baby Doe to Grandpa Doc: The Impact of the Federal Age Discrimination Act on the "Hidden" Rationing of Medical Care](#), 37 CATH. U. L. REV. 993 (1988); Charles R. Tremper, [Respect for the Human Dignity of Minors: What the Constitution Requires](#), 39 SYRACUSE L. REV. 1293 (1988); Weithorn, *supra* note 32; cf. Suzanne Meeks, *Age Bias in The Decision-Making Behavior of Clinicians*, 21 PROF. PSYCHOL.: RES. & PRAC. 279 (1990).

[FN78]. For examples of "ismic" behavior targeting other groups, see, e.g., [Frazier v. Heebe](#), 788 F.2d 1049 (5th Cir. 1986), rev'd, 482 U.S. 641 (1987) (out-of-state attorneys); [Welsh v. Boy Scouts of America](#), 742 F. Supp. 1413, 1416 n.1 (N.D. Ill. 1990) (non-believers in Supreme Being); Johnson, *supra* note 35, at 1638; Note, *supra* note 32; Soifer, *supra* note 74, at 255, 264-65 (sailors); Ellen Wertleib, *Individuals With Disabilities in the Criminal Justice System: A Review of the Literature*, 18 CRIM. JUST. & BEHAV. 332, 333 (1991); Leslie A. Zebrowitz & Susan M. McDonald, *The Impact of Litigants' Baby-Facedness and Attractiveness on Adjudications in Small Claims Court*, 15 LAW & HUM. BEHAV. 603 (1991) (all dealing with physical unattractiveness). On the relationship between mental, disability and irrational self-perceptions of physical unattractiveness, see Alison Bass, *When the Looking Glass*

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Reflects a Distorted Self-Image: In Little Known Disorder, Patients See Themselves As Grotesquely Flawed, BOSTON GLOBE, Oct 21, 1991, at 27. See generally LAWRENCE H. FUCHS, THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE (1990).

[FN79]. See generally GILMAN, *supra* note 29; Lawrence, *supra* note 29, at 374.

[FN80]. But see Judy Scales-Trent, [Black Women and the Constitution: Finding Our Place, Asserting Our Rights](#), 24 HARV. C.R.-C.L. L. REV. 9, 42 (1989) (characterizing black movement and women's movement as "two distinct and often warring social movements"). Compare Martha Minow, [Breaking the Law: Lawyers and Clients in Struggles for Social Change](#), 52 U. PITT. L. REV. 723 (1991) (discussing Scales-Trent's insight):

Part of the problem, I believe, stems from the ways that the women's movement and the movement for racial justice have each framed goals of equal treatment in terms set by the very legal system that excludes them. The movement for racial justice looks to the treatment of white people and the women's movement looks to the treatment of men. This approach lends large significance to the categories already prevailing in legal rules, and makes departures from those categories seem problematic.

Id. at 731.

[FN81]. On how the ways that we look to poverty to help shape our stereotypes, see generally Ross, *supra* note 39.

[FN82]. See, e.g., Frances L. Ansley, [Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship](#), 74 CORNELL L. REV. 993 (1989); Regina Austin, [Sapphire Bound](#), 1989 WIS. L. REV. 539 (1989); Taunya L. Banks, [Women and AIDS -- Racism, Sexism, and Classism](#), 17 N.Y.U. REV. L. & SOC. CHANGE 351 (1989-90) (discussing race, class and sex); Gary A. Debele, The Due Process Revolution and the Juvenile Court: The Matter of Race in the Historical Evolution of a Doctrine, 5 LAW & INEQ. 513 (1987) (discussing race, age and class); Freedman, *supra* note 23 (discussing race, sex and sexual orientation); Dorothy E. Roberts, [Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy](#), 104 HARV. L. REV. 1419 (1991); Slavin, The Social World and Political Community of Head-Injured People: Difference by Gender and Family Life Cycle, in GENDER DIFFERENCES, *supra* note 70, at 189 (discussing physical disability and gender).

Compare MACKINNON, *supra* note 70, at 63-67 (discussing [Santa Clara Pueblo v. Martinez](#), 436 U.S. 49 (1978) (challenge to Pueblo tribal rule preventing women who marry out of the tribe from passing their rights in common land on to their children)). MacKinnon's reading is criticized as "solipsistic and even manipulative" in Kathryn Abrams, Feminist Lawyering and Legal Method, 16 LAW & SOC. INQUIRY 373, 386 (1991).

[FN83]. See *infra* notes 85-93 and accompanying text.

[FN84]. For a particularly vivid example of the use of gay stereotypes in the judicial decisionmaking process, see [Bowers v. Hardwick](#), 478 U.S. 186 (1986) (statute prohibiting consensual sodomy not unconstitutional). Compare [Steffan v. Cheney](#), 780 F. Supp. 1 (D.C. Cir. 1991) (rational basis exists to sustain policy excluding gays from armed services). See generally Bailey & Pillard, *supra* note 8 ("respectable people" can publicly express their homophobia).

[FN85]. See Perlin, *supra* note 1, at 66.

[FN86]. See David Luban, [Difference Made Legal: The Court and Dr. King](#), 87 MICH. L. REV. 2152, 2156 (1989) (considering impact of MARTIN LUTHER KING, WHY WE CAN'T WAIT 77, 79 (1963) (Dr. Martin Luther King's jail letter)).

[FN87]. See CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

[FN88]. See Perlin, Last Frontier, *supra* note 14, at 1256-59; Michael L. Perlin, Are Courts Competent to Decide Competency Questions?, Stripping the Facade from United States v. Charters, 38 KAN. L. REV. 957, 998-99 (1990); David Rudenstine, Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate Over Political Structure, 59 S. CAL. L. REV. 451 (1986); Suzanna Sherry, [Issue Manipulation by the Burger Court: Saving the Community From Itself](#), 70 MINN. L. REV. 611 (1986).

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[FN89]. See, e.g., NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT 44-57 (1986), reprinted in 10 MENT. & PHYS. DIS. L. RPTR. 409, 464-77 (1986); LINDSAY G. ARTHUR ET AL., INVOLUNTARY CIVIL COMMITMENT: A MANUAL FOR LAWYERS AND JUDGES 9-11 (1988).

[FN90]. See generally Henderson, *supra* note 45, at 1605-06. On the role of empathy in lawyers' interpersonal contacts with clients, DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

[FN91]. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that reality of private biases and the potential injury were impermissible considerations when divesting a mother of her child because of the mother's remarriage to a person of another race). The author contends that this ban has been read to include the deinstitutionalization of the homeless in Perlin, *supra* note 1, at 138-42; see also James Wilson, *Reconstructing Section Five of the Fourteenth Amendment to Assist Impoverished Children*, 38 CLEV. ST. L. REV. 391, 438 (1990) (courts have a duty to root out unconstitutional prejudices).

[FN92]. Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 341 (1987); Perlin, *Myths*, *supra* note 9, at 704-06; Perlin, OCS, *supra* note 9, at 31-36.

[FN93]. Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 118-20 (1988); Perlin, OCS, *supra* note 9, at 59.

[FN94]. On judicial bias in criminal cases in general, see Judge Hugh W. Silverman, *Judicial Bias*, 33 CRIM. L.Q. 486 (1990).

[FN95]. See Peter J. Hammer, Note, *Free Speech and the "Acid Bath": An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment*, 87 MICH. L. REV. 499, 505 (1988). See also Charles A. Johnson et al., *The Salience of Judicial Candidates and Elections*, 59 SOC. SCI. Q. 371 (1978); Joel B. Grossman, *Social Backgrounds and Judicial Decisions: Notes for A Theory*, 29 J. POL. 334 (1967). On the way judges are "deliberately removed from society," and thus more likely to be out of touch with practical concerns, see David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1707 (1991).

[FN96]. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970) ("Trial judges . . . are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book."); see also Tracey Maclin, *Constructing Fourth Amendment Principles From the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669 (1988).

[FN97]. Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797 (1990).

[FN98]. Henderson, *supra* note 45, at 1638-50 (discussing Bowers), "[Bowers] bristles with emotion, to be sure, but it is the emotion of hate, not that of empathy." *Id.* at 1638. See also Kathryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 465 (1988) (Judges "rely on their own views of what is or should be the prevailing morality."), discussing *L. v. D.*, 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (denying lesbian mother custody).

[FN99]. Delgado & Stefancic, *supra* note 73, at 1929-34.

[FN100]. MINOW, *supra* note 12, at 69-70; Bartlett, *supra* note 37, at 855 n.99 (discussing Minow's work); see, e.g., *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting). "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live." *Id.*

[FN101]. Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1212 (1990); Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AMER. U. L. REV. 7 (1991); see also Melton, *supra* note 11, at 853; Gary B. Melton, *Law, Science, and Humanity: The Normative*

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Foundation of Social Science in Law, 14 LAW & HUM. BEHAV. 315 (1990).

[FN102]. For an exhaustive analysis of race bias, see Judge A. Leon Higginbotham, [Racism in American and South African Courts: Similarities and Differences](#), 65 N.Y.U. L. REV. 479 (1990); see also *In re Stevens*, 31 Cal.3d 403, 645 P.2d 99 (1982) (judge used phrases "nigger," "coon," and "jungle bunny"); *Peek v. State*, 488 So. 2d 52 (Fla. 1986) (judge in capital punishment case called black defendant's family "niggers"); *Matter of Pearson*, 386 S.E.2d 249 (S.C. 1989) (judge called individual a "nigger lover"). The implications of *Peek* (and the state Supreme Court's tepid response) are discussed in Radelet & Pierce, *supra* note 66, at 32.

[FN103]. Patricia A. Cain, [Good and Bad Bias: A Comment on Feminist Theory and Judging](#), 61 S. CAL. L. REV. 1945, 1953 (1988); see generally Lawrence, *supra* note 29. On the role of racial bias in judicial qualification matters, see John Leubsdorf, [Theories of Judging and Judicial Disqualification](#), 62 N.Y.U. L. REV. 237, 259-60 (1987).

[FN104]. Judge Patricia M. Wald, [Disembodied Voices--An Appellate Judge's Response](#), 66 TEX. L. REV. 623, 627 (1988).

[FN105]. See, e.g., 1 PERLIN, *supra* note 16, § 1.03, at 5-15; Perlin, *Institutionalization*, *supra* note 14, at 1249-54 (discussing how civil rights cases led to first judicial reform of mental disability law system).

[FN106]. See, e.g., *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982); *United States v. Lavallie*, 666 F.2d 1217 (8th Cir. 1981) (anti-Indian prejudice); *High Tech Gays v. Defense Indus. Security Clearance Off.*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd in part*, vacated in part, 895 F.2d 563 (9th Cir. 1990); *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991) (homophobia); *United States v. Weiss*, 930 F.2d 185, 200 (2d Cir. 1991) (Restani, J., dissenting), cert. denied, 112 S. Ct. 133 (1991) (anti-Semitism).

[FN107]. Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 972, 973- 75 (1991).

[FN108]. Institutionalized mentally disabled individuals remain largely invisible to the rest of society. They have little or no political leverage, and rarely have powerful political allies or interest groups to take up their cause. See, e.g., Anthony Lewis, [Enforcing Our Rights](#), 50 GEO. WASH. L. REV. 414, 420 (1982); see generally 1 PERLIN, *supra* note 16, § 1.03, at 7; Michael L. Perlin, *Rights of Ex-Patients in the Community: The Next Frontier?*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 33, 34 (1980).

On rights as empowerment for both the institutionalized mentally disabled and oppressed racial minorities, see Patricia S. Williams, *Alchemical Notes: Restructuring Ideals from Deconstructed Rights*, HARV. C.R.-C.L. L. REV. 401, 416 (1987):

[F]or slaves, sharecroppers, prisoners and mental patients . . . the experience of poverty and need is fraught with the realization that they are dependent "on the uncertain and fitful protection of a world conscience" For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one's status from human body to social being]

Id. See generally Sheri Lynn Johnson, *Confessions, Criminals and Community*, 26 HARV. C.R.-C.L. L. REV. 328, 357-58 (1991) (discussing Professor Williams' insights).

[FN109]. See, e.g., JOHN BIGGS, *THE GUILTY MIND: PSYCHIATRY & THE LAW OF MEDICINE* 26 (1955); WALTER BROMBERG, *FROM SHAMAN TO PSYCHOTHERAPIST: A HISTORY OF THE TREATMENT OF MENTAL ILLNESS* 63-64 (1975 ed.); MICHAEL MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 64-65 (1984); JUDITH NEAMAN, *SUGGESTION OF THE DEVIL: THE ORIGINS OF MADNESS* 31, 50, 144 (Anchor ed., 1975). See generally Perlin, *supra* note 29, manuscript at 29-51. On the similar ways that mental retardation has been seen as God's means of punishing sin or as a manifestation of evil, see WOLF WOLFENBERGER, *NORMALIZATION: THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES* 12-25 (1972); Marie Appelby, [The Mentally Retarded: The Need for Intermediate Scrutiny](#), 7 B.C. THIRD WORLD L.J. 109, 115 (1987).

[FN110]. GEORGE ROSEN, *MADNESS IN SOCIETY: CHAPTERS IN THE HISTORICAL SOCIOLOGY OF*

MENTAL ILLNESS 12, 33 (1969 ed.).

[FN111]. MICHAEL FOUCAULT, MADNESS AND CIVILIZATION 15 (1965).

[FN112]. Andrew T. Scull, Moral Treatment Reconsidered: Some Sociological Comments on an Episode in the History of British Psychiatry, in MADHOUSES, MAD DOCTORS, AND MADMEN: THE SOCIAL HISTORY OF PSYCHIATRY IN THE VICTORIAN ERA 105, 108-09 (Andrew T. Scull ed., 1981).

[FN113]. GILMAN, supra note 29, at 23-24. On the false stereotype of the mentally ill person as a sexual molester of small children, see [People v. McAlpin, 812 P.2d 563, 570-71 \(1991\)](#).

[FN114]. CHRISTOPHER HARDING & RICHARD W. IRELAND, PUNISHMENT: RHETORIC, RULE AND PRACTICE 105 (1989).

[FN115]. GILMAN, supra note 29, at 130.

[FN116]. See Perlin, supra note 29, manuscript at 91 n.278 (citing sources). On the way that our perceptions of individuals as members of outsider groups affects criminal justice policies, see Jonathan Kelley & Joan Braithwhite, Public Opinion and the Death Penalty in Australia, 7 JUST. Q. 529 (1990).

[FN117]. Perlin, supra note 1, at 111-12; Perlin, Myths, supra note 9, at 618-23, 706-31. See generally Stigma Task Force, supra note 14. On the cultural grounding of stereotypes of "mentally healthy women," see Denise LeBoeuf, Note, [Psychiatric Malpractice: Exploitation of Women Patients](#), 11 HARV. WOMEN'S L.J. 83, 86 (1988). On the way that "insanity has served as a metaphor for our nation's fears of its own craziness," see Herbert A. Eastman, Metaphor and Madness, Law and Liberty, 40 DEPAUL L. REV. 281, 283 (1991).

[FN118]. Three days prior to the presentation of the paper upon which this article is based, my hometown newspaper reported a hospital suicide with this headline: Jailed Psycho Kills Self With Pen Through Eye, TRENTONIAN, Jan. 3, 1992, at 4. On the media distortions in this context in general, see Mark S. Kaufman, ["Crazy" Until Proven Innocent: Civil Commitment of the Mentally Ill Homeless](#), 19 COLUM. HUM. RTS. L. REV. 333, 363 (1988); David A. Snow et al., The Myth of Pervasive Mental Illness Among the Homeless, 33 SOC. PROBS. 407, 407-08 (1986). See generally Henry Steadman & Joseph Cocozza, Selective Reporting and the Public's Misconception of the Criminally Insane, 41 PUB. OPIN. Q. 523, 531 (1971-78).

[FN119]. 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 (1992); Perlin, OCS, supra note 9, at 12-28; Saks & Kidd, supra note 26; Sherwin, supra note 46, at 737-39. Parallels are found in all aspects of the treatment of people labelled mentally retarded. See, e.g., James Ellis, Mental Retardation at the Close of the 20th Century: A New Realism, 28 MENTAL RETARDATION 263 (1990); Robert Hayman, Jr., [Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent](#), 103 Harv. L. Rev. 1201 (1990); Minow, supra note 12, at 110-39. James T. Hogan, Note, Community Housing Rights for the Mentally Retarded, 3 Det. Coll. L. Rev. 869, 872-74 (1987).

[FN120]. GILMAN, supra note 29, at 24-25.

[FN121]. Id. at 142, 148. On the perceived link between mental retardation and miscegenation, see James W. Ellis & Ruth A. Luckasson, [Mentally Retarded Criminal Defendants](#), 53 GEO. WASH. L. REV. 414, 419 n.23 (1985).

[FN122]. GILMAN, supra note 29, at 162. On the important question of cultural variance in the diagnosis and treatment of mental illness, see Horacio Fabrega, Jr., An Ethnomedical Perspective of Anglo-American Psychiatry, 146 AM. J. PSYCHIATRY 588 (1989); George S. Howard, Culture Tales: A Narrative Approach to Thinking, Cross-Cultural Psychology, and Psychotherapy, 46 AM. PSYCHOL. 187, 194-95 (1991); Lloyd H. Rogler, The Meaning of Culturally Sensitive Research in Mental Health, 146 AM. J. PSYCHIATRY 296 (1989). On the relationship between cultural bias and mistreatment of the mentally disabled, see Hayman, supra note 118, at 1228.

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[FN123]. See Lawrence, *supra* note 29, at 373-74. On the explicit link between governmental-sanctioned racial and disability-based segregation, see Thomas M. Cook, [The Americans With Disabilities Act: The Move to Integration](#), 64 *TEMP. L. REV.* 393, 399-407 (1991).

[FN124]. See, e.g., Martha Livingston Bruce et al., Poverty and Psychiatric Status, 48 *ARCH. GEN. PSYCHIATRY* 470 (1991) (relationship between psychiatric disorder and social class); Kirk Heilbrun et al., Comparing Females Acquitted by Reason of Insanity, Convicted, and Civilly Committed in Florida, 1977-1984, 12 *LAW & HUM. BEHAV.* 295 (1988) (relationship between gender, age and race and insanity defense success); Robert Weinstock et al., Psychiatric Patients and AIDS: The Forensic Clinician Perspective, 35 *J. FORENSIC SCI.* 644 (1990) (whether psychiatric hospitals should be allowed to refuse admissions to persons with AIDS).

[FN125]. [Debra P. v. Turlington](#), 730 F.2d 1405, 1414 (11th Cir. 1984).

[FN126]. Kimberly Waldron, Note, [Postpartum Psychosis as an Insanity Defense: Underneath a Controversial Defense Lies a Garden Variety Insanity Defense Complicated By Unique Circumstances For Recognizing Culpability](#), 21 *RUTGERS L.J.* 669, 680-81 (1990). On the relationship between stereotypes of the "mad" and the "bad" infanticidal woman, see Anih Wilczynski, Images of Women Who Kill Their Infants: The Mad and the Bad, 2 *WOMEN & CRIM. JUST.* 71 (1991).

[FN127]. Sarah Rosenfeld, Sex Roles and Societal Reactions to Mental Illness: The Labeling of "Deviant" Behavior, 23 *J. HEALTH & SOC. BEHAV.* 18 (1982) (in commitment context, both men and women receive more severe societal reaction when their deviation is inconsistent with traditional sex role norms); Sarah Rosenfeld, Race Differences in Involuntary Hospitalization: Psychiatric vs. Labeling Perspectives, 25 *J. HEALTH & SOC. BEHAV.* 14 (1982) (more coercive conditions under which nonwhites enter treatment accounts for greater involuntary hospitalization rate). On the relationship between institutionalization and women's social and political status, see Hendrick Hartog, Mrs. Packard on Dependence, 1 *YALE J.L. & HUMAN.* 79, 92 (1988).

[FN128]. [City of Cleburne v. Cleburne Living Center](#), 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part & dissenting in part).

[FN129]. Michelle Fine & Adrienne Asch, Disability Beyond Stigma: Social Interaction, Discrimination and Activism, 44 *J. SOC. ISSUES* 3 (1988); Gary B. Melton & Ellen G. Garrison, Fear, Prejudice and Neglect: Discrimination Against Mentally Disabled Persons, 42 *AM. PSYCHOL.* 1007, 1007 (1987); Okolo & Guskin, Community Attitudes Toward Community Placement of Mentally Retarded Persons, in 12 *INT'L REV. RES. IN MENTAL RETARD.* 26 (N.R. Ellis & N.W. Bray eds., 1984); Stewart Page, Psychiatric Stigma: Two Studies of Behavior When the Chips Are Down, 2 *CANAD. J. COMMUN. MENTAL HEALTH* 13 (1983).

[FN130]. See generally Perlin, *supra* note 1 (addressing the misconception of homeless suffering from mental illness); Special Issue: Homelessness, 46 *AM. PSYCHOL.* 1108-1252 (1991) (collection of articles addressing the social problem of homelessness).

[FN131]. MINOW, *supra* note 12, at 107.

[FN132]. See Robert A. Burt, [Constitutional Law and the Teaching of the Parables](#), 93 *YALE L.J.* 455, 462 (1984) (whether we "are inescapably obliged to regard retarded people as members of their community" is an issue raised by cases such as [Youngberg v. Romeo](#), 457 U.S. 307 (1982) and [Pennhurst State Sch. & Hosp. v. Halderman](#), 451 U.S. 1 (1981)).

[FN133]. There is now a significant body of literature by ex-patients. See, e.g., JUDI CHAMBERLIN, ON OUR OWN: PATIENT-CONTROLLED ALTERNATIVES TO THE MENTAL HEALTH SYSTEM (1978). In addition, there is some modest recognition of the role of ex-patients' groups in law reform litigation and political reform activity. See Neal Milner, The Right to Refuse Treatment: Four Case Studies of Legal Mobilization, 21 *LAW & SOC'Y REV.* 447 (1987) [hereinafter Milner I]; Neal Milner, The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups, 8 *LAW & POL'Y* 105 (1986) [hereinafter Milner II]. Yet, it does not appear that these stories have had a major impact on the consciousness of the general public. On the other hand, the recent passage

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of the Americans With Disabilities Act, [42 U.S.C.A. § § 12101-12213 \(West Supp. 1992\)](#), may lead to greater public awareness of the "stories" of physically disabled individuals. See, e.g., Birnbaum, No Voice for the Disabled, VILLAGE VOICE, Nov. 5, 1991 (letter to the editor). "The Voice, while standing firm behind most minorities and oppressed groups, seems to ignore the political, social, and civil issues concerning persons with disabilities." Id. at 5.

[FN134]. On the importance of congressional "black seats," see Julius L. Crockett, [Special Report: What Color Is the Constitution? The Summer of '64, When Young American Men and Women Fought and Smiled, Struggled and Died, and Won, in America, 15 HUM. RTS. 14, 15 \(1988\)](#). In New York City, an openly homosexual man was elected in a 1991 city council election. The gay council member, Tom Duane, represents Manhattan's Third District which includes portions of the Greenwich Village, Chelsea and Soho neighborhoods. See Michael Spencer, Gay Candidates Face Off in Single-Issue N.Y. Race, WASH. POST, Sept. 11, 1991. On the increase in openly gay candidates in state and local political elections, see Lisa Leff, Gay Cause Is Gaining Attention, WASH. POST, Aug. 26, 1986.

[FN135]. See 2 PERLIN, supra note 16, § 7.21, at 655 n.514. Over thirty years ago, researchers discovered that mental patients were no more "illogical, inconsistent, or unprepared" to vote than a similar sample of individuals who had never been institutionalized. See Marguerite Hertz et al., Mental Patients and Civil Rights: A Study of Opinions of Mental Patients on Social and Political Issues, 2 J. HEALTH & HUM. BEHAV. 251, 258 (1961).

[FN136]. See generally Hayman, supra note 119, and compare id. at 1221 (no reason to believe that mentally retarded parents are unable to meet the emotional needs of their children).

[FN137]. See, e.g., Roy P. van den Brink-Budgen, Liberal Dialogue, Citizenship and Mentally Handicapped Persons, 34 POLIT. STUD. 374 (1980); McCluskey, supra note 76, at 863. For comprehensive surveys of the history of legislation that has excluded the mentally disabled from the political process, see BRUCE D. SALES ET AL., MENTAL DISABILITY AND THE LAW (3d ed. 1985); SAMUEL J. BRAKEL ET AL., MENTAL DISABILITY AND THE LAW (3d ed. 1985) [hereinafter BRAKEL].

[FN138]. See generally Perlin & Sadoff, supra note 16; Perlin, Fatal Assumptions, supra note 16; Pinsley, A Wild Week at Bellevue Murder Trial, MANHATTAN LAWYER, Oct. 31-Nov 6, 1989, at 1 (criminal defense lawyer did not know if his client had been medicated for a court appearance; "I don't talk to [[[the defendant]]," the lawyer said. "We got enough psychotics in this courtroom.").

[FN139]. Of course, other mentally disabled individuals, the deinstitutionalized homeless mentally ill, are all too visible to many citizens. See Perlin, supra note 1, at 106-08.

[FN140]. Within the advocacy community, it is well known that certain disabled groups wish to distance themselves from others (i.e., groups advocating for developmentally disabled individuals emphasize that their clients are not mentally ill (thus avoiding the dangerousness stereotype); those advocating for mentally ill persons often focus on their clients' intellectual capacities and potential (thus separating themselves from mentally retarded individuals)). One of the most troubling moments of my career as a public interest litigator came when I suggested to a representative of an advocacy group seeking to ameliorate conditions of institutionalized autistic children that he seek out a certain state senator to introduce legislation on behalf of his clientele. "Not Senator X," he quickly replied, "He's the captive of the retardates! (sic)." Compare [Seide v. Prevost, 536 F. Supp. 1121 \(S.D.N.Y. 1982\)](#) (action by Board of Visitors of children's psychiatric hospital to enjoin opening of homeless shelter).

[FN141]. See, e.g., Steven E. Hyler et al., Homicidal Maniacs and Narcissistic Parasites: Stigmatization of Mentally Ill Persons in the Movies, 42 HOSP. & COMMUN. PSYCHIATRY 1044 (1991); Fred S. Berlin & Martin H. Malin, Media Distortion of the Public's Perception of Recidivism and Psychiatric Rehabilitation, 148 AM. J. PSYCHIATRY 1572 (1991); see also Gregory Leong et al., Dangerous Mentally Disordered Criminals: Unresolvable Societal Fear?, 36 J. FORENS. SCI. 210, 210 (1991) (caricature of "psychotic criminal . . . strikes terror in the mind of the common person"). See generally Douglas Biklen, The Culture of Policy: Disability Images and Their Analogues in Public Policy, 15 POL. STUD. J. 515 (1987).

[FN142]. Compare [Doe v. Colautti, 592 F.2d 704, 711 \(3d Cir. 1979\)](#). "Although the mentally ill have been the victims of stereotypes, the disabilities imposed on them have often reflected that many of the mentally ill do have

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reduced ability for personal relations, for economic activity, and for political choice." [Id. at 711](#). On the fallacy of using the "abnormal persons" approach in this context, see MINOW, *supra* note 12, at 105-07 (discussing majority opinion in *City of Cleburne*), and *id.* at 130, "abnormal persons are remnants or re-creations of a feudal hierarchical order."

[FN143]. GILMAN, *supra* note 29, at 240; see Stigma Task Force, *supra* note 15, at 1:

Individuals experience stigma and discrimination after they have been labelled "mentally ill" by society or by the mental health system. . . . Once people are labelled mentally ill, regardless of the precipitating cause, they are categorized and treated as members of a single group who are assumed implicitly to be more alike than different

The stereotyping and the subsequent response to people with mental illness or psychiatric disabilities are based on unexamined assumptions. These assumptions are negative and affect our social response.

[FN144]. See Perlin, *Myths*, *supra* note 9, at 721-24; see also Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zinermon v. Burch*, 14 INT'L J.L. & PSYCHIATRY 169 (1991), reprinted in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 83, 102 (David Wexler & Bruce J. Winick eds., 1991) [hereinafter *ESSAYS*] ("The difference between "crazy" and normal people is not as great as commonly is supposed."). For a stark example of difference in the way mentally disabled persons are treated, even after death, see, e.g., Joan Gallen, *Mental Patients Finally Put to Rest With Dignity*, THE NEWS TRIBUNE (Woodbridge, N.J.) Oct. 10, 1991 (nearly 1000 patients buried on New Jersey state hospital grounds in unmarked graves); David Corcoran, *Graves Without Names for the Forgotten Mentally Retarded*, N.Y. TIMES, Dec. 9, 1991, at B6 (850 residents of New York state school for mentally retarded similarly buried).

[FN145]. See generally GILMAN, *supra* note 29. This description is borrowed, almost verbatim, from Professor Peggy Davis's quotation of Gordon Allport's, see *supra* note 4, at 196-98, description of black stereotypes, see Davis, *supra* note 35, at 1561, and from Thomas Ross's characterization of public attitudes toward the poor, see Ross, *supra* note 39, at 1503, 1507. See also Ross, *supra* note 39, at 1516: "The Justices of the contemporary Court have resurrected the rhetorical theme of the moral weakness of the poor. They have relied on the initial step of separating the poor from us and labeling them as deviant. And the plea of judicial helplessness has also returned to prominence."

On the way that "positive" images of the mentally retarded (such as amiability) are consistent with stereotypical perceptions of ethnic minorities and women, see Robert F. Williams, *Perceptions of Mentally Retarded Persons*, 21 EDUC. & TRAINING OF THE MENTALLY RETARDED 13, 18 (1986); cf. McCluskey, *supra* note 76, at 870 (discussing how seemingly-positive images may express harmful stereotypes in context of disabled children and telethon broadcasts); see also Elizabeth R. OuYang, [Women with Disabilities in the Work Force: Outlook for the 1990's](#), 13 HARV. WOMEN'S L.J. 13, 18 (1990).

[FN146]. Susan Stefan, [Whose Egg Is It Anyway? Reproductive Rights of Incarcerated Institutionalized and Incompetent Women](#), 13 NOVA L. REV. 405, 448- 49 (1989), discussing *In re MacDonald*, 201 N.W.2d 447, 450 (Iowa 1972). See generally Hayman, *supra* note 119.

[FN147]. [Stevens v. Dobs, Inc.](#) 483 F.2d 82 (4th Cir. 1973), discussed *supra* note 62. Compare, GERALD PETIEVICH, *PARAMOUR* 260 (1991) (describing St. Elizabeth's Hospital in Washington, D.C.):

Inside, Powers was met by the strong warm odor of mental illness. Though there was no way to quantify or determine whether such a smell actually existed, among themselves all Secret Service Agents acknowledged it. Over the years, when investigating persons making threats against the life of the President, Powers had searched hundreds of . . . rooms . . . looking for . . . evidence. Though some places were more pungent than others, each had at least a hint of the scent . . . best described . . . as a combination of nervous perspiration and dead human skin: the odor of schizophrenia.

Id.

[FN148]. Steven Schwartz, [Damage Actions as a Strategy for Enhancing the Quality of Care of Persons With Mental Disabilities](#), 17 N.Y.U. REV. L. & SOC. CHANGE 651, 681 (1989-90). On the artificiality of the distinction between mentally ill and medically ill individuals, see Winick, in *ESSAYS*, *supra* note 144, at 102 (criticizing [Zinermon v. Burch](#), 494 U.S. 113, 133 n.18 (1990)).

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[FN149]. See Stephen Rachlin, *The Limits of Parens Patriae*, in *FOR THEIR OWN GOOD? ESSAYS ON COERCIVE KINDNESS* 1, 5 (Aaron Rosenblatt ed., 1988); Eric Doherty, *Misconceptions About Mentally Ill Patients*, 146 AM. J. PSYCHIATRY 131 (1989) (letter to editor)(discussing the perception of dangerousness of persons with mental disabilities); Hayman, *supra* note 119, at 1220 (research shows no correlation between mental retardation and violence); *Matter of M.M.B.*, 431 N.E.2d 329 (1988) (text available on WESTLAW) ("It is difficult to separate evidence of mental illness from evidence of dangerousness, because all persons have their own concepts of the effects of mental illness."). Compare Hayman, *supra* note 118, at 1220 (research shows no correlation between mental retardation and violence); Perlin, *Myths*, *supra* note 9, at 693-96; Linda Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 AM. J. PSYCHIATRY 593, 597-98 (1982) ("[T]he stereotype of the mentally ill as dangerous is not substantiated by our data.").

[FN150]. Compare JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 60 (1981) (psychiatrists wrong two out of three times); Bruce Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974)(questioning the reliability of psychiatric evaluations); Perlin, *Myths*, *supra* note 9, at 693-96.

[FN151]. Early insanity tests established a mental age of seven years as the baseline for criminal responsibility. See 6 & 7 Edw. II 109 (Selden Society 1313-14); see also Jane E. Ainsworth, [ReImaging Childhood and Reconstructing the Legal Order: The Case for Abolishing Juvenile Court](#), 69 N.C. L. REV. 1083, 1098 n.94 (1991) (a child, like an insane person, cannot commit a crime). Compare, David C. Faigman, [To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy](#), 38 EMORY L.J. 1005, 1034-35 (1989) (children as young as 15 may be competent to decide whether or not to seek commitment to mental hospitals) (discussing studies reported in Lois A. Weithorn & Susan B. Campbell, *Treatment Decisions*, 53 CHILD DEVEL. 1589, 1596 (1982)).

[FN152]. See generally 1 PERLIN, *supra* note 16, Chapter 2 (discussing commitment theories).

[FN153]. As a matter of law, incompetency cannot be presumed as a result of either mental illness or institutionalization. In re [Labelle](#), 728 P.2d 138, 146 (1986). Furthermore, there is "no necessary relationship between mental illness and incompetency which renders [mentally ill persons] unable to provide informed consent to medical treatment." [Davis v. Hubbard](#), 506 F. Supp. 915, 935 (N.D. Ohio 1980); Perlin, *supra* note 1, at 113-14; Bruce J. Winick, [Competency to Consent to Treatment: The Distinction Between Assent and Objection](#), 28 HOUS. L. REV. 15 (1991), reprinted in *ESSAYS*, *supra* note 143, at 41, 46-50. The word "competency" encompasses many judicial statutes; a finding of incompetency (or competency) for one does not necessarily imply a similar finding for any other. See Perlin, *supra* note 88, at 967. Compare Thomas Grisso & Paul S. Appelbaum, *Mentally Ill and Non-Mentally Ill Patients' Abilities to Understand Informed Consent Disclosures for Medication*, 15 LAW & HUM. BEHAV. 377, 385-86 (1991) (test results do not support generalized presumptions about capacities of mentally ill patients to understand informed consent); [Campbell v. Talladega City, Bd. of Ed.](#), 518 F. Supp. 47, 55 (N.D. Ala. 1981) (school's failure to offer student full range of appropriate tests may have stemmed from "widely held social stereotypes concerning the abilities of retarded citizens").

[FN154]. 1 PERLIN, *supra* note 16, § 3.45 nn. 726.1-726.3, at 46-47 (Supp. 1991); 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. FORENS. PSYCHIATRY 37, 52-59 (1991); Theresa Scheid-Cook, *Commitment of the Mentally Ill to Outpatient Treatment*, 23 COMMUN. MENT. HEALTH J. 173, 180-81 (1987).

[FN155]. [State v. Van Horn](#), 528 So. 2d 529, 530 (Fla. Dist. Ct. App. 1988) (discussing probativeness of lay witnesses' "perception of [defendant's] normality"); Walter Bromberg & Henry M. Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM. L. & CRIMINOLOGY 729, 738 (1952) (contrasting lay perceptions of "insanity" with actual attributes of schizophrenia); Perlin, *Myths*, *supra* note 9, at 727, n.608 (discussing [Battalino v. People](#), 199 P.2d 897, 901 (1948) (defendant not insane where there was no evidence of a "burst of passion with paleness, wild eyes and trembling"))).

[FN156]. On the ways that negative characterization of mental illness and mentally ill are used by prosecutors in criminal trial summations, see Thomas M. Fleming, Annotation, [Negative Characterization or Description of Defendant by Prosecutor During Summation of Criminal Trial, As Found for Reversal, New Trial, Or Mistrial -](#)

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[Modern Cases, 88 A.L.R. 4th 8 \(1991\)](#); Randy V. Cargill, "Hard Blows" Versus "Foul Ones": Restrictions on Trial Counsel's Closing Argument, *ARMY LAW.*, Jan. 1991, at 20, 26. On the descriptions used by members of Congress to describe mentally disabled individuals ("the demented," "the deranged," "lunatics," "madmen," "idiots and morons," "psychopaths and nincompoops"), see Motion for Leave to File and Brief of Amicus N.J. Dep't of the Public Advocate and ACLU, [U.S. Dep't of Treasury v. Galioto, 477 U.S. 556 \(1986\)](#) (No. 84-1904) (quoting legislative debate on 1968 gun control legislation).

For a fascinating counterpoint, compare Paramount Denies Wrongdoing in 'Crazy People' Campaign, *PSYCHIATRIC NEWS*, May 18, 1990, at 9 (mental health and patient advocacy groups claim credit for persuading Hollywood studio to "kill" offensive ad campaign), to Judi Chamberlin, Warning: This Article Is Intended to be Provocative, *NAPS NEWS*, Spring 1990, at 6 (ex-patient activist argues that groups' anti-stigma efforts are "misdirected"; use of phrase "crazy" not "a slur").

[FN157]. See, e.g., [N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 551 F. Supp. 1165, 1185 \(E.D.N.Y. 1982\)](#):

[T]he larger the facility the less likely it is that residents will become part of the community and will be accepted by their neighbors. Larger community facilities exacerbate community opposition to and fear of the retarded. This is because neighbors have more difficulty adjusting to a large group of individuals who appear to be different, and have more difficulty breaking down stereotypes in order to see these residents are individuals who happen to be retarded.

See generally 2 PERLIN, *supra* note 16, § 7.22, at 657-70; Robert L. Schonfeld, "Five Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded, 16 *FORDHAM URB. L.J.* 1 (1987-88) (discussing creation of large, institutional communities for people with mental disabilities).

[FN158]. Richard Rogers, APA's Position on the Insanity Defense: Empiricism Versus Emotionalism, 42 *AM. PSYCHOL.* 850, 845 (1987). On the way that insanity acquittees are viewed as "the most despised and feared group in society," see Deborah C. Scott et al., Monitoring Insanity Acquittes: Connecticut's Psychiatric Security Review Board, 41 *HOSP. & COMMUN. PSYCHIATRY* 980, 982 (1990).

[FN159]. Compare [Moore v. State, 525 So. 2d 870, 871 \(Fla. 1988\)](#) (juror who rejected insanity defense as basis for exculpatory criminal defense not excused for cause) (reversing conviction), with [Boblett v. Commonwealth, 396 S.E.2d 131, 135 \(Va. Ct. App. 1990\)](#) (no abuse of discretion where trial court refused to excuse for cause juror who indicated he might have difficulty voting for an NGRI verdict). See generally HENRY J. STEADMAN, BEATING A RAP? DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL (1979); Perlin, *Myths*, *supra* note 9, at 727-30. On the extent to which the public is misinformed about the insanity defense, see Valerie P. Hans, An Analysis of Public Attitudes Toward the Insanity Defense, 24 *CRIM.* 393 (1986); Valerie P. Hans & Dan Slater, "Plain Crazy": Lay Definitions of Legal Insanity, 7 *INT'L J.L. & PSYCHIATRY* 105, 111 (1984).

[FN160]. See, e.g., Richard Jeffrey & Richard A. Pasewark, Altering Opinions About the Insanity Plea, 11 *J. PSYCHIATRY & L.* 29 (1983); Richard A. Pasewark & Deborah Seidenzahl, Opinions Concerning the Insanity Plea and Criminality Among Mental Patients, 7 *BULL. AM. ACAD. PSYCHIATRY & L.* 199 (1979); Hans, *supra* note 159, at 393 (discussing the public's lack of information on the insanity plea).

[FN161]. Lawrence T. White, The Mental Illness Defense in the Capital Penalty Hearing, 5 *BEHAV. SCI. & L.* 411, 417 (1987); Perlin, *supra* note 29, manuscript at 112-14.

[FN162]. See, e.g., [State v. Duckworth, 496 So. 2d 624, 635 \(La. Ct. App. 1986\)](#) (juror who felt defendant would be responsible for action as long as he "wanted to do them" not excused for cause) (no error); 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"); Charles Krauthammer, Nature Made Me Do It, *WASH. POST*, May 11, 1990, at A27 (decrying use of "medical alibis"); cf. MINOW, *supra* note 12, at 47 (discussing the over-significance that we attribute to traits "that are largely or entirely beyond the control of the individuals who are identified by them").

[FN163]. Perlin, *supra* note 1, at 98-108; Perlin, Book Review, 8 *N.Y.L. SCH. J. HUM. RTS.* 557, 559-60 (1991) (reviewing ANNE BRADEN JOHNSON, *OUT OF BEDLAM: THE TRUTH ABOUT*

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DEINSTITUTIONALIZATION (1990)). Compare S.M. Saccomando Burke, Deinstitutionalization Has Failed -- Miserably, WASH. POST, Apr. 11, 1989, at A26 (letter to editor); James P. McGrath, A Hoax Called "Deinstitutionalization", WASH. POST Oct. 19, 1989, at A26 (letter to editor blaming patients' rights lawyers for deinstitutionalization failures).

[FN164]. This myth owes a great debt to the Supreme Court's decision in [Parham v. J.R., 442 U.S. 584, 605-06 \(1979\)](#) (characterizing civil commitment hearings for juveniles as "time-consuming procedural minuets"). Compare Michael L. Perlin, An Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger's "Time-Consuming Procedural Minuets" Theory in *Parham v. J.R.*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 149 (1981). On the proposition that civil commitment cases should be heard by separate administrative courts, see Paul S. Appelbaum, Civil Commitment From a Systems Perspective, 16 LAW & HUM. BEHAV. 71 (1992).

[FN165]. Anthony D'Amato, [Harmful Speech and the Culture of Indeterminacy](#), 32 WM. & MARY L. REV. 329, 332 (1991).

[FN166]. Perlin, OCS, supra note 9, at 59-61; 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, 133-37 (1991); see also Randolph N. Jonakait, Forensic Science: The Need for Regulation, 4 HARV. J.L. & TECH. 109, 167-68 (1991).

[FN167]. Perlin, OCS, supra note 9, at 61-69; Perlin, Myths, supra note 9, at 718-30.

[FN168]. On the way that legislators perceive jurors' attitudes, see Perlin, supra note 29, manuscript at 95 n.293. On the way that legislative reform may be nothing more than "an intellectual charade played for the benefit of an uninformed public," see Richard Rogers, Assessment of Criminal Responsibility: Empirical Advances and Unanswered Questions, 15 J. PSYCHIATRY & L. 73, 78 (1987) (insanity defense reform). See generally Judie English, [The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense](#), 40 HASTINGS L.J. 1 (1988).

[FN169]. On juror use of heuristic reasoning in decisionmaking, see Julian Eule, The Presumption of Sanity: Bursting the Bubble, 25 UCLA L. REV. 637, 661 (1978); see Perlin, OCS, supra note 9, at 39-53; Morrison Torrey, [When Will We Be Believed: Rape Myths and the Idea of a Fair Trial in Rape Prosecutions](#), 24 U.C. DAVIS L. REV. 1013, 1050 (1991); see also Caton F. Roberts & Stephen L. Golding, The Social Construction of Criminal Responsibility and Insanity, 15 LAW & HUM. BEHAV. 349, 372 (1991) (jurors' pre-existing attitudes toward insanity defense strongest predictor of individual verdicts).

[FN170]. See, e.g., Jean C. Beckham et al., Decision Making and Examiner Bias in Forensic Expert Recommendations for Not Guilty by Reason of Insanity, 13 LAW & HUM. BEHAV. 79 (1989); Stephen L. Deitschman et al., Self Selection Factors in the Participation of Mental Health Professionals In Competency for Execution Evaluations, 15 LAW & HUM. BEHAV. 287, 299-300 (1992); Robert Homant & Daniel B. Kennedy, Judgment of Legal Insanity as a Function of Attitude Toward the Insanity Defense, 8 INT'L L.J. & PSYCHIATRY 67 (1985); Perlin, supra note 154, at 135-36; Michael L. Perlin, Power Imbalances in Therapeutic and Forensic Relationship, 9 BEHAV. SCI. & L. 111, 118-19 (1991); Richard Rogers, supra note 157, at 844; Richard Rogers & Christopher D. Webster, Assessing Treatability in Mentally Disordered Offenders, 13 LAW & HUM. BEHAV. 19 (1989); Jack Zusman & Robert Simon, Differences in Repeated Psychiatric Examinations of Litigants to a Lawsuit, 140 AM. J. PSYCHIATRY 1300 (1983).

Beyond the scope of this paper is an important collateral inquiry: the way that these individual clinician biases may mirror sanist biases (recast in language of "benevolent paternalism") in the public positions of such professional groups as the American Psychiatric Association or the American Psychological Association. See Douglas Mossman & Michael L. Perlin, Psychiatry and the Homeless Mental Ill: A Reply to Dr. Lamb, 149 AM. J. PSYCHIATRY 951 (1992).

[FN171]. See Perlin, Myths, supra note 9, at 640-46.

[FN172]. For example, mentally disabled persons were often precluded from voting, serving on juries, or running for

office. See 2 PERLIN, supra note 7, § 7.21, at 655; SALES, supra note 137, at 99-112; John Parry, Decision Making Rights Over Persons and Property, in BRAKEL, supra note 136, at 435-47.

[FN173]. Laws limited the rights of mentally disabled persons to marry, to raise children, and to exercise reproductive autonomy. See SALES, supra note 137, at 62-76, 85-87; Samuel J. Brakel, Family Laws, in BRAKEL, supra note 137 at 508-10, 515-20; Hayman, supra note 119; Michael L. Perlin, Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?, 3 J. FORENS. PSYCHIATRY -- (forthcoming 1992).

[FN174]. Laws limited mentally disabled persons' capacity to contract or bequeath money. See SALES, supra note 137, at 54-61; Parry, supra note 172, at 438-41.

[FN175]. Laws limited mentally disabled persons' access to housing, automobile licensure and welfare entitlements. See SALES, supra note 137, at 113-29; Parry, supra note 172, at 441-44; 2 PERLIN, supra note 16, § 7.21, at 654-57.

[FN176]. 1 PERLIN, supra note 16, § 2.04, at 46-48.

[FN177]. 2 PERLIN, supra note 16, § 4.02-.04, at 3-19.

[FN178]. Id.

[FN179]. See, e.g., Ellen Hochstedler, Twice-cursed? The Mentally Disordered Criminal Defendant, 14 CRIM. JUST. & BEHAV. 251 (1987).

[FN180]. See, e.g., N.J. Stat. Ann. § 2A: 163-3 (West 1975), declared unconstitutional in [State v. Krol, 344 A.2d 289 \(N.J. 1975\)](#). See generally 1 Perlin, supra note 16, § 2.10, at 88-86.

[FN181]. See, e.g., [Scott v. Plante, 532 F.2d 939 \(3d Cir. 1976\)](#) (discussing conditions in New Jersey's V Room Building).

[FN182]. [325 F. Supp. 781 \(M.D. Ala. 1971\)](#) (subsequent citations omitted). See generally 2 PERLIN, supra note 16, § § 4.07-.19, at 29-111. On the specific impact of Wyatt in this context, see The Wyatt Standards: An Influential Force in State and Federal Rights, 28 HOSP. & COMMUN. PSYCHIATRY 374 (1977).

[FN183]. [422 U.S. 563 \(1975\)](#). See generally 1 PERLIN, supra note 16, § 2.12, at 99-110.

[FN184]. [406 U.S. 715 \(1972\)](#). See generally 1 PERLIN, supra note 16, § 2.08, at 75-79.

[FN185]. 1 PERLIN, supra note 16, § 2.16, at 130-38.

[FN186]. Id. § 11.03, at 953-58. See generally Martha A. Lyon et al., Patients' Bills of Rights: A Survey of State Statutes, 6 MENT. DIS. L. RPTR. 178 (1982).

[FN187]. Beyond the scope of this paper is a consideration of federal government entitlement and benefit statutes. See generally Leonard Rubenstein et al., Protecting the Entitlement of the Mentally Disabled: The SSDE/SSI Legal Battles of the 1980's, 11 INT'L J. L. & PSYCHIATRY 269 (1988).

[FN188]. See, e.g., [42 U.S.C. § § 6000-6081 \(Supp. II 1990\)](#) (Developmental Disabilities Assistance and Bill of Rights Act), discussed in 2 PERLIN, supra note 16, § 9.13, at 899-91; [42 U.S.C. § 10801 \(1988\)](#) (Protection and Advocacy for the Mentally Ill Act), discussed in 2 PERLIN, supra note 16, § 8.16, at 797-99.

[FN189]. [42 U.S.C. § § 12101-12213 \(Supp. II 1990\)](#). See generally 2 PERLIN, supra note 16, § 6.44A, at 77-81 (Supp. 1991); Nancy Lee Jones, [Overview and Essential Requirement of the Americans With Disabilities Act, 64 TEMP. L. REV. 471 \(1991\)](#); Cook, supra note 123. Many key sections of the ADA have just gone into effect. It will be necessary to consider carefully the response of the courts, the legislature, and, most importantly, the general public so as to determine whether the Act will significantly ameliorate sanist attitudes. On the social effect of the legal

suppression of discrimination, see Johnson, *supra* note 35, at 1650 (discussed *supra* note 53 and accompanying text).

[\[FN190\]](#). See Perlin, *supra* note 29, manuscript at 8-19; *supra* notes 1 & 153.

[\[FN191\]](#). See Mary L. Durham & John Q. LaFond, The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment, 3 YALE LAW & POL'Y REV. 395, 398 (1985); Perlin, Fatal Assumptions, *supra* note 16, at 56 n.105, discussing *inter alia*, Daniel W. Shuman, Innovated Statutory Approaches to Civil Commitment: An Overview and Critique, 13 LAW, MED. & HEALTH CARE 284, 286 (1985).

[\[FN192\]](#). See, e.g., R. Michael Bagby & Leslie Atkinson, The Effects of Legislative Reform on Civil Commitment Admission Rates, 6 BEHAV. SCI. & L. 45 (1988); R. Michael Bagby, The Effects of Legislative Reform on Admission Rates to Psychiatric Units of General Hospitals, 10 INT'L J.L. & PSYCHIATRY 383 (1987).

[\[FN193\]](#). See Perlin, *supra* note 166, at 135-36; Perlin, *supra* note 170, at 119-20, discussing *inter alia*, Paul Chodoff, The Case of Involuntary Hospitalization of the Mentally Ill, 133 AM. J. PSYCHIATRY 496 (1976).

[\[FN194\]](#). Perlin, Myths, *supra* note 9, at 637-39; *id.* at 638 n.173 (citing sources).

[\[FN195\]](#). See, e.g., Linda C. Fentiman, "Guilty But Mentally Ill": The Real Verdict Is Guilty, 26 B.C. L. REV. 601 (1985); Christopher Slobogin, [The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come](#), 53 GEO. WASH. L. REV. 494 (1985). Compare Ira Mickenberg, [A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense](#), 55 U. CIN. L. REV. 943 (1987).

[\[FN196\]](#). See Perlin & Sadoff, *supra* note 16, at 164; Virginia A. Hiday, The Attorney's Role in Involuntary Civil Commitment, 60 N.C. L. REV. 1027 (1982). On the limited role of the Protection and Advocacy Act as a potential ameliorating device, see Perlin, Fatal Assumptions, *supra* note 16, at 54-55.

[\[FN197\]](#). See Perlin, *supra* note 1, at 106 n.253 (discussing [K.C. v. State](#), 771 P.2d 774 (Wyo. 1989), and [Board of Supervisors v. Superior Court](#), 254 Cal. Rptr. 905 (Cal. Ct. App. 1989)).

[\[FN198\]](#). See, e.g., [42 U.S.C. § 12208](#) (act inapplicable to, *inter alia*, transvestites, kleptomaniacs, and compulsive gamblers).

[\[FN199\]](#). See Crenshaw, *supra* note 35, at 1370-77, discussed *supra* at notes 64 & 68 and accompanying text.

[\[FN200\]](#). See generally Perlin, OCS, *supra* note 9.

[\[FN201\]](#). "Three generations of imbeciles are enough." [274 U.S. 200, 207 \(1927\)](#). For contemporaneous reevaluations of this opinion, the factual record in Buck, and Justice Holmes' personal view, see Mary L. Dudziak, [Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law](#), 71 IOWA L. REV. 833 (1986); Stephen S. Gould, Carrie Buck's Daughter, 2 CONST'L COMMENTARY 331 (1985); Paul A. Lombardo, [Three Generations, No Imbeciles New Light on Buck v. Bell](#), 60 N.Y.U. L. REV. 30 (1985); Mark R. Killenbeck, Comment, We Have Met the Imbeciles and They Are Us: The Courts and Citizens With Mental Retardation, 65 NEB. L. REV. 768 (1986).

[\[FN202\]](#). But see *supra* note 3 and accompanying text (discussing Robertson, *supra* note 3 and sitting trial judge's endorsement of Holmes' dictum).

[\[FN203\]](#). None is perhaps as chilling as the following story: Sometime after the trial court's decision in [Rennie v. Klein](#), 462 F. Supp. 1131 (D.N.J. 1978) (granting involuntarily committed mental patients a limited right to refuse medication), 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."

[FN204]. See Perlin, Myths, *supra* note 9, at 711-31; Perlin, OCS, *supra* note 9, at 61-69, discussing Justice Rehnquist's opinions in [Wainwright v. Greenfield](#), 474 U.S. 284, 297 (1986) (concurring), and [Ake v. Oklahoma](#), 470 U.S. 68, 90-91 (1985) (dissenting), and concluding that, to Rehnquist, a defendant was not "'crazy' [if] he did not 'look' crazy." Perlin, OCS, *supra* note 9, at 66.

[FN205]. See, e.g., [United States v. Charters](#), 863 F.2d 302, 310 (4th Cir. 1988) (en banc), cert. denied, 494 U.S. 1016 (1990); THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 273 (1986); Perlin, *supra* note 88, at 987-88; David Wexler, Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian Commitment Codes, reprinted in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 165, 170 (David Wexler ed., 1990) [hereinafter THERAPEUTIC JURISPRUDENCE] (discussing courts' historically improper equation of serious mental illness with "incompetence, grave disability and committability"); Winick, *supra* note 153. It was my experience as a trial lawyer that, once a question was raised as to a witness's or litigant's competency in any area, her veracity was inevitably placed in question.

[FN206]. In re [Melas](#), 371 N.W.2d 653, 655 (Minn. Ct. App. 1985); [Matter of J.B.](#), 705 P.2d 598, 602 (Mont. 1985); 1 PERLIN, *supra* note 16, § 3.45, at 341 n.741; *id.* at 48 (Supp. 1991); Perlin, *supra* note 154, at 49-50. Compare Mary L. Durham & John Q. La Fond, A Search for the Missing Premise of Involuntary Therapeutic Commitment: Effective Treatment of the Mentally Ill, 40 RUTGERS L. REV. 303 (1988), reprinted in THERAPEUTIC JURISPRUDENCE, *supra* note 200, at 133, 154 (literature review suggests that from 21-70% of patients studied who were treated with drugs do no better than those given placebos).

[FN207]. See Perlin, *supra* note 1, at 116-17 n.308 (discussing In re [Melton](#), 565 A.2d 635, 649 (D.C. 1989) (Schwelb, J., dissenting), hearing granted & opinion vacated, 581 A.2d 788 (D.C. 1990), superseded on rehearing, 597 A.2d 892 (D.C. 1991)).

[FN208]. See [Youngberg v. Romeo](#), 457 U.S. 307, 323 (1982).

[FN209]. See [United States v. Charters](#), 863 F.2d 302, 313, questioned in Perlin, *supra* note 88, at 935.

[FN210]. See, e.g., Perlin, Fatal Assumptions, *supra* note 16, at 47-48, (discussing lack of implementation of [Jackson v. Indiana](#), 406 U.S. 715 (1972), in applying the due process clause to proceedings on post-incompetency to stand trial commitment). See Bruce J. Winick, Restructuring Competency to Stand Trial, 32 U.S.L.A. L. REV. 921, 940-41 (1985) (Ten years after Jackson, half the states had still not implemented the Supreme Court's decree.); Wertleib, *supra* note 78, at 336 (nonimplementation continues).

[FN211]. Other decisions are pretextual and based on phantasmic reasoning. In a recent case, turning on whether a defendant had the requisite specific intent to attempt to rob a bank, the trial court refused to allow the county jail psychiatrist to testify that he had been prescribing antipsychotic medication for the defendant for a specific time period, reasoning that such testimony might "be interfering with the treatment of [other] prisoners in jails because [other] prisoners might ask for more drugs to create the impression that they need more drugs." [United States v. Still](#), 856 F.2d 671, 672 (9th Cir. 1988). Nothing in the case suggests that there was ever any evidence that spoke remotely to this issue; nonetheless, the Ninth Circuit affirmed as "not manifestly erroneous." *Id.* See Perlin, *supra* note 166, at 135 (discussing Still as an example of judicial pretextuality).

[FN212]. See [Wainwright v. Greenfield](#), 474 U.S. 284, 297 (1986) (Rehnquist, J., concurring); [State v. Clayton](#), 656 S.W.2d 344, 350-51 (Tenn. 1983); Perlin, OCS, *supra* note 9, at 66-67. Similar standardized views of "craziness" are employed in civil cases. See [St. Louis S.W. Ry. Co. v. Pennington](#), 553 S.W.2d 436, 448 (Ark. 1977) (recovery for mental anguish of adult survivors of wrongful death victims allowed where survivors demonstrated that they suffered "more than the normal grief").

[FN213]. See [Lynch v. Overholser](#), 369 U.S. 705, 715 (1962); [United States v. Brown](#), 478 F.2d 606, 611 (D.C. Cir. 1973), as discussed in Peter Margulies, The Pandemonium Between the Mad and the Acquittees After Jones v. United States, 36 RUTGERS L. REV. 793, 806-07 n.85 (1984).

[FN214]. See [Jones v. United States](#), 463 U.S. 354, 365 (1983); [Overholser v. O'Beirne](#), 302 F.2d 852, 861 (D.C. Cir. 1961).

[FN215]. [Penry v. Lynaugh](#), 492 U.S. 302 (1989) (mental retardation); [Commonwealth v. Faulkner](#), 595 A.2d 28, 38 (Pa. 1991) (substantial mental impairment), cert. denied, 112 S. Ct. 1680 (1992); [Harris v. State](#), 499 N.E.2d 723 (Ind. 1986) (GBMI); see also [People v. Crews](#), 522 N.E.2d 1167 (Ill. 1988) (permissible to sentence GBMI defendant to post-life expectancy term), cert. denied, 492 U.S. 925 (1989). Compare [Ford v. Wainwright](#), 477 U.S. 399 (1986) (barring execution of the currently insane). On the question of whether mentally retarded individuals' lessened capacity for moral development prohibit their execution, see [Penry](#), 492 U.S. at 345 (Brennan, J., concurring in part and dissenting in part).

[FN216]. See [Buttrum v. Black](#), 721 F. Supp. 1268, 1295 (N.D. Ga. 1989), aff'd, 908 F.2d 695 (11th Cir. 1990). See generally RONALD ROESCH & STEPHEN GOLDING, COMPETENCY TO STAND TRIAL 15-17 (1980).

[FN217]. [People v. De Anda](#), 170 Cal. Rptr. 830, 832-33 (1980), discussed in David Wexler, Inappropriate Patient Confinement and Appropriate State Advocacy, LAW & CONTEMP. PROBS. 193 (Spring 1982), reprinted in THERAPEUTIC JURISPRUDENCE, supra note 205, at 347, 350-51.

[FN218]. [State v. Foucha](#), 563 So. 2d 1138, 1141 (La. 1990), rev'd, 112 S. Ct. 1780 (1992) (Louisiana statute sanctioning such continued confinement unconstitutional). Compare [id.](#) at 1800 (Thomas J., dissenting) (arguing on behalf of statute's constitutionality).

[FN219]. [Sinclair v. Wainwright](#), 814 F.2d 1516, 1522 (11th Cir. 1987) (quoting [Shuler v. Wainwright](#), 491 F.2d 1213, 1223 (5th Cir. 1974)).

[FN220]. [State v. Neely](#), 819 P.2d 249, 256 (N.M. 1991).

[FN221]. [Robinson v. Solem](#), 432 N.W.2d 246, 249 (S.D. 1988).

[FN222]. In re [C.P.K.](#), 516 So. 2d 1323, 1325 (La. Ct. App. 1987).

[FN223]. Daniel W. Shuman & Myron S. Weiner, The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege, 60 N.C. L. REV. 893 (1982), reprinted in THERAPEUTIC JURISPRUDENCE, supra note 205, at 75, 103.

[FN224]. Wexler, supra note 217, reprinted in THERAPEUTIC JURISPRUDENCE, supra note 205, at 348.

[FN225]. [325 F. Supp. 781 \(M.D. Ala. 1971\)](#); [334 F. Supp. 1341 \(M.D. Ala. 1971\)](#); [344 F. Supp. 373 \(M.D. Ala. 1972\)](#); [344 F. Supp. 387 \(M.D. Ala. 1972\)](#) (subsequent citations omitted).

[FN226]. See MINOW, supra note 12, at 131-45; see also Johnson, supra note 108, at 356-58.

[FN227]. [463 U.S. 880, 916 \(1983\)](#).

[FN228]. [494 U.S. 210, 236 \(1990\)](#).

[FN229]. [344 A.2d 289 \(N.J. 1975\)](#).

[FN230]. [Pennhurst State School & Hospital v. Halderman](#), 465 U.S. 89, 126 (1984).

[FN231]. [City of Cleburne v. Cleburne Living Center](#), 473 U.S. 432, 452 (1985) (Stevens, J., concurring); [id.](#) at 455 (Marshall, J., concurring in part and dissenting in part).

[FN232]. [United States ex rel. Schuster v. Vincent](#), 524 F.2d 153, 154 (2d Cir. 1975).

[FN233]. [476 F. Supp. 1294 \(D.N.J. 1979\)](#). "Medicine has not yet found a cure for the terrible pain of mental illness. The law cannot assist in this endeavor. But the Constitution can and does prevent those who have suffered so much at the hands of nature from being subjected to further suffering at the hands of man." [Id. at 1309](#).

[FN234]. See Wald, *supra* note 104, at 627 (Bazelon one of the "greatest appellate judges"); Heathcote W. Wales, *The Rise, the Fall, and the Resurrection of the Medical Model*, 63 GEO. L.J. 87 (1974). Judge Bazelon "invited the world of mental health professions and criminologists into his courtroom" to extend "his courtroom back into the world." *Id.* at 104. See generally Bazelon, *supra* note 11; David Bazelon, *Veils, Values and Social Responsibility*, 37 AM. PSYCHOL. 115 (Feb. 1982).

[FN235]. See, e.g., [S.H. v. Edwards](#), 860 F.2d 1045, 1053 (11th Cir.) (Clark, J., dissenting), cert. denied, 491 U.S. 905 (1989), vacated, 880 F.2d 1203 (11th Cir. 1989).

[FN236]. Perlin & Sadoff, *supra* note 16, at 164 (footnotes omitted).

[FN237]. Hiday, *supra* note 196, at 1030.

[FN238]. Elliott Andalman & David Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and a Proposal*, 45 MISS. L.J. 43, 72 (1974).

[FN239]. Norman B. Poythress, Jr., *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony*, 2 LAW & HUM. BEHAV. 1, 15 (1978).

[FN240]. See DAVID BAZELON, *QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW* 49 (1988); Perlin, *Myths*, *supra* note 9, at 654. A survey conducted by Harvard Medical School revealed that the "great majority" of defense counsel interviewed were unaware of the operative competency to stand trial criteria. 3 PERLIN, *supra* note 16, § 14.10, at 239 (citing study). For a particularly shocking example of poor counsel in a death penalty case involving a mentally disabled criminal defendant, see [Alvord v. Wainwright](#), 469 U.S. 956 (1984) (Marshall, J., dissenting from denial of grant of certiorari).

[FN241]. See Perlin, *Fatal Assumption*, *supra* note 16, at 49-52.

[FN242]. The standard text is BINDER & PRICE, *supra* note 90; see also DAVID BINDER ET AL., *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1991). For important critiques, see Anthony V. Alfieri, *Essay: The Politics of Clinical Knowledge*, 35 N.Y.L. SCH. L. REV. 7 (1990); Robert Dinerstein, [Client-Centered Counseling: Reappraisal and Refinement](#), 32 ARIZ. L. REV. 501 (1990).

[FN243]. See, e.g., *In re C.P.K.*, 516 So. 2d 1323, 1325 (La. Ct. App. 1987) (trial court did not know of existence of state Mental Health Advocacy service). But cf., [State ex rel. Memmel v. Mundy](#), 249 N.W.2d 573 (Wis. 1977), setting out duties of adversary counsel in involuntary civil commitment cases. There is now some empirical data suggesting that patients represented by public defender organizations generally obtain significantly more favorable outcomes in contested involuntary civil commitment cases than do patients represented by private counsel hired on short-term contracts. See Mary L. Durham & John Q. La Fond, *The Impact of Expanding a State's Therapeutic Commitment Authority*, reprinted in *THERAPEUTIC JURISPRUDENCE*, *supra* note 205, at 121-22; Mary L. Durham & John Q. La Fond, *The Empirical and Policy Implications of Broadening the Statutory Criteria for Civil Commitment*, 3 YALE L. & POL'Y REV. 395 (1985).

[FN244]. On the involvement of consumer groups in important patients' rights litigation, see 1 PERLIN, *supra* note 16, § 1.03, at 8 n.34; Milner I, *supra* note 133; Milner II, *supra* note 133. See generally *Challenging the Therapeutic State: Critical Perspectives on Psychiatry and the Mental Health System*, 11 J. MIND & BEHAV. 1 (1990) (symposium issue).

[FN245]. See, e.g., Stanley S. Herr, *Representation of Clients With Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE (1991); Stanley S. Herr, *The Future of Advocacy for Persons with Mental*

Disabilities, 39 RUTGERS L. REV. 443 (1987); Peter Margulies, "[Who Are You To Tell Me That?: Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients](#), 68 N.C. L. REV. 213 (1990); Schwartz, *supra* note 148; Paul R. Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 UTAH L. REV. 515 (1987).

[FN246]. See Perlin, Fatal Assumption, *supra* note 16, at 58-59 (recommending research agenda on this issue).

[FN247]. For an important and eloquent recent exception in a parallel area of disability law, see REED MARTIN, EXTRAORDINARY CHILDREN, ORDINARY LIVES: STORIES BEHIND SPECIAL EDUCATION CASE LAW (1991).

[FN248]. Cf. Fredrick Schauer, [Easy Cases](#), 58 S. CAL. L. REV. 399, 400 n.2 (1985) ("To generalize about constitutional law from certain particular topics within a course somewhat artificially named 'Constitutional Law' runs a serious risk of distortion.").

[FN249]. See, e.g., David Barnhizer, The Revolution in American Law Schools, 37 CLEV. ST. L. REV. 227 (1989).

[FN250]. See Thomas L. Hafemeister, Comparing Law Reviews For Their Amenability to Articles Addressing Mental Health Issues: How to Disseminate Law Related Social Science Research, 16 LAW & HUM. BEHAV. 219 (1992).

[FN251]. I do not want to overstate the case. Martha Minow's application of the social relations approach to cases involving the mentally disabled, MINOW, *supra* note 12, at 114-20, David Wexler's and Bruce Winick's ground breaking work on "therapeutic jurisprudence," THERAPEUTIC JURISPRUDENCE, *supra* note 205; ESSAYS, *supra* note 144, and the work of Gary Melton, Michael Saks, Dan Shuman, Stephen Morse and others in developing a psychology of jurisprudence are important exceptions.

[FN252]. The general implications of Costello's story are discussed in Perlin, *supra* note 163, and in Perlin, *supra* note 1, at 126 n.377.

[FN253]. For an excellent example, see Stigma Task Force, *supra* note 15.

[FN254]. See *supra* note 251.

[FN255]. Groups such as the Coalition for Fundamental Rights and Equality of Ex-patients and the National Mental Health Consumers' Association have regularly been filing amicus briefs in the United States Supreme Court for nearly a decade. See NAPS Members Active at Alternatives '91, NAPS News (Fall 1991), at 1.

[FN256]. See, in related contexts, Anthony V. Alfieri, The Antinomies of Poverty Law and a Theory of Dialogic Empowerment, 16 N.Y.U. REV. L. & SOC'L CHANGE 659 (1988-89); Joel F. Handler, [Dependent People, the State and the Modern/Postmodern Search for the Dialogic Community](#), 35 UCLA L. REV. 99 (1988); Lucie E. White, Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. REV. L. & SOC'L CHANGE 535 (1988-89).

[FN257]. See Richard Tessler et al., Patterns of Contact of Patients' Families With Mental Health Professionals and Attitudes Toward Professionals, 42 HOSP. & COMMUN. PSYCHIATRY 929 (1991); Agnes B. Hatfield, Families as Advocates for the Mentally Ill: A Growing Movement, 32 HOSP. & COMMUN. PSYCHIATRY 641 (1981); Thomas J. Craig et al., Family Support Programs in a Regional Mental Health System, 38 HOSP. & COMMUN. PSYCHIATRY 459 (1987).

[FN258]. David L. Bazelon, The Defective Assistance of Counsel, 42 U. CIN. L. REV. 2 (1973).

[FN259]. Birnbaum, *supra* note 5, at 107.

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Competency

***63 COMPETENCY, DEINSTITUTIONALIZATION, AND HOMELESSNESS: A STORY OF
MARGINALIZATION**

[Michael L. Perlin \[FNa\]](#)

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PROLOGUE: LIFE IMITATES ART^{v. 64}>>PROLOGUE: LIFE IMITATES ART

On the day before I finished the penultimate draft of this article, I saw the movie, *Enemies, A Love Story*, Paul Mazursky's powerful adaptation of Isaac Bashevis Singer's novel about the lives of several Jewish people who came to the United States in the late 1940's after having been imprisoned in Nazi concentration camps or after having spent the war in hiding from the SS. Ron Silver plays the male protagonist and suffers from what would now be called posttraumatic stress disorder. Whenever something abnormally stressful happens to him in America (five years after his emigration), he "flashes back" to the stormtroopers searching for him, and the aural image is of vicious police dogs barking as part of the search. The metaphor is a vivid one.

About two days later, as I emerged from the depths of the World Trade Center in Manhattan as part of my commute to work, I heard the unmistakable sounds of police dogs. As I walked through the transportation terminal, the barking grew louder. I finally came across a crowd of commuters--all motionless. A Port Authority Transit policeman was holding on to a police dog, barking, snarling, and attempting to break loose. They were both about three feet away from a homeless man, who was supine, perhaps unconscious, and sprawled out on the floor of the lower level of the World Trade Center. As the dog growled, seemingly poised to attack the homeless man (although I doubt that would have happened), many of the commuters broke out in spontaneous applause *65 in clear support of the officer. I will never forget that moment.

I. INTRODUCTION: CIVILIZATION'S DISCONTENTED

Institutional reform litigators in the early and mid-1970s regularly adapted Winston Churchill's well-travelled aphorism: [FN1] you can judge the state of a civilization by the way it treats its institutionalized. [FN2] It is now necessary to amend his dictum: we can also judge the state of a civilization by the way it treats those without a home. By this test, the United States, as a civilization, is an abject failure. We have failed, and we continue to fail, our dispossessed, our displaced, and our unwanted. The homeless, as Robert Hayes has eloquently stated, are "the shame of America." [FN3] Daily and exponentially, our shame increases.

Our national policy toward the homeless is shameful and mean. In the past decade we have, as a nation, adopted a policy that accepts, condones, and encourages the inevitability of the status of poverty, as well as an attitude of cruelty toward the poor. [FN4] The shame of socially-sanctioned homelessness taints our society today in very much the same way as did official policies of racial segregation in the 1950s and official policies of sexual inequality in the 1960s. [FN5]

Our policy toward the homeless is one of economic greed, social myopia, psychological brutality, and political cynicism. [FN6] We justify our policy through reliance on symbolic stereotypes and social *66 myths, [FN7] through prereflective "ordinary common sense," [FN8] and through the employment of what cognitive psychologists refer to as "heuristic thinking." [FN9] Our policies reveal the atrophied state of our national moral development. It is not too extreme to express the fear that, absent an external cataclysmic force too "outrageous to ignore," our policies have become nearly irreversible. [FN10]

We can no longer ignore the homeless. [FN11] In the words of the writer Peter Marin, they are "the sum total of our dreams, policies, intentions, errors, omissions, [and] cruelties" [FN12] They serve as a screen upon which we project our visions of our entire social welfare system. [FN13] Homelessness [FN14] is not new. [FN15] Its causes are many and *67 complex. [FN16] However, the public discourse on "the deinstitutionalized" has distorted the public discourse on the issue of "homelessness." The media, in its presentation of the story of the homeless, has equated the "homeless" with the "deinstitutionalized homeless." Conventional wisdom posits that the policy of

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deinstitutionalization has "caused" the increase in homelessness and urban troubles. [\[FN17\]](#) The public perceives homeless individuals as a nearly monolithic population--ex-patients, improvidently released from psychiatric hospitals, incompetent to care for themselves, and a danger to themselves and to the citizenry. [\[FN18\]](#) In his typically florid way, former New York City Mayor Ed Koch has characterized deinstitutionalization as one of the "lunacies of government." [\[FN19\]](#)

This blame-laying is misplaced. Its focus on the tree of deinstitutionalization, while of vital importance to the one-third of the homeless somehow affected by their histories as ex-patients, obscures the forest of deeper and broader shame: the crushing costs of homelessness to all of the less visible displaced and the dispossessed--the children, the young mothers, and, increasingly, the Vietnam veterans. [\[FN20\]](#) Homelessness remarginalizes these individuals *68 who have already once been marginalized by poverty, by race, and by social status.

The blame-laying, moreover, ignores the hundreds of thousands of homeless persons [\[FN21\]](#) who have never been institutionalized or who are not mentally ill. [\[FN22\]](#) It also ignores the concessions made by virtually every critic of deinstitutionalization policies: deinstitutionalization is not the sole cause of the increase in homelessness. [\[FN23\]](#) Further, it is the misexecution of deinstitutionalization rather than the "clinically sound and economically feasible" [\[FN24\]](#) concept of deinstitutionalization that has exacerbated the problems in question. [\[FN25\]](#) It is necessary to add an important caveat: as long as we direct our attention to some of the frivolous nonissues interspersed in the American Psychiatric Association's (APA's) otherwise thoughtful agenda (for example, blaming the American Civil Liberties Union--counsel for many plaintiff classes in the early 1970s mental patient civil rights test cases--as the true villain in the homelessness saga), [\[FN26\]](#) we will continue to blind ourselves to the harsher realities and true causes of urban poverty.

The same powerful forces of racism and classism that have helped distort the deinstitutionalization movement [\[FN27\]](#) are at work in the larger context of homelessness. [\[FN28\]](#) Ironically, many of those who *69 have regularly espoused liberal and "left" political positions in the national and international political debate possess the same sort of virulent bias and prejudice in dealing with the deinstitutionalized as do those members of the community who regularly articulate racist and sexist positions. [\[FN29\]](#) It is this extra bias of "sanism" [\[FN30\]](#) that is especially pernicious in the context of homelessness.

This article suggests several overlapping propositions. First, the extent of the homelessness problem is the inevitable result of a decade of soul-crushing economic policies, Presidentially-sanctioned mean-spiritedness, and born-again socially acceptable racism and classism. Second, the public's conflation of "misguided deinstitutionalization" and "homelessness" [\[FN31\]](#) has effectively obscured from the public debate the two-thirds of the homeless who never were institutionalized in mental hospitals (but many of whom stand in clear and present danger of becoming mentally ill as their status of homelessness becomes institutionalized). Third, our deinstitutionalization policies have been driven by a series of interrelated social and political agendas that obscure the sober reality; protests over deinstitutionalization policies are really, sub silentio, protests of deinstitutionalization of poor people, and these protestors willfully blind themselves to the long term moral and social bankruptcy of most public psychiatric systems. Fourth, the infusion of standard medical/legal categories of "competency" into the discussion will most likely be counterproductive. [\[FN32\]](#)

Part II of this article discusses the myths of homelessness and how these myths have helped distort our official policies. [\[FN33\]](#) Part III examines the myths of deinstitutionalization and again, how these myths have shaped these policies. [\[FN34\]](#) Part IV outlines the perceived homelessness/deinstitutionalization linkage, in particular how the treatment of this linkage in the policy debate has had a severe negative impact on our attitudes toward the homeless, the deinstitutionalized, and the deinstitutionalized homeless, and how this is reflected in our "sanist" policies. [\[FN35\]](#) Part V attempts to deconstruct the meanings of "competency," suggesting some additional meanings *70 not usually found in the legal or mental disability texts. [\[FN36\]](#) Finally, Part VI offers some modest explanations of the current state of affairs and some recommendations to policy makers and academic experts, as well as the only constituency that really matters, the general public. [\[FN37\]](#)

II. THE MYTHS OF HOMELESSNESS

A. Introduction

Homelessness has been present in Western societies for centuries, and has always existed in the United States. [\[FN38\]](#) Religious houses of worship were used as long ago as the fourth century to shelter homeless Greeks and Romans. [\[FN39\]](#) In colonial times, poor-houses and almshouses were established in part to serve the needs of those without adequate housing. [\[FN40\]](#) The economic depressions of the late nineteenth and early twentieth centuries significantly increased *71 the number of uprooted homeless persons. These persons were the residents of the cities' first "skid rows." [\[FN41\]](#) Social care for the homeless was traditionally organized by upper-and middle-class "caretakers," whose desire for moral reform and fear of social disorder demanded that homelessness be classified as a "social problem." [\[FN42\]](#)

The contemporary homeless defy such easy group categorization. [\[FN43\]](#) "They are a cross section of American society. They are men, women and children of all ages and all ethnic and religious backgrounds. They are single persons, couples and families. They represent all educational levels, occupations and professions." [\[FN44\]](#)

Most recent thoughtful investigations of homelessness focus on this "new class." [\[FN45\]](#) Lacking a "social network" [\[FN46\]](#) or "social margin," [\[FN47\]](#) these individuals exist at the fringe of society. They are "socially isolated, unmarried, out of touch or at odds with their families or friends, and [possess] few occupational skills." [\[FN48\]](#) As many as half the homeless are under the age of forty. [\[FN49\]](#) They are increasingly *72 more likely to be female [\[FN50\]](#) and more likely to be members of racial minorities. [\[FN51\]](#) We cannot understand homelessness or the homeless without recognition of the significance of this economic and social marginality. [\[FN52\]](#)

The popular images of the homeless are mythic--there is virtually no empirical support for any of the three popular images of the homeless. The homeless are not "independent, eccentric descendants of the nomadic hoboos of the past," "lazy, degenerate bums," or "crazy, possibly dangerous people who ought to be put away." [\[FN53\]](#) It is not enough to say that the only problem with the homeless is that they do not have "the good sense to come in from the cold." [\[FN54\]](#)

The problems of the homeless do not stop at homelessness. [\[FN55\]](#) They are "jobless, penniless, functionless, and supportless as well as homeless"; [\[FN56\]](#) marginalized and "unconnected"; [\[FN57\]](#) generally in *73 poor physical health; [\[FN58\]](#) in need of social and human services; [\[FN59\]](#) and often without any social support systems. [\[FN60\]](#) Homeless children are routinely deprived of a thorough and adequate education. [\[FN61\]](#) The homeless are extremely poor. [\[FN62\]](#) It is essential that any serious consideration of homelessness acknowledge the critical link between homelessness and extreme poverty. [\[FN63\]](#) Standing alone, the provision *74 of emergency shelter is simply not enough to reverse these long-term effects: if society's sole response to homelessness is the creation of an extensive shelter system, we are "effectively accepting the permanency of a large population of people with no place to call home." [\[FN64\]](#)

B. Contributing Factors

In addition to deinstitutionalization, [\[FN65\]](#) at least four independent social factors have had a significant impact on the problems of the homeless: the baby boom, the shrinking housing market, the general reduction in the availability of governmental benefits, and the persistently high rate of unemployment among unskilled and semiskilled workers. [\[FN66\]](#)

1. The baby boom. As the numbers of the homeless steadily grow, [\[FN67\]](#) their average age drops precipitously. [\[FN68\]](#) Younger, more mobile, episodically or permanently homeless individuals have been drawn to "magnet" communities through "migration streams" that also attract the chronically mentally ill. [\[FN69\]](#) Younger people also *75 show a greater tendency to use addictive substances (both drugs and alcohol), which often exacerbate the symptoms of illness [\[FN70\]](#) and make homelessness more likely. [\[FN71\]](#) Vietnam veterans are one hidden subset of this population, [\[FN72\]](#) and one commentator recently characterized them in this context as "soldiers of misfortune." [\[FN73\]](#)

2. The shrinking housing market. The elimination of available housing stock has had a tremendous impact on the growth of the homeless, especially in the larger cities. [\[FN74\]](#) A 1982 New York *76 State study found that the "single most critical factor in preventing effective service coordination and implementation of rational discharge planning is the lack of . . . adequate specialized housing for the chronically disabled." [\[FN75\]](#)

The shrinkage of alternative housing in New York, which has an overall rental vacancy rate of one percent [\[FN76\]](#) is paradigmatic. The Single Room Occupancy Hotels (SRO's), which for years provided their only affordable housing, [\[FN77\]](#) were a haven for ex-patients and other high risk homeless persons who gravitated to such facilities for shelter. [\[FN78\]](#) Between 1970 and 1982, New York City lost over 110,000 SRO units, which represented eighty-seven percent of the total supply. [\[FN79\]](#) These SRO units disappeared largely as a result of tax abatement programs [\[FN80\]](#) which encouraged developers to convert *77 (and "gentrify") these hotels into luxury housing. [\[FN81\]](#) The tax abatement laws were thus "subverted into a mechanism for converting unprofitable housing for the poor into extremely profitable housing for the well-to-do," [\[FN82\]](#) "greatly accentuat[ing] the problem." [\[FN83\]](#) At the same time, federal funding for subsidized housing has been reduced eighty-one percent in the past decade. [\[FN84\]](#) The waiting list for public housing in New York City is now estimated at eighteen years. [\[FN85\]](#)

States and communities, fearing they will become a "magnet" for the homeless, systematically compete in an effort to minimize their populations of homeless people. [\[FN86\]](#) While the lengths to which some cities have gone in an effort to rid themselves of homeless persons may be extreme (for example, Phoenix made it a criminal misdemeanor to lie on a park bench), [\[FN87\]](#) the general lack of state and federal funding for shelter services creates a strong incentive for other localities to "rid their jurisdictions of homeless people." [\[FN88\]](#)

*78 3. Reduction in governmental benefits. The procedures initiated by the Reagan Administration to review all Supplemental Security Income (SSI) recipients [\[FN89\]](#) resulted in over 350,000 people losing their benefits after fall 1981. [\[FN90\]](#) In this group, the mentally disabled were overrepresented by a factor of three. [\[FN91\]](#) Similarly, about a third of all persons whose benefits were discontinued were mentally impaired. [\[FN92\]](#) As of November 1981, every client of Project Reach Out--a mobile outreach program funded by the New York State Office of Mental Health to serve the homeless--who applied for SSI based on psychiatric disability was rejected. [\[FN93\]](#) A survey of another group of the homeless found that less than one-quarter received any sort of governmental financial assistance and that none received SSI. [\[FN94\]](#)

While these cutbacks have diminished to some extent in the face of public outrage, [\[FN95\]](#) congressional response, [\[FN96\]](#) and United States Supreme Court action, [\[FN97\]](#) the reduction of disability benefits *79 remains a significant factor in the increased number of homeless persons. [\[FN98\]](#) Additionally, the more recent amelioration in entitlement policy has not aided those individuals who lost benefits in the early 1980s. [\[FN99\]](#) These changes caused the annual income of homeless individuals to drop from \$1058 in 1958 to the equivalent of \$383 (in 1958 dollars) [\[FN100\]](#) at the present time. In other words, the homeless are more than two-thirds poorer than they were thirty years ago. [\[FN101\]](#)

4. Unemployment rates. Most of the "new homeless" are unskilled and were chronically unemployed even before they became homeless. [\[FN102\]](#) Even the mobile, physically and mentally capable homeless have had little opportunity for advancement because of poverty and atrophied skills levels. [\[FN103\]](#) To a significant extent, this group has helped reshape the demographic picture of the homeless; members of the racial and ethnic minority groups [\[FN104\]](#) who have been disproportionately hurt by the increase in unemployment rates in unskilled and semiskilled jobs [\[FN105\]](#) are more rapidly joining the ranks of the homeless. [\[FN106\]](#)

*80 C. Conclusion

The homeless are becoming increasingly marginalized. Always disaffiliated and unconnected with mainstream society, they are now poorer, more estranged, younger, and disproportionately female and racial minorities. To many, they symbolize poverty as well as the failures and the excesses of the Reagan [[[social] program." [\[FN107\]](#) In response, organized government has merely "shrug[ged] its fiscal shoulders." [\[FN108\]](#)

III. THE MYTHS OF DEINSTITUTIONALIZATION [\[FN109\]](#)

A. Historical Background

Our public mental health policy is cyclical, spurred by reform movements that seek to transform social problems into mental health issues [\[FN110\]](#) and medical issues. [\[FN111\]](#) In an important way, the deinstitutionalization debate [\[FN112\]](#) provides yet one more example of *81 how a discrete reform policy that fails to address the full range of

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underlying social issues is inevitably doomed. While the historical basis of deinstitutionalization is fairly clear, this history must be read upon a canvas of social and economic politics in order to understand the depths of the problems we face today as well as the intractable irrationality of our response to them. Our willful blindness towards both the underlying politics and the irrationality of our response calls into question our social competence to respond.

Deinstitutionalization is society's "whipping boy." Heuristically, [\[FN113\]](#) we perceive it as a massive social failure that has "worsened conditions of care, created community resistance and undermined *82 patient reintegration." [\[FN114\]](#) In order to determine the accuracy of this characterization, we must consider the forces that helped bring about current policies. [\[FN115\]](#) When these forces are considered in light of the social forces that have dramatically increased homelessness, [\[FN116\]](#) the relationship between the two should become clearer. The problems attributed to deinstitutionalization are far more complex than the debate suggests: they reflect important changes in national demography, in concepts of civil liberties, in social welfare policies, and in the provision of medical services. [\[FN117\]](#) Until we confront this complexity, we will remain in a social policy gridlock.

*83 As the extent of serious deficiencies in state hospitals became apparent to social reformers, [\[FN118\]](#) psychiatrists, [\[FN119\]](#) lawyers, [\[FN120\]](#) and political leaders, [\[FN121\]](#) they realized that alternatives to large, impersonal institutions needed to be developed. [\[FN122\]](#) Recognition of these deficiencies is not new. [\[FN123\]](#) For instance, in 1884, Dr. Pliny Earle (then *84 superintendent of a Massachusetts state hospital) wrote to that state's governor suggesting "an experiment . . . of giving [a patient] the opportunity of showing how far he could control himself away from the hospital." [\[FN124\]](#)

Mental health professionals and others thus began to turn their attention to different mechanisms to provide for community care of the mentally ill. [\[FN125\]](#) The debate as to whether this stemmed from humanitarian concerns or social expediency and economics has been waged for over forty years. [\[FN126\]](#) New and amended federal grant and entitlement programs [\[FN127\]](#) then appeared to provide a mechanism through which community programs could be reimbursed for the care of mentally disabled persons. [\[FN128\]](#) Clearly, most of the programs never fulfilled the mandate of treating the original target population--the deinstitutionalized. [\[FN129\]](#)

*85 Next, the development of antipsychotic drugs [\[FN130\]](#) created a modality of treatment which could, in many instances, be administered in the community in much the same manner as in institutions. [\[FN131\]](#) While the common wisdom that "the drugs emptied out the hospitals" [\[FN132\]](#) has been called sharply into question by revisionist social historians such as Andrew Scull, [\[FN133\]](#) many perceive the availability of these drugs as a primary precipitant of massive deinstitutionalization. [\[FN134\]](#) Importantly, at least one recent research study suggests that a significant number of deinstitutionalized mentally ill persons prefer homelessness to hospitalization because they can thus avoid the involuntary administration of such drugs. [\[FN135\]](#)

*86 Finally, as the United States Supreme Court and lower federal courts extended the "due process revolution" [\[FN136\]](#) to include the mentally disabled, [\[FN137\]](#) courts began to strike down vaguely-drafted involuntary civil commitment statutes [\[FN138\]](#) to impose durational limitations on commitments [\[FN139\]](#) and to extend the "least restrictive alternative" doctrine to institutional decision making. [\[FN140\]](#) Also, legislatures passed more restrictive commitment laws [\[FN141\]](#) and adopted periodic review mechanisms [\[FN142\]](#) so as to limit the numbers of those who would be initially institutionalized and who would subsequently remain institutionalized. [\[FN143\]](#) This aspect of deinstitutionalization has served as the bogeyman for the APA, the mass media, and--to a great extent--the public. Thus, the APA Task Force on the Homeless Mentally Ill has argued that legal advocacy efforts on behalf of institutionalized mental patients "neglected [the patients'] *87 right to high-quality comprehensive outpatient care." [\[FN144\]](#) The task force chairman, Dr. H. Richard Lamb, asserted that "some mental health lawyers and patients' rights advocates . . . have contributed heavily to the problems of homelessness." [\[FN145\]](#) Other deinstitutionalization critics, such as E. Fuller Torrey, have characterized inappropriate deinstitutionalization as the "primary" cause of homelessness, [\[FN146\]](#) accusing "civil liberties lawyers" of "compound[ing the disaster]" by filing such diverse suits as *Wyatt v. Stickney*, [\[FN147\]](#) *O'Connor v. Donaldson*, [\[FN148\]](#) *Dixon v. Weinberger*, [\[FN149\]](#) *88 and *Lessard v. Schmidt*. [\[FN150\]](#) These critics argue that, while the lawyers were "well-intentioned," their "outmoded ideas about the nature of serious mental illness"--brought on in some important part by their "having read Freud and Szasz"--have created significant legal impediments to care. [\[FN151\]](#) Former New York City Mayor Ed Koch chimed in by characterizing libertarian patients' rights lawyers as "crazies." [\[FN152\]](#)

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B. Myths and "Ordinary Common Sense"

When we reflect on the importance of this position, we must consider how this critique "fits" with our "ordinary common sense" conceptions of the mentally ill [\[FN153\]](#) and how certain heuristically-*89 driven images [\[FN154\]](#) have allowed us to obsessively focus on this social force while blithely ignoring others. [\[FN155\]](#) While it is common wisdom that deinstitutionalization has failed, there coexists an ample, largely uncontradicted but regularly ignored body of evidence that indicates that a well-conceived deinstitutionalization program offering a variety of intensive rehabilitative services has a positive and significant effect on the length of the ex-patients' "tenure" in the community. [\[FN156\]](#) We must ask why this body of evidence continues to be ignored by all important "players" in this game.

Perhaps these social forces are nothing more than the "cover" for a series of other "covert agendas" [\[FN157\]](#) that may have been the true impetus [\[FN158\]](#) behind deinstitutionalization: budget shifting, [\[FN159\]](#) *90 deprofessionalization, [\[FN160\]](#) oversimplification, [\[FN161\]](#) and privatization. [\[FN162\]](#) In this context, we must consider the rarely-articulated but never-refuted reality that community mental health services have never *91 been truly accessible to former state mental hospital patients. [\[FN163\]](#) These services are used instead by what is called, colloquially, the "worried well"--whole new classes of previously untreated patients. [\[FN164\]](#) As a result, the deinstitutionalized upon whom society focuses--the poor, the minorities, the marginalized--have never received any, much less adequate, community care. [\[FN165\]](#) Deinstitutionalization has thus "inadvertently accentuated a two-class system of mental health hospitalization in the United States." [\[FN166\]](#)

It is precisely this unserved population--"the voiceless, those persons traditionally isolated from the majoritarian, democratic political system" [\[FN167\]](#)--who have suffered disproportionately from *92 the "pathology of oppression." [\[FN168\]](#) When such individuals are deinstitutionalized, society's irrational mechanisms of oppression--paralleling in important ways society's traditional oppression of racial, religious, and sexual minorities [\[FN169\]](#)--create the condition of "sanism." Dr. Morton Birnbaum (perhaps ironically, the acknowledged father of the "right to treatment" doctrine) [\[FN170\]](#) has characterized "sanism" as "the irrational thinking, feeling and behavior patterns of response by an individual or by a society to . . . a mentally ill individual." [\[FN171\]](#) The concentrated efforts to "zone out" group homes and congregate residences for the mentally disabled [\[FN172\]](#) offers a paradigm of "sanist" behavior. It is especially *93 ironic that "liberals," traditionally counted upon to support the full range of social welfare legislation, condemn, often virulently, deinstitutionalization policies. [\[FN173\]](#) If we are to understand the underlying social problems besetting the homeless, the deinstitutionalized, and the deinstitutionalized homeless, we necessarily must acknowledge the importance and power of "sanism" in our society. [\[FN174\]](#)

*94 IV. DEINSTITUTIONALIZATION AND HOMELESSNESS

It is next necessary to ask how (if at all) these deinstitutionalization policies connect to homelessness. Three interrelated phenomena must be examined: (1) the extent to which (and the reasons why) the social policy of deinstitutionalization is perceived to have failed; (2) the extent of the empirical connection between homelessness, the failure of deinstitutionalization, and the forces that have led to these problems; and (3) the way our social policies are influenced by how we distinguish between the "deserving" or "undeserving poor" and how the social myths surrounding mental illness exacerbate our feelings of anger and revulsion towards the homeless mentally ill. After we critically examine these forces, we can then see (1) how public perceptions drive official social policy and (2) how "blaming the victim" fails to resolve social problems.

A. The Perceived Failures of Deinstitutionalization

The public at large, the media, and politicians perceive deinstitutionalization as an abject failure. [\[FN175\]](#) Mayor Koch's characterization of deinstitutionalization as one of the "lunacies of government" [\[FN176\]](#) is slightly modified by social critics who recharacterize it as a failure in the execution and focus instead on the implementation of deinstitutionalization programs, [\[FN177\]](#) the disorganization of such programs, [\[FN178\]](#) the unrealistic way such programs were conceived, *95 [\[FN179\]](#) the unarticulated goals of many such programs, [\[FN180\]](#) the incoherence of funding policies, [\[FN181\]](#) and the lack of social consensus supporting such programs. [\[FN182\]](#) In the words of E.F. Torrey, "the policy of deinstitutionalization has been a disaster whose dimensions are apparent everywhere." [\[FN183\]](#) Our policies appear to reflect perfectly what Jack Pitney has called "bile barrel politics": [\[FN184\]](#) when a theoretically-approved, benefit-dispersing social policy (the concept of deinstitutionalization) results in specific burdens on individual communities (the presence of unwanted, unsupported deinstitutionalized patients), "no one

should be surprised by the determined resistance of the concentrated losers-- the communities most affected." [\[FN185\]](#)

Although some commentators have recognized the occasional successful deinstitutionalization program [\[FN186\]](#) (almost as if it somehow emerged successfully by accident), [\[FN187\]](#) they pay little attention *96 to the countless examples of adequate community programs and facilities. [\[FN188\]](#) These programs and facilities, through the provision of supportive social structures, often facilitate the reintegration of chronic patients into the community. [\[FN189\]](#) Further, when patients are deinstitutionalized into alternative out-patient treatment programs, the latter are invariably more effective than inpatient treatment. [\[FN190\]](#) Even the American Psychiatric Association has issued a *97 series of generally thoughtful and provocative recommendations [\[FN191\]](#) geared toward the assurance that similar "supportive social structures" are in place in all community settings. [\[FN192\]](#) While these recommendations are not without some controversy, [\[FN193\]](#) they reflect at least a first attempt at sketching out the basic needs of an important percentage of the homeless population.

Ironically, most of these recommendations have had a negligible effect on the substance of the homelessness debate. Conversely, the APA's more florid blame of libertarian patients' rights lawyers as the true culprits has vividly caught the public's attention. This teaches us an important lesson: our unwitting refuge in heuristic images applies whether we are considering the alleged problem or the proposed solution.

***98 B. The Connection Between Homelessness and the Failures of Deinstitutionalization**

It is no longer [\[FN194\]](#) seriously disputed that a significant percentage of the homeless exhibit significant characteristics of mental illness, [\[FN195\]](#) that a significant (albeit minority) percentage of the mentally ill homeless were once hospitalized, [\[FN196\]](#) that the percentage is growing, [\[FN197\]](#) and that, for some homeless mentally ill individuals no longer under the supervision of public mental health agencies, shelters have become "permanent institutions." [\[FN198\]](#) These empirical facts, however, fall short of answering the questions of causation: Does deinstitutionalization "cause" homelessness? If deinstitutionalization had never come about, would there be significantly fewer homeless individuals? Are the deinstitutionalized homeless a representative sample of all the homeless? Even if we find there to be very little causal link between the two, does that minimize the social problems faced by (and caused by) the homeless mentally ill?

We now know that some percentage of the homeless have always been mentally ill, even before deinstitutionalization policies made significant reductions in state hospital population censuses. [\[FN199\]](#) While there has been some incremental increase in that *99 percentage, it in no way supports the conventional view directly linking the two. [\[FN200\]](#) We also know that, notwithstanding the public perception that it is virtually impossible for an individual to be involuntarily committed to a psychiatric hospital, the number of admissions continues to rise. [\[FN201\]](#) In spite of the APA's repeated assertion that significant commitment "reform" is necessary to provide for a more liberal commitment policy, over two-thirds of all American jurisdictions now provide for precisely the sort of substantive commitment standard that the APA insists is necessary to "deal with" inappropriate deinstitutionalization. [\[FN202\]](#) In addition, recent case law shows that, in some instances at least, appellate courts are willing to sensitively and carefully weigh facts and medical opinion testimony in assessing whether the party seeking institutionalization has met the appropriate standard. [\[FN203\]](#)

At the same time, we must rethink the Torrey/Lamb/Koch critique that blames patients' rights lawyers for bringing litigation that narrows civil commitment standards. Without even considering the proper role of counsel in the representation of the mentally disabled, [\[FN204\]](#) the application of the sixth amendment in the involuntary civil commitment context, [\[FN205\]](#) the historically pathetic track *100 record of individually and sporadically appointed counsel, [\[FN206\]](#) the significance of broad-based legally oriented mental health advocacy organizations, [\[FN207\]](#) or the specific fact contexts in which much of the litigation focused on arose, [\[FN208\]](#) it remains necessary to contextualize the evolution of the criticized case law.

"Inspired by the success of the civil rights movement on behalf of black people in the 1960's," [\[FN209\]](#) lawyers representing the mentally disabled replicated the experiences of "public interest lawyers" [\[FN210\]](#) who had successfully counseled other unrepresented and powerless minority groups [\[FN211\]](#) and helped them to obtain equal access to justice. [\[FN212\]](#) Cases such as *Wyatt v. Aderholt* [\[FN213\]](#) and *Pennhurst State School v. Haldeman* [\[FN214\]](#) arose from conditions that shocked the conscience of a civilized society. [\[FN215\]](#)

The case law that developed brought about massive changes in *101 the way public mental health institutions are run and in the way the involuntary civil commitment process operates. This litigation empowered the ultimate clientele: the mentally disabled. [\[FN216\]](#) As Hendrik Wagenaar and Dan Lewis have explained:

The extension of civil rights to the mentally ill has irrevocably altered the relationship between patients and therapists. For instance, patients gained the right to request release from the hospital and to have their request considered in court within a specified number of days. With this right, patients gained leverage in their negotiations with staff for release . . . More than anything else, patients' increased leverage over their treatment has determined the utilization patterns that are characteristic of the modern public hospital system. [\[FN217\]](#)

Beyond these empirical facts, we know additional social facts. We know that discourse about the deinstitutionalized refers, virtually exclusively, to the poor and to the black. [\[FN218\]](#) We also know that individuals who formerly were institutionalized at expensive private facilities do not enter into this social debate. [\[FN219\]](#) After Elizabeth Ashley divulged that she had been a psychiatric patient in an expensive New York City private hospital, no one raised stereotypic deinstitutionalization myths when she was released to star in Barefoot in the Park with Robert Redford and to live with George Peppard in a Central Park West penthouse. [\[FN220\]](#) Conversely, many *102 patients have remained hospitalized "solely because they are too poor to be released." [\[FN221\]](#)

We now know that the deinstitutionalized have the greatest number of social problems of all the homeless [\[FN222\]](#) and that their needs are not currently being met by the mental health system, [\[FN223\]](#) the social service system, or by a combination of the two systems. [\[FN224\]](#) We know that massive reinstitutionalization [\[FN225\]](#) is not a viable solution for a variety of reasons [\[FN226\]](#) including the fact that such movement inevitably diverts "scarce resources" away from treatment of others in the community. [\[FN227\]](#) We know that the homeless deinstitutionalized need psychosocial and rehabilitation programs beyond those available in the hospital setting. [\[FN228\]](#) We also know that persons of lower socioeconomic status are more likely than those of middle and upper status to develop symptoms of distress in response to problematic life experiences. [\[FN229\]](#) Additionally, we now *103 know that the deinstitutionalized homeless have even fewer social supports in the community than do other homeless individuals. [\[FN230\]](#) Lastly, we know, anecdotally, that this clientele is neither a particularly "easy" nor "preferred" one to deal with professionally. [\[FN231\]](#)

If anything, these facts may prove the converse of "ordinary common sense": even though there is virtually no reliable evidence that either deinstitutionalization or mental illness is a major cause of homelessness, [\[FN232\]](#) it may be that homelessness causes mental illness. [\[FN233\]](#) This does not mean that the problems of the deinstitutionalized homeless mentally ill are either trivial or marginal: twice cursed, [\[FN234\]](#) their problems are neither. As long as we see homelessness as a problem caused by inappropriate deinstitutionalization, however, we will remain blind to the underlying economic discontinuities [\[FN235\]](#) that would perpetuate homelessness even if all mentally ill individuals were massively (albeit illegally) reinstitutionalized.

A "joker" in this entire analysis is the role played by the massive use of psychotropic drugs in state mental hospitals. Common wisdom has suggested that one of the key factors in the creation of deinstitutionalization policies was the mass marketing of psychiatric drugs. [\[FN236\]](#) Whether or not Scull's revisionist position is correct, [\[FN237\]](#) a statistically significant number of formerly hospitalized patients now receive psychotropic drug treatment in the community. [\[FN238\]](#) Yet, *104 no one has explored what may be the most important hidden issue: the impact of forced public hospital drugging on increased homelessness.

We no longer question the epidemic prevalence of tardive dyskinesia and psychotropic drug side effects in the state hospital population. [\[FN239\]](#) As Judge Stanley Brotman noted over a decade ago in Rennie v. Klein, [\[FN240\]](#) the same drugs prescribed to lessen the severity of thought disorders also served to "inhibit a patient's ability to learn social skills needed to fully recover from psychosis" [\[FN241\]](#) Side effects such as akinesia and akathisia [\[FN242\]](#) have the inevitable effect of retarding social skill progress and of making expatients even less employable once they are deinstitutionalized. [\[FN243\]](#) While the drugs may be effective in reducing the floridity of symptomatology and lessening the excesses of psychic pain, [\[FN244\]](#) no one--neither the patients' rights advocates, the spokespersons for the APA, nor the deinstitutionalization theorists--has yet critically considered the linkage between these drug side effects, the failure *105 of patients to be meaningfully reintegrated into society after their release, and homelessness. [\[FN245\]](#) The linkage is especially pernicious in light of the parallel literature illuminating

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the ways in which institutional dependency progressively leads to losses of social and vocational competencies, precisely the sort of "competencies" that are essential if homeless individuals are to reintegrate themselves meaningfully into mainstream society. [\[FN246\]](#)

The deinstitutionalization literature on this point offers tantalizing clues. Evidence suggests that some deinstitutionalized homeless individuals remain on the streets to avoid regimens of compulsory drugging in hospitals. [\[FN247\]](#) Parenthetically, other researchers have learned that the deinstitutionalized homeless will accept medication in alternative social service settings. [\[FN248\]](#) This difference in behavior may be explained when one examines other evidence. For instance, the deinstitutionalized homeless reject the alternative of mental hospitals [\[FN249\]](#) but frequently seek out medical care in *106 general hospitals. [\[FN250\]](#) Some explanation, other than the tautology that suggests that this behavior merely indicates the depths of the population's underlying mental illness, is necessary.

We can suggest as a hypothesis that the deinstitutionalized homeless know, from searing personal experience, that the indictment of public mental hospitals leveled by then-APA president Dr. Harry Solomon over thirty years ago--"bankrupt beyond remedy" [\[FN251\]](#)--is still frequently a valid critique. [\[FN252\]](#) While there is episodic evidence of idiosyncratic improvement, [\[FN253\]](#) a reading of case law and literature suggests little reason for the wide-ranging optimism that implicitly buttresses the APA critique: if these folks were back in the hospital, they'd be a lot safer. [\[FN254\]](#)

*107 They might not be safer, but perhaps we would be relieved. Again, the issue is one of social class and of racial and economic marginalization. [\[FN255\]](#) The deinstitutionalized homeless reflect the socio-economic characteristics of those hospitalized in public facilities--a universe increasingly more populated by ethnic minorities, the poor, the young, [\[FN256\]](#) and those with few social supports. [\[FN257\]](#) Those who have been hospitalized and feel a profound sense of social isolation are subsequently cut adrift without social support. [\[FN258\]](#) No inquiry into the specific problems can begin to make sense if we fail to come to grips with the significance of this reality: it is the "once *108 and future" marginalized that we target in our attacks on the deinstitutionalized homeless mentally ill. [\[FN259\]](#)

C. Our Attitude Towards the Poor

The deinstitutionalized homeless represent the latest group of the "undeserving poor" to feel public and political wrath. [\[FN260\]](#) As a result of the social myths and meta-myths that have evolved about the mentally ill over centuries, the deinstitutionalized homeless exacerbate that wrath, [\[FN261\]](#) heightening our feelings of "anger and revulsion" towards them, [\[FN262\]](#) especially those whom we feel have "given in" to their dependency needs." [\[FN263\]](#) It is probably not coincidental that former Mayor Koch has chosen to blame a "social worker's philosophy" as the cause of homelessness among the deinstitutionalized, [\[FN264\]](#) *109 while former President Reagan urged voters to support Republican law-and-order senators as a vehicle for ensuring a conservative federal judiciary, stating, "We don't need a bunch of sociology majors on the bench." [\[FN265\]](#)

To a significant degree, these feelings drive our social policies toward the homeless and help explain why it is easier for us to focus upon the deinstitutionalized homeless: it is much easier for us to rationalize policies of "frugality" and "economic responsibility" when our target is the formerly institutionalized mentally ill than when it is the sort of homeless individual written about so evocatively and poignantly in Jonathon Kozol's *Rachel and Her Children*. [\[FN266\]](#) Indeed, this focus allows us to ignore society's "fundamental economic dislocations" and allows us to "salve [our] conscience by attributing the problem to pathology rather than poverty." [\[FN267\]](#) In actual fact, more recent empirical studies suggest that deinstitutionalization has played a minimal role in causing homelessness. [\[FN268\]](#)

Our focus creates a "perceptual trap" through which the most *110 florid and bizarre behavior of the most mentally ill individual comes to typify all homeless people, creating an "illusion of homogeneity." [\[FN269\]](#) Our public perceptions drive our official policies. [\[FN270\]](#) We reduce complex and multidimensional social problems to stereotypes, [\[FN271\]](#) a policy of reductionism encouraged by media distortions [\[FN272\]](#) and exacerbated by the vividness heuristic and "ordinary common sense". [\[FN273\]](#) Our official policies--"harsh in execution" [\[FN274\]](#)--blame the deinstitutionalized homeless for their plight [\[FN275\]](#) *111 and thus legitimate political bias toward this population. [\[FN276\]](#) This undercuts any pretense of a commitment to equality. [\[FN277\]](#) Under the rubric of the state's right to "improve itself," [\[FN278\]](#) we launch lengthy and increasingly vicious counterattacks when community groups seek to open halfway houses or group homes in residential neighborhoods. [\[FN279\]](#) We respond

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to the moral dimensions of the underlying problems by seeking to exert total social control over the deinstitutionalized homeless. Deinstitutionalization is unacceptable to the public because it runs counter to conventional wisdom and to "ordinary common sense." [\[FN280\]](#)

Our response to the homeless mentally ill must then be considered through these two filters: social classism (the homeless being "jobless, penniless, functionless and supportless") [\[FN281\]](#) and sanism (via the same sort of irrational thought processes that spawn racism and other similar social pathologies). [\[FN282\]](#) To avoid dealing with issues of economic marginality [\[FN283\]](#) and racial exclusion, [\[FN284\]](#) we *112 perpetuate symbolic stereotypes [\[FN285\]](#) of mental illness [\[FN286\]](#) that reify centuries of social myths and meta-myths [\[FN287\]](#) and that have traditionally colored and shaped the ways we treat the mentally ill. We thus focus our attention upon a group of victims against whom there is significant social prejudice instead of questioning the societal problems that are the true sources of homelessness. [\[FN288\]](#) In the end, it is precisely these "sanist" policies [\[FN289\]](#) that best explain the moral bankruptcy of our treatment of the homeless mentally ill. As Neil McKittrick has pointed out:

By focusing on the mentally ill, [New York City] perpetuates the stereotype that the homeless are insane, while creating the perception that it is addressing the problem. By categorizing the homeless as insane, no fundamental economic dislocations need to be examined, and society can salve its conscience by attributing the problem to pathology rather than poverty. [\[FN290\]](#)

V. THE MULTIPLE MEANINGS OF "COMPETENCY"

Having considered the relationship between deinstitutionalization *113 and homelessness, we turn now to the question of "competency" and its relationship to these two phenomena. This inquiry has two different dimensions: (1) a "plain meaning" investigation into the way that varying legal definitions of "competency" affect deinstitutionalization and homelessness and (2) a "deconstructed" analysis of some other "competencies" not usually discussed in this context. [\[FN291\]](#)

A. "Plain Meanings"

After stating the obvious--that the search for a unitary test of competency is, in the words of Dr. Loren Roth, a "search for a Holy Grail" [\[FN292\]](#)--we are confronted immediately with the perception that the legal and mental health professions "understand the very notion of competence in characteristically different ways." [\[FN293\]](#) Thus, Paul Appelbaum and Dr. Roth have set up this duality:

The law has tended to address competency as a fixed attribute of an individual, a characteristic in itself with an inherent stability. The clinician, on the other hand, knows that what the law calls competency is, in fact, a set of deductions from a variety of clinical data that can be as subject to influence and change as the more basic mental attributes on which it is based. [\[FN294\]](#)

This dichotomy may be more illusory than real. Thus, while a Pennsylvania statutory definition--an incompetent is one who "lacks sufficient capacity to make or communicate responsible decisions concerning his person" [\[FN295\]](#)--provides a fairly generic legal definition, a flood [\[FN296\]](#) of recent opinions have offered differing definitions of the term in a wide variety of cases. [\[FN297\]](#) Thus, competency *114 is thus not necessarily a "fixed state"; [\[FN298\]](#) a person may be competent for some legal purposes and incompetent for others at the same time. [\[FN299\]](#) Therefore, incompetency and mental illness are not identical states. [\[FN300\]](#)

Mental health professionals frequently couch definitions of competence in more functionalist language: for example, a patient's ability to balance risks and benefits. [\[FN301\]](#) The functionalist perspective in assessing competency in criminal cases looks beyond the question of "mental illness" to take account of "the psychopathological, cognitive and affective capacities of the defendant [[[as] related to the specific demands of the legal case and the competencies in question." [\[FN302\]](#)

How does this relate to the problem of deinstitutionalization and homelessness? Putting aside the specific issues raised by the deinstitutionalization of individuals who were originally committed pursuant to a finding of incompetency to stand trial on criminal *115 charges, [\[FN303\]](#) it would seem that the relevant medico-legal inquiry here has at least two important dimensions: (1) competency as a *116 factor in voluntary hospital admissions and (2) competency as a factor in release decisions.

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1. Voluntary hospitalization. Considering its importance and the number of individuals it affects, [\[FN304\]](#) it is astonishing how little scholarly and judicial attention is paid to the voluntary hospital admissions process. We do know that courts and legislatures generally articulate their preference of voluntary to involuntary treatment. [\[FN305\]](#) Among the shards of the scattered case law, we can find expressions of support for, variously, judicial review of voluntary patient status, [\[FN306\]](#) the need for a finding of inability or unwillingness to accept voluntary treatment as a prerequisite to involuntary commitment, [\[FN307\]](#) and the argument that the denial of mental illness and refusal to accept treatment could be a sufficient basis upon which the voluntary commitment alternative could be rejected in an involuntary commitment proceeding. [\[FN308\]](#)

*117 Cases involving voluntary patients rarely address the question of competency. [\[FN309\]](#) Yet, because most involuntary civil commitment statutes fail to define the level of competence necessary for a valid voluntary admission, many patients who consent to their hospitalization are, in fact, incompetent to do so. [\[FN310\]](#) If psychiatric patients were to meet a stricter standard of competency, the number of voluntary admissions--steadily on the rise [\[FN311\]](#) and regularly encouraged by both the legal and medical communities [\[FN312\]](#)--would inevitably be reduced. [\[FN313\]](#)

This becomes even murkier when one examines the underside of the voluntary admissions process. Scholars have begun to question critically whether an actual difference exists in the way that voluntary and involuntary patients are treated once hospitalized. [\[FN314\]](#) Indeed, evidence suggests that voluntary patients are subject to *118 "abuse" [\[FN315\]](#) and "substantial elements of coercion;" [\[FN316\]](#) they have even fewer opportunities for discharge than involuntary patients. [\[FN317\]](#)

Thus, the competency inquiry creates a self-contained paradox. Notwithstanding scholarly criticism, voluntary admission remains preferable to involuntary status. Yet, a close consideration of competency questions will probably serve to reduce the number of voluntary admissions, thus potentially re-increasing the number of involuntary patients. While such reinstitutionalization might serve as a palliative to the public's demand that "something be done about those people," it will probably not ameliorate the underlying social problems.

This likelihood is now even greater in the wake of the United States Supreme Court's decision in *Zinerman v. Burch*, [\[FN318\]](#) which held that a voluntary patient could proceed with a section 1983 civil rights action against a state hospital. [\[FN319\]](#) In *Zinerman*, the plaintiff had charged that hospital officials should have known that he was incompetent to consent to admit himself voluntarily to the hospital at the time he signed hospital admission forms. [\[FN320\]](#) This complex procedural decision [\[FN321\]](#) raises for the first time the concerns of a majority of the court that some "voluntary" patients may not be competent to admit themselves to psychiatric facilities. [\[FN322\]](#)*119 Especially in light of public hospital staff mental health professionals' growing fear of litigation, [\[FN323\]](#) *Zinerman* probably will have a further reductive effect on state hospital voluntary admissions.

2. The decision to release. The question of competency in release decision making is even more problematic. 'Cases such as *O'Connor v. Donaldson* [\[FN324\]](#) and *Addington v. Texas* [\[FN325\]](#) make it clear that patients cannot be forced to stay in institutions once they are no longer dangerous to themselves or others. [\[FN326\]](#) State court decisions such as *State v. Fields* [\[FN327\]](#) and *Fasulo v. Arafeh* [\[FN328\]](#) extend procedural due process commitment protections to periodic review hearings. [\[FN329\]](#) Questions of competency are not generally cognizable at such hearings where the question is the patient's present dangerousness. [\[FN330\]](#)

Yet, the public's perception of deinstitutionalization as being fueled by "inappropriate" civil liberties decisions such as *O'Connor**120 *v. Donaldson* [\[FN331\]](#) or *Lessard v. Schmidt* [\[FN332\]](#) attributes homelessness, in an important way, to the inevitable outcome of such decisions: [\[FN333\]](#) patients who, while perhaps not "technically" dangerous [\[FN334\]](#) to others (especially where they have committed no "overt act") [\[FN335\]](#) inevitably decompensate after release because, in the vernacular sense of the phrase, they are not competent to make life decisions. [\[FN336\]](#)

In partial response, attention has turned to the option of outpatient commitment "OPC" as a solution to the perceived problems. The APA has recommended that legislatures revise involuntary civil commitment laws to allow for this option and that existing OPC laws be "more widely used." [\[FN337\]](#) The prototype North Carolina statute provides for OPC where:

- (a) The respondent is mentally ill;
- (b) The respondent is capable of surviving safely in the community with available supervision from family, friends,

or others;

*121 (c) Based on the respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness [to himself or others]; and

(d) His current mental status or the nature of his illness limits or negates his ability to make an informed decision to seek voluntarily or comply with recommended treatment. [\[FN338\]](#)

Supporters of OPC argue that such statutes are necessary to prevent a discrete group of the mentally ill from "slip[ping] through [the law's] cracks [[[:] [t]he chronic mentally ill who failed to obtain treatment on their own, who then decompensated and exhibited bizarre behavior, [but who] could not be civilly committed until they did something dangerous even though they had a history of becoming dangerous in the later stages of decompensation following the bizarre behavior." [\[FN339\]](#)

Such statutes would insure that these individuals--a group that appears to include many of the deinstitutionalized mentally ill most susceptible to homelessness [\[FN340\]](#)--would have enhanced access to what proponents have characterized as "protective liberty" through broad-based treatment mechanisms in an atmosphere that would overcome "rehabilitative inertia." [\[FN341\]](#) Its opponents respond that outpatient commitment means little more than disguised "benevolent coercion" accompanied by excessive state intervention; where implemented, it will subvert the dangerousness standard, lead to significant quality control problems, defeat the right to refuse *122 treatment, and "undermin[e] therapeutic relationships." [\[FN342\]](#)

Empirical response has been mixed. [\[FN343\]](#) One of the most recent analyses concludes that, while outpatient commitment succeeds in terms of keeping patients on medication, thus extending their maintenance in the community, [\[FN344\]](#) its ultimate success may depend on the dedication of community mental health centers ("CMHC"s) "to making [it] work". [\[FN345\]](#) Where centers pay only "lip service" to outpatient commitment, the law becomes undermined. [\[FN346\]](#) This is especially troubling in light of Torrey's broad indictment of CMHCs: they have never provided aftercare for ex-patients and have exhibited attitudes toward public hospitals ranging from "difficult" to "adversarial." [\[FN347\]](#) In their desire to treat the "worried well"--patients with inter-and intrapersonal problems amenable to counseling and psychotherapy--CMHCs have historically turned their back on precisely the population that OPC was designed to serve. [\[FN348\]](#)

In a powerful critique from a civil libertarian perspective, Steven Schwartz and Cathy Costanzo focus on outpatient commitment *123 as "an expression of the much enlarged authority which developed over the past century to promote the health or interests of persons considered to be mentally infirm." [\[FN349\]](#) Schwartz and Costanzo characterize outpatient commitment as a "significant distortion of the historical purpose and benign motivation of the parens patriae principle" [\[FN350\]](#) and, primarily, as a "guise for substantially modifying the criteria for state-imposed psychiatric intervention." [\[FN351\]](#) Additionally, Professor Susan Stefan has "unpacked" outpatient commitment to differentiate "traditional" OPCs (premised on least restrictive alternative constructs and conditional release schemata) from the post-deinstitutionalization model which she characterizes as "preventative commitment." [\[FN352\]](#) According to Stefan, by focusing on the spectre of deterioration, an implied presumption of incompetency, and an assumed availability of treatment, [\[FN353\]](#) preventative commitment "broadens the class of people subject to commitment, and expands the conditions under which the state can intervene in a person's life." [\[FN354\]](#) While this is clearly a laudable goal to critics such as Torrey and Lamb, this expansion inadequately considers the additional procedural and substantive due process dilemmas regarding the right to treatment, the right to refuse treatment, and rights of economic sovereignty that are raised by the possibility of a greatly expanded use of this commitment status. [\[FN355\]](#) In short, this attempt to "solve" the perceived deinstitutionalization-homelessness link through focusing on a patient's "competency" may not prove to be a panacea at all. [\[FN356\]](#)

Stefan and Schwartz and Costanzo focus sharp criticism on precisely the issue which is frequently seen as the lynch-pin of OPC's efficiency value: its use as a tool to compel medication compliance in the community. [\[FN357\]](#) Stefan characterizes forced medication *124 as the "core of OPC"; [\[FN358\]](#) Schwartz and Costanzo speculate that OPC "already has or will become synonymous with forced medications." [\[FN359\]](#) While the OPC statutes rarely address this issue squarely, [\[FN360\]](#) it raises serious constitutional, philosophical, and operational concerns [\[FN361\]](#) that must be addressed. This is especially true when we remind ourselves that, as is the case with all other involuntary commitment mechanisms, it is the socially marginalized, indigent patient-- precisely the one in whom CMHCs traditionally have been disinterested--who likely will be disproportionately represented in any outpatient commitment

caseload. [\[FN362\]](#)

In short, neither of the two traditional "competency" inquiries help us focus our attention on more than discrete fragments of the larger and more complex underlying social problems.

B. Deconstructed Meanings

In attempting to solve the deinstitutionalization-homelessness conundrum, the importance of competency determinations requires further analysis. A more fully deconstructed reading of "competency" raises other "competencies" to consider: (1) the competence of bureaucrats to implement deinstitutionalization policies; (2) the competence of mental health professionals to effectively treat the institutionalized mentally disabled so that, once released, they do not decompensate to such a degree as to become homeless; (3) the competence of legislators to effectively draft statutes that stand a reasonable likelihood of ameliorating the current conditions; (4) the competence of lawyers to effectively represent this population on an individualized basis; and (5) the competence of public interest litigators, judges, and academics to offer creative *125 solutions to the underlying social problems. [\[FN363\]](#)

1. The competency of bureaucrats to implement deinstitutionalization policies. Deinstitutionalization, as implemented, frequently has been an operational disaster. [\[FN364\]](#) Officials in state mental health departments, for a combination of reasons, choose to wilfully blind themselves to the realities of much of the wretched conditions facing some deinstitutionalized individuals, especially in our big cities. [\[FN365\]](#) Although a psychological inquiry into why such policies have been doggedly followed [\[FN366\]](#) goes beyond the scope of this paper, this inquiry deserves re-emphasis since we have kept our collective heads "buried in the sands" for years. [\[FN367\]](#) Planned reconceptualization appears to be in progress only because of persistent and massive criticism. [\[FN368\]](#)

2. The competency of treatment staffs. The record of state hospital staffs in the provision of adequate treatment to institutionalized patients historically has been a national scandal. [\[FN369\]](#) Many of the legislative solutions that would "widen the net" [\[FN370\]](#) and expand the civil commitment power assume, sub silentio, the availability of adequate treatment in public inpatient facilities. This assumption is utterly belied by the hospitals' track record over the past several decades, a record that demonstrates, in many instances, *126 that hospitalization caused harm or retarded recovery. [\[FN371\]](#) Even in the case of preventative commitment or outpatient commitment, significant problems surround the implementation of a right to treatment. [\[FN372\]](#) Further, public hospitals' dismal performance in the administration of antipsychotic medication is troubling in light of the likelihood that, especially for the population in question here, [\[FN373\]](#) drug regimens will be the treatment of choice. [\[FN374\]](#) Beyond this, the sociological critique that focuses upon the inculcation of institutional dependency in public psychiatric facilities has never been effectively rebutted. [\[FN375\]](#) The track record is deplorable, and there is no reason to believe that significant amelioration will occur. [\[FN376\]](#)

3. The competency of lawyers to represent state hospital patients. Traditionally, lawyers assigned to represent state hospital patients have failed miserably in their mission. [\[FN377\]](#) Recent studies corroborate earlier findings that organized counsel provide far more adequate representation than those lawyers occasionally or sporadically assigned. [\[FN378\]](#) In most jurisdictions, however, counsel are *127 not assigned in an organized way. Most attorneys do not specialize in this area, and few are supported by mental health professionals. [\[FN379\]](#) This track record is especially problematic in cases of patients released from state hospitals without hearings. [\[FN380\]](#) In those cases, lack of adequate counsel (or, more probable, any counsel) will likely "translate" into a lack of adequate investigation and inquiry into the sufficiency or availability of posthospital living arrangements. [\[FN381\]](#)

The U.S. Supreme Court may have delivered the coup de grace here six years ago in the case of *Strickland v. Washington*, [\[FN382\]](#) which established a vague and weak "reasonableness" standard to assess adequacy of counsel in criminal cases under the sixth amendment. [\[FN383\]](#) Cases after *Strickland* have starkly revealed the minimal level of competency expected by courts when mentally disabled criminal defendants are involved. [\[FN384\]](#) Thus, we can have no realistic expectations of a more vigorous or searching inquiry in *128 cases involving mentally disabled or homeless civil plaintiffs or individuals subject to the civil commitment process.

4. The competency of legislators to offer effective solutions. The issue is clearly drawn on the wisdom of broadening the criteria for involuntary civil commitment as a strategy for "correcting" deinstitutionalization errors and thus

reducing the number of the homeless mentally ill. [\[FN385\]](#) Whether or not we accept the premise that civil-libertarian-based statutes "went too far" and that it has become time for "the pendulum to be reversed," [\[FN386\]](#) we must confront an important reality: legislative activity in this area is driven by heuristic reasoning. The vivid, "outrageous" case that shows the public what happens when "someone falls through the cracks" animates legislative reform designed to insure that such errors are not ***129** replicated. [\[FN387\]](#)

Scholars who have studied this process carefully have reached two divergent conclusions. First, when new, broader criteria are actually adhered to, the results raise troubling issues relating to social control, allocation of resources, and the role of the public hospital in the mental health system. [\[FN388\]](#) Second, and perhaps even ***130** more important for our purposes, in cases of jurisdictions where commitment standards are more narrow, little evidence suggests that mental health professionals adhere to the legislative guidelines. [\[FN389\]](#) Here, Doctors Bagby and Atkinson speculate that such professionals exhibit "psychological reactance" [\[FN390\]](#) in resisting legislative attempts to reduce their prerogative. [\[FN391\]](#) Because of this resistance--grounded in what some professionals see as their "moral obligation"--restrictive laws are ignored and some psychiatrists continue to commit those "whom they believe should be committed." [\[FN392\]](#)

***131** This final conclusion raises deeply troubling questions as to the ultimate competence of legislators to craft a commitment standard that both meets constitutionally mandated criteria and is "accepted" by expert witnesses on whose testimony contested civil commitment cases will inevitably turn. If legislators are unable to do this, then their competence to "solve" the problems of the deinstitutionalized, homeless mentally ill is seriously suspect. [\[FN393\]](#)

5. The competency of public interest lawyers and legal scholars to offer creative solutions. On the other hand, there may be one glimmer of hope. In individual law reform actions, attorneys representing patients, former patients, and homeless individuals have offered a number of innovative answers to the underlying problems. [\[FN394\]](#) In addition, scholars have suggested other strategies that may eventually yield further solutions for the classes in question. [\[FN395\]](#)

Thus, to deal with the dilemma of posthospital placement of the nondangerous patient with "nowhere to go," lawyers have successfully convinced state courts to establish a separate set of placement hearings to insure the availability of appropriate aftercare. [\[FN396\]](#) ***132** Others have sought, with varying success, the establishment of a constitutional or statutory right to treatment in community settings. [\[FN397\]](#) Still others have brought civil rights actions on behalf of deinstitutionalized ex-patients [\[FN398\]](#) and on behalf of mentally handicapped individuals residing in the community who seek to maintain funding of community services so as to avoid the need for institutionalization. [\[FN399\]](#)

Additionally, lawyers representing homeless groups have brought actions seeking to establish constitutional and statutory rights to shelter [\[FN400\]](#) and attempting to force local officials to develop ***133** comprehensive plans to deal with homelessness problems. [\[FN401\]](#) Others have turned to state welfare, mental health services, and entitlement laws in efforts to mandate the availability of shelter and benefit programs for the homeless. [\[FN402\]](#)

More recent litigation has focused upon the availability of congregate shelters for homeless individuals with AIDS, [\[FN403\]](#) the right of deinstitutionalized homeless individuals to have individualized service discharge plans, [\[FN404\]](#) the right of homeless individuals to interpose tenancy law defenses in eviction cases, [\[FN405\]](#) the right of ***134** homeless individuals to have access to drug treatment services, [\[FN406\]](#) and most controversially, the right of homeless individuals to panhandle in public facilities. [\[FN407\]](#)

Scholars have suggested that health planning laws be considered as sources of rights for ex-patients in the community [\[FN408\]](#) and view litigation and administrative activity under these laws as an "opportunity for advocacy on behalf of the mentally ill" [\[FN409\]](#) as well as part of an overall scheme to help the deinstitutionalized obtain community benefits. [\[FN410\]](#) They have similarly considered welfare laws as potential rights sources. [\[FN411\]](#) Student commentators have suggested that at least two "as yet untried alternatives" might result in judicial recognition of a right to shelter for the homeless: [\[FN412\]](#) (1) an entitlement right on the part of deinstitutionalized mental patients to state-provided shelter [\[FN413\]](#) and (2) a tort remedy [\[FN414\]](#) based on ***135** the twin theories that the "treatment" which hospitalized patients received prior to deinstitutionalization "aggravated, if not caused, the present inability of the homeless to care for themselves," [\[FN415\]](#) and that in many situations, such discharge "was premature, contrary to sound medical judgment and accomplished without inquiry into the ability of individual patients to contend with

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conditions outside the institution." [\[FN416\]](#) Others have argued that the fundamental right of families to "remain intact" creates a derivative right to shelter for homeless families. [\[FN417\]](#) Also, state constitutional provisions have been considered as another source of emergency shelter rights. [\[FN418\]](#)

Other advocates have turned to fair housing laws as a source of rights for the homeless and the mentally ill, [\[FN419\]](#) while others have focused on the potential importance of National Health Insurance. [\[FN420\]](#) Still others have weighed alternative state statutory and common-law strategies in support of community treatment alternatives. [\[FN421\]](#) Finally, some advocates have stressed the importance of *136 full funding and implementation of the McKinney Act, [\[FN422\]](#) the first federal legislation authorizing the creation or expansion of programs designed specifically to assist the homeless. [\[FN423\]](#) Many of these various solutions share a major unstated conceptual premise: the assumption that courts will be receptive to such litigation strategies. [\[FN424\]](#) Is this assumption an example of a "fact not in evidence," or does the judiciary's track record inspire encouragement here? Our attention must next turn to this question.

VI. CONCLUSION: TWO "WILD CARDS"

Before case law and the scholarly proposals are viewed as a panacea to the social problems in question, two "wild cards" must be weighed carefully, both separately and in combination: (1) the meaning of cases such as *Pennhurst State School & Hospital v. Halderman* [\[FN425\]](#) that have sent a clear message that the United *137 States Supreme Court will be more sympathetic to majoritarian rather than minoritarian claims in civil rights cases involving similarly disenfranchised groups, [\[FN426\]](#) and (2) the depth of the hostility on the public's part toward the individuals in question. [\[FN427\]](#)

A. Court Hostility

The United States Supreme Court's undisguised hostility [\[FN428\]](#) in cases such as *Pennhurst* has had a clear "trickle-down" effect. Federal intermediate appellate courts have grown increasingly more hostile to the sort of creative litigation suggested as palliatives for the current crisis involving homeless mentally ill individuals. [\[FN429\]](#) The federal courts see the Constitution increasingly "through the eyes of mainline America," through means that are "insensitive or at least unempathetic to those most in need of its protection." [\[FN430\]](#) Judges appear to endorse the implicit existence of a *138 "community tolerance threshold" [\[FN431\]](#) frequently consonant with the imposition of their own psychological, social, economic, or moral preconceptions. [\[FN432\]](#) Heuristically-driven social attitudes reject attempts at reasoned discourse. The courts mimic public figures and the media by taking refuge in distorted stereotypes, with rhetoric substituting for meaningful debate. [\[FN433\]](#) This final question of competency--the competency of the judicial system to change deepseated social attitudes [\[FN434\]](#)-- remains the insoluble dilemma.

B. The Depth of Social Attitudes

In *City of Cleburne v. Cleburne Living Center*, [\[FN435\]](#) the United States Supreme Court rejected the city's argument that the "negative attitudes" of neighbors and nearby property owners sanctioned a local zoning ordinance which excluded group homes for the retarded. [\[FN436\]](#) The Court stated, "private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect." [\[FN437\]](#)

As laudable as this aspiration might be, [\[FN438\]](#) our treatment of the deinstitutionalized and the homeless does not clearly fit within this ban. It is our social attitudes--attitudes born in bias, honed by the thoughtless acceptance of stereotypes, and perpetuated by the cognitive error of heuristics--that resonate in the discourse on the homeless mentally ill. We focus on the mentally ill and thus *139 perpetuate the stereotype that the homeless are all "insane." [\[FN439\]](#) By doing so, we perpetuate the perception that we are "doing something" about the problem. [\[FN440\]](#) By perpetuating this stereotype, we can avoid examining the fundamental economic and social questions underlying homelessness and look, instead, for easy targets to blame. Who better to criticize than the patients' rights lawyers originally responsible for the litigation strategies developed in response to the United States Supreme Court's tardy acknowledgment that the due process clause applies to the institutionalized mentally ill? [\[FN441\]](#)

Our "sanist" attitudes, reinforced by political [\[FN442\]](#) and media distortions, [\[FN443\]](#) are shaped by the heuristic fallacies of thinking through which vivid individual cases overwhelm our ability to rationally consider social data. It is not coincidental that the power of heuristics is especially potent in dealing with populations as rife with symbolic

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ideation as the mentally ill; the previously hospitalized mentally ill; and the poor, minority, previously hospitalized mentally ill. We attribute our social woes to pathology, to activist courts, and to "radical" lawyers. We wilfully blind ourselves to the underlying social and economic problems. We ignore the role of economic greed in the transformation of our urban areas, the significance of "bile barrel" politics, [\[FN444\]](#) and the depth of the "pathology of oppression" that drives much of our social and political policies. Without a significant and dramatic change in our social attitudes, the "glimmer of hope" presented by innovative law reform strategies may be nothing more than an illusion.

Dr. Rene Jahiel, professor of medicine at New York University Medical School, pulls no punches in his indictment of our failings: "The current situation of homelessness in our social order is--brutally stated--that a significant part of the population is becoming very affluent at the expense of another significant part of the population made up of its most vulnerable members who are *140 forced into malignant homelessness." [\[FN445\]](#)

Not coincidentally, the Heritage Foundation, one of the Reagan Administration's most favored policy "think tanks," recently stated flatly that "deinstitutionalization . . . is the major cause of homelessness." [\[FN446\]](#) A more cogent argument is that considerable blame for this social catastrophe must rest at the feet of Ronald Reagan, Reaganomics, and the legacy of a "malfeasant" Reagan Administration that "hollow[ed] out . . . the federal government" [\[FN447\]](#) Indeed, the Reagan era helped create a social and economic environment in which "large-scale innovation for the socially disfavored [became] practically unthinkable." [\[FN448\]](#)

Goldman and Morrissey state flatly, "[p]ublic attitudes . . . must change if there is to be progress." [\[FN449\]](#) By "medicaliz[ing]" [\[FN450\]](#) the problem of homelessness, we reify public images and simultaneously confirm and assuage public fears. Our "hydraulic" [\[FN451\]](#) response is doomed to failure. Five years after Cleburne, the "insidious obstacle" of exclusionary zoning laws [\[FN452\]](#) remains a nearly insurmountable barrier to the development of successful community alternatives for former residents of state mental institutions. [\[FN453\]](#) In short, even if the United States Supreme Court declared *141 a broad-based constitutional right to shelter and even if accessible, voluntary community mental health services were made available to all mentally ill homeless individuals, the problems we face probably would not disappear.

So, the questions must be recast: Are the courts competent to stem this tide? Is that the proper role of courts? Does the public insist on a majoritarian judiciary in the face of its increasing frustration with social policies that it perceives to be an abject failure? Can public attitudes be changed? To what extent can the judiciary deal with the problems spawned by the economic greed that has so contributed to the underlying social problems? [\[FN454\]](#) These questions are especially important in light of the remarkable role the judiciary has played for the past two decades in all aspects of the politics of the American mental health system. [\[FN455\]](#)

There is a stunning degree of cognitive dissonance in the case law. On the one hand, there are the broad-based, institutional reform/public-law decisions such as Wyatt v. Stickney [\[FN456\]](#) and Rennie v. Klein, [\[FN457\]](#) and civil libertarian, commitment-standard-narrowing decisions such as O'Connor v. Donaldson [\[FN458\]](#) and Lessard v. Schmidt; [\[FN459\]](#) on the other, there are the jurisdiction-narrowing opinions by the United States Supreme Court such as Pennhurst, [\[FN460\]](#) which evince hostility to both public interest lawyers and their clients. *142 The latter both sanction and encourage the type of "ordinary justice" meted out in local courts, as reflected in the chilling statistic that the average contested civil commitment hearing lasts less than ten minutes. [\[FN461\]](#)

Moral suasion may not be enough. [\[FN462\]](#) It is, however, the first step that we all must take. [\[FN463\]](#) We must "unpack" the broad, stereotypical presentations of vivid, heuristic evidence. We must consider, carefully and soberly, the underlying social dislocations; the malignancy of greed; the dominant social, racial, ethnic, and class-based prejudices; the "pathology of oppression" exemplified by "sanism"; and the degree to which we are willing coconspirators in the re-marginalization of the already-marginalized. We must do this consciously and openly if we are to afford the homeless any "measure of dignity," [\[FN464\]](#) and if we are to have any chance to succeed in stemming the shameful tide that threatens to sweep away our nation's cities.

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[FN1]. Churchill originally declared that "[t]he mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country." H. BLOCH & G. GEIS, MAN, CRIME AND SOCIETY 557 (1962).

[FN2]. See Arnold v. Arizona Dep't of Health Servs., 160 Ariz. 593, 775 P.2d 521, 537 (1989) (quoting former Vice President Hubert Humphrey, "[T]he moral test of a government is how it treats those. . . who are in the shadows of life, the sick, the needy and the handicapped").

[FN3]. Homeless in America: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 2d Sess. 60 (1982) [hereinafter Housing Hearings] (statement of Robert Hayes).

[FN4]. See generally Marmor & Gill, The Political and Economic Context of Mental Health Care in the United States, 14 J. HEALTH POL., POL'Y & L. 459, 459 (1989) (penetrating analysis of the effect of the Reagan Administration's social and economic strategies on mental health policy).

[FN5]. Cf. Letter from Martin Luther King, Jr. to eight Alabama clergymen (Apr. 16, 1963), reprinted in M. KING, WHY WE CAN'T WAIT 76, 79 (1964) ("Injustice anywhere is a threat to justice everywhere."). See generally Luban, Difference Made Legal: The Court and Dr. King, 87 MICH. L. REV. 2152, 2156 & n. 13 (1989) (considering Dr. King's letter).

[FN6]. See Jahiel, The Situation of Homelessness, in THE HOMELESS IN CONTEMPORARY SOCIETY 99, 114-15 (R. Bingham ed. 1987) (discussing the role of greed).

[FN7]. Refer to notes 174, 285-87 *infra* and accompanying text.

[FN8]. Refer to note 153 *infra* and accompanying text.

[FN9]. Refer to note 113 *infra* and accompanying text.

[FN10]. Cf. 3 P. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: THE POLITICS AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR, 1900-09 21 (2d ed. 1973) (death of workers in the Triangle Shirtwaist factory fire of 1911 led to the appointment of the New York State Factory Investigating Commission); C. WHALEN & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 33-34 (1985) (1963 church bombing killing four youths in Birmingham, Alabama served as the impetus for the passage of civil rights laws).

[FN11]. 2 M. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 7.23, at 672 (1989).

[FN12]. Marin, Helping and Hating the Homeless: The Struggles at the Margins of America HARPER'S, Jan. 1987, at 39, 41.

[FN13]. Much of the text accompanying notes 14-25 is adapted from M. PERLIN, *supra* note 11, § 7.23.

[FN14]. Differing definitions of homelessness abound. See Fischer & Breakey, Homelessness and Mental Health: An Overview, 14 INT'L J. MENTAL HEALTH 6, 7 (1986) (emphasizing lack of shelter and disaffiliation). See generally Santiago, Bachrach, Berren & Hannah, Defining the Homeless Mentally III: A Methodological Note, 39 HOSP. & COMMUNITY PSYCHIATRY 1100, 1101 (1988) [[hereinafter Santiago] (emphasizing methodological flaws in current studies that are designed to promote a specific political agenda).

The definitions focus on various factors, including (1) whether the individual resides in a shelter, (2) whether hospital admission records designate the individual as "undomiciled", or (3) the length of time that the individual has been without an official residence. See, e.g., Morrison, Correlations Between Definitions of the Homeless Mentally III

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Population, 40 HOSP. & COMMUNITY PSYCHIATRY 952, 952 (1989) (further subdividing definitions into those homeless for extended periods, those episodically homeless, those potentially homeless and those in a precarious living situation with family or friends); see also Arce, Tadlock, Vergare & Shapiro, A Psychiatric Profile of Street People Admitted to an Emergency Shelter, 34 HOSP. & COMMUNITY PSYCHIATRY 812, 814 (1983) [hereinafter Psychiatric Profile] (classifying the homeless as street people, episodic homeless, or others); Chafetz & Goldfinger, Residential Instability in a Psychiatric Emergency Setting, 56 PSYCHIATRIC Q. 20, 20 (1984) (examining two levels of residential instability: lack of shelter and transient living arrangements); Mowbray, Johnson & Solarz, Homelessness in a State Hospital Population, 38 HOSP. & COMMUNITY PSYCHIATRY 880, 880 (1987) (analyzing characteristics of homeless or potentially homeless psychiatric patients).

The Alcohol, Drug Abuse and Mental Health Administration of the United States Department of Health and Human Services developed perhaps the most commonly used definition: "anyone who lacks adequate shelter, resources and community ties." Fischer & Breakey, *supra*, at 7.

On the political significance of the choice of definition, see P. ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS 12 (1989) (disputes over definitions not merely "scholastic issues," but involve "central political values"); Santiago, *supra*, at 1101 (observing that the estimated number of homeless changes by 50% when the definition changes).

[FN15]. P. ROSSI, *supra* note 14, at 17-33; Arce & Vergare, Identifying and Characterizing the Mentally Ill Among the Homeless, in THE HOMELESS MENTALLY ILL 75, 75 (H. Lamb ed. 1984).

[FN16]. Refer to notes 65-108 *infra* and accompanying text. See also Hatfield, Farrell & Starr, The Family's Perspective on the Homeless, in THE HOMELESS MENTALLY ILL, *supra* note 15, at 279, 283-89.

[FN17]. E.g., Lamb, Deinstitutionalization and the Homeless Mentally Ill, in THE HOMELESS MENTALLY ILL, *supra* note 15, at 55, 56-60 [hereinafter Deinstitutionalization] (deinstitutionalization did not anticipate, but caused criminalization and homelessness among many); see also A. SCULL, DECARCERATION: COMMUNITY TREATMENT AND THE DEVIANT: A RADICAL VIEW 2 (1977) [hereinafter DECARCERATION] (deinstitutionalization has meant a "nightmare existence" for ex-patients); A. SCULL, SOCIAL ORDER/MENTAL DISORDER: ANGLO-AMERICAN PSYCHIATRY IN HISTORICAL PERSPECTIVE 300-29 (1989) [hereinafter SOCIAL ORDER/MENTAL DISORDER]; Rhoden, [The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory](#), 31 EMORY L.J. 375, 375 (1982) ("Deinstitutionalization, once hailed as an ideal social reform, is now decried as a near disaster.").

[FN18]. Refer to note 114 *infra* and accompanying text.

[FN19]. Koch, Lunacies of Government: Legal, Bureaucratic, Ideological, 200 N.Y.L.J. at 1, col. 1 (1988).

[FN20]. See 2 M. PERLIN, *supra* note 11, § 7.23, at 672.

[FN21]. See P. ROSSI, *supra* note 14, at 38 (all estimates point to a national disgrace). Cf. Langdon & Kass, Homelessness in America: Looking for the Right to Shelter, 19 COLUM. J.L. & SOC. PROBS. 305, 305 n.1, 310 n.27 (1985) (noting population estimates ranging from 250,000 to 2,000,000); Note, Homelessness: Halting the Race to the Bottom, 3 YALE L. & POL'Y REV. 551, 553 n.11 (1985) [hereinafter Halting the Race] (comparing United States Congressman Henry Gonzales' conservative estimate of 2,000,000 with the Department of Housing and Urban Development's estimate of between 192,000 and 586,000). But cf. Milburn & Watts, Methodological Issues in Research on the Homeless and the Homeless Mentally Ill, 14 INT'L J. MENTAL HEALTH 42, 53 (1986) (criticizing methodology used to reach estimates).

[FN22]. Few analyses have differentiated between the mentally ill and the mentally ill who were formerly hospitalized. But see NEW YORK CITY HUMAN RESOURCES ADMIN., NEW YORK CITY PLAN FOR HOMELESS ADULTS, 13 (April 1984); NEW YORK CITY HUMAN RESOURCES ADMIN., CORRELATES OF SHELTER UTILIZATION: ONE DAY STUDY, Table D-1 (Aug. 1984).

[FN23]. See Deinstitutionalization, *supra* note 17, at 56 ("we can[not] simply explain homelessness as a result of deinstitutionalization").

[FN24]. Talbott & Lamb, Summary and Conclusions, in *THE HOMELESS MENTALLY ILL*, supra note 15, at 1, 3.

[FN25]. See, e.g., Deinstitutionalization, supra note 17, at 55 ("problems such as homelessness are not the result of deinstitutionalization per se but rather of the way deinstitutionalization has been implemented").

[FN26]. Refer to notes 192-93 infra and accompanying text.

[FN27]. Refer to notes 157-66 infra and accompanying text.

[FN28]. Refer to notes 173 infra and accompanying text.

[FN29]. Refer to note 173 infra and accompanying text.

[FN30]. Id.

[FN31]. See, e.g., Cohen, Killer Conservatism, *Wash. Post*, Mar. 16, 1989, at A27, col. 2 ("We are inundated with the homeless, beggars, the insane and the just plain weird.").

[FN32]. Refer to notes 292-302 infra and accompanying text.

[FN33]. Refer to notes 38-108 infra and accompanying text.

[FN34]. Refer to notes 109-74 infra and accompanying text.

[FN35]. Refer to notes 175-290 infra and accompanying text.

[FN36]. Refer to notes 291-424 infra and accompanying text.

[FN37]. Refer to notes 425-64 infra and accompanying text.

[FN38]. Much of the text accompanying notes 39-64 infra is adapted from M. PERLIN, supra note 11, § 7.24. See also P. ROSSI, supra note 14, at 17 (observing that "[c]oncern about homelessness can be discerned in the minutes of seventeenth-century New England town meetings"); Rossi, *The Old Homeless and the New Homeless in Historical Perspective*, 45 AM. PSYCHOLOGIST 954 (1990) (historical overview). See generally J. CROUSE, *THE HOMELESS TRANSIENT IN THE GREAT DEPRESSIONS: NEW YORK STATE, 1929-1941*, 11-23 (1986) (history of American sentiment toward indigent transients dates back to early English heritage); M. KATZ, *IN THE SHADOW OF THE POORHOUSE* (1986) (historical perspective); Hoch, *A Brief History of the Homeless Problem in the United States*, in *THE HOMELESS IN CONTEMPORARY SOCIETY*, supra note 6, at 16 (examining historical phases of homelessness in America from the early years of colonial development to the present).

[FN39]. This dates to at least the time of Constantine and Theodosius in the fourth century. See *St. John's Evangelical Lutheran Church v. Hoboken*, 195 N.J. Super. 414, 418, 479 A.2d 935, 938 (1983) (finding that municipality's use of zoning to prohibit a church from sheltering the homeless was a violation of the free exercise of religion); see also *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 146 Misc. 2d 500, 511, 550 N.Y.S.2d 981, 988 (Sup. Ct. 1989) ("'There was no room for them in the inn.' (Luke 2:7)"). See generally Goldberg, *Gimme Shelter: Religious Provision of Shelter to the Homeless as a Protected Use Under Zoning Laws*, 30 WASH. U. J. URB. & CONTEMP. L. 75 (1986) (providing shelter to the homeless is a religious obligation which is protected from zoning principles by the first amendment).

[FN40]. Talbott, Foreword, in *THE HOMELESS MENTALLY ILL*, supra note 15, at xiii. While limited public support existed in colonial times, public attitudes were not substantially different than attitudes today. "Reports dating back to the colonial period . . . note both the official resentment of the indigent and the particular burden posed by the 'indigent insane,' who no doubt elicited fear of their mental illness as well as irritation at their dependence." Goldfinger & Chafetz, *Developing a Better Service Delivery System for the Homeless Mentally Ill*, in *THE HOMELESS*

MENTALLY ILL, *supra* note 15, at 92.

[FN41]. Arce & Vergare, Identifying and Characterizing the Mentally Ill Among the Homeless, in *THE HOMELESS MENTALLY ILL*, *supra* note 15, at 75. See P. ROSSI, *supra* note 14, at 31 (pointing out that studies of Skid Row residents present a picture of "dire conditions": extreme poverty, disability through advanced age, alcoholism, physical or mental illness, and disaffiliation-- absent or tenuous ties to family and kin and few or no friends); see also E. TORREY, *NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL* 37-40 (1988) (arguing that the presence of large numbers of the homeless mentally ill during the early 19th century led to the building of insane asylums).

[FN42]. Hoch, *supra* note 38, at 17.

[FN43]. See Baxter & Hopper, Shelter and Housing for the Homeless Mentally Ill, in *THE HOMELESS MENTALLY ILL*, *supra* note 15, at 109, 111.

[FN44]. Arce & Vergare, *supra* note 15, at 76-77; see Note, Homeless Families: Do They Have a Right to Integrity? 35 *UCLA L. REV.* 159, 160 (1987) (dividing homeless into: (1) the chronically homeless single males and females; (2) the deinstitutionalized mentally ill; (3) the chemically dependent; and (4) the "new poor"); see also J. ERICKSON & C. WILHELM, *HOUSING THE HOMELESS* xxvii (1986) (defining nine categories of the homeless).

[FN45]. Baxter & Hopper, The New Mendicancy: Homeless in New York City, 52 *AM. J. ORTHOPSYCHIATRY* 393, 393 (1982).

[FN46]. See Lipton & Sabatini, Constructing Support Systems for Homeless Chronic Patients, in *THE HOMELESS MENTALLY ILL*, *supra* note 15, at 153, 156 (defining social network as "the set of concrete interpersonal relationships linking individuals with other individuals").

[FN47]. See Segal, Baumohl & Johnson, Falling Through the Cracks: Mental Disorder and Social Margin in a Young Vagrant Population, 24 *SOC. PROBS.* 387, 387 (1977) (defining social margin as "all personal possessions, attributes or relationships which can be traded for help in time of need").

[FN48]. Cf. Wing, Who Becomes Chronic?, 50 *PSYCHIATRIC Q.* 178, 182-83 (1978) (describing typical social characteristics of chronically mentally ill persons).

[FN49]. Family's Perspective, in *THE HOMELESS MENTALLY ILL*, *supra* note 15, at 281; see also Werner, On the Streets: Homelessness Causes and Solutions, 17 *CLEARINGHOUSE REV.* 11, 12 (1984) (indicating that a 1981 New York City study revealed that 63% of all homeless persons were under 40 years of age, and a 1982 Baltimore survey revealed that 42% were between 20 and 29 years of age).

[FN50]. P. ROSSI, *supra* note 14, at 39 (while a 1963 study showed that only 3% of the homeless were women, recent investigations reveal rates ranging from 7-33%); Rossi, *supra* note 38, at 956 (discussing increase in number of homeless women). See generally Carty, Preventing Homelessness: Rent Control or Rent Assistance, 4 *NOTRE DAME J.L., ETHICS & PUB. POL'Y* 365, 383 (1989) (discussing "feminization of poverty"); Sullivan & Damrosch, Homeless Women and Children, in *THE HOMELESS IN CONTEMPORARY SOCIETY*, *supra* note 6, at 82 (noting considerable change in the composition of the female homeless population in recent years).

[FN51]. P. ROSSI, *supra* note 14, at 122-26.

[FN52]. See generally *id.*; Wagenaar & Lewis, Ironies of Inclusion: Social Class and Deinstitutionalization, 14 *J. HEALTH POL., POL'Y & L.* 503, 507-19 (1989) (examining the social and economic characteristics of institutionalized mentally ill). For a compelling and moving reportorial account, see J. KOZOL, *RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA* (1988).

[FN53]. Baxter & Hopper, *supra* note 45, at 397. For an analysis of the homelessness that attempts to break the population into subclasses, see Fischer & Breakey, *supra* note 14, at 10-13 (differentiating between the chronically

mentally ill, "street people," chronic alcoholics and "the situationally distressed").

[\[FN54\]](#). Baxter & Hopper, *supra* note 45, at 397.

[\[FN55\]](#). See Benda & Dattalo, Homelessness: Consequences of a Crisis or a Long-Term Process? 39 HOSP. & COMMUNITY PSYCHIATRY 884, 885 (1988) (explaining that homelessness is often the most recent stage in a series of problems).

[\[FN56\]](#). Lipton & Sabatini, *supra* note 46, at 156; see also Williams, Bellis & Wellington, Deinstitutionalization and Social Policy: Historical Perspectives and Present Dilemmas, 50 AM. J. ORTHOPSYCHIATRY 54, 61-64 (1980) (minorities and the poor, who have traditionally suffered the worst institutional care, will be most at risk in community settings). As the former Commissioner of New Jersey's Department of Human Services testified at a Congressional hearing:

[W]e must all recognize . . . that one of the primary problems of the chronically mentally ill is poverty. These people are very, very poor and one reason that it is difficult to provide services for them is that they simply do not have the wherewithal to buy decent housing or any of the services that they require.

Community Support for Mental Patients: Hearing Before the Subcomm. on Health and the Environment of the Comm. in Interstate and Foreign Commerce, on Programs in the Community for the Chronically Mentally Ill Adults, 96th Cong., 1st Sess. 92 (1979) (testimony of Ann Klein).

[\[FN57\]](#). Wagenaar & Lewis, *supra* note 52, at 518; see also P. ROSSI, *supra* note 14, at 31 (homeless suffer from "disaffiliation").

[\[FN58\]](#). See Fischer & Breakey, *supra* note 14, at 13-15 (39% of respondents in one survey reported that they were in "poor health"; 22% of those sampled in another had "a significant health problem"). Homeless chronic alcoholics are particularly at risk. *Id.*

[\[FN59\]](#). See, e.g., Dorwart, A Ten-Year Follow-up Study of the Effects of Deinstitutionalization, 39 HOSP. & COMMUNITY PSYCHIATRY 287, 290 (1988) (deinstitutionalized persons may require "social, rehabilitative, psychotherapeutic, . . . vocational, transitional, residential and community aftercare services . . ."); Morse & Calsyn, Mentally Disturbed Homeless People in St. Louis: Needy, Willing, But Underserved, 14 INT'L J. MENTAL HEALTH 74, 82-85 (1986) (finding a need for more mental health care as well as physical health care, housing, employment training, financial assistance, and informal social support).

[\[FN60\]](#). See Belcher, Defining the Service Needs of Homeless Mentally Ill Persons, 39 HOSP. & COMMUNITY PSYCHIATRY 1203, 1204 (1988) (none of the 33 homeless, formerly institutionalized individuals studied had relationships with family members).

[\[FN61\]](#). See generally DIVISION OF STUDENT DEV. & FAMILY SUPPORT SERVS., NEW YORK STATE EDUC. DEPT, THE NEW YORK STATE PLAN FOR THE EDUCATION OF HOMELESS CHILDREN AND YOUTH, 1989-1991 (1989). But cf. [Orozco ex rel. Arroyo v. Sobol](#), 674 F. Supp. 125, 131 (S.D.N.Y. 1987) (school district required to enroll homeless child in school pending decision on the merits).

[\[FN62\]](#). For a recent overview, see Sard, Roisman & Hartman, Homeless: A Dialogue on Welfare and Housing Strategies, 23 CLEARINGHOUSE REV. 104, 105-06 (1989). See generally Jahiel, *supra* note 6, at 114 (because the chief problem for the homeless is poverty, any attempted solution to homelessness must take that into account). Peter Rossi defines the "extremely poor" as members of households whose annual incomes are below \$4000 in 1988 dollars. P. ROSSI, *supra* note 14, at 13.

[\[FN63\]](#). While testifying before a congressional subcommittee investigating the problems of the homeless and urging the adoption of legislation which would grant a federal right to shelter, Robert Hayes, counsel to the National Coalition for the Homeless, stated graphically:

It is fair to say that without concerted governmental action soon, there will be United States cities teeming with hundreds of thousands of what in India are referred to as "pavement dwellers." Inaction, Mr. Chairman, is all that is necessary to create, coast to coast, dozens of Calcuttas in this country.

.....
The homeless, living and dying on the streets of our cities, are a standing challenge to the moral legitimacy of this nation. The homeless are the shame of America.
Housing Hearings, supra note 3, at 57.

[FN64]. Benda & Dattalo, supra note 55, at 886.

[FN65]. Refer to notes 175-290 infra and accompanying text.

[FN66]. See Arce & Vergare, supra note 15, at 77. Much of the text accompanying notes 91-136 infra is adapted from 2 M. PERLIN, supra note 11, § 7.25.

[FN67]. Hayes, Reforming Current City Policies, 2 CBC Q. 1, 1 (1982) (noting that the number of homeless is reaching "epidemic" proportion).

[FN68]. Bachrach, The Homeless Mentally Ill and Mental Health Services: An Analytical Review of the Literature, in THE HOMELESS MENTALLY ILL, supra note 15, at 14; see also P. ROSSI, supra note 14, at 40 (a large number of homeless are in their twenties and thirties; the median age has dropped rapidly over the past decade); Reich & Segal, The Emergence of the Bowery as a Psychiatric Dumping Ground, 50 PSYCHIATRIC Q. 191, 194 (1978) (the Bowery's population has a large percentage of mentally ill persons, and the number is increasing).

As the post-World War II baby-boom children reach maturity, "the absolute number of young persons at risk for developing schizophrenia and . . . other chronic mental disorders has increased dramatically." Bachrach, supra, at 11, 15.

[FN69]. Bachrach, supra note 68, at 15. But see Ball & Havassy, A Survey of the Problems and Needs of Homeless Consumers of Acute Psychiatric Services, 35 HOSP. & COMMUNITY PSYCHIATRY 917, 917-19 (1984) (disputing the accuracy of a San Francisco study that stereo-types the mentally disabled homeless as nomads); cf. Fischer & Breakey, supra note 14, at 26 (observing that while the "migration stream" theory applies to the young, chronic population, other homeless groups, such as chronic alcoholics, are significantly less transient); Snow, Baker, Anderson & Martin, The Myth of Pervasive Mental Illness Among the Homeless, 33 SOC. PROBS. 407, 411-12 (1986) [hereinafter Myth] (while the homeless in general are quite mobile, the chronically mentally ill homeless are among the least mobile of all homeless individuals).

[FN70]. Bachrach, supra note 68, at 15.

[FN71]. See, e.g., Kaufmann, Implications of Biological Psychiatry for the Severely Mentally Ill: A Highly Vulnerable Population, in THE HOMELESS MENTALLY ILL, supra note 15, at 201, 216 (40% of all shelter residents manifest primary or secondary alcohol abuse).

Some commentators have suggested that the counterculture that developed in the late '60s provided a temporary refuge for a significant percentage of today's young homeless population. E.g., Bachrach, supra note 68, at 16.

[FN72]. See generally Hope & Young, Deinstitutionalization and the Homeless, 17 URB. & SOC. CHANGE REV. 7, 8 (1983) (veterans comprise 30% of San Francisco's homeless); Kanter, Homeless Mentally Ill People: No Longer Out of Sight and Out of Mind, 3 N.Y.L. SCH. HUM. RTS. ANN. 331, 336 n.35 (1986) (veterans traditionally comprise a high proportion of the homeless); Robertson, Homeless Veterans: An Emerging Problem? in THE HOMELESS IN CONTEMPORARY SOCIETY, supra note 6, at 64, 78 (providing a study of all studies, and concluding that Vietnam veterans comprise between 16% and 43% of all homeless veterans); Rosenheck, Leda, Gallup, Astrachan, Milstein, Leaf, Thompson & Errera, Initial Assessment Data From a 43-Site Program for Homeless Chronic Mentally Ill Veterans, 40 HOSP. & COMMUNITY PSYCHIATRY 937, 937-38 (1989) [hereinafter Initial Assessment Data] (available data indicate that a substantial number of homeless are veterans); Lewin, Nation's Homeless Veterans Battle a New Foe: Defeatism, N.Y. Times, Dec. 30, 1987, at A1, col. 5 (according to studies by various researchers, a quarter to a third of homeless persons are veterans). On the significance of the inclusion of Vietnam veterans into the mental health system in the 1960s and '70s, see Durham, The Impact of Deinstitutionalization on the Current Treatment of the Mentally Ill, 12 INT'L J.L. & PSYCHIATRY 117, 123 (1989); see also Robertson, supra, at 78-79 (the largest group of homeless veterans served during Vietnam war). On the prevalence of post-traumatic stress disorder (PTSD) among

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the homeless, see Jones, Gray & Goldstein, Psychosocial Profiles of the Urban Homeless, in B. JONES, TREATING THE HOMELESS 47, 63 (1986); see also Initial Assessment Data, *supra*, at 941 (over 30% of homeless mentally ill veterans reported they were under combat fire during their term of service).

[FN73]. Robertson, *supra* note 72, quoting H. GOLDIN, SOLDIERS OF MISFORTUNE 3-4 (1982).

[FN74]. Carmody, Study Blames Poverty For Most Homelessness, N.Y. Times, Nov. 2, 1984, at B2, col. 5 (Governor Mario Cuomo, quoting a study by the New York State Department of Social Services, stating "[h]omelessness is by its nature a crisis of housing"). More recent studies echo this conclusion. See, e.g., P. ROSSI, *supra* note 14, at 181 (declaring that "it is easy to lose sight of the fact that the essential and defining symptom of homelessness is lack of access to conventional housing"); Rossi, *supra* note 38, at 957 ("Homelessness today is a more severe condition of housing deprivation than in decades past." (emphasis in original)); Stevens, U.S. Advocacy Group for Homeless is Born, N.Y. Times, Feb. 16, 1986, at B1, col. 1 (quoting Boston Mayor Raymond Flynn, keynote speaker at a national conference on problems of the homeless: "Housing is the real issue").

[FN75]. Baxter & Hopper, *supra* note 43 (quoting New York State Office of Mental Health, COMMITTEE REPORT TO THE COMMISSIONER OF MENTAL HEALTH (Jan. 1, 1982)); see also Rapson, The Right of the Mentally Ill to Receive Treatment in the Community, 16 COLUM. J.L. & SOC. PROBS. 193, 207 (asserting that "[h]ousing, the core of any community-based treatment plan, is the most striking testament to the breakdown of deinstitutionalization theory"). For a discussion of the relationship of housing issues to homelessness, see generally P. ROSSI, *supra* note 14, at 181-86; COALITION FOR THE HOMELESS, STEMMING THE TIDE OF DISPLACEMENT: HOUSING POLICIES FOR PREVENTING HOMELESSNESS (1986) [hereinafter STEMMING THE TIDE]; J. KOZOL, *supra* note 52; Milstein, Pepper & Rubenstein, The Fair Housing Amendments Act of 1988: What It Means for People With Mental Disabilities, 22 CLEARINGHOUSE REV. 127, 128 (1989) (discussing the linkage between federal reform legislation, housing and the mentally disabled).

[FN76]. E. BAXTER & K. HOPPER, PRIVATE LIVES/PUBLICSPACES--HOMELESS ADULTS ON THE STREETS OF NEW YORK 6-7 (1981).

[FN77]. B. KATES, THE MURDER OF A SHOPPING BAG LADY 160 (1985). Cf. Rhoden, *supra* note 17, at 391-92 ("The New York City subway system has been called 'the largest SRO' in existence").

[FN78]. Cf. P. ROSSI, *supra* note 14, at 35 (contending that "[t]he new 'emergency shelters' that have been provided in city after city are certainly better than having no roof at all over one's head, but a case can be made that in some respects the cubicle hotels were better").

[FN79]. Baxter & Hopper, *supra* note 43, at 113 (citing Green, HOUSING SINGLE, LOW-INCOME INDIVIDUALS (paper presented at the Conference on New York State Social Welfare Policy, Oct. 1-2, 1982)); see also B. KATES, *supra* note 77, at 164 (115,000 SRO units lost since 1970). See generally STEMMING THE TIDE, *supra* note 75, at 29-32 (discussing loss of housing units). Nationwide, over one million SRO units were lost during the same time period, or nearly half of the entire nation's available single occupancy stock. Baxter & Hopper, *supra* note 43, at 113. Perhaps partially because of this lack of available housing, hospitals discharged patients in increasingly greater numbers to "unknown" living arrangements in urban states. In 1979-80, this happened to 23% of all discharged New York state patients, including 59% of one hospital's total discharges. *Id.* at 114 (citing New York State Office of Mental Health, MEMO FROM POLICY PLANNING AND PROGRAM DEVELOPMENT DIVISION: OCT. 29, 1980 (Mar. 31, 1980)).

[FN80]. See Langdon & Kass, *supra* note 21, at 311-12 n.35 (providing an analysis of the specific impact of the so-called "J-51" tax abatement program in New York City); STEMMING THE TIDE, *supra* note 75, at 33; see also Cohen, What To Do About the Homeless, Starting Now, N.Y. Times, Jan. 4, 1985, at A26, col. 3 (letter to the editor) (discussing role of J-51 tax abatement in causing homelessness in New York City).

Joel Dvoskin recently reported seeing a bumper sticker in Albany, New York, that read: "Houses--Nobody Gets 2 Until Everybody Gets 1."

[FN81]. B. KATES, *supra* note 77, at 160-65.

[\[FN82\]](#). *Id.* at 162.

[\[FN83\]](#). Lipton, Sabatini & Katz, Down and Out in the City: The Homeless Mentally Ill, 34 HOSP. & COMMUNITY PSYCHIATRY 817, 821 (1983).

[\[FN84\]](#). Carmody, *supra* note 74, at B2, col. 5 (where 47,000 New York state households once received housing subsidies, only 8,000 currently receive them).

[\[FN85\]](#). Hollings, Bush's Real Problem--The Ruins of Reaganism, Wash. Post, Apr. 30, 1989, at C1, col. 4.

[\[FN86\]](#). Halting the Race, *supra* note 21, at 555-56; cf. P. ROSSI, *supra* note 14, at 35 (discussing study reported in Crystal & Goldstein, Chronic and Situational Dependency: Long Term Residents in a Shelter For Men (1982) (shelter residents rated prisons as superior to shelters in safety, cleanliness and food quality)).

[\[FN87\]](#). The Phoenix City Council also defined all trash as "city property." Halting the Race, *supra* note 21, at 556 n.21. Other municipalities have considered even more grotesque approaches. A city councilman in Fort Lauderdale suggested that the city spray all garbage cans with poison to prevent the "disgusting sight" of homeless persons picking through garbage. Langdon & Kass, *supra* note 21, at 322-23 n.91 (quoting Robert Hayes, Remarks at the National Conference on Social Welfare, Boston, Mass. (Apr. 29, 1982)); see also Note, An Overview of Homelessness in America, 35 LOY. L. REV. 216, 229 (1989) (discussing recently proposed similar local ordinances).

[\[FN88\]](#). Halting the Race, *supra* note 21, at 557. According to the commentators, the approach of the governmental entities paradoxically mirrors that of states in efforts to attract corporations. The phrase "race to the bottom" originally described interstate competition to offer the most permissive regulatory or statutory scheme. Whereas this strategy was designed to attract corporate business, the states now compete to rid themselves of homeless people. See, e.g., Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663, 690 (1974); Halting the Race, *supra* note 21, at 555 n.19. For an explanation of how this reflects "bile barrel politics," see generally Pitney, Bile Barrel Politics: Siting Unwanted Facilities, 3 J. POL'Y ANALYSIS & MGMT. 446, 448 (1984) (describing political manipulations to bar siting of hazardous waste sites, nerve gas warehouses, and prisons); Marmor & Gill, *supra* note 4, at 467. Refer to notes 184-85 *infra* and accompanying text. But see Dunlap, Listing Shows Homeless Sites To Aid Census; New York's First Count Finds 2,100 Locations, N.Y. Times, Jan. 22, 1990, at B1, col.5 (discussing New York City's strategy to determine true number of the homeless for census purposes).

[\[FN89\]](#). Cf. [Stieberger v. Heckler](#), 615 F. Supp. 1315, 1398-99 (S.D.N.Y. 1985) (secretary's nonacquiescence policy, allowing administrative law judges to disregard federal court decisions that conflicted with Secretary's policies, violates separation of powers clause).

[\[FN90\]](#). Baxter & Hopper, *supra* note 43, at 132 (citing MENTAL HEALTH LAW PROJECT, ARBITRARY REDUCTIONS OF DISABILITY ROLLS (Mar. 3, 1982)).

[\[FN91\]](#). *Id.*

[\[FN92\]](#). *Id.*

[\[FN93\]](#). *Id.* at 117 (citing Barrow & Lovell, The Referral of Outreach Clients to Mental Health Services: Progress Report for 1982-1983, (New York State Psychiatric Inst. 1983)).

[\[FN94\]](#). Bassuk, Rubin & Lauriat, Is Homelessness a Mental Health Problem? 141 AM. J. PSYCHIATRY 1546, 1548 (1984) (three percent of the individuals studied received Social Security Disability Insurance, a parallel entitlement program). Cf. *Hart v. Perales*, Nos. 40 & 49-85 (N.Y. Sup. Ct. 1986), reported in N.Y.L.J., Apr. 10, 1986, at 7, col. 2 (granting new hearing in case of welfare recipient who lost his benefits on the grounds that he "lived in a men's shelter that meets all of his food, shelter and incidental needs and . . . is not actively seeking housing").

[\[FN95\]](#). See Simon, [Rights and Redistribution in the Welfare System](#), 38 STAN. L. REV. 1431, 1471 n.119 (1986)

(discussing public attitudes toward need for continued Social Security benefits program).

[FN96]. See [42 U.S.C. § 423 \(1988\)](#).

[FN97]. See, e.g., [City of New York v. Heckler, 578 F. Supp. 1109, 1112-16 \(E.D.N.Y.\)](#) (concluding that denial of social security disability and supplemental security income benefits without due process is not permissible), [aff'd, 742 F.2d 729, 740 \(2d Cir. 1984\)](#), [aff'd sub nom. Bowen v. City of New York, 476 U.S. 467 \(1986\)](#).

[FN98]. See Bassuk & Lauriat, The Politics of Homelessness, in THE HOMELESS MENTALLY ILL, *supra* note 15, at 301-02.

[FN99]. See generally Note, Building a House of Legal Rights: A Plea for the Homeless, 59 ST. JOHN'S L. REV. 530, 533-38 (1985) (considering ways in which the administration of such entitlement programs as AFDC, SSI, and food stamps are negatively affecting the plight of the homeless, and noting that "by requiring bona fide residence for AFDC and SSI relief, the legislative intent behind the programs is defeated").

[FN100]. P. ROSSI, *supra* note 14, at 40.

[FN101]. *Id.*

[FN102]. See Halting the Race, *supra* note 21, at 552.

[FN103]. *Id.*

[FN104]. See P. ROSSI, *supra* note 14, at 40 ("We can generalize that minorities are consistently overrepresented among the new homeless in ratios that are some multiple of their presence in the community.").

[FN105]. See Langdon & Kass, *supra* note 21, at 313 ("If the focus of productivity continues to shift away from the heavy industry sector of the economy, it is likely that a growing number of workers will become jobless and then temporarily, if not chronically, homeless.").

[FN106]. See Homelessness in America II: Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 98th Cong., 2d Sess. 1874 (1984); see also Langdon & Kass, *supra* note 21, at 308 n.21 (90% of the population using municipal men's shelters in New York City are now minority). See generally Wagenaar & Lewis, *supra* note 52, 511-13 (for an increasing number of men between 1970 and 1980, the labor market ceased to function as the provider of the resources necessary for an adequate existence in society); Halting the Race, *supra* note 21, at 530-31 n.3 (discussing [Price v. Cohen, 715 F.2d 87, 97 \(3d Cir. 1983\)](#), and observing that the needy have difficulty finding work); Werner, On the Streets: Homelessness Causes and Solutions, 18 CLEARINGHOUSE REV. 11, 12 (1984) (presenting demographic problems of homeless individuals). But cf. H. BAHR, SKID ROW: AN INTRODUCTION TO DISAFFILIATION 100 (1973) ("skid row" residents traditionally were white, middle-aged males).

[FN107]. Oreskes & Toner, The Homeless at the Heart of Poverty and Policy, N.Y. Times, Jan. 29, 1989, § 4, at 5, col. 1.

[FN108]. [Williams v. Department of Human Servs., 228 N.J. Super. 529, 536, 550 A.2d 505, 509 \(App. Div. 1988\)](#), *rev'd on other grounds, 116 N.J. 102, 114, 561 A.2d 244, 256 (1989)*.

[FN109]. Much of the text accompanying notes 110-17 is adapted from 2 M. PERLIN, *supra* note 11, § 7.02.

[FN110]. Durham, *supra* note 72, at 117-19; Goldman & Morrissey, The Alchemy of Mental Health Policy: Homelessness and the Fourth Cycle of Reform, 75 AM. J. PUB. HEALTH 727, 728-29 (1985); Morrissey & Goldman, Care and Treatment of The Mentally Ill in the United States: Historical Developments and Reforms, 484 ANNALS 12 (1986). See generally E. TORREY, *supra* note 41; Armour, Mental Health Policymaking in the United States: Patterns, Process, and Structures, in HANDBOOK ON MENTAL HEALTH POLICY IN THE UNITED STATES 173-92

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(1989) (D. Rochefort ed.); Rochefort, Mental Illness and Mental Health as Public Policy Concerns, in HANDBOOK ON MENTAL HEALTH POLICY IN THE UNITED STATES, supra at 1, 3, 16-17.

[FN111].

An almost natural corollary of this excessive emphasis on deinstitutionalization is the medicalization of homelessness. When a social condition or problem is medicalized, several important consequences follow. First, the medical profession becomes the major source of expertise, functioning to define in large measure the nature and parameters of the problem. Second, the problem is framed from the standpoint of the medical model such that it is both individualized and depoliticized. And third, this perspective comes to function as the screen through which the problem is viewed and debated publicly.

Myth, supra note 69, at 420.

[FN112]. As defined by the National Institute of Mental Health (NIMH), the concept of "deinstitutionalization" involves three processes: (1) the prevention of inappropriate admissions to facilities for the mentally handicapped through the provision of community alternatives for treatment; (2) the release or transfer to the community of those institutionalized patients who are adequately prepared for the change; and (3) the establishment and continued maintenance of community support systems for non-institutionalized persons receiving mental disability services. L. BACHRACH, DEINSTITUTIONALIZATION: AN ANALYTICAL REVIEW AND SOCIOLOGICAL PERSPECTIVE 1 (1977) (citing B. Brown, Director of NIMH, Deinstitutionalization and Community Support Systems, Statement (Nov. 4, 1975)); see also Bachrach, A Conceptual Approach to Deinstitutionalization, 29 HOSP. & COMMUNITY PSYCHIATRY 573, 574 (1978) (the concept of deinstitutionalism is broad and diverse, and many people contemplate different solutions); 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 (K. Menninger & W. Watts eds. 1979) (the phrase "deinstitutionalization" has become a "shibboleth, catch phrase, litmus test and call to arms to groups across the entire social and political spectrum").

[FN113]. "Heuristics" refers to principles that individuals use in attempting to simplify complex information-processing tasks. Application of the heuristic method leads to distorted and systematically erroneous decisions and lead decisionmakers to "ignore or misuse items of rationally useful information." Carroll & Payne, The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information Processing Psychology, in COGNITION AND SOCIAL BEHAVIOR 13, 21 (1976). See generally Saks & Kidd, Human Information Processing and Adjudication: Trial By Heuristics, 15 L. & SOC'Y REV. 123, 131 (1980-81) (heuristic biases can effect decision making dramatically). For a discussion of other mental disability law issues from this perspective, see Perlin, Psychodynamics and the Insanity Defense: 'Ordinary Common Sense' and Heuristic Reasoning, 67 NEB. L. REV. 3, 12-22 (1990) [[hereinafter Psychodynamics] (insanity defense). See also Perlin, Are Courts Competent to Discuss Questions of Competency? Stripping the Facade from United States v. Charters, 38 U. KAN. L. REV. 957, 958-68 (1990) [hereinafter Facade] (right of pretrial detainees to refuse antipsychotic medication); Perlin, Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance, 19 BULL. AM. ACAD. PSYCHIATRY & L. ____ (1991) (in press) [hereinafter Morality] (expert testimony in civil commitment cases).

For an example of the use of heuristics in the deinstitutionalization context, see Cohen & Marcos, The Bad-Mad Dilemma For Public Psychiatry, 40 HOSP. & COMMUNITY PSYCHIATRY 677, 677 (1989) (discussing public attitudes towards discharge of mental patients following the murder of a church usher by a chronically mentally ill individual in St. Patrick's Cathedral in New York City).

[FN114]. Mills & Cummins, Deinstitutionalization Reconsidered, 5 INT'L J.L. & PSYCHIATRY 271, 274 (1982). See generally Baron, Changing Public Attitudes About the Mentally Ill in the Community, 32 HOSP. & COMMUNITY PSYCHIATRY 173 (1981) (the public's continued negative response to deinstitutionalization remains a substantial barrier to the integration of the mentally ill into the community); Talbott, Deinstitutionalization: Avoiding the Disasters of the Past, 30 HOSP. & COMMUNITY PSYCHIATRY 621, 621 (1979) (recognizing the primary reasons for the problems caused by deinstitutionalization as lack of consensus about policy, failure to properly test its philosophical bases, are lack of planning for alternative facilities and services, and inadequacies of mental health care delivery system in general). But see [City of Cleburne v. Cleburne Living Centers](#), 473 U.S. 432, 448 (1985), quoting [Palmore v. Sidoti](#), 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). Refer to notes 331-32 infra and accompanying text.

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[\[FN115\]](#). For short and helpful overviews, see generally Kanter, *supra* note 72, at 333-42 (historical trends in institutional care); Langdon & Kass, *supra* note 21, at 312-13 (arguing that deinstitutionalization is a major cause of the rise in the homeless population); Mills & Cummins, *supra* note 114, at 272-74 (consideration of relevant social forces).

In 1955, the national census of state hospitals peaked at slightly over half a million persons. Talbott, *supra* note 114, at 621. Currently, there are little more than 100,000 residents so institutionalized. Bachrach, *Deinstitutionalization: What Do the Numbers Mean?*, 37 HOSP. & COMMUNITY PSYCHIATRY 118 (1986) (pointing out that during a recent typical year, there were still 344,000 "admissions" and 342,000 "discontinuations"--discharges plus placements on leave--in the same hospitals; see also Goldman, Adams & Taube, *Deinstitutionalization: The Data Demythologized*, 34 HOSP. & COMMUNITY PSYCHIATRY 129, 131 (1983) ("as the census fell, admissions increased"). See generally C. KIESLER & A. SIBULKIN, *MENTAL HOSPITALIZATION: MYTHS AND FACTS ABOUT A NATIONAL CRISIS* 147 (1987) ("episodic rate of mental hospitalization has been increasing quite rapidly over the past 15 years"); Kiesler, *Mental Hospitals and Alternate Care: Noninstitutionalization as Potential Public Policy for Mental Patients*, 37 AM. PSYCHOLOGIST 349 (1982) (showing that the number of mental hospital episodes increased 38% from 1955 to 1975); *The Federal Role in Providing Services to the Mentally Ill: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Government Operations*, 100th Cong., 1st Sess. 45 (1988) (testimony of Dr. Charles A. Kiesler) (asserting that rate of mental hospitalization has increased over 60% in the past 15 years).

[\[FN116\]](#). Refer to notes 38-107 *supra* and accompanying text.

[\[FN117\]](#). Mechanic, *Correcting Misconceptions in Mental Health Policy: Strategies for Improved Care of the Seriously Mentally Ill*, 65 MILBANK Q. 203, 226 (1987).

[\[FN118\]](#). See generally, A. DEUTSCH, *THE MENTALLY ILL IN AMERICA* (1949) (analysis of the evolution of people's perception of the insane and modern trends of state care); D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971) (historical background of the introduction of asylums in the Jacksonian era); E. GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961); Bell, *From the Asylum to the Community in U.S. Mental Health Care: A Historical Overview*, in *HANDBOOK ON MENTAL HEALTH POLICY IN THE UNITED STATES*, *supra* note 110, at 89-120; Dain, *Deinstitutionalization: Intended and Unintended Impacts on the Community: Three Centuries of Vicissitudes of Mental Health*, in *THE COMMUNITY IMPERATIVE: PROCEEDINGS OF A NATIONAL CONFERENCE ON OVERCOMING PUBLIC OPPOSITION TO COMMUNITY CARE FOR THE MENTALLY ILL* 189 (1980) [hereinafter *THE COMMUNITY IMPERATIVE*].

[\[FN119\]](#). See, e.g., Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY 1, 2 (1958) (psychiatric profession has failed to meet one of its great challenges--to provide care to the long-term mentally ill).

Other psychiatrists began to examine the high readmissions rate at public hospitals in an effort to determine if some recidivism was preventable. In one of the first studies, Dr. John Talbott revealed that one hospital might have prevented 84% of readmissions in a sample of 100 cases studied, and that, in half of these cases, only minor improvements in existing services--not necessitating any further expenditures of money--were needed. Talbott, *Stopping the Revolving Door--A Study of Readmissions to a State Hospital*, 48 PSYCHIATRY Q. 159 (1974).

[\[FN120\]](#). See, e.g., Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499, 500-01 (1960) (developing theoretical basis for the right to treatment).

[\[FN121\]](#). See Special Message to the Congress on Mental Illness and Mental Retardation, in *PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: JOHN F. KENNEDY* 126 (1964).

[\[FN122\]](#). For a study of early alternatives, see B. PASAMANICK, F. SCARPITTI & S. DINITZ, *SCHIZOPHRENICS IN THE COMMUNITY: AN EXPERIMENTAL STUDY IN THE PREVENTION OF HOSPITALIZATION* (1967). See also Kanter, *supra* note 72, at 334-35 (tracing the role of social reformers such as Dorothea Dix, Deutsch, and Erving Goffman).

[\[FN123\]](#). As early as 1919, the superintendent of a state school for the mentally retarded endorsed the "trial outside" the institution for the "few defectives [sic] [who] do not need or deserve life-long segregation." Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595, 620 n.119 (1983) (citing Fernald, *After-Care Study of the Patients Discharged from Waverley for a Period of Twenty-five Years*, 5 UNGRADED 25 (1919)); see also DAVIES, *SOCIAL CONTROL OF THE MENTALLY DEFICIENT* 202 (1930) (cited in Ferleger, *supra*, as quoting a second such superintendent that "the number of feeble-minded that can be safely cared for in the community is in direct ratio to the supervision that the community is willing to provide"); Williams, *supra* note 55, at 55 (historical survey of social and economic forces on the placement and treatment of chronically mentally ill persons). See generally Ferleger, *supra*, at 619-24 (tracing historical roots of "disillusionment with institutional care in the 20th century"); Goldman & Morrissey, *supra* note 110, at 727 (citing E.N. GROB, *MENTAL ILLNESS AND AMERICAN SOCIETY, 1875-1940* (1983) and J.M. GRIMES, *INSTITUTIONAL CARE OF MENTAL PATIENTS IN THE UNITED STATES* (1934)) (the term "deinstitutionalization" was used as early as 1934).

[\[FN124\]](#). Geller, *Deinstitutionalization in 19th-Century America*, 40 HOSP. & COMMUNITY PSYCHIATRY 85, 85 (1989).

[\[FN125\]](#). See, e.g., Bassuk & Gerson, *Deinstitutionalization and Mental Health Services*, 238 SCI. AM. 46 (1978) (historical and analytical discussion of alternatives in treating the mentally ill). On the other hand, critics of deinstitutionalization have questioned both the level of care and the value of treatment received in many of the community facilities to which patients have been deinstitutionalized, and have suggested that, in many instances, these facilities have simply taken over the function of the state hospital. See Lamb, *The New Asylums in the Community*, 36 ARCHIVES GEN. PSYCHIATRY 129 (1979); Lamb & Goertzel, *Discharged Mental Patients--Are They Really in the Community?*, 24 ARCHIVES GEN. PSYCHIATRY 29, 29 (1971); Scherl & Macht, *Deinstitutionalization in the Absence of Consensus*, 30 HOSP. & COMMUNITY PSYCHIATRY 599, 599 (1979).

[\[FN126\]](#). Note, [1986 Amendments to Georgia's Mental Health Statutes: The Latest Attempt to Provide a Solution to the Problem of the Chronically Mentally Ill](#), 36 EMORY L.J. 1313, 1315-16 (1987).

[\[FN127\]](#). See, e.g., Ewing, [Health Planning and Deinstitutionalization: Advocacy Within the Administrative Process](#), 31 STAN. L. REV. 679, 695-701 (1979) (discussing Health Planning and Resources Act, 42 U.S.C. § 300e-4, 300m-300t (1976)). For a discussion of the availability of federal grant programs for housing services for the mentally disabled, see Kanter, *supra* note 72, at 342-45. See also Note, *The National Health Planning and Resources Development Act and State Action: A Reappraisal of the Role of Private Health Care Institutions*, 57 B.U.L. REV. 511, 513-17 (1977) (analysis of the act).

[\[FN128\]](#). Talbott, *The History of the State Mental Hospital*, reprinted in J. TALBOTT, *THE DEATH OF THE ASYLUM* 13-23 (1978).

[\[FN129\]](#). See E. TORREY, *supra* note 41, at 142-50. See generally Durham, *supra* note 72, at 120; Marmor & Gill, *supra* note 4 (subjectiveness in mental health diagnoses creates problems with third party insurers because mental illness treatments fail to fit into the traditional medical model).

It is well known that, following the rise of deinstitutionalization as a social movement, "money did not follow patients into the community." As a result of political and employee union pressures, state hospitals still receive an increasingly disproportionate share of the state budget as deinstitutionalization continues. See E. TORREY, *supra* note 41, at 155-56; Durham, *supra* note 72, at 121-22; Marmor & Gill, *supra* note 4, at 472-73.

[\[FN130\]](#). For a discussion of legal issues relating to antipsychotic drugs, see generally 2 M. PERLIN, *supra* note 11, ch. 5; Brooks, *The Constitutional Right to Refuse Antipsychotic Medications*, 8 BULL. AM. ACAD. PSYCHIAT. & L. 179, 180-81 (1980); Brooks, *The Right to Refuse Antipsychotic Medications: Law and Policy*, 39 RUTGERS L. REV. 339, 339 (1987) (analysis of whether involuntarily committed mental patients have a legal right to refuse antipsychotic medication); Winick, *Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1, 69-76 (1989). For a list of other important sources, see THE RIGHT TO REFUSE ANTIPSYCHOTIC MEDICATION 101-10 (D. Rappaport & J. Parry eds. 1986) (providing an annotated bibliography).

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[FN131]. See, e.g., Baldessarini, Schizophrenia, 297 NEW ENG. J. MED. 988 (1977); Berger, The Medical Treatment of Mental Illness, 200 SCI. 974 (1978) (discussing the revolutionary treatment of mental illness through drugs and the scientific and ethical issues raised). On the incidence of use of these drugs in non-hospital settings, see Gelman, Mental Hospital Drugs, Professionalism, and the Constitution, 72 GEO. L.J. 1725, 1727 n.23 (1984) ("[d]rugging of the mentally ill in the 'community' is all but universal").

[FN132]. See e.g., H.R. REP. NO. 541, 100th Cong., 2d Sess. 3 (199). The common view is that the development of these medications has been the major precipitant of deinstitutionalization. See, e.g., Brill & Patton, Analysis of 1955-1956 Population Fall in New York State Mental Hospitals in First Year of Large Scale Use of Tranquilizing Drugs, 114 AM. J. PSYCHIATRY. 509 (1957) (discusses the consequences of the large scale introduction of psychotropic drugs); Brill & Patton, Analysis of Population Reduction in New York State Mental Hospitals During the First Four Years of Large-Scale Therapy With Psychotropic Drugs, 116 AM. J. PSYCHIATRY. 495,495 (1959).

[FN133]. See DECARCERATION, supra note 17, at 79-89 (concluding that it is "highly implausible" to suggest that the efficacy of such drugs was "primarily responsible" for the early roots of deinstitutionalization). Cf. Durham, supra note 72, at 120 (concluding that drugs played "an important but circumscribed role in the original development of deinstitutionalization as a mental health policy"); Kaplan, State Control of Deviant Behavior: A Critical Essay on Scull's Critique of Community Treatment and Deinstitutionalization, 20 ARIZ. L. REV. 189, 193 (1978) (critical analysis of Scull's methodology). For Scull's most recent contributions to the debate, see SOCIAL ORDER/MENTAL DISORDER, supra note 17; Scull, Mental Patients and the Community: A Critical Note, 9 INT'L J.L. & PSYCHIATRY 383 (1986).

[FN134]. See, e.g., Lamb, supra note 17, at 60-62; E. TORREY, supra note 41, at 87-88.

[FN135]. See Fischer & Breakey, supra note 14, at 29; see also Stefan, [Preventive Commitment: The Concept and Its Pitfalls](#), 11 MENTAL & PHYSICAL DISABILITY L. REP. 288, 294 (1987) ("the core of outpatient treatment is forced medication"). Refer to notes 247-50 infra and accompanying text.

[FN136]. See generally Perlin, Rights of Ex-Patients in the Community: The Next Frontier?, 8 BULL. AM. ACAD. PSYCHIATRY & L. 33 (1980):

[Recent] development of mental health rights law must be seen as a logical culmination of the expansion of such parallel fields as civil rights, consumer rights, criminal procedure, and inmates' rights: to a large extent, mental health law is at the crossroads of all of these paths, as an outgrowth of a process by which lawyers have become able to contribute to "public consciousness of inequities or shortcomings in the society" through "substantive concerns with issues of social policy."

Id. at 34 (footnotes omitted). Refer also to notes 136-50 infra.

[FN137]. See, e.g., [O'Connor v. Donaldson](#), 422 U.S. 563, 573 (1975) (right to liberty); [Jackson v. Indiana](#), 406 U.S. 715, 738 (1972) (due process applies to involuntary civil commitment decisionmaking).

[FN138]. E.g., [Lessard v. Schmidt](#), 349 F. Supp. 1078, 1093 (E.D. Wis. 1972) (applying procedural due process methodology to all aspects of involuntary civil commitment process), vacated and remanded, [414 U.S. 473 \(1974\)](#), on remand, [379 F. Supp. 1376 \(E.D. Wis. 1974\)](#), vacated and remanded, [421 U.S. 957 \(1975\)](#), reinstated, [413 F. Supp. 1318 \(E.D. Wis. 1976\)](#).

[FN139]. [O'Connor](#), 422 U.S. at 575 (even when involuntary confinement is initially permissible, "it could not constitutionally continue after [a constitutionally adequate] basis no longer existed"); see also Comment, Bitter Freedom: Deinstitutionalization and the Homeless, 3 J. CONTEMP. HEALTH L. & POL'Y 205, 214-21 (1987) (discussing O'Connor).

[FN140]. See, e.g., [Lessard](#), 349 F. Supp. at 1096.

[FN141]. See, e.g., [Wis. Stat. Ann. § 51.001 \(2\)](#) (West 1985). See generally 1 M. Perlin, supra note 11, § 2.16, at 130-38; Zander, Civil Commitment in Wisconsin: The Impact of *Lessard v. Schmidt*, 1976 Wis. L. Rev. 503, 504 (arguing that decisions such as *Lessard* will force courts and legislatures to consider fundamental notions of liberty

and individuality).

[FN142]. See, e.g., [N.C. GEN. STAT. § 122C-276 \(1989\)](#).

[FN143]. See S. BRAKEL, J. PARRY & B. WEINER, *THE MENTALLY DISABLED AND THE LAW* 21, 72 (3d ed. 1985) (concluding that periodic review spelled the "virtual demise" of "indeterminate involuntary commitment"); see also Note, [Substantive Limits on the Duration of Civil Commitment for the Treatment of the Mentally Ill](#), 16 *HARV.C.R.-C.L. L. REV.* 205, 219-23 (1981) (discussing cases).

[FN144]. Recommendations of the American Psychiatric Association Task Force on the Homeless Mentally Ill, in *THE HOMELESS MENTALLY ILL*, supra note 15, at 7 [hereinafter APA Task Force]. Cf. 2 M. PERLIN, supra note 11, § 7.03, at 569 ("[T]he U.S. Supreme Court's holding in [Youngberg v. Romeo](#), 457 U.S. 307 (1982), that there was no general [constitutional] right to services in the community appeared to diminish the likelihood that . . . a universal right [to treatment in the community] would be found in the near future."). But cf. *Patients v. Camden County Bd. of Chosen Freeholders*, No. L-33417-74 P.W. (N.J. Super. Ct., Camden County, Jan. 19, 1981) (right to aftercare found by trial court based on state constitution and state statutes), vacated, Nos. A-3271-80T3, A-4407-80T3 (App. Div., Feb. 17, 1982) (finding complexity of issues made summary judgment inappropriate) as reported in *Patients*, 5 *MENTAL DISABILITY L. REP.* 108, 108 (1981); see also Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 *L. & CONTEMP. PROBS.* 7, 31 n.115 (1982).

For a general discussion of state constitutional basis for the rights in question, see Meisel, supra; Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 *LOY. L.A.L. REV.* 1249, 1283-86 (1987).

[FN145]. Deinstitutionalization, supra note 17, at 62; see also Lamb, *Deinstitutionalization and the Homeless Mentally Ill*, 35 *HOSP. & COMMUNITY PSYCHIATRY* 899, 902 (1984) (observing that patients' right to freedom "not synonymous with releasing them to streets where they cannot take care of themselves, are too disorganized or fearful to avail themselves of what help is available, and are easy prey for every predator"). For a clinical perspective alleging that aggressive patient advocacy can lead to clinical passive-aggressivity, see Peele, Gross, Arons & Jafri, *The Legal System and the Homeless*, in *THE HOMELESS MENTALLY ILL*, supra note 15, at 261, 263.

[FN146]. Engel, *D.C.'s Homeless Schizophrenics Get Little Help*, Report Finds, *Wash. Post*, Apr. 24, 1985, at C1.

[FN147]. 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala.), 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala.), aff'd sub nom. [Wyatt v. Aderholt](#), 503 F.2d 1305 (5th Cir. 1974) (broadly based constitutional right to treatment). See generally 2 M. PERLIN, supra note 11, Ch. 4 (discussing, inter alia, the role of Wyatt in the development of mental disability law).

It is worth noting that the American Psychiatric Association declined the court's request to participate as amicus in Wyatt. For a discussion of the APA's possible motivations, see Sadoff, *Changes in the Mental Health Law: Progress for Patients, Problems for Psychiatrists*, in 4 *NEW DIRECTIONS IN MENTAL HEALTH SERVICES: COPING WITH THE LEGAL ONSLAUGHT* 1, 2 (S. Halleck ed. 1979) (psychiatric concern that "courts will usurp their medical functions by telling them how they must treat their patients"); see also Stone, *The Right to Treatment and the Medical Establishment*, 2 *BULL. AM. ACAD. PSYCHIATRY & L.* 159, 161 (1974) (APA position stands as a "a monument to bureaucratic myopia").

[FN148]. 422 U.S. 563 (1975) (right to liberty).

[FN149]. 405 F. Supp. 974, 978 (D.D.C. 1975) (statutory right to aftercare in the community). See generally 2 M. PERLIN, supra note 11, § § 7.06, 7.07, at 578-98 (discussing Dixon, and reprinting subsequent order in *Dixon v. Harris*, No. 74-285 (D.D.C. 1980)); *Deinstitutionalization Case Settled*, 11 *MENTAL & PHYSICAL DISABILITY L. REP.* 191, 191 (1987) (discussing approval of final settlement in *Dixon v. Bowen*, No. 74-285 (D.D.C., Mar. 31, 1987)).

[FN150]. 349 F. Supp. 1078 (E.D. Wis. 1972) (applying procedural due process concepts to involuntary civil commitment process).

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[\[FN151\]](#). E. TORREY, *supra* note 41, at 156-59; see also Lamb, *supra* note 145, at 902 (blaming patients' rights advocates for contributing to homelessness); Lamb, *Involuntary Treatment for the Homeless Mentally Ill*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y 269, 276 (1989) (discussing Szasz, Goffman and Laing as intellectually animating sources for "many attorneys"); McGrath, *A Hoax Called 'Deinstitutionalization'*, Wash. Post, Oct. 19, 1989, at A26, col. 4-5 (letter-to-the-editor) (arguing that a Washington-based legal advocacy office for patients has helped to escalate the homeless problem); cf. Haber, *The Freedom to Be Psychotic*, 2 J.L. & HEALTH 157, 165 n.51 (1987-88) (legal barriers to care "have been erected primarily by the American Civil Liberties Union"); see also Monahan, *From the Man Who Brought You Deinstitutionalization*, 33 CONTEMP. PSYCHOLOGY 492, 492-93 (1988) (considering Szasz' historical influence).

Criticism of patients' rights lawyers in this context is not a recent development. See, e.g., M. PESZKE, *INVOLUNTARY TREATMENT OF THE MENTALLY ILL* 134-35 (1975) (lawyers and law students perceived by doctor as individuals "who will distort the truth," whose scholarship shows "gross ignorance or even a conscious malevolence and dishonesty alien to worthy scholarship," and whose interest in law and psychiatry matters comes from a desire "to learn how to punch holes and to show the psychiatrist up in court"). Cf. Bursztajn, *More Law and Less Protection: 'Critogenesis,' 'Legal Iatrogenesis,' and Medical Decision Making*, 18 J. GERIATRIC PSYCHIATRY 143, 152 (1985) (incompetent patient's interests are best served by family and physicians rather than by judicial intervention); Gutheil, Bursztajn, Kaplan & Brodsky, *Participation in Competency Assessment and Treatment Decisions: The Role of the Psychiatrist-Attorney Team*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 446, 449 (1987) (discussing "critogenesis"--the "intrinsic risks of legal intervention" in medical decision-making). For a new and important perspective on the underlying issues, see D. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990) (discussing therapeutic impacts of legal interventions).

[\[FN152\]](#). Lambert, *Psychologists Back Koch Policy on Hospitalizing Homeless People*, N.Y. Times, Sept. 1, 1987, at A1, col. 2.

[\[FN153\]](#). Compare Psychodynamics, *supra* note 113, at 22-39 and Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737 (1988) (ordinary common sense is a "prereflective attitude exemplified by the attitude of 'what I know is self-evident'; it is 'what everybody knows'") with E. TORREY, *supra* note 41, at the unnumbered page prior to title page (quoting from a review of Torrey's book in the Wall Street Journal): "Intuitively, everyone seems to sense that the process of deinstitutionalization . . . has produced a large population of street people incapable of taking care of themselves." (emphasis added).

[\[FN154\]](#). See, e.g., Rosenhan, *Psychological Realities and Judicial Policy*, 19 STAN. LAW. 10, 13 (1984) (discussing the "vividness effect," a phenomenon through which concrete and vivid information about a specific case overwhelms the abstract data upon which rational choices should be based); Facade, *supra* note 113, at 987; Morality, *supra* note 113. Visual images, particularly those dealing with the mentally disabled, are especially vivid. See S. GILMAN, *SEEING THE INSANE* 2-11 (1982); see also Gutheil, *supra* note 151, at 447 (discussing the vividness heuristic in a clinical setting).

[\[FN155\]](#). See Hyde, *Homelessness in America: Public Policy, Public Blame*, 8 PSYCHOSOC. REHAB. J. 21, 22 (1985) (APA task force report inevitably led to "quick fix," blame-allocating mentality; public perceptions that "all homeless people are mentally ill and that all mentally ill people are homeless" increased).

[\[FN156\]](#). See, e.g., Cohen, Sichel & Berger, *The Use of a Mid-Manhattan Hotel as a Support System*, 13 COMMUNITY MENTAL HEALTH J. 76 (1977) (demonstrates the feasibility of using community resources for follow-up care of the mentally ill); Solomon, *Discharged State Hospital Patients' Characteristics and Use of Aftercare: Effect on Community Tenure*, 141 AM. J. PSYCHIATRY 1566 (1984) (discussing tracking of discharged patients through an aftercare program). For a thoughtful defense of deinstitutionalization, see Clarke, *In Defense of Deinstitutionalization*, 57 MILBANK MEM. FUND. Q. 461 (1979). See also Lehmann, Possidente & Hawken, *The Quality of Life of Chronic Patients in a State Hospital and in a Community Residence*, 37 HOSP. & COMMUNITY PSYCHIATRY 901, 911 (1986) (community residents perceived their living conditions more favorably, had more financial resources, and were less likely to have been assaulted in the past year than inpatients).

[\[FN157\]](#). Mills & Cummins, *supra* note 114, at 273.

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[FN158]. See, e.g., Borus, Sounding Board: Deinstitutionalization of the Chronically Mentally Ill, 305 NEW ENG. J. MED. 339, 339 (1981) (deinstitutionalization policy supported by a "curious political marriage of liberals, who decry the custodial-level care in state mental hospitals, and conservatives, who see the closing of expensive public institutions as an easy way to save tax dollars").

[FN159]. See, e.g., id. at 340-41 ("Deinstitutionalization may have been embraced by state governments as a way to decrease spending by phasing down expensive state institutions and shifting the burden of mental health care to local governments through Community Mental Health Centers . . . and to the federal government through Medicaid."); see also E. TORREY, supra note 41, at 150-51 (noting that "the power of federal money . . . was the real driving force behind deinstitutionalization"); Goldman, Adams & Taube, supra note 115, at 133 ("State mental hospitals have gained control over the admission of potential chronic patients."). Cf. Glenn, Community Programs for Chronic Patients--Administrative Financing, 5 PSYCHIATRIC ANNALS 174, 175 (1975) (noting that administrative problems can occur between two levels of government at all eight separate stages of planning process); Scull, Finance and Mental Health Policy: A Brief Historical Overview, in THE COMMUNITY IMPERATIVE, supra note 118, at 263 (exploring financial issues in this context).

For the parallel British experience, see Brahams & Weller, Crime and Homelessness Among the Mentally Ill, 54 MEDICO-LEGAL J. 42, 45 (1986); for the Canadian experience, see Richman & Harris, Mental Hospital Deinstitutionalization in Canada: A National Perspective With Some Regional Examples, 11 INT'L J. MENTAL HEALTH 64 (1983). In a powerful social critique, Professor Carol Warren has argued that deinstitutionalization is a "myth," masking the "transfer of responsibility for 'social junk' from state budgets to various combined welfare-private profit options that cost the state less and provide numerous entrepreneurial opportunities. Warren, New Forms of Social Control: The Myths of Deinstitutionalization, 24 AM. J. BEHAVIORAL SCI. 724, 726 (1981), cited in M. PERLIN, supra note 11, at 726.

[FN160]. See, e.g., Mills & Cummins, supra note 114, at 273. According to Mills and Cummins, the deinstitutionalization movement coincided with a lapse in psychiatry's credibility, as reflected in the writings of its critics. See, e.g., T. SZASZ, THE MYTH OF MENTAL ILLNESS xxi (1961) (arguing that the myth denigrated the value of psychiatry, and promoted the assertion that mental illness does not exist).

[FN161]. Mills & Cummins, supra note 114, at 273-74 (governmental neglect of differing skill levels and therapeutic needs among mental patients led to the implementation of inadequate deinstitutionalization plans); see also McGarrah, The Deinstitutionalization Process, the Patients, and the Employees: A View From the American Federation of State, County and Municipal Employees, in THE COMMUNITY IMPERATIVE, supra note 118, at 201 (discussing the labor unions' perspective in deinstitutionalization politics); Friedman, Resistance to Alternatives to Hospitalization, 8 PSYCHIATRIC CLINICS N. AM. 471, 477-78 (1985) (considering the psychological roots of hospital staff resistance to deinstitutionalization).

[FN162]. See Eisenberg, Health Care: For Patients or Profits?, 143 AM. J. PSYCHIATRY 1015, 1016 (1986) (deinstitutionalization has "privatized" community care by accelerating the pace at which publicly-financed services have been shifted to private management); see also Schlesinger & Dorwart, Ownership and Mental Health Services, A Reappraisal of the Shift Toward Privately Owned Facilities, 311 NEW ENG. J. MED. 959, 960 (1984) (defining privatization as a growth in the importance of both private nonprofit and for-profit providers); Gelman, supra note 131, at 1751-52 (discussing the role of psychotropic drugs in the shift to private forms of custody).

On the specific issues implicated in the privatization of childrens' hospitals (and the concomitant increases in population censuses and admissions rates), see Dalton & Foreman, Conflicts of Interests Associated With the Psychiatric Hospitalization of Children, 57 AM. J. ORTHOPSYCHIATRY 12, 13 (1987). I discuss the ethical implications of these conflicts in Perlin, Power Imbalance in Therapeutic and Forensic Relationships 9 BEHAV. SCI. & L. ____ (1991) (in press).

[FN163]. See E. TORREY, supra note 41, at 138-60; see also [Rhode Island Dept. of Mental Health v. R.B., 549 A.2d 1028, 1031 \(R.I. 1988\)](#) (concluding that community mental health centers have right to refuse admission to outpatients).

For an analysis of Community Mental Health Center (CMHC) policies, see Cameron, A National Community Mental Health Program: Policy Initiation and Progress, in HANDBOOK ON MENTAL HEALTH POLICY IN THE

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UNITED STATES, *supra* note 110, at 121-42; Dowell & Ciarlo, An Evaluative Overview of the Community Mental Health Centers Program, in *HANDBOOK ON MENTAL HEALTH POLICY IN THE UNITED STATES*, *supra* note 110, at 195-236.

[FN164]. Bellack & Mueser, A Comprehensive Treatment Program for Schizophrenia and Chronic Mental Illness, 22 *COMMUNITY MENTAL HEALTH J.* 175, 177-78 (1980); see also E. TORREY, *supra* note 41, at 145-46 (the "worried well" is a new class of mental patients). See also Note, *supra* note 126, at 1323 ("A weakness in the community treatment system that has emerged in practice is community mental health centers' preference for treating 'good patients' rather than the chronically mentally ill"); Durham, *supra* note 72, at 122 ("the fledgling community mental health services reached a new and different clientele than had been treated in hospitals by attending to caseloads of more affluent, acute care patients receiving brief therapy for much less severe problems and conditions"). Only about one-quarter of all CMHC patients have ever been hospitalized. Hope & Young, Who Cares For the Mentally Ill?, *NATION*, Dec. 26, 1987-Jan. 2, 1988, at 782-83.

[FN165]. Compare Goldman, Adams & Taube, *supra* note 115, at 130 (outpatient care does not replace inpatient care, state hospitals will not become obsolete; costs have not shifted from public to private sources, but from one public source to another) with Mechanic, Toward the Year 2000 in United States Mental Health Policymaking and Administration, in *HANDBOOK ON MENTAL HEALTH POLICY IN THE UNITED STATES*, *supra* note 110 ("The community mental health movement was a blend of idealism, optimism, opportunism, and naivete.").

[FN166]. Durham, *supra* note 72, at 126-27; see also Eisenberg, *supra* note 162, at 1016 (transfer of indigent patients in Chicago from private hospital to public facility rose from 70 per month in 1983 to 500 per month in 1985); *id.* at 7016 (quoting a 1984 brokerage advisory touting private psychiatric hospital stock offerings):

[Additional] advantages over general hospitals include the widespread acceptance of two classes of psychiatric care (high quality care in private psychiatric hospitals . . . versus lower-quality care in government owned mental health centers).

Id. at 1016.

[FN167]. Perlin, Institutionalization and the Law, in *PSYCHIATRIC SERVICES IN INSTITUTIONAL SETTINGS* 75, 77 (American Hosp. Ass'n ed. 1978). On deinstitutionalization's disproportionate negative impact on women, see Sullivan & Damrosch, *supra* note 50, at 87 (homeless women have a higher rate of more serious mental illness than homeless men, are exposed to rape and violence, and find shelter space to be less available).

[FN168]. Birnbaum, The Right to Treatment: Some Comments on Its Development, in *Medical, Moral and Legal Issues in Mental Health Care* 97, 107 (F. Ayd ed. 1974) (quoting civil rights lawyer Florynce Kennedy); see also G. Allport, The Nature of Prejudice 9 (1955) (defining prejudice as "an antipathy based upon a faulty and inflexible generalization"). On the irrational bases of the way disfavored social minorities are treated, see Boswell, Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities, 1 *Yale J.L. & Hum. Rts.* 205, 205 (1989); Dalton, [Disgust and Punishment](#), 96 *Yale L.J.* 881, 901 (1987).

[FN169]. Birnbaum, *supra* note 168, at 107.

[FN170]. See Perlin, Patients' Rights, in 2 *PSYCHIATRY*, ch. 35, at 2 (J. Cavenar ed. 1985); see also Wallach, A Constitutional Right to Treatment: Past, Present, and Future, 7 *PROF. PSYCHOLOGY* 453, 454 (1976) (discussing Birnbaum's pioneer effort, beginning in the 1960's, foreshadowing efforts to define minimum standards for treatment, including tort liability and funding difficulties); Rachlin, One Right Too Many, 3 *BULL. AM. ACAD. PSYCHIATRY & L.* 99, 99 (1975) (hailing Birnbaum's proposal as "the turning point of patients' rights").

[FN171]. Birnbaum, *supra* note 168, at 106-07; see also Birnbaum, 'The Right to Treatment' Updated, in *AMERICAN HOSP. ASS'N*, *supra* note 167, at 85, 89. On public attitudes in general, see Rabkin, Dangerousness of Discharged Mental Patients: Public Beliefs and Empirical Findings, *THE COMMUNITY IMPERATIVE*, *supra* note 118, at 39.

[FN172]. Refer to note 173 *infra*. See also Note, *supra* note 44, at 167-68 n.41; 2 M. PERLIN, *supra* note 11, § 7.22, at 657-59 n.522. Similar litigation continues unabated. See, e.g., [Incorporated Village of Freeport v. Association for Help of Retarded Children](#), 94 *Misc. 2d* 1048, 1051, 406 *N.Y.S.2d* 221, 223 (Sup. Ct.) (a community residence in

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which eight young women live as a family unit is consistent with the lifestyle intended for single family neighborhoods and thus conforms to the purpose of the zoning ordinance), *aff'd*, [60 A.D.2d 644, 400 N.Y.S.2d 724 \(1977\)](#); *Little Neck Community Ass'n v. Working Org. for Retarded Children*, [52 A.D.2d 90, 94, 383 N.Y.S.2d 364, 368 \(Sup. Ct.\)](#) (a group home for retarded children constituted a family for zone restricted to single family dwellings), leave to appeal denied, [40 N.Y.2d 803, 356 N.E.2d 482, 387 N.Y.S.2d 1030 \(1976\)](#); *Allegheny Valley School v. Zoning Hearing Bd.*, [102 Pa. Commw. 290, 517 A.2d 1385, 1388-89 \(1986\)](#) (group home for the mentally retarded persons, living as one household, is the functional equivalent of a single family residence); Kohn, L.I. Town Fails To Bar Home for Mentally Ill, N.Y.L.J., Oct. 3, 1989, at 1, col. 5. Such exclusionary zoning policies can "zone in" residential facilities in "disability ghettos." See Boyd, Strategies in Zoning and Community Living Arrangements for Retarded Children: Parens Patriae Meets Police Power, 25 VILL. L. REV. 273, 278-79 (1979-80). Such overconcentrations occur disproportionately in poor and minority neighborhoods and tend to cause fear of a drop in property values. *Id.* at 278-79, 288-89.

Exclusion can also result from official and unofficial governmental policies. See Alisky & Iczkowski, Barriers to Housing for Deinstitutionalized Psychiatric Patients, 41 HOSP. & COMMUNITY PSYCHIATRY 93 (1990) (waits of up to a year for public housing reflect poor public policies and private discrimination). See generally Devers & West, Exclusionary Zoning and Its Effect on Housing Opportunities for the Homeless, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y 349, 351 (1989) ("[T]he exclusionary policies of local governments . . . produce far more spatial separation [among racial, ethnic, and economic groups] than would be the case if only economic and social factors influenced the distribution of people in the spreading metropolis.") (quoting M. DANIELSON, THE POLITICS OF EXCLUSION 23 (1976)).

[FN173]. See Perlin, *supra* note 112, at 28, 38 nn.69-70 (discussing sanist responses to deinstitutionalization by state senator traditionally aligned with mental health law reform legislation and by head of local community board on Manhattan's traditionally liberal Upper West Side); see also *BAM Historic Dist. Ass'n v. Koch*, [723 F.2d 233, 235 \(2d Cir. 1983\)](#) (evidence of irreparable injury stemming from operation of shelter for homeless men concerned only one occasion when resident of shelter asked one plaintiff for money to buy wine; public interest would have been seriously impaired if City forced to abandon shelter). Cf. Quindlen, Rooms of Their Own, N.Y. Times, Jan. 21, 1990, § 4, at 21, col. 6 ("It seems the homeless have always been with us, and it's begun to occur to us that lots of them are people we don't like very much."). See generally D. ROTHMAN & S. ROTHMAN, THE WILLOWBROOK WARS 188-89 (1984) (discussing role of paradigmatically liberal Congresswoman Elizabeth Holtzman--"fresh from her role in the Watergate investigations"--in attempting to block the opening of group homes for the mentally retarded in her Brooklyn district).

[FN174]. See generally Bach, [Requiring Due Care in the Process of Patient Deinstitutionalization: Toward a Common Law Approach to Mental Health Care Reform](#), 98 YALE L.J. 1153, 1160 n.41 (1989) (discussing NIMBY ["not in my back yard"] phenomenon); Rosenberg, Combatting NIMBY, 1 Mental Health Law Project Action Line 1 (Sept. 1989) Schonfeld, 'Not In My Neighborhood: Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State, 13 FORDHAM URB. L.J. 281 (1984-1985). See generally Perlin, *supra* note 112 (discussing "sanism" in deinstitutionalization context). Professor Margulies recently has called for "rule-directed empathy" as a partial solution to some NIMBY-related problems. See P. Margulies, Opening Up My Backyard: Formulating and Evaluating Approaches to Siting Community Human Service Facilities in light of the Fair Housing Amendments Act of 1988 (unpublished manuscript). It is probably worth pointing out that, while race and sex are immutable, we all can become mentally ill, homeless, or both. Perhaps this illuminates the level of virulence we experience here.

[FN175]. See, e.g., Cuomo's Curious View of History, N.Y. Post, Nov. 27, 1989, at 11, col. 1 ("government erred by releasing [mental patients] en masse from asylums, due to pressure from the American Civil Liberties Union and kindred groups"). See generally Kiley, The Homeless Are Dying in the Subway, N.Y. Times, Feb. 17, 1990, at A27 (reporting the growing problem of urban homelessness).

[FN176]. Koch, *supra* note 19, at 1, Col. 2.

[FN177]. See, e.g., Lamb, *supra* note 17, at 55 (concluding that homelessness results not from "deinstitutionalization per se but rather . . . the way deinstitutionalization has been implemented"); see also Lamb, Deinstitutionalization at the Crossroads, 39 HOSP. & COMMUNITY PSYCHIATRY 941, 944 (1988) ("We should acknowledge that while

deinstitutionalization was a positive step and the correct thing to do, it has gone too far.").

[FN178]. See Rhoden, *supra* note 17, at 393 (deinstitutionalization services are seldom provided in any organized, systematic manner); see also Myers, *Involuntary Civil Commitment of the Mentally Ill: A System in need of Change*, 29 VILL. L. REV. 367, 405-07 (1983-84) (society's failure to provide adequate community services has caused "incalculable" human suffering); Note, [Establishing a Right to Shelter for the Homeless](#), 50 BROOKLYN L. REV. 939, 948 n.45 (1984) ("failure to provide for care or treatment of mental patients released into the community" results from "a lack of planning either prior to or during the process of deinstitutionalization, assumptions on the part of public officials that communities or other agencies or levels of government would deliver the required services, and a lack of support in communities for the establishment of group homes in residential areas").

[FN179]. See Rhoden, *supra* note 17, at 394 (deinstitutionalization policies have been implemented in a "disorganized and unrealistic manner").

[FN180]. *Id.* at 392.

[FN181]. *Id.* at 393-94.

[FN182]. See, e.g., *id.* at 393 (efforts to establish group homes in residential areas have often been thwarted by restrictive zoning laws, contributing to the concentration of mental patients in deteriorating neighborhoods). But see [City of Cleburne v. Cleburne Living Center, Inc.](#), 473 U.S. 432, 435 (1985) (local ordinance banning group homes for the mentally retarded violates equal protection).

[FN183]. E. TORREY, *supra* note 41, at 36.

[FN184]. Pitney, *supra* note 88 (defining the term as signifying a category opposite to that of desirable of "pork barrel" projects; "bile barrel" projects include such as prisons, nerve gas warehouses, and hazardous waste sites).

[FN185]. Marmor & Gill, *supra* note 4, at 467.

[FN186]. See LaFave, Grunberg, Woodhouse & Barrington, *Is the Community Ready?*, in *STATE MENTAL HOSPITALS: WHAT HAPPENS WHEN THEY CLOSE* 184 (1976) (describing the closing of a state hospital in the southern part of Saskatchewan, and characterizing the process as a successful one because "careful development of community programs [preceded] rapid rates of discharge"); Rhoden, *supra* note 17, at 394 (where community alternatives are developed first, deinstitutionalization "has been a generally positive experience"); see also Bachrach, *supra* note 68, at 14 (underscoring that "it should not be concluded that [the growth of a homeless mentally ill population] is entirely an artifact of deinstitutionalization"); J. Costello, *Autonomy and the Homeless Mentally Ill: Rethinking Civil Commitment in the Aftermath of Deinstitutionalization* (paper presented at the American Association of Law Schools, section on Law & Psychiatry, Annual Conference in San Francisco, California, Jan. 1990).

For a table of all state statutes conferring responsibility on states for patients' aftercare after release from state mental hospitals, see Langdon & Kass, *supra* note 21, at 362-92.

[FN187]. E.g., *Deinstitutionalization*, *supra* note 17, at 70 (comparing the effect of the deinstitutionalization on the mentally ill to that on the developmentally disabled, concluding that the success in deinstitutionalization of the latter group demonstrates "what can be accomplished when there is determined advocacy and adequate funding and community resources").

[FN188]. See Gudeman, Dickey, Rood, Hellman, & Grinspoon, *Alternative to the Back Ward: The Quarterway House*, 32 HOSP. & COMMUNITY PSYCHIATRY 330 (1981) (describing program which increased personal freedom and interpersonal skills, helped patients re-enter society in a limited manner, and helped residents readjust to community living); Rhoden, *supra* note 17, at 389 n.77; Sandall, *Community Alternatives in Mental Health Care*, in *PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED* 23 (V. Bradley & G. Clarke eds. 1976); see also Shore, *Alternatives to Hospitalization Developed by an Urban Mental Health Center: An Overview*, 32 HOSP. & COMMUNITY

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PSYCHIATRY 323 (1981) (including as suggested follow-up programs for deinstitutionalized patients a quarterway house, a network of residential placements, and a program for training psychiatric residents); Levine & Rog, Mental Health Services for Homeless Mentally Ill Persons: Federal Initiatives and Current Social Trends, 45 AM. PSYCHOLOGIST 963 (1990) (discussing current federal initiatives). Cf. Stemming the Tide, supra note 75, at 25 (noting that, in a three month period, not a single story devoted to homelessness in any of New York City's daily newspapers addressed possible approaches to keeping people in their homes).

[FN189]. See, e.g., Mosher & Keith, Psychosocial Treatment: Individual, Group, Family and Community Support Approaches, 6 SCHIZOPHRENIA BULL. 10 (1980); see also Greenblatt & Budson, A Symposium: Follow-Up Studies of Community Care, 133 AM. J. PSYCHIATRY 916, 917 (1976) (devoted to studies of follow-up community care). See generally Heskin, Los Angeles: Innovative Local Approaches, in R. BINGHAM, supra note 5, at 170 (reviewing housing projects for the homeless and other very low income populations of the last decade); Lipton & Sabatini, supra note 46, at 157-59.

Dr. Bachrach also concludes that even the chronically mentally ill will benefit from deinstitutionalized service initiatives "when those initiatives are implemented under ideal circumstances." Bachrach, supra note 68, at 26. See generally ALTERNATIVES TO MENTAL HOSPITAL TREATMENT (L. Stein & M. Test eds. 1978). In one matched study, patients released from public hospitals to a city with a "rich network of accessible private services and a [model] public mental health system" experienced fewer readmissions, were more apt to be employed, and reported a higher level of well-being than similar patients released in a city with "limited" aftercare services. Beiser, Shore, Peters, & Tatum, Does Community Care for the Mentally Ill Make a Difference? A Tale of Two Cities, 142 AM. J. PSYCHIATRY 1047, 1047 (1985).

For a systematic investigation of the full literature, see charts reproduced in C. KIESLER & A. SIBULKIN, supra note 115, at 158 (Table 9.1), and in Kiesler, supra note 115, at 353 (Table 1).

[FN190]. See, e.g., Kiesler, supra note 115, at 349 (review of 10 studies showed that in "no case were the outcomes of hospitalization more positive than alternative treatment"). See generally Barnes & Toews, Deinstitutionalization of Chronic Mental Patients in the Canadian Context, 24 CAN. PSYCHOLOGIST 22 (1983) (providing a comprehensive review of alternate out-patient treatment programs).

[FN191]. See M. HOPE & J. YOUNG, THE FACES OF HOMELESSNESS 189 (1986) (recommending a range of graded housing settings in the community, general medical care, including psychiatric services, a community link, and a one-to-one patient-staff ratio).

[FN192]. See, e.g., APA Task Force, supra note 144, at 5-10. Among the Task Force's recommendations are the following:

3) Adequate, comprehensive, and accessible psychiatric and rehabilitative services must be available, and must be assertively provided through outreach services when necessary.

5) Crisis services must be available and accessible to both the chronically mentally ill homeless and the chronically mentally ill in general.

6) A system of responsibility for the chronically mentally ill living in the community must be established, with the goal of ensuring that ultimately each patient has one person responsible for his or her own care.

7) Basic changes must be made in legal and administrative procedures to ensure continuing community care for the chronically mentally ill.

Id. at 6-7 (emphasis added). Cf. U.S. COMPTROLLER GEN., REPORT TO CONGRESS, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE 184-91 (1977) (recommending deinstitutionalization policies for governmental agencies).

The APA recommendations raise some potentially serious constitutional issues. A well-known patients' rights lawyer has predicted that the "assertive" employment of outreach services will "coerce" patients into making use of such services. See Rhoden, supra note 17, at 408 (quoting Christopher Hansen). Refer to text accompanying notes 245-68 infra. Compare APA Task Force, supra note 144, at 7 (viewing the call for "basic changes" in legal procedures as guaranteeing a right to treatment in the community) with In re S.L., 94 N.J. 128, 462 A.2d 1252, 1257 (1983) (recommendation to loosen commitment standards would impermissibly "widen the net" of the civil commitment process, creating the danger that due process protections could be diminished).

[FN193]. Refer to note 192 supra. Importantly, the recommendations begin by stressing that "[a]ny attempt to address

the problems of the homeless mentally ill must begin with provisions for meeting their basic needs: food, shelter, and clothing." APA Task Force, *supra* note 144, at 5.

[FN194]. Nine years ago, a New York City mental health official took the position that the homeless were "relatively well-educated, relatively well-functioning, well-traveled, middle-class dropouts, who have learned to maneuver the system and who move around." Carmody, *New York is Facing Crisis on Vagrants*, N.Y. Times, June 28, 1981, § 1, at 1, col. 1. (quoting Dr. Stanley Hoffman, director of research and evaluation for the New York City Regional Office of Mental Health). See Baxter & Hopper, *supra* note 41, at 114.

[FN195]. See, e.g., Belcher, *Defining the Service Needs of Homeless Mentally Ill Persons*, 39 HOSP. & COMMUNITY PSYCHIATRY 1203 (1988) (in six months after initial release from hospital, 36% of patients studied became homeless). But see Myth, *supra* note 69, at 413 (15% of sample studied showed evidence of mental illness).

[FN196]. Gelberg, Linn & Leake, *Mental Health, Alcohol and Drug Use, and Criminal History Among Homeless Adults*, 145 AM. J. PSYCHIATRY 191, 192 (1988) (29% of sample of homeless previously hospitalized). As of 1984, it was estimated by the American Psychiatric Association that 17-22% of shelter residents had once been institutionalized in state hospitals. See Hearings Before the Subcomm. on Housing and Consumer Interests of the House Select Comm. on Aging, 98th Cong., 2d Sess. 4 (1984) (statement of Dr. A. Anthony Arce, for the American Psychiatric Association).

[FN197]. See Appleby & Desai, *Documenting the Relationship Between Homelessness and Psychiatric Hospitalization*, 36 HOSP. & COMMUNITY PSYCHIATRY 732, 736 (1985) ("The data clearly support the contention that homelessness is increasing among the severely mentally ill.").

[FN198]. Bassuk, Rubin & Lauriat, *Is Homelessness a Mental Health Problem?* 141 AM. J. PSYCHIATRY 1546, 1549 (1984) [hereinafter *Is Homelessness a Mental Health Problem?*].

[FN199]. P. ROSSI, *supra* note 14, at 41 (asserting that "[t]he current homeless suffer from much the same levels of mental illness, alcoholism and physical disability as the old homeless"); see also *id.* at 41-42 (reviewing studies of Chicago and New York City "flophouses" of the 1950's and 1960's which showed a mental illness prevalence rate of 20% finding that 16% of the Philadelphia homeless in 1960 had been previously hospitalized).

[FN200]. Myth, *supra* note 69, at 421 (linkage between homelessness and mental illness "overstated").

[FN201]. Refer to note 115 *supra*.

[FN202]. Compare Kanter, *supra* note 72, at 354 (noting that, contrary to popular opinion, "there is no indication that current civil commitment laws result in homelessness to any great extent") with Schwartz & Costanzo, *Compelling Treatment in the Community: Distorted Doctrines and Violated Values*, 20 LOY. L.A.L. REV. 1329, 1345 n.71 (1987) ("Some critics . . . would attribute America's housing shortage and its resultant homelessness crisis to the reaffirmation by the Supreme Court, lower federal courts and state legislatures of the dangerousness standard for civil commitment"). Cf. Saccomando, *Deinstitutionalization Has Failed--Miserably*, Wash. Post, Apr. 26, 1989 (letter to the editor) (alleging that homeless individuals cannot be institutionalized "under present regulations" absent a dangerousness finding).

[FN203]. See, e.g., *In re LaBelle*, 107 Wash. 2d 196, 728 P.2d 138, 146- 51 (1986) (weighing facts in four separate commitment cases).

[FN204]. See generally 2 M. PERLIN, *supra* note 10, at Ch. 8 (considering the proper role of counsel as advocates).

[FN205]. See, e.g., *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) (when involuntary incarceration is likely, state has inescapable duty to observe constitutional safeguards of due process); *Lessard*, 349 F. Supp. at 1097-98 (applying the right to counsel to the commitment process).

[FN206]. See N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* 92

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(1973) (characterizing counsel as "superficial and at times totally inadequate"); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 448 (1966) (charging that attorneys perfunctorily performed their task); Weihofen, *Mental Health Service for the Poor*, 54 CALIF. L. REV. 920 (1966) (viewing counsel as "passive"). See generally Perlin & Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBLEMS 161, 162-63 (1982) (ethical issues in the commitment process demand more attention).

[FN207]. See, e.g., [N.J. STAT. ANN. § 52:27E-21](#) (West 1986) (establishing state Division of Mental Health Advocacy).

[FN208]. See Facade, *supra* note 113, at 996-97 (right to refuse imposition of antipsychotic medication).

[FN209]. Kanter, *supra* note 72, at 337.

[FN210]. Public rights litigation is discussed comprehensively in Chayes, [The Role of the Judge in Public Law Litigation](#), 89 HARV. L. REV. 1281 (1976).

[FN211]. See 1 M. PERLIN, *supra* note 11, § 1.03, at 6-7; Fleming, *Shrinks vs. Shysters: The (Latest Battle) for Control of the Mentally Ill*, 6 L. & HUMAN BEHAVIOR 355, 356 (1982) (discussing increased social and judicial emphasis on civil rights "during the 1960s and 1970s for minority groups--juveniles, ethnic minorities, women, and the mentally ill").

[FN212]. See Johnson, *Equal Access to Justice*, 41 ALA. L. REV. 1, 1 (1989) (the impossibility of enforcing our most important rights "without access to the legal process"). On the special role of courts in the politics of mental health, see Marmor & Gill, *supra* note 4, at 469-71.

[FN213]. [503 F.2d 1305 \(5th Cir. 1974\)](#).

[FN214]. [451 U.S. 1 \(1981\)](#).

[FN215]. See, e.g., [Wyatt](#), 503 F.2d at 1311 n.6 (relating an incident in which "[o]ne [Alabama state hospital patient]. . . died after a garden hose had been inserted in his rectum for five minutes by a working patient who was cleaning him; one died when a fellow patient hosed him with scalding water; another died when soapy water was forced into his mouth . . . "); L. LIPPMANN & I. GOLDBERG, *THE RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATION FOR EXCEPTIONAL CHILDREN* 17 (1973) (recounting that the chairman of the legal action committee of the National Association of Retarded Children characterized Pennhurst as "Dachau, without ovens").

[FN216]. See, e.g., [Pitts v. Black](#), 608 F. Supp. 696, 708 (S.D.N.Y. 1984) (election board's refusal to allow homeless persons to register to vote violated equal protection clause); see 1 M. PERLIN, *supra* note 11, § 1.03, at 8 n.34 (explaining the role of self-help, ex-patient groups in litigation); Hopper, *Homelessness: Reducing the Distance*, NEW ENG. J. HUM. SERVS., Fall 1983, at 316 (reviewing the role of non-legal advocacy for the homeless); Jahiel, *supra* note 6, at 112-13 (discussing the empowerment of the homeless); see also Funicello, *Give New Shelters*, NATION, Apr. 2, 1988, at 1 (homeless woman's criticism of traditional legal advocacy efforts); Whitaker, *Helping Them Help Themselves*, TIME, Feb. 26, 1990, at 56 (pointing out the significance of the creation of a monthly newspaper staffed by homeless individuals).

[FN217]. Wagenaar & Lewis, *supra* note 52, at 506.

[FN218]. See *id.* at 510 (deinstitutionalization has largely failed nonwhite men); Durham & La Fond, "Thank You, Dr. Stone": A Response to Dr. Alan Stone and Some Further Thoughts on the Wisdom of Broadening the Criteria for Involuntary Therapeutic Commitment of the Mentally Ill, 40 RUTGERS L. REV. 865, 879 n.53 (1988) (90% of all individuals civilly committed in Washington study were unemployed at the time of civil commitment); Perlin, *supra* note 112, at 29 (99% of all patients subject to involuntary civil commitment at New Jersey's state and county mental hospitals were indigent).

[\[FN219\]](#). See Ashley, A Short Time Out, NEW YORK, Aug. 14, 1978, at 37; see also Perlin, *supra* note 112, at 23-24 (discussing Ashley's case in this context).

[\[FN220\]](#). *Id.*

[\[FN221\]](#). Saphire, The Civilly-Committed Public Mental Patient and the Right to Aftercare, 4 FLA. ST. U.L. REV. 232, 288 (1976); see also Levine & Haggard, Homelessness as a Public Mental Health Problem, in THE COMMUNITY IMPERATIVE, *supra* note 117 ("Perhaps no group of disabled people in the United States are as impoverished and underserved as the homeless mentally ill population").

[\[FN222\]](#). Gelberg, Linn & Leake, *supra* note 146, at 194.

[\[FN223\]](#). *Id.* at 195; Chavetz & Goldfinger, *supra* note 14, at 22 (lack of fit between the needs of the homeless and the aims of the mental health system).

[\[FN224\]](#). Morse & Calsyn, *supra* note 59, at 84-85, 89-91.

[\[FN225\]](#). For a variety of discussions relating to massivereinstitutionalization, see, e.g., Is Homelessness a Mental Health Problem?, *supra* note 198, at 1549; Krauthammer, For the Homeless: Asylum, Wash. Post, Jan. 4, 1985 (using data from Is Homelessness a Mental Health Problem? to recommend reinstitutionalization). Bassuk, the principal author of Is Homelessness a Mental Health Problem?, has taken issue with Krauthammer's reinstitutionalization recommendation. See M. HOPE & J. YOUNG, *supra* note 190, at 20-21 (also critiquing Krauthammer's conclusions on methodological and analytical bases); Detzer, Still Looking for the Rose Garden: The Effects of Deinstitutionalizing Mental Health Services, HUMANIST, Nov.-Dec. 1983, at 37 (suggesting less draconian reinstitutionalization recommendations).

[\[FN226\]](#). See Kanter, *supra* note 72, at 351-56 (asserting that most homeless people are not mentally ill, that inpatient psychiatric admissions actually continue to increase, that existing civil commitment laws adequately address the needs of the severely mentally ill homeless, and that a change in commitment laws will not increase money available to community alternative programs).

[\[FN227\]](#). Durham, *supra* note 72, at 128.

[\[FN228\]](#). See Dorwart, A Ten-Year Follow-up Study of the Effects of Deinstitutionalization, 39 HOSP. & COMMUNITY PSYCHIATRY 287, 290 (1988) (in order to be prepared for deinstitutionalization, "patients may require social, rehabilitative, psychotherapeutic (individual, family, and group), vocational, transitional-residential, and community aftercare services to prepare to live outside the hospital").

[\[FN229\]](#). Kessler & Cleary, Social Class and Psychological Disorders, 45 AM. SOC. REV. 463 (1980).

[\[FN230\]](#). Morse & Calsyn, *supra* note 59, at 89 (the "safety net" of social welfare fails to catch most homeless, and thus is "woefully inadequate" for their needs).

[\[FN231\]](#). See generally E. TORREY, *supra* note 41, at 1-36 (discussing case histories).

[\[FN232\]](#). Durham & La Fond, A Search for the Missing Premise of Involuntary Therapeutic Commitment: Effective Treatment of the Mentally Ill, 40 RUTGERS L. REV. 303, 306-07 & n.9 (1988); see also Connell, A Right to Emergency Shelter for the Homeless Under the New Jersey Constitution, 18 RUTGERS L.J. 765, 784-85 (1987) (recent "findings de-emphasize the significance of deinstitutionalization as a source of homelessness").

[\[FN233\]](#). See Kaufman, Homelessness: A Comprehensive Policy Approach, 17 SOC. SCI. REV. 21, 23 (1984) (arguing that homelessness results in mental disorientation); Stefl, The New Homelessness: A National Perspective, in THE HOMELESS MENTALLY ILL, *supra* note 15, at 54 (Some homeless individuals assume the coloration of mental illness as a protective, defensive device).

[FN234]. Cf. Hochstedler, "Twice-Cursed": The Mentally Disabled Criminal Defendant, 14 CRIM. JUST. & BEHAV. 251, 260-62 (1987).

[FN235]. See Hopper, *supra* note 216, at 314-17.

[FN236]. Refer to notes 100-04 *supra* and accompanying text. Compare E. TORREY, *supra* note 41, at 87-88 (use of drugs in state hospital "a miracle") with Gelman, *supra* note 131, at 1727 n.23 ("Drugging of the seriously mentally ill in the 'community' is all but universal."). See generally Schwartz & Costanzo, *supra* note 202, at 1335 (analyzing the issues involved in right to refuse medication decisionmaking in community settings).

[FN237]. Refer to note 103 *supra*.

[FN238]. Gelman, *supra* note 131, at 1727 ("the mentally ill live a drugged existence in . . . private settings"); see also *id.* at 1750: "Drugs make custody possible without its traditional physical trappings. To house a drugged population, the thick walls, physical barriers, geographical isolation and staff supervision of state mental hospitals are generally unnecessary." (footnote omitted).

[FN239]. See, e.g., Rennie v. Klein, 476 F. Supp. 1294, 1299-1300 (D.N.J. 1979) (recognizing that possibly 35-50% of all state hospital patients suffer tardive dyskinesia and druginduced parkinsonism), modified, 653 F.2d 836 (3d Cir. 1981), vacated, 458 U.S. 1119 (1982), on remand, 720 F.2d 266 (3d Cir. 1983).

[FN240]. *Id.*

[FN241]. *Id.* at 1299.

[FN242]. See United States v. Charters, 829 F.2d 479, 493-94 (4th Cir. 1987), vacated en banc, 863 F.2d 302 (4th Cir. 1988), cert. denied, 110 S. Ct. 1317 (1990).

[FN243]. Cf. Rennie, 462 F. Supp. at 1146 (remarking that the likelihood of a patient contracting tardive dyskinesia raises the question of whether "the cure would be worse than the illness"); Bellack & Mueser, *supra* note 164, at 177 (asserting that as many as 50% of schizophrenics may not benefit from antipsychotic medication, and that it does not help patients "develop skills of daily living that enhance the quality of life"). See generally Diamond, Drugs and the Quality of Life: The Patient's Point of View, 46 J. CLINICAL PSYCHIATRY 29 (1985).

[FN244]. See Rennie v. Klein, 462 F. Supp. 1131, 1137 (D.N.J. 1978), supplemented, 476 F. Supp. 1294 (D.N.J. 1979), modified, 653 F.2d 836 (3d Cir. 1981), vacated, 458 U.S. 1119 (1982). The court observed that "[p]sychotropic drugs are effective in reducing thought disorder in a majority of schizophrenics. With first admission patients, success rates of as high as 95% have been obtained. . . . Success rates are less impressive with chronic patients However, no other treatment modality has achieved equal success in the treatment of schizophrenia" *Id.*; see also Hollister, Choice of Antipsychotic Drugs, 127 AM. J. PSYCHIATRY 104, 104 (1970); May, et al., Schizophrenia - A Follow up Study of Results of Treatment, 33 ARCH. GEN. PSYCHIATRY 474, 474-78, 481-86 (1976) (both relied on by the court in making its assessment).

[FN245]. There is significant literature decrying the purported antitherapeutic outcomes of right-to-refuse litigation. See, e.g., Haber, *supra* note 151; Appelbaum & Gutheil, Rotting With Their Rights On: Constitutional Theory and Clinical Reality Drug Refusal by Psychiatric Patients, 7 BULL. AM. ACAD. PSYCHIATRY & L. 306 (1979); Rachlin, One Right Too Many?, 3 BULL. AM. ACAD. PSYCHIATRY & L. 99 (1975); see also Treffert, Dying With Their Rights On, 130 AM. J. PSYCHIATRY 1041, 1041 (1973). But see Schwartz & Costanzo, *supra* note 202, at 1345 n.70 (contending that such "doomsday predictions" rarely materialize). Cf. Blackburn, The "Therapeutic Orgy" and the "Right to Rot" Collide: The Right to Refuse Antipsychotic Drugs Under State Law, 27 HOUS. L. REV. 447, 448 (1990) (arguing for a balancing of therapeutic concerns with the right to medical self-determination).

Scholars are now beginning to examine critically the therapeutic and antitherapeutic outcomes of mental disability litigation and legislation. See generally D. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990).

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[FN246]. C. KIESLER & A. SIBULKIN, *supra* note 151, at 148; see also Goldstein, *The Sociology of Mental Health and Illness*, 5 AM. REV. SOC. 381 (1979); McEwen, *Continuities in the Study of Total and Non-total Institutions*, 6 AM. REV. SOC. 143 (1980).

[FN247]. See Fischer & Breakey, *supra* note 14, at 29. The authors found that a proportion of the mentally ill homeless have opted out of the mental health system, preferring the "street" life to institutional life, and have elected to live with the symptoms of mental illness rather than suffer from the side effects of antipsychotic medication. *Id.* The reader may view this result either as a rational choice or as evidence of impairment of the mentally ill individual's thought systems. See also *id.* (of a series of 15 problem areas, the homeless rated mental illness as 13th in importance); Gelberg, Linn & Leake, *supra* note 196, at 193 (determining that deinstitutionalized patients are the least likely of the homeless to sleep in emergency shelters).

[FN248]. *Psychiatric Profile*, *supra* note 14, at 812 (concluding that 86% of the homeless mentally ill were willing to comply with psychotropic medications in community support service settings).

[FN249]. See Farr, *A Mental Health Treatment Program for the Homeless Mentally Ill in the Los Angeles Skid Row Area*, in B. JONES, *supra* note 72, at 64, 71 (finding that the vast majority of those studied "would rather live in filth and be subjected to beatings and violence than to be institutionalized, even in our finest mental hospitals") (emphasis added).

[FN250]. See Silver, *Voluntary Admission to New York City Hospitals: The Rights of the Mentally Ill Homeless*, 19 COLUM. HUM. RTS. L. REV. 399, 400-01 n.3, 402-03 n.5 (1988) (noting that substantial numbers of homeless mentally ill seek treatment in emergency rooms of city general hospitals); Basler, *Mentally Ill Rise in City Hospitals*, N.Y. Times, Dec. 8, 1985, § 1, pt. 2, at 89 (reporting that the number of mentally ill people taken to New York City's municipal hospitals for treatment has more than doubled in the last three years, while the number of those patients accepted by state mental hospitals has dropped 25%).

[FN251]. See Robitscher, *Implementing the Rights of the Mentally Disabled: Judicial, Legislative and Psychiatric Action*, in F. AYD, *supra* note 168, at 145, 146 (commenting on inadequate staffing in state mental hospitals).

[FN252]. See, e.g., [Thomas S. by Brooks v. Flaherty](#), 699 F. Supp. 1178, 1201-02 (W.D.N.C. 1988) (holding that conditions at a North Carolina public hospital violated the "reasonable professional judgment" standard of [Youngberg v. Romeo](#), 457 U.S. 307 (1982)), *aff'd*, 902 F.2d 250 (4th Cir.), cert. denied, 111 S. Ct. 373 (1990); cf. *Beds For Mental Patients*, Miami Herald, Feb. 7, 1990 ("For the lack of bed space, patients suffering from crises wait, restrained with leather ankle straps, in the emergency rooms at Broward General Medical Center or Memorial Hospital in Hollywood. . . . Shackling patients for several days in an emergency room is a scandal in 1990").

[FN253]. According to Dr. Joseph Bloom, president of the American Academy of Psychiatry and Law, a "number" of state hospitals are "vastly improved," pointing to in particular, "dramatic" improvement in Oregon, partially as a result of salary increases, the creation of linkages with strong academic and research programs, and a "stabilization" of the entire state mental health system. Remarks at the Association of American Law Schools, Section on Law and Psychiatry, Annual Conference, in San Francisco, Cal. (Jan. 1990) (tape nos. 140-41 available from AALS). See generally Morrisey, *The Changing Role of the Public Mental Hospital*, in D. ROCHEFORT, *supra* note 110, at 311-38.

On the willingness of the judiciary to confront meaningfully the underlying issues, compare [Arnold v. Department of Health Servs.](#), 160 Ariz. 593, 775 P.2d 521 (1989) (state and county under mandatory statutory duty to provide mental health care to indigent chronically mentally ill persons) with [K.C. v. State](#), 771 P.2d 774 (Wyo. 1989) (no constitutional right to treatment in community residential facilities); see also [Board of Supervisors v. Superior Court](#), 207 Cal. App. 3d 552, 254 Cal. Rptr. 905, 909 (1989) (reading state statute to set "absolute limit" on county's mental health obligations).

[FN254]. See, e.g., Lamb, *supra* note 17, at 66. Dr. Lamb limits the universe of those whom he sees to be in need of rehospitalization to "a small proportion of long-term, severely-disabled psychiatric patients [that] lack sufficient impulse control to handle living in an open setting such as a board-and-care home or with relatives." *Id.* He also

criticizes the views of those who recommend massive rehospitalization as simplistic, exaggerative and overly romantic (as to the role and capabilities of state hospitals). See *id.* at 67. Nevertheless, the APA Task Force report prepared under his direction, is viewed in the public debate as an important argument in favor of exactly such massive reinstitutionalization. See, e.g., Hyde, *supra* note 155, at 22 (APA report evaluated through the "give me an immediate solution" demands of the public). But cf. Durham & La Fond, *supra* note 232, at 357-59 (contending that expansion of commitment authority "may actually harm the very persons the state is seeking to help" by creating institutional dependency in patients); Durham & La Fond, *The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment*, 3 YALE L. & POL'Y REV. 395, 401 (1985) (observing that the overcrowding that resulted from such expansion caused voluntary patients to be "virtually excluded from state hospitals"); Morse, *A Plea for the Mentally Disordered Homeless*, APLS NEWSLETTER, Summer 1987, at 1 (opposing expansion of involuntary hospitalization in this context). For background information relating to the debate, see C. KIESLER & A. SIBULKIN, *supra* note 115, at 114 (discussion of institutional dependency); Friedman, *supra* note 161, at 475-76 (discussing psychosocial costs of hospital care).

[FN255]. See Wagenaar & Lewis, *supra* note 52, at 508 (pointing out that "the class dimension in mental hospitalization is largely ignored"). Interestingly, Dr. Lamb explicitly acknowledges the role of cultural bias on our deinstitutionalization policy:

An important issue related to goal setting is that the kinds of criteria that theorists, researchers, policymakers, and clinicians use to assess social integration have a distinct bias in favor of the values held by these professionals and by middle-class society generally. Thus holding a job, increasing one's socialization and relationships with other people, and living independently may be goals that are not shared by a large proportion of the long-term mentally ill.

Likewise, what makes the patient happy may be unrelated to these goals. . . .
Lamb, *supra* note 145, at 942.

[FN256]. P. ROSSI, *supra* note 14, at 120-39; see also Wagenaar & Lewis, *supra* note 52, at 508-13.

[FN257]. See, e.g., Fischer & Breakey, *supra* note 14, at 22-24, 31-32.

[FN258]. See generally W. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (graphically demonstrating the extent to which the "extremely poor" or "socially marginalized" are cut off from mainstream society); see also Luban, *supra* note 5, at 2160 n.22 (citing the "wealth of horrendous detail concerning the emiseration of black Americans," and the "grim, even terrifying, summary of the emergency conditions under which we live").

[FN259]. See, e.g., Schumer, *Shutting the Doors on the Poor*, N.Y. Times, Mar. 9, 1988, at A31 (noting that the effect of the deinstitutionalization of many mentally ill patients in the 1960s and 1970s reinforced already existing stereotypes of the homeless).

[FN260]. See Collin & Barry, *Homelessness: A Post-Industrial Society Faces a Legislative Dilemma*, 20 AKRON L. REV. 409, 429-31 (1987); Note, *supra* note 44, at 160 n.2. Collin and Barry read the New York State Constitution's Article XVII, section I, which mandates the provision of care to the needy, to reflect the following drafting intent: "Aid is to be provided to all those individuals who are 'involuntarily needy'; but it is properly within the realm of legislative discretion to deny aid to employable persons who are deemed not 'needy' because they have wrongfully refused to avail themselves of an opportunity for employment." Collin & Barry, *supra*, at 409 n.2. The latter group of individuals is deemed to be "voluntarily in need." See *id.*

[FN261]. See Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 706-30 (1989-90).

[FN262]. Cf. Goldstein & Katz, *Abolish the "Insanity Defense"--Why Not?*, 72 YALE L.J. 853, 868-69 (1963) (our "largely unconscious feelings of apprehension, awe and anger toward the 'sick' . . . are hidden by the more acceptable conscious desire to protect [them]"); Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the Ake in Barefoot's Achilles Heel*, 3 N.Y.L. SCH. HUM. RTS. ANN. 91, 168 (1985) (speculating that when dealing with the mentally ill, Supreme Court justices, like most people "are beset by ambiguous and ambivalent feelings in need of self-rationalization:

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unconscious feelings of awe, of fear, of revulsion, of wonder"). Some commentators advocate the need to overcome these destructive biases. See Friedman, *supra* note 161, at 472-73 (tracing society's treatment of the mentally ill through history); Wagenaar & Lewis, *supra* note 52, at 521 (it is necessary to "deal effectively with the moral dimension of mental disorder without reneging on the humanitarian and egalitarian promise of the current inclusive system of care"). Cf. J. ROBITSCHER, *THE POWERS OF PSYCHIATRY* 1 (1980) ("We must be aware of the dangers which lie in our most generous wishes").

[\[FN263\]](#). Lamb, *supra* note 145, at 943 (observing that as "products of our culture and society," we tend to "morally disapprove of persons who 'give in' to their dependency needs, who have adopted a passive, inactive life-style, and who have accepted public support instead of working"); J. Costello, *supra* note 186 (public assumes mentally ill homeless individuals are "bad, . . . stubborn, . . . weak, or . . . lack willpower").

[\[FN264\]](#). Lambert, *supra* note 152, at A1, col. 2.

[\[FN265\]](#). Rowland, Songer & Carp, *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 L. & SOC'Y REV. 191, 194 (1988).

[\[FN266\]](#). Kozol's book is an eloquent reportorial account of the lives of homeless residents of the Hotel Martinique in New York City. It focuses on issues of race, class, poverty, and housing shortages. Kozol specifies what he is not writing about:

[T]he emphasis is not on those who were confined in mental hospitals and were deinstitutionalized ten years ago. The emphasis, if anything, is the reverse: It is the creation of an institution that makes healthy people ill, normal people clinically depressed, and those who may already be unwell a great deal worse . . .

J. KOZOL, *supra* note 52, at 20-21; cf. Note, *Between Helping the Child and Punishing the Mother: Homelessness Among AFDC Families*, 12 HARV. WOMEN'S L.J. 237-38 (1989) (reporting findings of U.S. Conference of Mayors 1987 study that families with children constitute 95% of the homeless in Norfolk, Virginia, 75% in Massachusetts, 70% in Trenton, New Jersey and that in major American cities, 25% of all homeless individuals are children). See generally Note, *supra* note 44, at 179-201 (discussing the specific problems faced by homeless families).

[\[FN267\]](#). McKittrick, *The Homeless: Judicial Intervention on Behalf of a Politically Powerless Group*, 16 FORDHAM URB. L.J. 389, 428 (1988). On the heuristic of attribution, see Facade, *supra* note 113, at 986-87 & n.200 (once a stereotype is adopted, a wide variety of evidence can be read to support that stereotype, including events that could equally support the opposite interpretation); Psychodynamics, *supra* note 112, at 17-18; see also Lord, Ross & Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERS. & SOC. PSYCHOLOGY 2098, 2099 (1979) ("[T]here is considerable evidence that people tend to interpret subsequent evidence so as to maintain their initial beliefs.").

[\[FN268\]](#). K. CLARY & D. VENEZIO, *EXPLORATORY STUDY OF HOMELESS FAMILIES: SOCIO-ECONOMIC FACTORS LEADING TO HOMELESSNESS* 7-9 (1986); Connell, *supra* note 232, at 783.

[\[FN269\]](#). Myth, *supra* note 69, at 420. For an example of typification involving the mentally disabled, see Van Zandt, [Common Sense Reasoning, Social Change, and the Law](#), 81 NW. U.L. REV. 894, 914 (1987).

[\[FN270\]](#). Goldman & Morrissey, *supra* note 110, at 729-30.

[\[FN271\]](#). McKittrick, *supra* note 267, at 428 ("By focusing on the mentally ill, [New York City] perpetuates the stereotype that the homeless are insane, while creating the perception that it is addressing the problem."); Note, *supra* note 185, at 256-57 (critiquing the "explicitly racist and sexist stereotype of the 'typical' AFDC family . . . immortalized by President Ronald Reagan"); J. Costello, *supra* note 186; M. Perlin, *Authoritarianism, The Mystique of Ronald Reagan and the Future of the Insanity Defense* (work in progress). On the significance of former President Reagan's anecdotal style on the debate on another mental health/social policy issue (the insanity defense), see Perlin, *supra* note 112, at 20 & n.81.

[\[FN272\]](#). For a range of mass media depictions, see Myth, *supra* note 69, at 407-08. See also Kaufman, ["Crazy" Until Proven Innocent: Civil Commitment of the Mentally Ill Homeless](#), 19 COLUM. HUM. RTS. L. REV. 333, 363 (1988)

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(critically assessing the influence of media prejudices toward mentally ill and homeless individuals on public policy decision making); Protesse, Leff, Brooks & Gordon, *Uncovering Rape: The Watchdog Press and the Limits of Agenda Setting*, 49 PUB. OPINION Q. 19, 19-20 (1985). See generally Nunnally, *The Communication of Mental Health Information: A Comparison of the Opinions of Experts and the Public With Mass Media Presentations*, 2 BEHAV. SCI. 222, 230 (1957) (discussing mass media's emphasis on "bizarre symptoms").

For a critical evaluation of mass media depictions of the so-called "criminally insane," see Steadman & Cocozza, *Selective Reporting and the Public's Misconceptions of the Criminally Insane*, 41 PUB. OPINION Q. 523, 531 (1977-78).

[FN273]. See generally Perlin, *supra* note 112, at 22-39; Facade, *supra* note 113, at 966. On the heuristic fallacy in mental health decision making, see Durham & La Fond, *supra* note 218, at 886; Gutheil, Bursztajn, Kaplan & Brodsky *supra* note 151, at 447; Hoge, Sachs, Appelbaum, Greer & Gordon, *Limitations on Psychiatrists' Discretionary Civil Commitment Authority by the Stone and Dangerousness Criteria*, 45 ARCH. GEN. PSYCHIATRY 764, 768 (1988); Comment, *Pennsylvania Standard for Involuntary Civil Commitment of the Mentally Ill: A Clear and Present Danger?*, 27 DUQ. L. REV. 325, 346 (1989).

[FN274]. Fischer & Breakey, *supra* note 14, at 27; see also Ball & Havassy, *supra* note 69, at 920 (serious mismatch exists between services provided by community mental health systems and services the homeless feel they need); Bassuk, *The Homelessness Problem*, 251 SCI. AM. 40, 45 (1984) (arguing that public officials have failed to recognize the implications of mental illness among the homeless); Baxter & Hopper, *supra* note 45, at 394 (deinstitutionalization subjects the mentally ill to the hazards of a marginal existence in the community; one result is a high suicide rate for the group).

[FN275]. Goldman & Morrissey, *supra* note 110, at 729; Hyde, *supra* note 155, at 22-23; Lamb, *supra* note 145, at 906; Oreskes & Toner, *supra* note 107, at E5.

[FN276]. Kaufman, *supra* note 272, at 363 ("politically astute" public officials may advocate broad civil commitment standard to "convince" the public that the government is both "helping the unfortunate and eliminating the problem of unsightly 'crazies'"). See generally Kanter, *supra* note 72, at 346-48 (discussing strategies of community opposition to community residences for the mentally handicapped).

[FN277]. See generally Field, [Honest Differences in Discerning the Constitution's Meaning--The Task of Defining Constitutional Rights for Persons Who Are Retarded](#), 72 IOWA L. REV. 1301, 1305-06 (1987) (demonstrating that differences exist in determining the constitutional rights of the retarded such as their right to live in a specific community); Minow, [When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference](#), 22 HARV. C.R.-C.L. L. REV. 111, 113 (1987) (arguing that categorical approaches undermine commitments to equality).

[FN278]. Note, *supra* note 126, at 1340 (quoting N. KITTRIE, *supra* note 206, at 47).

[FN279]. Perlin, *supra* note 112, at 22-28. See generally 2 M. PERLIN, *supra* note 11, § 7.22 (discussing the right of the mentally disabled to be free from discrimination in housing); D. LEWIS, J. GRANT & D. ROSENBAUM, *THE SOCIAL CONSTRUCTION OF REFORM: CRIME PREVENTION AND COMMUNITY ORGANIZATIONS* (1988) (discussing the politics of community organizations, with emphasis on an analysis of groups receiving grants for community crime prevention programs); Margolis, *Conceptual Puzzles About Community Responses*, in *THE COMMUNITY IMPERATIVE*, *supra* note 118, at 223; Stickney, *Siting Residential Facilities: Strategies for Gaining Community Acceptance*, in *THE COMMUNITY IMPERATIVE*, *supra* note 118, at 331; cf. Boydell, Trainor & Pierri, *The Effect of Group Homes for the Mentally Ill on Residential Property Values*, 40 HOSP. & COMMUNITY PSYCHIATRY 957, 958 (1989) (all empirical literature demonstrates that group homes do not have a negative effect on neighborhood property values; in fact, in some markets, nearby property values were strengthened).

[FN280]. Friedman, *supra* note 161, at 472.

[FN281]. Lipton & Sabatini, *supra* note 46, at 156.

[\[FN282\]](#). Refer to notes 167-73 *supra* and accompanying text.

[\[FN283\]](#). See Wagenaar & Lewis, *supra* note 52, at 513-19.

[\[FN284\]](#). See Luban, *supra* note 5, at 2160 n.22; Wagenaar & Lewis, *supra* note 52, at 509-10.

[\[FN285\]](#). See Perlin, *supra* note 261, at 618-23; see also O.W. HOLMES, JOHN MARSHALL, COLLECTED LEGAL PAPERS 270 (1920) ("We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it.").

[\[FN286\]](#). McKittrick, *supra* note 267, at 428. See generally Perlin, *supra* note 257 (discussing the symbolism and mythology underlying the insanity defense policy).

[\[FN287\]](#). Perlin, *supra* note 261, at 706-31.

[\[FN288\]](#). See generally Levy, Coexistence Implies Reciprocity, in THE COMMUNITY IMPERATIVE, *supra* note 118, at 323 (discussing the importance of coexistence in the social community in this context).

[\[FN289\]](#). See The Homelessness Test: There is a Right Answer, N.Y. Times, Mar. 1, 1990, at A26 (editorial):
Why did so many people, especially the mentally ill, begin living on the streets of New York City during the 1990's?
(1) Because misguided reformers threw tens of thousands of patients right out of New York State mental hospitals under a policy called "deinstitutionalization."
(2) Because New York City failed to provide adequate mental health programs.
(3) Because the law prevents the police from taking homeless people off the streets.
(4) Because a shift in the real estate market eliminated tens of thousands of cheap rooms.
Nos. 1 and 2 might have been plausible answers 10 years ago, but they don't explain the problem now. Though No. 3 is often glibly cited, it has never been a big factor. The only correct answer is No. 4. . . .
(emphasis in original).

[\[FN290\]](#). McKittrick, *supra* note 267, at 428.

[\[FN291\]](#). Refer to text accompanying note 363 *infra*.

[\[FN292\]](#). Roth, Meisel & Lidz, Tests of Competency to Consent to Treatment, 134 AM. J. PSYCHIATRY 279, 283 (1977). See generally T. GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 15-29 (1986) (suggesting an important model of legal competency containing six elements: functional abilities, context, causal inference, interaction, judgment and disposition).

[\[FN293\]](#). Gutheil, Bursztajn, Kaplan & Brodsky, *supra* note 151, at 446-47.

[\[FN294\]](#). Appelbaum & Roth, Clinical Issues in the Assessment of Competency, 138 AM. J. PSYCHIATRY 1462, 1466 (1981).

[\[FN295\]](#). [20 PA. CONS. STAT. ANN. § 5501\(2\)](#) (Purdon 1975); see also *In re Estate of Wood*, 368 Pa. Super. 173, 533 A.2d 772, 775 (1987) (despite memory loss, nursing home patient was held competent to manage her financial affairs).

[\[FN296\]](#). Facade, *supra* note 113, at 967.

[\[FN297\]](#). See, e.g., [Ford v. Wainwright](#), 477 U.S. 399, 410 (1986) (competency to be executed); [Colorado v. Connelly](#), 479 U.S. 157, 167 (1986) (competency to confess); [Drope v. Missouri](#), 420 U.S. 162, 172 (1975) (competency to stand trial); [Malinauskas v. United States](#), 505 F.2d 649, 654 (5th Cir. 1974) (competency to plead guilty); [State v. Cameron](#), 146 Ariz. 210, 704 P.2d 1355, 1358 (Ct. App. 1985) (competency to waive a jury); [People v. Kessler](#), 113 Ill. App. 3d 354, 447 N.E. 2d 495, 501 (1983) (competency to waive counsel); [State v. Khan](#), 175 N.J. Super. 72, 417 A.2d 585, 588-89 (App. Div. 1980) (competency to waive insanity defense).

[FN298]. Appelbaum & Roth, *supra* note 294, at 1465.

[FN299]. Roth, Meisel & Lidz, *supra* note 292, at 279.

[FN300]. Cf. N.J. STAT. ANN. § 30:4-24.2(c) (West 1981) (a patient may not be presumed incompetent merely because he has been treated for mental illness); In re LaBelle, 107 Wash. 2d 196, 728 P.2d 138, 146 (1986) ("the mere fact that an individual is mentally ill does not mean that the person so affected is incapable of making a rational choice with respect to his or her need for treatment"). But see Appelbaum, Mirkin & Bateman, Empirical Assessment of Competency to Consent to Psychiatric Hospitalization, 138 AM. J. PSYCHIATRY 1170, 1175 (1981) (empirical evidence suggests that "the presumption of competency to consent to psychiatric hospitalization will have to fall").

[FN301]. Gutheil, Bursztajn, Kaplan & Brodsky, *supra* note 151, at 447. See generally Chodoff, The Case for Involuntary Hospitalization of the Mentally Ill, 133 AM. J. PSYCHIATRY 496, 498 (1978) (patient dissatisfaction actually reflects a deeper desire to be treated; preference is subtly masked by the same thought disorder that needs treating); cf. J. CHAMBERLIN, ON OUR OWN (1978) (ex-patient consumer movement policy positions reflect dissatisfaction with traditional mental health programs).

On the competency of the mentally ill to engage in their own decisionmaking about their treatment, see Fischer & Breakey, *supra* note 14, at 29. See also Ball & Havassy, *supra* note 69, at 917 (ex-patients chose to remain homeless on the streets untreated rather than endure the side effects of psychotropic medication).

[FN302]. Golding & Roesch, Competency for Adjudication: An International Analysis, in 4 LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES 73, 102 (D. Weisstub ed. 1988). Cf. Roth, Meisel & Lidz, *supra* note 292, at 280 (competency tests "fall into five categories: (1) evidencing a choice, (2) a 'reasonable' outcome of choice, (3) a choice based on 'rational' reasons, (4) ability to understand, and (5) actual understanding").

[FN303]. See generally Arvanites, The Impact of State Mental Hospital Deinstitutionalization on Commitments for Incompetency to Stand Trial, 26 CRIMINOLOGY 307, 318 (1988) (although increases in incompetency to stand trial (IST) commitments are positively related to deinstitutionalization, there is no evidence that deinstitutionalization "has resulted in the wholesale criminalization of the mentally ill or that [IST procedures] are increasingly being used to hospitalize minor offenders through incompetency commitments"). In a more recent study, Professor Arvanites has found that, after deinstitutionalization, non-whites had significantly more state mental hospitalizations than did whites. Arvanites, The Differential Impact of Deinstitutionalization on White and Nonwhite Defendants Found Incompetent to Stand Trial, 17 BULL. AM. ACAD. PSYCHIATRY & L. 311, 318-19 (1989). See generally Steadman, Vanderwyst & Ribner, Comparing Arrest Rates of Mental Patients and Criminal Offenders, 135 AM. J. PSYCHIATRY 1218, 1220 (1978) (former mental patient arrest rates have increased as the composition of state mental hospitals has changed to include more persons with prior criminal records); 3 M. PERLIN, *supra* note 11, § § 14.01-14.23 (discussing IST issues, including due process contours of the competency determination, burden of proof at trial, medication of defendants to achieve competency, counsel's role at the incompetency hearing, nonpsychiatric physiological disorders and mentally retarded defendants); Perlin & Dvoskin, AIDS Related Dementia and Competency to Stand Trial: A Potential Abuse of the Forensic Mental Health System?, 18 BULL. AM. ACAD. PSYCHIATRY & L. 349 (1990).

Some critics argue that overly restrictive involuntary civil commitment laws have resulted in the "criminalization of psychosis" as a result of which individuals who would formerly have been involuntarily civilly committed are now charged with minor criminal offenses such as trespassing. E. TORREY, *supra* note 41, at 13-14. Arrest is thus seen as "a more expedient method" of case disposition than is referral for hospitalization. Pogrebin & Poole, Deinstitutionalization and Increased Arrest Rates Among the Mentally Disordered, 15 J. PSYCHIATRY & L. 117, 120 (1987); see also Briar, Jails: Neglected Asylums, 64 SOC. CASEWORK 387, 388 (1983) (jail may be "our most enduring asylum"). See generally Brahm & Weller, *supra* note 159, at 43; Morrissey & Goldman, *supra* note 110, at 24-26 (discussing the increasing use of the criminal process to hospitalize seriously mentally ill but nondangerous persons); Pogrebin & Poole, *supra*, at 122, quoting Roesch & Golding, The Impact of Deinstitutionalization, in AGGRESSION AND DANGEROUSNESS (1985) (increases in imprisonment rate for the mentally disabled "reflect the manner in which the institutions of our society react to individual behavior" rather than changes in crime rates among the mentally disabled); Snow, Baker & Anderson, Criminality and Homeless Men: An Empirical Assessment, 36 SOC. PROBS. 532, 539 (1989) (empirical data showed that most offenses committed by homeless men were

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"relatively minor and victimless" and not a "direct threat to domiciled citizens"). Persons of low social class are disproportionately overrepresented both in populations of correctional institutions and mental hospitals. Monahan & Steadman, *Crime and Mental Disorder*, in NATIONAL INST. OF JUSTICE, RESEARCH IN BRIEF (1984). Mary Durham has suggested that the mental health system, the criminal justice system and other segments of the human services systems may work in a "hydraulic" fashion so that change in one institutional system forces changes in another part of the system. Durham, *supra* note 72, at 129. On the effect of similar "hydraulic" pressures in insanity defense decision-making, see Perlin, *supra* note 261, at 614-15; on its effect in cases involving forensic testimony in general, see Morality, *supra* note 113.

For a radical criminology perspective, see Barak & Bohm, *The Crimes of the Homeless or the Crime of Homelessness? On the Dialectics of Criminalization, Decriminalization, and Victimization*, 13 CONTEMP. CRISES 275 (1989).

[FN304]. In 1980, there were 840,000 voluntary mental health admissions to public hospitals. See MENTAL HEALTH, U.S., 1983 45 (1985). See generally 1 M. PERLIN, *supra* note 11, § 3.69 (reviewing litigation on questions of voluntary status).

[FN305]. See, e.g., Stromberg & Stone, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 HARV. J. LEGIS. 275, 325 (1983) (the model state law for civil commitment seeks to encourage voluntary admissions); Shuman, Hegland & Wexler, *Arizona's Mental Health Services Act: An Overview and An Analysis of Proposed Amendments*, 19 ARIZ. L. REV. 313, 324-25 (1977) (voluntary treatment is preferable from both medical and legal perspectives); *Developments in the Law--Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1399 (1974) [hereinafter *Developments*] (proposed reforms to current mental health care programs encourage voluntary admissions).

[FN306]. See *In re G.M.*, 217 N.J. Super. 629, 526 A.2d 744, 745 (Ch. Div. 1987).

[FN307]. *In re Alleged Mentally Disordered Person*, 145 Ariz. 81, 699 P.2d 1312, 1313-14 (Ct. App. 1985).

[FN308]. *In re Melas*, 371 N.W.2d 653, 655 (Minn. Ct. App. 1985). While involuntary civil commitment courts have split on the extent to which they should rely on evidence of refusal to take medication in ordering involuntary commitment, they generally rely upon such proof in deciding to commit. See, e.g., *In re J.B.*, 217 Mont. 504, 705 P.2d 598, 602 (1985) (viewing the patient's failure to take medication as requiring institutionalization and precluding further consideration of community outpatient treatment or services). For cases considering this factor in affirming commitment orders, see *Delaware State Hosp. v. Morris*, 541 A.2d 139, 141 (Del. Super. Ct. 1988); *In re Fusa*, 355 N.W.2d 456, 457 (Minn. Ct. App. 1984); *In re L.R.*, 146 Vt. 17, 497 A.2d 753, 757 (1985). But cf. *People v. Nunn*, 108 Ill. App. 3d 169, 438 N.E.2d 1342, 1345 (App. Ct. 1982) (reversing commitment order). This issue appears in the release context as well. Compare *Johnson v. State*, 536 So. 2d 1054, 1055 (Fla. Dist. Ct. App. 1988) (denial of conditional release erroneous where denial based solely on inability of experts to "guarantee" that patient would abstain from alcohol and take prescribed medication if released) with *Butler v. State*, 258 Ga. 344, 369 S.E.2d 252, 253 (1988) (denial of insanity acquittee's application for release properly supported by testimony that defendant had poor history of taking prescribed medication).

Many judges perceive it as a matter of "ordinary common sense" that the failure of the mentally ill individual to take prescribed antipsychotic medications provides the stepping stone in the pathway from premature deinstitutionalization to homelessness. E.g., *In re Melton*, 565 A.2d 635, 649 (D.C. 1989) (Schwelb, J., dissenting):

Once upon a time, long, long ago, the King of Epirus defeated his Roman adversaries in a battle at Asculum The king's name was Pyrrhus, and [] [his] kind of triumph . . . has come to be known as a Pyrrhic victory.

I am very much afraid that what [the appellant] has won through litigation may be as counter-productive in the long run as the famous monarch's flawed win at Asculum. Indeed, I am constrained to wonder how many of the homeless persons who live wretched and squalid lives on grates and benches and pavements in our nation's capital are there because they have "won," through litigation or the threat thereof, or as a result of premature deinstitutionalization, the "liberty" not to be required to take medication essential to their mental health.

Id. (footnotes omitted).

[FN309]. See Olin & Olin, *Informed Consent in Voluntary Mental Hospital Admissions*, 132 AM. J. PSYCHIATRY 938, 938 (1975); Palmer & Wohl, *Voluntary-Admission Forms: Does the Patient Know What He's Signing?*, 23 HOSP. & COMMUNITY PSYCHIATRY 250, 251 (1972); Perlin & Sadoff, *supra* note 206, at 190.

[FN310]. See Appelbaum, Mirkin & Bateman, *supra* note 300, at 1175; Legemaate, Legal Aspects of Voluntary Psychiatric Hospitalization, 11 INT'L J.L. & PSYCHIATRY 259, 261 (1988); Perlin & Sadoff, *supra* note 206, at 190. See generally Winick, [Competency to Consent to Treatment: The Distinction Between Assent and Objection](#), 28 HOUS. L. REV. 15 (1990).

[FN311]. Legal Issues in State Mental Health Care: Proposals for Change-- Civil Commitment, 2 MENTAL DISABILITY L. REP. 75, 94 nn.135-36 (1977).

[FN312]. Perlin & Sadoff, *supra* note 206, at 189-90; Developments, *supra* note 305, at 1399.

[FN313]. Legemaate, *supra* note 310, at 260.

[FN314]. See Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 CALIF. L. REV. 840, 845-46 (1974). Compare Herr, Civil Rights, Uncivil Asylums and the Retarded, 43 U. CIN. L. REV. 679, 722 (1974) (distinction between voluntary and involuntary often "illusory") with [New York State Ass'n for Retarded Children, Inc. v. Rockefeller](#), 357 F. Supp. 752, 756 (E.D.N.Y. 1973) (voluntary residents at state school for retarded not treated differently than those who were involuntarily committed).

[FN315]. Developments, *supra* note 305, at 1400-01.

[FN316]. Legemaate, *supra* note 310, at 261-262; Wexler, Foreword: Mental Health Law and the Movement Toward Voluntary Treatment, 62 CALIF. L. REV. 671, 676 (1974). See generally Gilboy & Schmidt, "Voluntary" Hospitalization of the Mentally Ill, 66 NW. U.L. REV. 429, 452 (1971) (in a study of voluntary admissions in Illinois, a majority of individuals who voluntarily committed themselves did so under threat of involuntary commitment).

[FN317]. Herr, *supra* note 314, at 723. The most recent literature suggests that voluntary patients are hospitalized twice as long as involuntary patients and are less frequently considered to have received maximum benefits from their hospitalizations. Nicholson, Characteristics Associated With Change in the Legal Status of Involuntary Psychiatric Patients, 39 HOSP. & COMMUNITY PSYCHIATRY 424, 427 (1988).

[FN318]. [110 S. Ct. 975 \(1990\)](#).

[FN319]. [Id. at 984-86](#).

[FN320]. [Id. at 986](#).

[FN321]. Zinermon confronted the extent to which [Parratt v. Taylor](#), 451 U.S. 527 (1981), and [Hudson v. Palmer](#), 468 U.S. 517 (1984), controlled a situation in which predeprivation procedural safeguards might have had value in preventing the alleged deprivation. [Zinermon](#), 110 S. Ct. at 977-79. Both prior cases held that deprivation of constitutionally protected interests caused by a state employee's random, unauthorized conduct does not give rise to a section 1983 procedural due process action. *Id.* See 1 M. PERLIN, *supra* note 11, § 3.69, at 33-35 (1990 Supp.); 3 M. PERLIN, *supra* note 11, § 12.33, at 10-12 (1990 Supp.). Zinermon is discussed in B. Winick, Competency to Consent to Voluntary Hospitalization: An Analysis of Zinermon v. Burch (unpublished manuscript).

[FN322]. [Zinermon](#), 110 S. Ct. at 987-88.

[FN323]. See, e.g., Brodsky, Fear of Litigation in Mental Health Professionals, 15 CRIM. JUST. & BEHAV. 492, 497 (1988) (disproportionate reactions by mental health professionals responding to fear of suit have reached phobic proportions); Breslin, Taylor & Brodsky, Development of a Litigaphobia Scale: Measurement of Excessive Fear of Litigation, 58 PSYCHOLOGICAL REP. 547, 547-48 (1986) (the fear of malpractice litigation is widespread; the irrational or excessive fear of litigation--"litigaphobia"--may detrimentally affect the quality of practitioners' work). See generally Facade, *supra* note 113, at 989 n.211 (discussing this issue).

[FN324]. [422 U.S. 563, 576 \(1975\)](#) (a state cannot confine, without more, a nondangerous individual who is capable of

surviving safely in freedom by himself or with the help of family or friends merely because he is mentally ill).

[FN325]. [441 U.S. 418, 431-33 \(1979\)](#) (clear and convincing proof is needed to sustain involuntary civil commitment).

[FN326]. See generally 1 M. PERLIN, *supra* note 11, § 2.06-2.13 (discussing multiple meanings of "dangerousness" for involuntary civil commitment purposes).

[FN327]. [77 N.J. 282, 390 A.2d 574, 583 \(1978\)](#) (the state must renew its authority to continue to deprive a committed individual of his liberty at each periodic review hearing).

[FN328]. [173 Conn. 473, 378 A.2d 553, 556 \(1977\)](#) (the due process clause of the Connecticut constitution mandates that involuntarily confined civilly committed individuals be granted periodic judicial reviews of the propriety of their continued confinement).

[FN329]. See generally 1 M. PERLIN, *supra* note 11, § 3.60 (discussing the right of involuntarily confined civilly committed individuals to periodic judicial review).

[FN330]. Cf. Brahams & Weller, *supra* note 159, at 47-48 (in England, "no decision" as to whether a mentally ill patient can form the necessary intent to "voluntarily" discharge himself or herself from a psychiatric hospital). But see *In re S.L.*, [94 N.J. 128, 462 A.2d 1252, 1258-59 \(1983\)](#) (ordering placement review hearings for patients no longer dangerous but unable to survive independently in the community).

[FN331]. [422 U.S. 563 \(1975\)](#). Refer to notes 137 & 139 *supra* and accompanying text.

[FN332]. [349 F. Supp. 1078 \(E.D. Wis. 1972\)](#). Refer to notes 138 & 140 *supra*.

[FN333]. Compare E. TORREY, *supra* note 41, at 156-60 with Wagenaar & Lewis, *supra* note 52, at 506 (extension of civil rights to the mentally ill has "irrevocably altered" their relationships with their therapists). On the therapeutic potential of the legal process for mentally ill individuals, see generally D. WEXLER, *supra* note 245, at 3-20 (discussing the therapeutic aspects of civil commitment hearings, voluntary confinement compared to forced hospitalizations, and the roles of judges and lawyers in the process); Ensminger & Liguori, The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential, 6 J. PSYCHIATRY & L. 5, 7 (1978) (the civil commitment process contains considerable potential for therapeutic effects on the involuntarily committed patient); Facade, *supra* note 113, at 981-82 (discussing Supreme Court's failure to consider therapeutic outcomes in juvenile commitment cases); Wexler, Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian Commitment Codes, 9 INT'L J.L. & PSYCHIATRY 39, 54 (1986) (the very process of gathering evidence of a person's committability under a libertarian law may operate therapeutically to render commitment unnecessary).

[FN334]. On the question of the way "moral" psychiatrists may consciously subvert the legislative commitment standards to insure commitment of individuals who may not "technically" meet such standards, see Bagby & Atkinson, The Effects of Legislative Reform on Civil Commitment Admission Rates: A Critical Analysis, 6 BEHAV. SCI. & L. 45, 58-59 (1988); Morality, *supra* note 112. Refer to notes 388-92 *infra* and accompanying text.

[FN335]. See 1 M. PERLIN, *supra* note 11, § 2.13, at 110-15.

[FN336]. See, e.g., Fischer & Breakey, *supra* note 14, at 27-32; Hiday & Scheid-Cook, The North Carolina Experience with Outpatient Commitment: A Critical Appraisal, 10 INT'L J.L. & PSYCHIATRY 215, 215-16 (1987).

[FN337]. APA Task Force, *supra* note 144, at 8; see also Miller, Commitment to Outpatient Treatment: A National Survey, 36 HOSP. & COMMUNITY PSYCHIATRY 265, 267 (1985) (while OPC can be effective for those who will not obtain treatment voluntarily, states must seek input from clinicians to properly develop OPC procedures); Peele, Gross, Arons, & Jafri, *supra* note 145, at 265- 68 (discussing trends in commitment laws, including OPC and alternatives to OPC).

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[FN338]. [N.C. GEN. STAT. § § 122C-263\(d\) \(1989\)](#). In determining the appropriateness of OPC, the committing physician must consider a variety of factors, including current and prior history of mental illness, treatment history, risk of danger to self or others, "ability to survive safely without inpatient commitment, . . . availability of supervision from family, friends or others[,] and capacity to make an informed decision concerning treatment." [Id. § § 122C-263\(c\)](#). For a state-by-state survey of OPC statutes, see Schwartz & Costanzo, *supra* note 202, at 1363-72, 1405-29.

[FN339]. Hiday & Scheid-Cook, *supra* note 336, at 215. Compare *id.* at 215- 16 (asserting that OPC provisions are necessary to treat the mentally ill who do not seek voluntary treatment, but do not meet the involuntary commitment criteria) with Kanter, *supra* note 72, at 354 (arguing that two-thirds of states already provide for inpatient commitment based on a "grave disability" theory for precisely this group of individuals). Refer to note 202 *supra* and accompanying text.

[FN340]. Refer to text accompanying notes 260-69 *supra*.

[FN341]. See Mulvey, Geller & Roth, The Promise and Peril of Involuntary Outpatient Commitment, 42 AM. PSYCHOLOGIST 571, 577-79 (1987) ("involuntary outpatient commitment rests on the state's obligation to provide positive liberty rather than simple noninterference, the likelihood of more efficacious treatment through broad-based intervention, and the possibility of initiating a positive cycle of community involvement").

[FN342]. See *id.* at 575-77 (setting forth opposing arguments to OPC that the costs to individual rights and professional relationships are too great).

[FN343]. Compare, e.g., Hiday & Goodman, The Least Restrictive Alternative to Involuntary Hospitalization, Outpatient Commitment: Its Use and Effectiveness, 10 J. PSYCHIATRY & L. 81, 88-91 (1982) (results of court-ordered outpatient treatment indicate that OPCs are successful; in a two-year study, only 15.7% of patients in the first year and 9.5% in the second year subsequently required rehospitalization) with Miller & Fiddelman, Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes, 60 N.C.L. REV. 985, 1009-13 (1982) (asserting that North Carolina's statutory amendments did not make a significant difference in OPC use, based upon a study of patients committed before and after the amendments).

[FN344]. See Hiday & Scheid-Cook, *supra* note 336, at 229.

[FN345]. *Id.* at 230; see also Note, *supra* note 126, at 1344 n.183, quoting Perry, The Status of Mental Health Partial Hospitalization Services in the Atlanta Region, in 2 EXPLORING MENTAL HEALTH PARAMETERS 66 (1976) (concluding that "[e]ven if clinicians support community treatment in theory, 'the attitudes, prejudices, and non-coordination of support staff in a program of [community] treatment can be quite debilitating in lowering the quality of an existing program and in preventing an increase in the scale of the program'").

[FN346]. See Hiday & Scheid-Cook, *supra* note 336, at 230-31; see also *id.* at 230:

Some centers paid lip service to OPC, treating a respondent ordered to them as another deinstitutionalized chronic patient who soon would have to be readmitted to the hospital or as another problem patient with whom no one could do anything. They showed little understanding of the intent or provisions of the law. Some primary clinicians at these centers did not know that OPC was not for alcoholics, that the sheriff could be called to bring in a respondent or that the OPC could be extended.

[FN347]. E. TORREY, *supra* note 41, at 142-51.

[FN348]. *Id.*; see also Schwartz & Costanzo, *supra* note 202, at 1386-89.

[FN349]. *Id.* at 1346.

[FN350]. *Id.* at 1348.

[FN351]. *Id.* at 1404.

[\[FN352\]](#). Stefan, *supra* note 135, at 288. See generally 1 M. PERLIN, *supra* note 11, § § 3.46-3.54, at 341-68 (discussing "least restrictive alternative" and "conditional release" models).

[\[FN353\]](#). Stefan, *supra* note 135, at 288-91.

[\[FN354\]](#). *Id.* at 296.

[\[FN355\]](#). *Id.* at 291-95.

[\[FN356\]](#). *Id.* at 289; see also Schwartz & Costanzo, *supra* note 202, at 1379-80 (arguing that states will not be likely to provide the necessary funds to adequately assist those who will not seek help voluntarily).

[\[FN357\]](#). See Schwartz & Costanzo, *supra* note 202, at 1380-85. See generally Winick, *supra* note 310. But see Miller & Fiddelman, Outpatient Commitment: Treatment in the Least Restrictive Environment?, 35 HOSP. & COMMUNITY PSYCHIATRY 147, 149 (1984) (presenting clinicians' arguments that patient's history of psychotic behavior when medication is stopped justifies coercion and continued court supervision).

[\[FN358\]](#). Stefan, *supra* note 135, at 294; see also J. La Fond, The Homeless Mentally Ill: Is Coercive Psychiatry the Answer? (paper presented at annual meeting of American Association of Law Schools, January 1990, San Francisco, CA, tape available through AALS) (in outpatient settings, "[d]rugs-- with all their risks--will undoubtedly be the treatment of choice").

[\[FN359\]](#). Schwartz & Costanzo, *supra* note 202, at 1368.

[\[FN360\]](#). See *id.* (reporting that as of 1987, "only seven states explicitly authorize[d] [forced] medication as a form of community treatment," although no OPC statutes precluded it).

[\[FN361\]](#). See *id.* at 1382; see also Mulvey, Geller & Roth, *supra* note 341, at 580-81.

[\[FN362\]](#). See Note, *supra* note 126, at 1323-24, 1341.

[\[FN363\]](#). I have recently attempted to do this elsewhere in connection with the jurisprudence of the right of pretrial detainees to refuse antipsychotic medication, see Facade, *supra* note 113, at 994-1001, and the pretextuality in the way lawyers and forensic mental health professionals address systemic problems, see Morality, *supra* note 112.

[\[FN364\]](#). See, e.g., Baxter & Hopper, *supra* note 43, at 114 (reporting from a 1979-80 study that 59% of all discharges from a single New York state hospital were to "unknown" living arrangements).

[\[FN365\]](#). Refer to notes 252-53 *supra* and accompanying text. Cf. Wagenaar & Lewis, *supra* note 52, at 521 (stating that, as state hospitals' control over the "socially disruptive" diminishes, the burden of dealing with such individuals shifts to groups "least equipped to do so: families and inner-city neighborhoods").

[\[FN366\]](#). See P. Margulies *supra* note 174, at 43-57 (analyzing interests and ambivalences of bureaucrats in community residential care decisionmaking).

[\[FN367\]](#). Refer to notes 163 & 165 *supra*.

[\[FN368\]](#). See, e.g., Bach, *supra* note 174, at 1163-65 (considering whether state hospital failure to locate and arrange for community aftercare prior to patient discharge violates common law tort principles).

For a recent optimistic effort, see Cuomo and Dinkins Agree to House 5,225 Mentally Ill, N.Y. Times, Aug. 23, 1990, at A1, col. 2. (state and city service units agreed to provide residential housing for over 5,000 homeless New York city residents).

[\[FN369\]](#). Refer to notes 214-15 *supra* and accompanying text.

[\[FN370\]](#). Refer to note 396 *infra*.

[\[FN371\]](#). See 2 M. PERLIN, *supra* note 11, at chs. 4 & 5.

[\[FN372\]](#). See Stefan, *supra* note 135, at 293-94.

[\[FN373\]](#). See Hiday & Scheid-Cook, *supra* note 336, at 215-16 (describing the group of chronic mentally ill served by OPC statutes as those who have "slipped through the cracks").

[\[FN374\]](#). See, e.g., Note, [A Common Law Remedy for Forcible Medication of the Institutionalized Mentally Ill](#), 82 COLUM. L. REV. 1720, 1723-27 (1982) (discussing the use of antipsychotic drugs for schizophrenic and non-schizophrenic patients, and arguing that the use is often unwarranted and even dangerous to the patient).

[\[FN375\]](#). See C. KIESLER & A. SIBULKIN, *supra* note 115, at 148.

[\[FN376\]](#). But see Mossman, Macaulay, Johnson, & Baker, Improving State-Funded Child Psychiatric Care: Reducing Protracted Hospitalization Through Changes in Treatment Planning, 16 QUALITY REV. BULL. 20, 24 (1990) (reporting that a study completed by a state-funded children's hospital suggests that "community-focused efforts yielded shorter hospitalizations and fewer needlessly motivated ones").

[\[FN377\]](#). See generally Perlin & Sadoff, *supra* note 206, at 164 (discussing surveys that indicate that counsel sporadically appointed to represent the mentally ill were reluctant to investigate, lacked expertise, and did not assume an active role as advocate for the clients' rights). The heuristic public perception here is both inapposite and wrong. Cf. J. Costello, *supra* note 186 ("Occasionally at cocktail parties . . . I'm buttonholed by friends who say, 'Weren't you one of those people who got everybody out of the mental hospital? This is all your fault!'") (Costello, a law professor, has served as counsel in several patients' rights cases.).

[\[FN378\]](#). See, e.g., Durham & La Fond, *supra* note 254, at 425-28, 439-43 (concluding that a public defense system provides better legal representation for clients resisting commitment, based upon a study of commitment cases under a public defense system and a court-appointment system).

[\[FN379\]](#). See 2 M. PERLIN, *supra* note 11, § 8.19, at 802-04.

[\[FN380\]](#). Dr. Robert L. Sadoff, past president of the American Academy of Psychiatry and Law, recently questioned whether courts should be involved in release decision making in all cases of patients involuntarily committed to hospitals pursuant to a dangerousness to others finding. Telephone interview with Dr. Robert L. Sadoff (Feb. 19, 1990). This precise question was the topic of a panel discussion, "Discharging 'Dangerous' Patients: Who Decides?" presented at the annual American Academy of Psychiatry and Law Conference, October, 1990, in San Diego (debate between Dr. Sadoff and Dr. Abraham Halpern moderated by the author). This is a cutting-edge topic, albeit one that has not yet attracted significant scholarly attention.

[\[FN381\]](#). On the broader question of the duties of lawyers representing putatively incompetent clients, see Margulies, "Who Are You To Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C.L. REV. 213, 235 n.83 (1990) (a hospitalized client may still have the capacity to make certain decisions; if the client does not have such capacity, the attorney should counsel the client's guardian or even other colleagues); Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 UTAH L. REV. 515, 517-21 (discussing the problems and possible solutions presented to an attorney representing an incompetent client).

[\[FN382\]](#). 466 U.S. 668 (1984).

[\[FN383\]](#). *Id.* at 688. See generally 2 M. PERLIN, *supra* note 11, § 8.30 (discussing implications of Strickland for litigation involving mentally disabled clients); Perlin, *supra* note 261, at 145-69 (discussing Strickland's reasonableness test, and criticizing it as "nearly-standardless, seemingly-impossible-to-fail test for adequacy of

counsel").

[FN384]. See, e.g., [Alvord v. Wainwright](#), 469 U.S. 956, 959 (1984) (Marshall, J., dissenting from certiorari denial) (discussing counsel's total failure to pursue a possible insanity defense, and arguing that the resulting standard of reasonableness imposes no duty on the attorney to pursue any defenses the defendant does not desire).

For a recent excellent overview of all relevant issues, see Klein, *The Relationship of the Court and Defense Counsel: The Impact of Competent Representation and Proposals for Reform*, 29 B.C.L. REV. 531 (1988).

[FN385]. Compare Durham & La Fond, *supra* note 232, at 357-62 (arguing that involuntary commitment for nondangerous mentally ill patients does more harm than good) and Durham & La Fond, *supra* note 218, at 886-88 (asserting that coercive commitment is ineffective in treating the mentally ill, and that scarce resources should be concentrated on providing care on a voluntary basis) and Durham & La Fond, *supra* note 254, at 444 (concluding through empirical research that expanding involuntary commitment results in overcrowding in state institutions, chronic use of state psychiatric hospitals, and lack of available treatment for voluntary patients) with Stone, *Broadening the Statutory Criteria for Civil Commitment: A Reply to Durham & La Fond*, 5 YALE L. & POL'Y REV. 412, 422-27 (1987) (attacking Durham and La Fond's research, and asserting that "therapeutically oriented criteria" for commitment protects the patient's rights and limits inappropriate confinements). For clinical evaluations of Stone's proposals, see Beck & Golowka, *A Study of Enforced Treatment in Relation to Stone's "Thank You" Theory*, 6 BEHAV. SCI. & L. 559, 564 (1988) (reporting 15 of 39 patients in their study stated that they benefited from the involuntary hospitalization); Hoge, Appelbaum, & Greer, *An Empirical Comparison of the Stone and Dangerousness Criteria for Civil Commitment*, 146 AM. J. PSYCHIATRY 170, 174-75 (1989) (arguing that the Stone criteria would exclude currently committable patients without adding other patients, and that the criteria would dramatically affect the delivery of psychiatric services); Hoge, Sachs, Appelbaum, Greer & Gordon, *supra* note 273, at 767-68 (asserting that, although the Stone criteria is more restrictive than the dangerousness standard, it may not significantly decrease the number of patients committed).

[FN386]. On the pendulum theory, see 1 M. PERLIN, *supra* note 11, § 1.04, at 24 n.134 (discussing Durham & La Fond, *supra* note 254, at 398); Fisher, Pierce, & Appelbaum, *How Flexible Are Our Civil Commitment Statutes?*, 39 HOSP. & COMMUNITY PSYCHIATRY 711, 711 (1988) (providing that the restrictiveness and inflexibility of statutes based on dangerousness have led several states to broaden commitment requirements); Myers, *supra* note 178, at 379 (some mental health professionals who initially applauded the changes in involuntary commitment laws, eventually criticized them as "anti-therapeutic" and even harmful); Shuman, *Innovative Statutory Approaches to Civil Commitment: An Overview and Critique*, 13 L. MED. & HEALTH CARE 284, 286 (1985) (trend away from the dangerousness standard precipitated by the apparently inappropriate exclusion of people from hospitals, thus forming the "mental patient ghettos" in the larger cities); Wexler, *supra* note 333, at 39 (asserting that statutory broadening of commitment criteria results from public opinion that "the pendulum has swung too far in favoring 'rights' over 'therapy'").

[FN387]. See, e.g., Bagby & Atkinson, *supra* note 334, at 46 ("publicly salient events such as a heinous murder of an innocent victim at the hands of a discharged mentally ill patient, or community intolerance of deviance, may have the effect of increasing the rate of commitments"); Durham & La Fond, *supra* note 232, at 416-18 (increase in commitments before the effective date of Washington's new broadened statutory commitment criteria may have been attributable to a well-publicized murder by a person denied voluntary admission to a state hospital); Fischer, Pierce, & Appelbaum, *supra* note 379, at 712 (reporting that after an individual was denied admission to a Washington state hospital and murdered two elderly neighbors, commitments from that vicinage rose by nearly 100% even prior to legislative reform); Tsiantar, *New York State Seeks To Reduce Psychiatric Beds; City Officials Fear Results Will Be an Increase in Mentally Ill Homeless People*, Wash. Post, Sept. 19, 1986, at F5 (discussing impact on deinstitutionalization debate of highly publicized murder of 11 people on the Staten Island Ferry committed by ex-patient).

Durham & La Fond respond to the major psychiatric critique of their earlier work, see Stone, *supra* note 385, by accusing Stone of relying on "anecdotal accounts, armchair speculation, and two idiosyncratic prospective studies." Durham & La Fond, *supra* note 218, at 886; see also Lamb, *supra* note 151, at 277 (criticizing the utilization of improperly narrow civil commitment criteria, but without citing to a single court decision demonstrating a tendency to apply such criteria too "literally").

In an analysis of civil commitment decisionmaking in cases involving the homeless mentally ill in Ohio, Professor

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John Belcher suggests that "aggressive use" of the civil commitment power is necessary to "ensure appropriate care." Belcher, *Defining the Service Needs of Homeless Mentally Ill Persons*, 39 HOSP. & COMMUNITY PSYCHIATRY 1203, 1204 (1988). A careful reading of the prevailing Ohio state case law indicates, however, that Ohio's judiciary has carefully set out substantive commitment criteria in a way that suggests "regular" use of the civil commitment power is sufficient to ensure appropriate care. See, e.g., [State v. Bruton](#), 27 Ohio App. 3d 362, 368-69, 501 N.E.2d 651, 658-59 (1985) (finding that a patient's probable failure to take medication provided a sufficient basis for a court to find that he posed a danger to himself and others and warranted his confinement); In re [Burton](#), 11 Ohio St. 3d 147, 464 N.E.2d 530, 534 (1984) (setting forth various factors to guide lower courts in commitment cases, including the risk of danger to the patient or others and the probability that the patient will not continue treatment); In re [McKinney](#), 8 Ohio App. 3d 278, 456 N.E.2d 1348, 1351-52 (1983) (holding that statutory definition of mental illness is met when a patient exhibits substantial thought or mood disorder that affects the patient's ability to meet the ordinary demands of life, whether or not psychiatric experts so denominate it).

[FN388]. Under new criteria in Washington, the number of involuntarily committed patients increased significantly, including many first-time commitments. The Washington guidelines also extended the lengths of stay for new patients, thus raising the number of chronic users of inpatient mental health services. The extreme overcrowding caused by the implementation of these guidelines virtually excluded voluntary admissions from all state hospital facilities. See Durham & La Fond, *supra* note 232, at 401.

Conversely, when legislatures have attempted to tighten civil commitment criteria, the number of involuntary admissions has not been significantly reduced. See Bagby & Atkinson, *supra* note 328, at 57-59; see also Bagby, *The Effects of Legislative Reform on Admission Rates to Psychiatric Units of General Hospitals*, 10 INT'L J.L. & PSYCHIATRY 383, 385-86 (1987) (analyzing the impact of legislative revision on involuntary admission rates).

[FN389]. Cf. Bagby & Atkinson, *supra* note 334, at 57 (reaction of mental health professionals who perceive legislation as an unnecessary constraint upon the treatment of the mentally ill); Page, *New Civil Commitment Legislation: The Relevance of Commitment Criteria*, 25 CAN. J. PSYCHIATRY 646, 646 (1980) (Canadian Civil Liberties Union concluded that about 70% of civil commitment criteria did not meet the requirements of the mental health act); Page, *Civil Commitment: Operational Definition of New Criterion*, 26 CAN. J. PSYCHIATRY 419, 420 (1981) (due to low compliance the Canadian mental health act was modified); Page & Firth, *Civil Commitment Practices in 1977: Troubled Semantics and/or Troubled Psychiatry*, 24 CAN. J. PSYCHIATRY 329, 330-31 (1979) (exploring why civil commitment practices are not followed); Page & Yates, *Civil Commitment and the Danger Mandate*, 18 CAN. PSYCHIATRIC ASS'N. 267, 268-70 (1973) (examination of Ontario's new mental health act as contrasted with the narrow criteria of the Canadian mental health act).

[FN390]. S. BREHM & J. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* 357-72 (1981); *Psychodynamics*, *supra* note 112, at 12 n.46; *Morality*, *supra* note 112.

[FN391]. Bagby & Atkinson, *supra* note 334, at 58; see also Friedman, *supra* note 161, at 477-78 (examining why clinicians do not aggressively pursue alternatives to clinical determinants). See generally M. Perlin, *Pretexts Within the Forensic System: Why Are We Really Doing This This Way?* (paper presented at Grand Rounds, Clarke Institute of Psychiatry, Toronto, Ontario, Canada, June 1990) (on file at Houston Law Review).

[FN392]. See Chodoff, *supra* note 301, at 498; see also Kaufman, *supra* note 272, at 362 (broad statutory criteria "invite [medical witnesses] to implement hidden agendas about treating the mentally ill and protecting society"); Lamb, *supra* note 151, at 277 (criticizing courts for interpreting civil commitment laws "literally"). See generally Bagby, Silverman, Ryan & Dickens, *Effects of Mental Health Legislative Reform in Ontario*, 28 CAN. PSYCHOLOGIST 21, 27-28 (1987) (raising serious questions about the ability of lawmakers to legislate the practices of mental health professionals); Compare Martin & Cheung, *Civil Commitment Trends in Ontario: The Effect of Legislation on Clinical Practice*, 30 CAN. J. PSYCHIATRY 259, 259 (1985) (mental health legislation had little effect on local commitment practice) with Tremblay, *supra* note 381, at 538-39 n.97 (legal mandate of presumption of competence "is seldom followed by the medical profession").

Although Peters and his colleagues have reported significant changes in Florida's admissions and census following legislative change, see Peters, Miller, Schmidt, & Meeter, *The Effects of Statutory Change on the Civil Commitment of the Mentally Ill*, 11 L. & HUM. BEHAV. 73, 77 (1987), Bagby & Atkinson suggest that such initial post-reform changes are not predictive of subsequent commitment rates. Bagby & Atkinson, *supra* note 334, at 56-57.

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[FN393]. For a recent legislative effort, increasing financial incentives for communities to treat patients in non-hospital community settings, see Ohio Rev. Code Ann. § 5199.01 (Mental Health Act of 1988).

[FN394]. For a helpful survey, see McKittrick, *supra* note 267, at 428; see also Dakin, [Homelessness: The Role of the Legal Profession in Finding Solutions Through Litigation](#), 21 FAM. L.Q. 93, 111-26 (1987) (explicitly calling upon lawyers to develop creative solutions); Hopper, *supra* note 216, at 317-23 (discussing the role of legal advocacy for the homeless); Hayes, [Litigating on Behalf of Shelter for the Poor](#), 22 HARV. C.R.-C.L. L. REV. 79, 79 (1987) (one of the pre-eminent litigators in the field declaring that the lawsuit must fit "into the context of building a consensus for more equitable distribution" of wealth); Hayes, Homelessness and the Legal Profession, 35 LOY. L. REV. 1, 1 (1989) (litigation the equivalent of the "bull in a china shop") See generally Alfieri, The Antimonies of Poverty Law and a Theory of Dialogic Empowerment, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 698-70 (1987-88) (philosophical inquiry into the relationship between lawyers and their clients in such litigation); White, Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 538-40 (1987- 88) (discussing litigation and marginalization).

[FN395]. See generally Chackes, Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor, 31 WASH. U.J. URB. & CONTEMP. L. 155, 195-98 (1987) (discussing the various remedies that can be fashioned by state courts when state and local governments fail to perform their common law and statutory duties to the poor); Reid, Law, Politics and the Homeless, 89 W. VA. L. REV. 115, 117-34 (1986) (arguing that more statutory entitlement programs are needed because the judicial system is failing to meet the needs of the homeless).

[FN396]. See, e.g., [In re S.L.](#), 94 N.J. 128, 133-34, 462 A.2d 1252, 1258 (1983) (establishing hearing schedule and criteria). For cases following and construing S.L., see [In re A.F. & E.S.](#), 94 N.J. 597, 597, 468 A.2d 231, 231 (1983); [K.P. v. Albanese](#), 204 N.J. Super. 166, 497 A.2d 1276, 1282 (App. Div. 1985); [In re B.R.](#), 202 N.J. Super. 182, 494 A.2d 333-334 (App. Div. 1985); [In re G.M.](#), 217 N.J. Super. 629, 526 A.2d 744, 745 (Ch. Div. 1987).

[FN397]. In the furthest reaching statutory case, the Arizona Supreme Court has interpreted that state's community mental health services statutes, ([Ariz. Rev. Stats. § 11-251\(5\)](#); 11-291(A); 36-550-36-558; 36-3403(B) (1)), to mandate a wide variety of state and county-provided services to the chronically mentally ill in the community. [Arnold v. Arizona Dep't of Health Servs.](#), 160 Ariz. 593, 775 P.2d 521, 532-34, 538 (1989); see also Santiago, The Evolution of Systems of Mental Health Care: The Arizona Experience, 147 Am. J. Psychiatry 148, 148-52 (1990) (Arnold case an "interactive variable" which led to change in the Arizona mental health system).

Constitutional litigation has yielded inconsistent results. Compare [Phillips v. Thompson](#), 715 F.2d 365, 367-68 (7th Cir. 1983), and [Society for Good Will to Retarded Children v. Cuomo](#), 737 F.2d 1239, 1247 (2d Cir. 1984) (finding no constitutional right to community placement) with [Clark v. Cohen](#), 794 F.2d 79, 86 (3d Cir. 1986) and [Thomas S. v. Morrow](#), 781 F.2d 367, 367-374 (4th Cir. 1986) (finding constitutional right to community placement where consonant with professional judgment). See generally 2 M. PERLIN, *supra* note 11, § 7.18, at 646-49 (analyzing the impact of Youngberg--"no general right to services in the community"--on other cases involving community treatment rights).

[FN398]. See 2 M. PERLIN, *supra* note 11, § § 7.20-7.21, at 652-57 (discussing litigation of patients civil rights in after care facilities and in the community).

[FN399]. See [Philadelphia Police & Fire Ass'n v. City of Philadelphia](#), 874 F.2d 156, 159 (3d Cir. 1989) (reversing trial court decision that had invalidated a city budgetary plan that denied certain support services and benefits for retarded individuals living at home, and ordering the state to pay for such services), enforced, [705 F. Supp. 1103 \(E.D. Pa. 1989\)](#).

[FN400]. In [Callahan v. Carey](#), N.Y.L.J., Dec. 11, 1979, at 10, col. 2 (N.Y. Sup. Ct. Dec. 5, 1981), the trial court ruled that, under both the New York State Constitution and the applicable regulatory scheme, both the city and state were obligated to provide shelter to homeless males. When city defendants refused to extend the terms of the decree to homeless women, a subsequent suit was filed on their behalf. [Eldredge v. Koch](#), 118 Misc. 2d 163, 459 N.Y.S.2d 960, 961 (Sup. Ct. 1983), rev'd in part on other grounds, [98 A.D.2d 675, 676, 469 N.Y.S.2d 744, 745 \(1983\)](#). The trial court ruled that the Callahan decree applied equally to women. [459 N.Y.S.2d at 961](#). As the court noted, the plaintiffs'

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"contention is so obviously meritorious that it scarcely warrants discussion." *Id.* The Court went on to find that several of the women's shelters violated Callahan's substantive standards. Although the Appellate Division ruled that more evidence was needed on the question of specific violations, it affirmed the applicability of Callahan to women. *Id.*; see also [Wilkins v. Perales](#), 128 Misc. 2d 265, 487 N.Y.S.2d 961, 964-65 (Sup. Ct. 1985) (holding that the decisions of the state commissioner of department of social services amounted to a waiver of the regulations establishing maximum limits for capacity of each shelter facility).

In another New York case, that state's highest court held that the trial court had the power to enjoin state departments of social service and housing to provide emergency housing for homeless families with children which satisfied minimum standards of "sanitation, safety and decency." [McCain v. Koch](#), 70 N.Y.2d 109, 109, 511 N.E.2d 62, 63, 517 N.Y.S.2d 918, 919 (1987). See Finder, New York Lags in Goal to Move Homeless Families From Hotels, N.Y. Times, Feb. 19, 1990, at B1, col. 2. Cf. Sherburne, The Judiciary and the Ad Hoc [Development of a Legal Right to Shelter](#), 12 HARV. J.L. & PUB. POL'Y 193, 215-20 (1989) (criticizing litigation aimed at a construction of right to shelter).

[FN401]. In what has been characterized as "perhaps the most far-reaching" right to shelter case, *Stille*, Seeking Shelter in the Law, NAT'L L.J., Feb. 10, 1986, at 1, 25, col. 1, a New Jersey trial court judge used state law as the basis for an order compelling Atlantic City to develop a comprehensive plan to deal with its homeless problems. *Maticka v. Atlantic City*, No. L8306-84E (N.J. Super. Ct., Law Div., Atlantic County, Jan. 29, 1986), remanded, [216 N.J. Super. 434, 524 A.2d 416, 423 \(App. Div. 1987\)](#) (remanded to state Department of Human Services for rulemaking hearing); see also 2 M. PERLIN, *supra* note 10, § 7.26, at 689 n.701 (discussing *Maticka*).

[FN402]. See, e.g., [Williams v. Department of Human Servs.](#), 116 N.J. 10, 16, 561 A.2d 244, 251 (1989) (interpreting the state's General Assistance (GA) law, [N.J. STAT. ANN. § 44:8-107-44:8-152](#) (West 1989), to impose a continuing obligation to provide shelter to GA-eligible individuals). Consequently, the Williams court ordered a remand to the state Office of Administrative Law for further clarification. *Id.* at 256. On February 2, 1990, the Office of Administrative Law found that the State Department of Human Services had failed to communicate clearly to municipal welfare departments their continuing obligation to provide such shelter to GA-eligible individuals after the initial five month period of emergency assistance had expired. *Williams v. Department of Human Servs.*, No. HPW 38-90, slip op. at 3 (N.J. Off. Admin. Law Feb. 9, 1990). On March 1, 1990, the Acting Commissioner of the Department of Human Services accepted that finding, and agreed to promulgate regulations to implement it. *Id.* (N.J. Dept. Hum. Servs., Mar. 1, 1990), final dec. at 4. See also [Hodge v. Ginsberg](#), 303 S.E.2d 245, 250 (W. Va. 1983) (finding that a homeless person was an "incapacitated adult" under state welfare laws); [Newark Div. Pub. Welfare v. Ragin](#), 197 N.J. Super. 225, 484 A.2d 716, 719 (App. Div. 1984) (finding that a homeless person could not have his welfare benefits suspended after he was discharged from work for sleeping on employment premises after hours). But see [Williams v. Barry](#), 708 F.2d 789, 792 (D.C. Cir. 1983) (limiting procedural due process rights of homeless individuals prior to local government's decision to close shelters).

[FN403]. [Mixon v. Phillips](#), 157 A.D.2d 423, 426, 556 N.Y.S.2d 885, 887 (1989).

[FN404]. [Heard v. Cuomo](#), 142 A.D.2d 537, 539, 531 N.Y.S.2d 253, 255 (1988).

[FN405]. See *Brohim v. Holt*, N.Y.L.J., Jan. 26, 1990, at 27, col. 5 (N.Y. City Ct. 1990); [Universal Motor Lodges v. Seignious](#), 146 Misc. 2d 395, 550 N.Y.S.2d 800, 804 (Just. Ct. 1990) (reported in N.Y.L.J., Jan. 26, 1990, at 27, col. 5). See generally Adams, Rulings Expand Rights of Homeless in Hotels, N.Y.L.J. Jan. 26, 1990, at 1, col. 3 (discussing court ruling that give homeless persons due process rights when evicted).

[FN406]. *Palmieri v. Cuomo*, reported in N.Y.L.J., Jan. 10, 1990, at 22, col. 5 (Sup. Ct. 1990).

[FN407]. [Young v. New York City Transit Auth.](#), 903 F.2d 146, 152-53 (2d Cir. 1990) (transit authority rule prohibiting panhandling did not violate plaintiffs' first amendment rights).

On the question of the causal relationship between panhandling, deinstitutionalization, and homelessness, see Butterfield, New Yorkers Growing Angry Over Aggressive Panhandlers, N.Y. Times, July 29, 1988, at A1, col. 2. For other innovative litigation, see also [Canady v. Koch](#), 598 F. Supp. 1139, 1141 (E.D.N.Y. 1984) (homeless mothers challenged the government's failure to provide lawful emergency housing) [608 F. Supp. 1460, 1463-64 \(S.D.N.Y. 1985\)](#), *aff'd sub nom.* [Canady v. Valentin](#), 768 F.2d 501, 502-03 (2d Cir. 1985) (affirming the district court's decision to abstain pending resolution of a similar state court action); [Koster v. Webb](#), 598 F. Supp. 1134, 1137 (E.D.N.Y.

[\[1983\]](#) (plaintiff's allegation that the state violated the Social Security Act by failing to provide emergency shelter for the homeless stated a cause of action under [42 U.S.C. § 1983](#)).

[\[FN408\]](#). Rhoden, *supra* note 17, at 434-35 (focusing upon those sections of the Social Security Act and the National Health Planning and Resources Development Act).

[\[FN409\]](#). *Id.* at 434.

[\[FN410\]](#). See *id.* at 436.

[\[FN411\]](#). Morawetz, *Welfare Litigation to Prevent Homelessness*, 16 N.Y.U. REV. L. & SOC. CHANGE 565, 567-68 (1987-88).

[\[FN412\]](#). Note, *supra* note 178, at 941.

[\[FN413\]](#). *Id.* at 941-42. The author contends that, since state action deprives the mental patient "of the capacity to independently obtain even the bare essentials needed to survive--shelter and food--that he received while in a state mental hospital," the government is responsible to him after release. *Id.* at 974.

[\[FN414\]](#). *Id.* at 942. Courts, however, have not been receptive to such tort claims. See, e.g., [Klostermann v. Cuomo](#), 126 Misc. 2d 247, 481 N.Y.S.2d. 580, 585 (Sup. Ct. 1984) (refusing to find a common law duty to protect state hospital patients from reasonably foreseeable harm).

[\[FN415\]](#). Note, *supra* note 178, at 984.

[\[FN416\]](#). *Id.* Each of these theories poses serious difficulties. First, in recent terms, the Supreme Court has not indicated a great receptivity toward any efforts to expand entitlement theories in community settings. See [Youngberg v. Romeo](#), 457 U.S. 307, 317 (1982); see also 2 M. PERLIN *supra* note 11, § 7.03, at 569 (discussing Youngberg). Second, the Court's recent expansion of the doctrine of immunity from damages in suits brought pursuant to [42 U.S.C. § 1983](#) against mental health care providers working in public setting inevitably will have a chilling effect on future filings. See Youngberg, 475 U.S. at 323. But see [Zinermon v. Burch](#), 110 S. Ct. 975 (1990); refer also to text accompanying notes 318-23 *supra* for a discussion of Zinermon.

Finally, the premature discharge argument flies in the face of much of the deinstitutionalization litigation which has been brought in recent years. See 2 M. PERLIN, *supra* note 11, § 7.02-7.09, at 560-603. While there is no reason to expect a uniform doctrinal consistency on the part of lawyers bringing cases on behalf of ex-patients, it is likely that the premature discharge theory will be employed only episodically. In short, none of these theories will change significantly the legal status of homeless ex-patients.

[\[FN417\]](#). Note, *supra* note 44, at 190.

[\[FN418\]](#). Connell, *supra* note 232, at 784-85 (discussing the enforcement of state constitutional laws as a remedy for the homeless problem). See generally Perlin, *supra* note 144, at 1249 (state constitutional law basis of rights of mentally disabled).

[\[FN419\]](#). See, e.g., Milstein, Pepper & Rubenstein, *supra* note 75; Sard, Roisman & Hartman, *supra* note 61, at 106. [42 U.S.C. § 3604\(f\)\(1\)\(3\)](#) (barring discrimination in sale or rental of dwellings). But see *Familystyle of St. Paul, Inc. v. City of St. Paul* 728 Supp. 1396, 1402-04 (D. Minn. 1990) (state licensing statute imposing space requirement on residential programs for mentally disabled not preempted by 1988 Fair Housing Act Amendments).

[\[FN420\]](#). See Hope & Young, *supra* note 72; Marmor & Gill, *supra* note 4, at 467-69. Refer to note 253 *supra*. On an innovative, foundation-driven alternative, see Wright, *The National Health Care for the Homeless Program*, in *THE HOMELESS MENTALLY ILL*, *supra* note 15, at 150.

[\[FN421\]](#). See, e.g., Bach, *supra* note 174; Silver, *supra* note 250; Note, *The Duty of California Counties to Provide Mental Health Care for the Indigent and Homeless*, 25 SAN DIEGO L. REV. 197, 208-12 (1988). For a successful

example of litigation based on such theories, see [Arnold v. Arizona Dep't of Health Servs.](#), 160 Ariz. 543, 775 P.2d 521, 538 (1989); refer also to discussion of the case in note 397 supra.

[FN422]. See [42 U.S.C. § 11361](#) (1988).

[FN423]. See, e.g., Spector, Finding a Federal Forum: Using the Stewart B. McKinney Homeless Assistance Act to Circumvent Federal Abstention Doctrines, 6 L. & INEQUAL. 273, 280-81 (1988); O'Connor, Homeless: A Local View of the McKinney Act, 23 CLEARINGHOUSE REV. 116, 117, 121-22 (1989). For a model emergency shelter statute, see Evans, Federal Emergency Shelter Assistance to the Homeless: Mandating a Standard of Decency, 4 NOTRE DAME J.L., ETH. & PUB. POL'Y 325 (1989). For a consideration of state legislation, see Note, Hunger and Homelessness in America: A Survey of State Legislation, 66 DENV. U.L. REV. 277, 283-87 (1989). For a consideration of a British counterpart, see Collin & Barry, supra note 182, at 425-28. Cf. Note, supra note 21, at 564-70 (urging Congress to pass federal legislation to establish a "uniform, minimum level of care for the homeless").

[FN424]. This recitation of scholarly and litigative creativity should not lead the reader to assume that either public interest lawyers or legal scholars are somehow personally immune from bias and the power of heuristics. Cf. Jackson, Psychiatric Decision-making For the Courts: Judges, Psychiatrists, Lay People?, 9 INT'L J.L. & PSYCHIATRY 507, 511-16 (1986) (psychiatric decision makers may be as susceptible to heuristic biases as lay persons); Jackson, The Clinical Assessment and Prediction of Violent Behavior: Toward a Scientific Analysis, 16 CRIM. JUST. & BEHAV. 114, 124-27 (1989) (recognizing that mental health practitioners are no less likely to be swayed by heuristic biases than lay persons); C. WEBSTER, R. MENZIES & M. JACKSON, CLINICAL ASSESSMENTS BEFORE TRIAL 121 (1983). The record seems clear that factual education alone is not enough. See Poythress, Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony, 2 L. & HUM. BEHAV. 1, 15 (1978) ("trained" attorneys' courtroom behavior not materially different from that of "untrained" attorneys in cases involving psychiatric testimony where attitudes of "trained" attorneys toward their clients remained unchanged).

[FN425]. [465 U.S. 89, 106-12 \(1984\)](#) (greatly expanding the states' eleventh amendment immunity from suit in cases involving the right of institutionalized mentally retarded individuals to community treatment); see also, Rudenstine, Pennhurst and the Scope of Federal Judicial Power to Reform Social Institutions, 6 CARDOZO L. REV. 71, 76 (1984) (arguing that a majority of the Court wants to limit the federal courts' power to vindicate federal rights in cases involving social institutions).

[FN426]. See Perlin, supra note 144, at 1258-59 ("the significance of the Pennhurst line of cases lies in the undeniable fact that, at least until there is a significant restructuring of the Supreme Court, the terrain of federal courts will prove to be far more hostile to suits brought on behalf of the mentally disabled than it was a decade ago"). Compare Facade, supra note 113, with Chayes, supra note 210, at 1308 ("One must ask whether democratic theory really requires deference to majoritarian outcomes whose victims are . . . inmates of mental institutions . . .").

[FN427]. See, e.g., Note, supra note 421, at 352 ("There seems little sense in changing the standard for involuntary civil commitment unless changes in the system are accompanied by changes in societal attitudes . . .").

[FN428]. See, e.g., [Washington v. Harper](#), 110 S. Ct. 1028, 1036-37 (1990) (state administrative procedures satisfy due process requirements in cases involving convicted prisoners wishing to refuse the administration of antipsychotic drugs). But see [Zinermon v. Burch](#), 110 S. Ct. 975, 983 (1990) (voluntary patient could maintain § 1983 action in which he alleged hospital officials should have known he was incompetent to seek admission). Refer to notes 313-18 supra and accompanying text.

[FN429]. See [Valley Forge Christian College v. Americans United for Separation of Church and State](#), 454 U.S. 464, 487 (1982) (illustrating the Court's hostility to public interest lawyers: "The Federal courts were simply not constituted as ombudsmen of the general welfare"). Cf. [Philadelphia Police & Fire Ass'n v. City of Philadelphia](#), 874 F.2d 156, 159 (3d Cir.), enforced, 705 F. Supp. 1103 (E.D. Pa. 1989); [United States v. Charters](#), 829 F.2d 479, 493-94 (4th Cir. 1987) vacated en banc, 863 F.2d 302 (4th Cir. 1988), cert. denied, 110 S. Ct. 1317. Refer to notes 238 and 392 supra.

On the renaissance of the "hands off" doctrine in institutional litigation, see Cassak, Hearing the Cries of Prisoners: The Third Circuit's Treatment of Prisoners Rights Litigation, 19 SETON HALL 526, 531-34 (1989).

[FN430]. Stone, [O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition](#), 19 GA. L. REV. 15, 19, 22 (1984).

[FN431]. Boehnert, Psychological and Demographic Factors Associated With Individuals Using the Insanity Defense, 13 J. PSYCHIATRY & L.Q. 27, 28 (1985); Perlin, *supra* note 261, at 704-06 (discussing use of this standard in insanity defense decisionmaking).

[FN432]. Finer, Gates, Leon, and the Compromise of Adjudicative Fairness (Part II): Of Aggressive Majoritarianism, Willful Deafness, and the New Exception to the Exclusionary Rule, 34 CLEV. ST. L. REV. 199, 205-06 (1986).

[FN433]. Cf. Psychodynamics, *supra* note 113, at 61-69 (considering Chief Justice Rehnquist's treatment of cases involving mentally disabled criminal defendants in this context).

[FN434]. Cf. Facade, *supra* note 113, at 999-1000 (considering this question in the context of the insanity defense); Perlin, *supra* note 261, at 713-30 (considering this question in the context of the insanity defense).

[FN435]. [473 U.S. 432 \(1985\)](#).

[FN436]. [Id. at 448](#).

[FN437]. *Id.* (quoting, [Palmore v. Sidoti](#), 466 U.S. 429, 433 (1984)).

[FN438]. See P. Margulies, Pursuit of a Mirage: Equitable Interpretation, Legislative Intent and the Legal Process (unpublished manuscript) (classifying certain laws as "aspirational," and counseling that courts try to construe the purpose of such laws as consistent with a "best view of social and political transformation"). See generally [State v. Hoyt](#), 21 Wis. 2d 284, 291, 128 N.W.2d 645, 652 (1964) (Willkie, J., concurring) (discussing aspirational component of law).

[FN439]. See McKittrick, *supra* note 267, at 428.

[FN440]. Durham, *supra* note 72, at 128.

[FN441]. See [Jackson v. Indiana](#), 406 U.S. 715, 731-39 (1972).

[FN442]. See Kaufman, *supra* note 272, at 363 (politically astute public officials argue for broad commitment standards so as to create a perception that the mentally ill are being helped and that the general public is being sheltered from the socially undesirable).

[FN443]. See *id.* at 363-64 (discussing media perpetuation of stereotypes that encourage blaming the mentally ill and homeless for their condition).

[FN444]. See Marmor & Gill, *supra* note 4, at 467 (discussing how burdens of deinstitutionalization are concentrated while benefits are dispersed).

[FN445]. Jahiel, *supra* note 6, at 115.

[FN446]. STEMMING THE TIDE, *supra* note 75, at 26 (emphasis added).

[FN447]. Hollings, *supra* note 85, at C1, col. 4.

[FN448]. Marmor & Gill, *supra* note 4, at 474.

[FN449]. Goldman & Morrissey, *supra* note 110, at 730.

[FN450]. See Durham & La Fond, *supra* note 232, at 306-07 n.9 (stating that no one has documented any reliable

evidence that deinstitutionalization or mental illness is a major cause of homelessness).

[\[FN451\]](#). Durham, *supra* note 72, at 129. Refer to note 243 *supra*.

[\[FN452\]](#). Kanter, *supra* note 72, at 346.

[\[FN453\]](#). See *id.* For a sampling of representative litigation decided in the past two years, see [Mehta v. Surles](#), 720 F. Supp. 324, 332-33 (S.D.N.Y. 1989) (dismissing suit by landowners who shared common driveway with premises selected as community residence for mentally disabled persons alleging unconstitutional taking without due compensation), *aff'd in part, vacated in part*, 905 F.2d 595 (2d. Cir. 1990); [Westwood Homeowners Ass'n v. Tenhoff](#), 155 Ariz. 229, 745 P.2d 976, 981-84 (Ct. App. 1987) (restrictive covenant found to be contrary to policy of Arizona Developmental Disabilities Act); [Overlook Farms Home Ass'n v. Alternate Living Serv.](#), 143 Wis. 2d 485, 422 N.W.2d 131, 133-34 (Ct. App. 1988) (upheld as constitutional a group home statute that expressly voided restrictive covenants and local zoning ordinances); see also [Frick v. Patrick](#), 165 Mich. App. 689, 419 N.W.2d 55, 58-9 (1988) (refusing to recognize a mentally handicapped individual as a third party beneficiary of a lease agreement between the state and property owners); [Step-By-Step, Inc. v. Zoning Hearing Bd.](#), 117 Pa. Commw. 547, 549, 543 A.2d 1293, 1295 (1988) (permitting a group home not qualifying for residential single-family status to locate in a residential district, so long as owner obtained proper special use permits).

[\[FN454\]](#). See Jahiel, *supra* note 6, at 115 (discussing the importance of shifting emphasis toward prevention of homelessness and rehabilitation of the homeless).

[We must take] a firm stand against greed. The greed of developers must be overcome Greed of business must be overcome Greed at the labor union-management bargaining table must be overcome Greed of industries dealing with the government . . . should be overcome . . . ; finally, the greed of the average citizen should be overcome, to make room for social support for the disabled and elderly, and to provide a more accessible health care system. *Id.* Cf. Karmel, A Decade of Greed, N.Y.L.J. Dec. 20, 1990, at 3 (discussing the Reagan Administration's policies and greed in the securities industry).

[\[FN455\]](#). See generally Marmor & Gill, *supra* note 4, at 469-71 (demonstrating that the judiciary exerts considerable influence over mental health practices).

[\[FN456\]](#). 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala.), 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala.), *aff'd sub nom.* [Wyatt v. Aderholt](#), 503 F.2d 1305 (5th Cir. 1974). Refer to text accompanying note 147 *supra*.

[\[FN457\]](#). 462 F. Supp. 1294 (D.N.J. 1978), supplemented, 476 F. Supp. 1131 (D.N.J. 1979), modified, [653 F.2d 836 \(3d Cir. 1981\)](#), vacated, [458 U.S. 1119 \(1982\)](#) on remand, [720 F.2d 266 \(3d Cir. 1983\)](#). Refer to text accompanying note 239 *supra*.

[\[FN458\]](#). [422 U.S. 563 \(1975\)](#). Refer to text accompanying note 137 *supra*.

[\[FN459\]](#). 349 F. Supp. 1078 (E.D. Wis. 1972), vacated, [414 U.S. 473](#), on remand, [379 F. Supp. 1376 \(E.D. Wis. 1974\)](#), vacated, [421 U.S. 957 \(1975\)](#), on remand, [413 F. Supp. 1318 \(E.D. Wis. 1976\)](#). Refer to text accompanying note 138 *supra*.

[\[FN460\]](#). [451 U.S. 1 \(1981\)](#). Refer to text accompanying note 214 *supra*.

[\[FN461\]](#). Cf. [Parham v. J.R.](#), [442 U.S. 584, 609 n.17 \(1979\)](#) (a number of studies conclude that the average time for commitment hearings is less than ten minutes).

[\[FN462\]](#). See Jahiel, *supra* note 6, at 115. For moral suasion to be effective, it must operate in a setting in which the actors can somehow rid themselves of the type of belief perseverance that flows from heuristic thinking; see, e.g., R. NISBETT & L. ROSS, HUMAN INFERENCES: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 169-88, 273-96 (1980) (weighing strategies to cope with the irrationality of such devices).

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[\[FN463\]](#). Cf. King, *supra* note 5, at 167. ("American politics needs nothing so much as an injection of the idealism, self-sacrifice and sense of public service which is the hallmark of our movement [O]thers must move out into political life as candidates and infuse it with their humanity, their honesty and their vision.").

[\[FN464\]](#). In re [Rulemaking](#), N.J.A.C. 10:82-1, 117 N.J. 311, 314, 566 A.2d 1154, 1155 (1989).

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