QUT Law Review ISSN: Online- 2201-7275
Volume 16, Issue 3, pp. 106-126. DOI: 10.5204/qutlr.v16i3.689

"INFINITY GOES UP ON TRIAL": SANISM, PRETEXTUALITY, AND THE REPRESENTATION OF DEFENDANTS WITH MENTAL DISABILITIES

MICHAEL L PERLIN*

I INTRODUCTION

I begin by sharing a bit about my past. Before I became a professor, I spent 13 years as a lawyer representing persons with mental disabilities, including three years in which my focus was primarily on such individuals charged with crime. In this role, when I was Deputy Public Defender in Mercer County (Trenton) NJ, I represented several hundred individuals at the maximum security hospital for the criminally insane in New Jersey, both in individual cases, and in a class action[1] that implemented the then-recent US Supreme Court case of *Jackson v Indiana*,[2] that had declared unconstitutional state policy that allowed for the indefinite commitment of pre-trial detainees in maximum security forensic facilities if it were unlikely he would regain his capacity to stand trial in the 'foreseeable future.'[3]

I continued to represent this population for a decade in my later positions as Director of the NJ Division of Mental Health Advocacy and Special Counsel to the NJ Public Advocate. Also, as a Public Defender, I represented at trial many defendants who were incompetent to stand trial, and others who, although competent, pled not guilty by reason of insanity.[4] Finally, during the time that I directed the Federal Litigation Clinic at New York Law School, I filed a brief on behalf of appellant in *Ake v Oklahoma*,[5] on the right of an indigent defendant to an independent psychiatrist to aid in the presentation of an insanity defence.[6] I have appeared in courts at every level from police court to the US Supreme Court, in the latter 'second-seating' *Strickland v Washington.*[7] I raise all this not to offer a short form of my biography, but to underscore that this article draws on my experiences of years in trial courts and appellate courts as well as from decades of teaching

* Michael L Perlin AB (Rutgers University), JD (Columbia University School of Law), LLD (honorary) (John Jay College of Criminal Justice), Professor Emeritus of Law; founding director, International Mental Disability Law Reform Project; co-founder, New York Law School Mental Disability Law and Policy Associates.

[1] *Dixon v Cahill*, No L30977/y-71 PW (NJ Super Ct Law Div 1973), reprinted in Michael L Perlin and Heather Ellis Cucolo, *Mental Disability Law: Civil and Criminal* (Lexis Nexis, 3rd ed, 2016) § 19-8, 19-86 - 19-88, and discussed in Michael L Perlin, 'For the Misdemeanor Outlaw': The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities' (2000) 52 *Alabama Law Review* 193, 206–07.

[2] 406 US 715 (1972).

[3] Ibid 738.

[4] See eg, Michael L Perlin, 'Mental Patient Advocacy by a Public Advocate' (1982) 54 *Psychiatric Quarterly* 169.

[5] 470 US 68 (1986) (finding such a right).

[6] Brief filed on behalf of amicus Committee on the Fundamental Rights and Equality of Ex-Patients (FREE)).

[7] 466 US 668 (1984), (establishing effectiveness of counsel standard in criminal cases; conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result). In this context, the term 'second-seating' is used to describe the person who sits at counsel table with – but does not argue – the case in question.

and of writing books and articles about the relationship between mental disability and the criminal trial process.[8] And it was those experiences that have formed my opinions and my thoughts about how society's views of mental disability have poisoned the criminal justice system, all leading directly to this paper, that will mostly be about what I call 'sanism' and what I call 'pretextuality'. The paper will also consider how these factors drive the behaviour of judges, jurors, prosecutors, witnesses, and defence lawyers, whenever a person with a mental disability is charged with crime, and about a potential remedy that might help eradicate this poison.

It is essential that lawyers representing criminal defendants with mental disabilities understand the meanings and contexts of *sanism* and *pretextuality*[9] and to show how these two factors infect all aspects of the criminal process, and offer some thoughts as to how they may be remediated.[10] I believe – and I have been doing this work for over 40 years – that an understanding of these two factors is absolutely essential to any understanding of how our criminal justice system works in the context of this population, and how it is essential that criminal defence lawyers be in the front lines of those seeking to eradicate the contamination of these poisons from our system.[11]

I need to add: this is not all that is on the table. I believe that, in order to have any idea about why our criminal justice system treats persons with mental disabilities the way it does, we also need to understand the meaning of '*heuristics'* and the meaning of (false) *'ordinary common sense.'*[12] I believe that, if we do not come to grips with all of these factors, we are doomed to flail our arms, swear colourfully and otherwise be stymied in our abilities to truly provide the most meaningful representation for our clients that we can. In this article, I will then add some thoughts on these two additional factors and why they need to be considered hand-in-glove with the rest of what I'm explaining. I conclude by discussing the school of thought known as *therapeutic jurisprudence* ('TJ'),[13] and why – even though it has been criticised fairly severely by some criminal defence lawyers[14] – I believe that it is the *only* way that we can strip the sanist and pretextual façade from

[8] See, eg, Michael L Perlin, *The Jurisprudence of the Insanity Defense* (Carolina Academic Press, 1995); Michael L Perlin, *Mental Disability and the Death Penalty: the Shame of the States* (Rowman and Littlefield, 2013); Michael L Perlin, *A Prescription for Dignity: Rethinking Criminal Justice and Mental Disability Law* (Routledge, 2013); Michael L Perlin and Heather Ellis Cucolo, *Shaming the Constitution: the Detrimental Results of Sexualyl Violent Predator Legislation* (Temple University Press, 2017, forthcoming).

[9] See infra text accompanying notes 38–68. The word 'sanism' was, to the best of the author's knowledge, coined by Dr Morton Birnbaum. See also Morton Birnbaum, 'The Right to Treatment: Some Comments on its Development, in Medical, Moral and Legal Issues in Health Care' in Frank J Ayd (ed), *Medical, Moral and Legal Issues in Mental Health Care* (Williams and Wilkins, 1974) 97, 106-07; *Koe v Califano* 573 F 2d 761, 764 n12 (2d Cir 1978). The word 'pretextuality,' in this context, was, to the best of the author's knowledge, in his article Michael L Perlin, 'Morality and Pretextuality, Psychiatry and Law: Of Ordinary Common Sense, Heuristic Reasoning, and Cognitive Dissonance' (1991) 19 *The Bulletin of the American Academy of Psychiatry and the Law* 131.

[10] See, eg, Michael L Perlin, 'Half-Wracked Prejudice Leaped Forth: Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It did' (1999) 10 *Journal of Contemporary Legal Issues* 3; Michael L Perlin, 'Pretexts and Mental Disability Law: The Case of Competency' (1993) 47 *University of Miami Law Review* 625.

[11] Although the author is most familiar with the system in the US, his work 'on the ground' in other nations – including Australia and New Zealand (and on all continents) – has made it clear to him that these observations are universal.

[12] Perlin, 'Half-Wracked Prejudice Leaped Forth', above n 10, 3–20.

[13] See infra test accompanying notes 114–127; see generally, in this context, Perlin, *A Prescription for Dignity*, above n 8.

[14] See Mae C Quinn, 'An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar. Unable to Join You (Already (Somewhat Similarly) Engaged' (2007) 48 *Boston College Law Review* 539.

the criminal justice system and provide the best possible representation for criminal defendants with mental disabilities.

My title comes, in part, from Nobel Prize-winner Bob Dylan's brilliant song, *Visions of Johanna*, as part of the verse that begins with these lines:

> Inside the museums, infinity goes up on trial
> Voices echo this is what salvation must be like after a while.[15]

This song, 'an undisputed masterpiece,'[16] is about, in part, nightmares and hallucinations.[17] Our courtrooms – where contemporaneous understandings of mental illness and its relationship to criminal behaviour are ignored, and where we repeat myths and shibboleths from the early 19th century[18] – are, in fact, museums of the past. There is no place for nuance; rather, the 'infinite' permutations that exist when people with mental disabilities commit inexplicable otherwise-criminal acts is utterly ignored.

Writing some years ago about neonaticide cases, I said we 'impose a dyadic straightjacket on neonaticidal defendants. They are either crazy or they are evil.'[19] So it is with all defendants with mental disabilities in the criminal process. Like 'infinity' in Dylan's lyric, our entire criminal justice system 'goes up on trial.'

II ATTITUDES[20]

To a great extent, my interest in sanism and pretextuality began at two separate points in time, both in the 1970s, many years before I had heard of or thought of either word. 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 behaviour in seizing contraband (usually small amounts of 'street drugs') violated the Fourth Amendment's ban on 'unreasonable searches and seizures.'[21] 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.[22]

---

[15] Bob Dylan, *Visions of Johanna* (1966) <http://www.bobdylan.com/us/songs/visions-johanna>.
[16] Oliver Trager, *Keys to the Rain: The Definitive Bob Dylan Encyclopedia* (Billboard Books, 2004) 654.
[17] Robert Shelton, *No Direction Home: The Life and Music of Bob Dylan* (Hal Leonard, 1997) 213.
[18] See eg, Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity* (Little Brown & Co, 1838).
[19] Michael L Perlin, 'She Breaks Just Like a Little Girl: Neonaticide, The Insanity Defense, and the Irrelevance of Ordinary Common Sense' (2003) 10 *William and Mary Journal of Women and the Law* 1, 27.
[20] I self-consciously begin with this auto-biographical information as I think it creates the mise en scene that is necessary for this article to make sense to those unfamiliar with the underlying issues.
[21] This body of law, in the US, flows from the US Supreme Court decision in *Mapp v Ohio*, 367 US 643 (1961), mandating the suppression of illegally-seized evidence.
[22] Perlin, 'Half-Wracked Prejudice Leaped Forth', above n 10, 6.

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 'dropsy' cases, 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 per cent of judges, public defenders and prosecutors questioned (including seventy-seven per cent of judges) believed that police officers fabricate evidence in ca se reports at least 'some of the time,' and that a staggering ninety-two per cent (including ninety-one per cent of judges) believe that police officers lie in court to avoid suppression of evidence at least 'some of the time.[23] Although I did not know it at the time, this was my first introduction to pretextuality in law.

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 reason I came to file the class action so as to implement *Jackson v Indiana*). 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.[24]

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 summarised for me many of the frustrations of my job.[25] 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 neighbourhood — 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 deinstitutionalisation 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 institutionalisation in one of New York City's most esteemed private psychiatric hospitals and of her subsequent release from that hospital to live with the equally-prominent actor George Peppard, and to co-star with Robert Redford on Broadway in *Barefoot in the Park.*[26] 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 hospitalisation. Both were subsequently released. Yet their stories are presented — and read — in entirely different ways.[27]

[23] Myron W Orfield, 'Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts' (1992) 63 *University of Colorado Law Review* 75, 100–107, discussed in this context in Perlin, *Pretexts and Mental Disability Law*, above n 10, 627.
[24] Perlin, 'Half-Wracked Prejudice Leaped Forth', above n 10, 7.
[25] Ibid 8.
[26] Ibid.
[27] Ibid.

Gerald Kerrigan's story reflected to many the 'failures of deinstitutionalisation' 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) characterised George Peppard's condo as a 'deinstitutionalisation facility' or labelled 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. [28]

Again, at about the same time, I read a short article by Morton Birnbaum[29] 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' controlled mental disability law policy.[30]

I remember, about forty years ago, the moment when I read Birnbaum's essay, and how, immediately, something simply 'clicked.' At that point in time, I had already represented this population for several years, 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 behaviour on the part of the other participants in the mental disability law system.[31] 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*, the comments of the prosecutor if I were to raise an issue of my client's competency to stand trial or criminal responsibility, the *voir dire* responses from jurors when I sought to question them about their attitudes towards criminal defendants with mental disabilities.[32] 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.

And, once I left practice and started teaching and writing more, I started writing about sanism and pretextuality, and how these two factors — again, hand in glove with heuristics[33] and 'ordinary

[28] See Michael L Perlin, 'The Deinstitutionalization Myths: Old Wine in New Bottles' in Karl Menninger and Heather Watts (eds), *Conference Report: The Second National Conference on the Legal Rights of the Mentally Disabled* (Kansas Bar Association, 1979) 20.

[29] Morton Birnbaum, 'The Right to Treatment: Some Comments on its Development' Frank J Ayd (ed), *Medical, Moral and Legal Issues in Health Care* (Williams and Wilkins, 1974) 97, 106–07.

[30] Ibid 107.

[31] Perlin, 'Half-Wracked Prejudice Leaped Forth', above n 10, 9.

[32] In the American system, prior to trial, judges (in some jurisdictions, this is done by the lawyers themselves) question jurors to determine if there are reasons they should be challenged for cause or via what are called 'preemptory challenges' in which lawyers are allowed to challenge a specific number of jurors (often without having to state reasons). See eg Nancy S Marder and Valerie P Hans, 'Introduction to Juries and Lay Participation: American Perspectives and Global Trends' (2015) 90 *Chicago-Kent Law Review* 789.

[33] By way of example, the vividness heuristic is the cognitive-simplifying device through which a 'single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.' 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' (1997) 82 *Iowa Law Review* 1375, 1417.

common sense'[34] — controlled the practice (and the jurisprudence) of mental disability law, specifically in cases involving criminal law and procedure.[35] I have looked at these issues in the context of competency, of insanity, of trial practice, of sentencing, of sex offender law, and of the death penalty.[36] It is always the same: we cannot begin to understand *why* our law has developed as it has until we come to grips with the pernicious power of these two factors.

These factors cause us to make, and to reinforce, biased and irrational judgments, and doom us to repeat the errors that we continue to make in the way we deal with questions that relate to the representation of criminal defendants with mental disabilities. They also diminish the likelihood that we will treat this population with the level of dignity that the law (and authentic common sense) should demand.[37]

III SANISM

Sanism infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable.[38] It is based predominantly upon stereotype, myth, superstition, and deindividualisation,[39] and reflects the assumptions that are made by the legal system about persons with mental disabilities — who they are, how they got that way, what makes them different, what there is about them that lets society treat them differently, and whether their condition is

[34] '"[O]rdinary common sense" is a "prereflective attitude" exemplified by the attitude of "What I know is 'self-evident'"; it is "what everybody knows."' Keri K Gould and Michael L Perlin, '"Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudence and Clinical Teaching' (2000) 24 *Seattle University Law Review* 339, 357.

[35] I continue to do this. See eg, Michael L Perlin, 'God Said to Abraham/Kill Me a Son: Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence' (2016) *American Criminal Law Review* (forthcoming); Michael L Perlin, 'Your Corrupt Ways Had Finally Made You Blind': Prosecutorial Misconduct and the Use of 'Ethnic Adjustments' in Death Penalty Cases of Defendants with Intellectual Disabilities' (2016) 65 *American University Law Review* 1437; Michael L Perlin, 'Merchants and Thieves, Hungry for Power': Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities' (2016) 73 *Washington and Lee Law Review* 1501;Michael L Perlin and Alison J Lynch, 'In the Wasteland of Your Mind: Criminology, Scientific Discoveries and the Criminal Process' (2016) 4 *Virginia Journal of Criminal Law* 304.

[36] See generally, Perlin and Cucolo, 'Shaming the Constitution', above n 8; Perlin, *A Prescription for Dignity*, above n 8; Michael L Perlin, *The Hidden Prejudice: Mental Disability on Trial* (APA, 2000). I have also looked at these in the context of related civil law issues. See eg, Michael L Perlin and Alison J Lynch, *Sexuality, Disability and the Law: Beyond the Last Frontier?* (Palgrave Macmillan, 2016); Michael L Perlin, 'International Human Rights and Institutional Forensic Psychiatry: The Core Issues' in Birgit Völlm and Norbert Nedopil (eds), *The Use of Coercive Measures in Forensic Psychiatric Care: Legal, Ethical and Practical Challenges* (Springer, 2016) 9; Michael L Perlin and Naomi Weinstein, 'Friend to the Martyr, a Friend to the Woman of Shame: Thinking About The Law, Shame and Humiliation' (2014) 24 *Southern California Review of Law and Social Justice* 1; Michael L Perlin, 'The Ladder of the Law Has No Top and No Bottom': How Therapeutic Jurisprudence Can Give Life to International Human Rights (2014) 37 *International Journal of Law and Psychiatry* 535.

[37] Michael L Perlin, 'A Law of Healing' (2000) 68 *University of Cincinnati Law Review* 407; see also, Michael L Perlin, 'Understanding the Intersection between International Human Rights and Mental Disability Law: The Role of Dignity' in Bruce Arrigo and Heather Bersot (eds) in *The Routledge Handbook of International Crime and Justice Studies* (Routledge, 2013) 191.

[38] Michael L Perlin, 'Everybody Is Making Love/Or Else Expecting Rain: Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia' (2008) 83 *University of Washington Law Review* 481, 486.

[39] Ibid.

immutable.[40] These assumptions — that reflect societal fears and apprehensions about mental disability,[41] persons with mental disabilities,[42] and the possibility that any individual may become mentally disabled[43]— ignore the most important question of all — why do we feel the way we do about 'these' people (quotation marks understood)?[44]

Decisionmaking in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes[45] and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decisionmaking.[46] Sanist decisionmaking infects all branches of mental disability law – especially as it relates to questions of criminal law and criminal procedure – and distorts mental disability law jurisprudence.[47] Paradoxically, while sanist decisions are frequently justified as being therapeutically based, sanism customarily results in anti-therapeutic outcomes.[48]

Significantly, we tend to ignore, subordinate, or trivialise behavioural research in this area, especially when acknowledging that such research would be cognitively dissonant with our intuitive (albeit empirically flawed) views. 'Sensational media portrayals of mental illness' exacerbate the underlying tensions. We believe that '[m]ental illness can be easily identified by lay persons and matches up closely to popular media depictions.' It is commonly assumed that persons with mental illness cannot be trusted. Common stereotypes about people with mental illness include the beliefs that they are invariably dangerous, unreliable, lazy, responsible for their illness or otherwise blameworthy, faking or exaggerating their condition, or childlike and in need of supervision or care.

Think about the sanist myths that dominate our legal system:

---

[40] See eg, Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, 1990); Sander Gilman, *Difference and Pathology: Stereotypes of Sexuality, Race and Madness* (Cornell University Press, 1985).

[41] In US law, the phrase 'mental disability' generally includes both mental illness (psychosocial disability) and intellectual disability.

[42] See H Archibald Kaiser, 'The Convention on the Rights of Persons with Disabilities: Beginning to Examine the Implications for Canadian Lawyers' Professional Responsibilities' (2012) 20 *Health Law Review* 26.

[43] See Michael L Perlin, 'Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization' (1991) 28 *Houston Law Review* 63, 108 (on society's fears of persons with mental disabilities), 93 (see 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). Sex is immutable?

[44] See eg, Marchell Goins, Kyneitres Good and Cori Harley, 'Perceiving Others as Different: A Discussion on the Stigmatization of the Mentally Ill' (2010) 19 *Annals of Health Law* 441. On how sanism is more pernicious than other stigmas, see Matthew Large and Christopher J Ryan, 'Sanism, Stigma and the Belief in Dangerousness' (2012) 46 *Australian and New Zealand Journal of Psychiatry* 1099.

[45] See eg, Wim De Neys et al, 'Biased but in Doubt: Conflict and Decision Confidence' (2011) 6 *Plos One* 1. On disability stereotypes in general, see Bradley A Areheart, 'Disability Trouble' (2011) 29 *Yale Law and Policy Review* 47.

[46] See Perlin, 'On Sanism' (1992) 46 *SMU Law Review* 373, 373–77.

[47] On the ways that judges conceptualize mental disability professionals in forensic testimonial contexts, see Douglas Mossman, '"Hired Guns," "Whores," and "Prostitutes": Case Law References to Clinicians of Ill Repute' (1999) 27 *Journal of the American Academy of Psychiatry and Law* 414.

[48] See eg, David B Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence, (1992) 40 *Cleveland State Law Review* 517; David B Wexler (ed), *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990).

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 institutionalisation 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 institutionalisation.

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 behaviour.

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 defence 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 defence 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.[49]

[49] Michael L Perlin, '"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, Us and Them' (1998) 31 *Loyola of Los Angeles Law Review* 775, 786–87.

Social science research confirms that mental illness is 'one of the most – if not the most – stigmatised of social conditions.'[50] Historically, individuals with psycho-social disabilities 'have been among the most excluded members of society... Research firmly establishes that people with mental disabilities are subjected to greater prejudice than are people with physical disabilities.'[51] One might optimistically expect, though, that this gloomy picture should be subject to change because of a renewed interest in the integration of social science and law, and greater public awareness of defendants with mental disabilities…One might also expect that litigation and legislation in these areas would draw on social science data in attempting to answer such questions as the actual impact that deinstitutionalisation has had on homelessness, or whether experts can knowledgeably testify about criminal responsibility in so-called 'volitional prong' insanity cases.[52]

And yet, any attempt to place mental disability law jurisprudence in context results in confrontation with a discordant reality: social science is rarely a coherent influence on mental disability law doctrine.[53] Rather, the legal system selectively — teleologically — either accepts or rejects social science data depending on whether or not the use of that data meets the *a priori* needs of the legal system. In other words, social science data is privileged when it supports the conclusion the fact finder wishes to reach, but it is subordinated when it questions such a conclusion.[54]

As discussed above, these ends are sanist. Further, judges are not immune from sanism. '[E]mbedded in the cultural presuppositions that engulf us all,'[55] judges reflect and project the conventional morality of the community; judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes,[56] a global error that is most critical in criminal law and procedure cases. Judges' refusals to consider the meaning and realities of mental illness cause them to act in what appears, at first blush, to be contradictory and inconsistent ways. Teleologically, they privilege evidence of mental illness (where that privileging

[50] Susan Stefan, *Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act* (APA, 2001) 4–5.

[51] Michael E Waterstone and Michael Ashley Stein, 'Disabling Prejudice' (2008) 102 *Northwestern University Law Review* 1351, 1363–64.

[52] See, eg, Norman Finkel, 'The Insanity Defense: A Comparison of Verdict Schemas' (1991) 15 *Law and Human Behavior* 533, 535; Richard Rogers, 'APA's Position on the Insanity Defense: Empiricism Versus Emotionalism' (1987) 42 *American Psychologist* 840; Richard Rogers, 'Assessment of Criminal Responsibility: Empirical Advances and Unanswered Questions' (1987) 17 *Journal of Psychiatry and the Law* 73.

[53] See eg, Michael L Perlin, 'Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence' (1989–90) 40 *Case Western Reserve Law Review* 599, 658, n 256 (federal legislators ignored empirical evidence about the insanity defense in the debate leading to the passage of the Insanity Defense Reform Act of 1984).

[54] Michael L Perlin, 'Baby, Look inside Your Mirror': The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities (2008) 69 *University of Pittsburgh Law Review* 589, 599–600. See eg, John Q La Fond and Mary L Durham, *Back to the Asylum: The Future of Mental Health Law and Policy in the United States* (Oxford University Press, 1992) 156: 'Neoconservative insanity defense and civil commitment reforms value psychiatric expertise when it contributes to the social control function of law and disparage it when it does not. In the criminal justice system, psychiatrists are now viewed skeptically as accomplices of defense lawyers who get criminals "off the hook" of responsibility. In the commitment system, however, they are more confidently seen as therapeutic helpers who get patients "on the hook" of treatment and control. The result will be increased institutionalization of the mentally ill and greater use of psychiatrists and other mental health professionals as powerful agents of social control.'

[55] Anthony D'Amato, 'Harmful Speech and the Culture of Indeterminacy' (1991) 32 *William and Mary Law Review* 329, 332.

[56] See Perlin, above n 406, 400–404.

serves what they perceive as a socially-beneficial value) or subordinate it (where that subordination serves what they perceive as a similar value).[57]

Judges are not the only sanist actors. Lawyers, legislators, jurors, and witnesses (both lay and expert) all exhibit sanist traits and characteristics.[58] Until system 'players' confront the ways that sanist biases (selectively incorporating or mis-incorporating social science data) inspire such pretextual decision-making, mental disability jurisprudence will remain incoherent.[59]

IV PRETEXTUALITY

Sanist attitudes lead to pretextual decisions. 'Pretextuality' means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and 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.[60] 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. [61]

Pretextual devices such as condoning perjured testimony, distorting appellate readings of trial testimony, subordinating statistically significant social science data, and enacting purportedly prophylactic civil rights laws that have little or no 'real world' impact dominate the mental disability law landscape.[62] Judges in mental disability law cases often take relevant literature out of context,[63] misconstrue the data or evidence being offered,[64] and/or read such data selectively,[65] and/or inconsistently.[66] Other times, courts choose to flatly reject this data or ignore its existence.[67] In other circumstances, courts simply 'rewrite' factual records so as to avoid having to deal with social science data that is cognitively dissonant with their view of how the world 'ought to be.'[68]

---

[57] See La Fond and Durham, above n 54, 156.
[58] Michael L Perlin and Keri K Gould, 'Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines' (1995) 22 *American Journal of Criminal Law* 431, 443.
[59] See Perlin, above n 53, 599–600.
[60] See eg, ibid 602.
[61] See Michael L Perlin, '"Through the Wild Cathedral Evening": Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities' (2008) 13 *Texas Journal on Civil Liberties and Civil Right*s 413, 416–17.
[62] Michael L Perlin, '"There's No Success like Failure/and Failure's No Success at All": Exposing the Pretextuality of Kansas v. Hendricks' (1998) 92 *Northwestern University Law Review* 1247, 1257.
[63] David Faigman, 'Normative Constitutional Fact-Finding': Exploring the Empirical Component of Constitutional Interpretation (1991) 139 *University of Pennsylvania Law Review* 541, 577.
[64] Ibid 581.
[65] J Alexander Tanford, 'The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology' (1990) 66 *Indiana Law Journal* 137, 153–54.
[66] See, eg, Thomas Hafemeister and Gary Melton, 'The Impact of Social Science Research on the Judiciary' in Gary Melton (ed) *Reforming the Law: Impact of Child Development Research* (Guilford Press, 1987) 27.
[67] See, eg, *Barefoot v Estelle*, 463 US 880, 897–902 (1983), discussed in this context in Perlin and Cucolo, 'Shaming the Consitution', above n 8.
[68] The classic example is Chief Justice Burger's opinion for the court in *Parham v JR*, 442 US 584, 605–10 (1979) (approving more relaxed involuntary civil commitment procedures for juveniles than for adults). See, eg, Gail Perry and Gary Melton, 'Precedential Value of Judicial Notice of Social Facts: Parham as an Example' (1984) 22 *Journal of Family Law* 633 (critiquing Parham).

V HEURISTICS

Heuristics is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks,[69] the use of which frequently leads to distorted and systematically erroneous decisions,[70] and causes decision-makers to 'ignore or misuse items of rationally useful information.'[71] One single vivid, memorable case overwhelms mountains of abstract, colourless data upon which rational choices should be made.[72] Empirical studies reveal jurors' susceptibility to the use of these devices.[73] Similarly, legal scholars are notoriously slow to understand the way that the use of these devices affects the way individuals think.[74] The use of heuristics 'allows us to wilfully blind ourselves to the 'grey areas' of human behaviour,'[75] and predispose 'people to beliefs that accord with, or are heavily influenced by, their prior experiences.'[76]

Experts are similarly susceptible to heuristic biases,[77] specifically the seductive allure of simplifying cognitive devices in their thinking; further, they frequently employ such heuristic gambits as the vividness effect or attribution theory in their testimony.[78] Also, biases are more likely to be *negative*; individuals retain and process negative information as opposed to positive information.[79] Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.[80]

By way of example, the vividness heuristic is 'a cognitive-simplifying device through which a 'single vivid, memorable case overwhelms mountains of abstract, colourless data upon which rational choices should be made.'[81] Through the 'availability' heuristic, we judge the probability or frequency of an event based upon the ease with which we recall it. Through the 'typification' heuristic, we characterise a current experience via reference to past stereotypic behaviour; through the 'attribution' heuristic, we interpret a wide variety of additional information to reinforce pre-

---

[69] See Michael L Perlin, 'Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic Reasoning' (1990) 69 *Nebraska Law Review* 3, 12–17.

[70] See Michael J Saks and Robert F Kidd, 'Human Information Processing and Adjudication: Trial by Heuristics' (1980-81) 15 *Law and Society Review* 123.

[71] John S Carroll and John W Payne, 'The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology' in John S Carroll and John W Payne (eds) *Cognition and Social Behavior* (Psychology Press, 1976) 13, 21.

[72] David Rosenhan, 'Psychological Realities and Judicial Policy' (1984) 19 *Stanford Law Review* 10, 13.

[73] Jonathan Koehler and Daniel Shaviro, 'Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods' (1990) 75 *Cornell Law Review* 247, 264–65.

[74] Thomas Tomlinson, 'Pattern-Based Memory and the Writing Used to Refresh' (1995) 73 *Texas Law Review* 1461, 1461–62.

[75] Perlin, above n 19, 27.

[76] Russell Covey, 'Criminal Madness: Cultural Iconography and Insanity' (2009) 61 *Stanford Law Review* 1375, 1381.

[77] See Oren Perez, 'Can Experts Be Trusted and What Can Be Done About It? Insights from the Biases and Heuristics Literature' in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Bloomsbury, 2015).

[78] Perlin, 'Pretexts and Mental Disability Law', above n 10, 602–03: Michael L Perlin, 'They Keep It All Hid': The Ghettoization of Mental Disability Law and its Implications for Legal Education (2010) 54 *Saint Louis University Law Journal* 857, 874–75.

[79] Kenneth D Chestek, 'Of Reptiles and Velcro: The Brain's 'Negative Bias' and Persuasion' (2015) 15 *Nevada Law Journal* 605.

[80] Perlin, 'Pretexts and Mental Disability Law', above n 10, 602–03: Perlin, above n 78, 874–75.

[81] See Perlin, above n 33, 1417.

existing stereotypes. Through the 'hindsight bias,' we exaggerate how easily we could have predicted an event beforehand. Through the 'outcome bias,' we base our evaluation of a decision on our evaluation of an outcome.[82] Through the 'representative heuristic,' we extrapolate overconfidently based upon a small sample size of which they happen to be aware.[83] Through the heuristic of 'confirmation bias,' people tend to favour 'information that confirms their theory over disconfirming information.'[84]

It is impossible to understand the thrall in which the media portrayal of criminal defendants has captured the public without understanding the pernicious power of these cognitive-simplifying heuristics.

VI 'ORDINARY COMMON SENSE'

'Ordinary common sense' ('OCS') is a 'powerful unconscious animator of legal decision making.' It is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities .[85] OCS is self-referential and non-reflective: 'I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is.'[86] It is supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information.[87]

The positions frequently taken by former Chief Justice Rehnquist, Justice Scalia and Justice Thomas in criminal procedure cases best highlight the power of OCS as an unconscious animator of legal decision-making.[88] Such positions frequently demonstrate a total lack of awareness of the underlying psychological issues and focus on such superficial issues as whether a putatively mentally disabled criminal defendant bears a 'normal appearance.' [89]

These are not the first jurists to exhibit this sort of closed-mindedness. Trial judges will typically say, 'he (the defendant) doesn't look sick to me,' or, even more revealingly, 'he is as healthy as

[82] Michael L Perlin, 'The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence' (1994) 8 *Notre Dame Journal of Law, Ethics and Public Policy* 239, 256; see also n 86 of this article (citing research sources).

[83] See, eg, Amos Tversky and Daniel Kahneman, 'Belief in the Law of Small Numbers' (1971) 76 *Psychological Bulletin* 105 , as discussed in Michael L Perlin, '"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?' (2009) 42 *Akron Law Review* 885, 898, n 89.

[84] Alafair S Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science (2006) 47 *William and Mary Law Review* 1587, 1594, as discussed in Covey, above n 76, 1381, n 22.

[85] Michael L Perlin, 'Wisdom Is Thrown into Jail': Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness' (2013) 17 *Michigan State University Journal of Medicine and Law* 343, 365, n 127.

[86] Perlin, above n 18, 8.

[87] Michael L Perlin, '"Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems' (2009) 25 *Georgia State University Law Review* 607, 622.

[88] Perlin, above n 19, 25.

[89] Perlin, above n 78, 1418. See, eg, *State Farm Fire & Cas Ltd v Wicka*, 474 NW 2d 324, 327 (Minn, 1991), (stating that both law and society are always more skeptical about a putatively mentally ill person who has a 'normal appearance' or 'doesn't look sick').

you or me.'[90] In short, advocates of OCS believe that simply by using their OCS, jurists can determine whether defendants conform to 'popular images of "craziness."'[91] If they do not, the notion of a handicapping mental disability condition is flatly, and unthinkingly, rejected.[92] Such views – reflecting a false OCS – are made even more pernicious by the fact that we 'believe most easily what [we] most fear and most desire.'[93] Thus, OCS presupposes two 'self-evident' truths: 'First, everyone knows how to assess an individual's behaviour. Second, everyone knows when to blame someone for doing wrong.'[94]

Reliance on OCS is one of the keys to an understanding of why and how, by way of example, insanity defence jurisprudence has developed.[95] Not only is it prereflexive and self-evident, it is also susceptible to precisely the type of idiosyncratic, reactive decision making that has traditionally typified insanity defence legislation and litigation. Paradoxically, the insanity defence is necessary precisely because it rebuts 'common-sense everyday inferences about the meaning of conduct.'[96]

Empirical investigations corroborate the inappropriate application of OCS to insanity defence decision-making. Judges 'unconsciously express public feelings…reflect[ing] community attitudes and biases because they are "close" to the community.'[97] Virtually no members of the public can actually articulate what the substantive insanity defence test is. The public is seriously misinformed about both the 'extensiveness and consequences' of an insanity defence plea.[98] And, the public explicitly and consistently rejects any such defence substantively broader than the 'wild beast' test.[99]

Elsewhere, in discussing the insanity defence, I have stated,

> Not only [are our insanity defence attitudes] 'prereflexive' and 'self-evident,' it is susceptible to precisely the type of idiosyncratic, reactive decisionmaking that has traditionally typified insanity defence 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 decisionmaking in an area where

[90] Perlin, above n 33, 147. By way of example, the trial judge in the US must seek a competency evaluation if s/he believes there is a 'bona fide' question as to the defendant's incompetency. See eg, Perlin, above n 85, 358–59. Cases are collected in Perlin and Cucolo, above n 1, § 13-1.2.2.

[91] Perlin, 'Pretexts and Mental Disability Law', above n 10, a24.

[92] Ibid.

[93] Thomas D Barton, 'Violence and the Collapse of Imagination' (1996) 81 *Iowa Law Review* 1249, 1249 (book review of Wendy Kaminer, *It's All the Rage: Crime and Culture* (Basic Books, 1995)).

[94] Michael L Perlin, 'Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes' (1996) 24 *Bulletin of the American Academy of Psychiatry and the Law* 5, 16–17.

[95] See generally, Perlin, *The Jurisprudence of the Insanity Defense*, above n 8.

[96] Benjamin Sendor, 'Crime as Communication: An Interpretative Theory of the Insanity Defense and the Mental Elements of Crime' (1986) 74 *Georgetown Law Journal* 1371, 1372. On the need for the retention of the insanity defense, see Perlin, 'God Said to Abraham/Kill Me a Son', above n 35.

[97] Perlin, above n 33, 1420.

[98] Valerie Hans and Dan Slater, '"Plain Crazy": Lay Definitions for Legal Insanity' (1984) 7 *International Journal of Law and Psychiatry* 105, 105–06.

[99] Caton F Roberts et al, 'Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense' (1987) 11 *Law and Human Behavior* 207, 226.

> we have traditionally been willing to base substantive criminal law doctrine on medieval conceptions of sin, redemption, and religiosity.[100]

VII AS APPLIED IN THE CRIMINAL JUSTICE SYSTEM

This example of the relationship between OCS and the insanity defence is just the tip of the iceberg. I have previously considered just about *every* aspect of the criminal trial and appellate process from these perspectives, and in each instance, my conclusions are the same: these factors dominate and contaminate the way the criminal trial system works, and it is absolutely essential that those representing criminal defendants 'get this' so as to seek to revere and remediate this behaviour. Here are some illustrative examples.

Sanism infects incompetency-to-stand-trial jurisprudence in at least four critical ways: (1) courts resolutely adhere to the conviction that defendants regularly malinger 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 institutionalisation and appropriate treatment; and (4) courts regularly accept patently inadequate expert testimony in incompetency to stand trial case.[101]

Consider sanism's impact on jurors in insanity cases: Juror attitudes consistently reflect 'sanist' thinking;[102] in insanity cases, jurors demonstrate what I have characterised as 'irrational brutality, prejudice, hostility, and hatred toward insanity pleaders.'[103] Think of some of the sanist myths upon which jurors rely:

- reliance on a fixed vision of popular, concrete, visual images of craziness;
- an obsessive fear of feigned mental states;
- a presumed absolute linkage between mental illness and dangerousness;
- 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');
- the incessant confusion and conflation of substantive mental status tests; and
- the regularity of sanist appeals by prosecutors in insanity defence summations, arguing that insanity defences are easily faked, that insanity acquittees are often immediately released, and that expert witnesses are readily duped.[104]

Also consider how pretextuality relates to the insanity defence:

> (T)he fear that defendants will fake the insanity defence to escape punishment continues to paralyze the legal system in spite of an impressive array of empirical evidence that reveals (1) the

[100] Perlin, 'Pretexts and Mental Disability Law', above n 10, 29.
[101] Perlin, above n 1, 235–36.
[102] Perlin, above n 82, 257.
[103] Perlin, *The Jurisprudence of the Insanity Defense*, above n 8, 317.
[104] Perlin, above n 33, 1422; Perlin, above n 53, 648–51.

> minuscule number of such cases, (2) the ease with which trained clinicians are usually able to catch malingering in such cases, (3) the inverse greater likelihood that defendants, even at grave peril to their life, will be more likely to try to convince examiners that they're not crazy, (4) the high risk in pleading the insanity defence (leading to statistically significant greater prison terms meted out to unsuccessful insanity pleaders), and (5) that most successful insanity pleaders remain in maximum security facilities for a far greater length of time than they would have had they been convicted on the underlying criminal indictment. In short, pretextuality dominates insanity defence decisionmaking. The inability of judges to disregard public opinion and inquire into whether defendants have had fair trials is both the root and the cause of pretextuality in insanity defence jurisprudence.[105]

Sentencing decisions are often pretextual. One example: In the case of a chronically depressed, compulsive gambler under threats of violence to pay off his debts (apparently from organised crime figures), the Sixth Circuit justified its rejection of a downward departure on the grounds that the defendant could have 'just said no.' The court moralised: 'He had the option of reporting the threats he received to the authorities, of course, but he chose instead to engage in serious violations of the law.'[106]

And decision-making at the penalty phase of a death penalty trial bespeaks both sanism and pretextuality.[107] Consider, for one notorious example, the improper use of mental disorders as an aggravating factor at the punishment phase; is there any example more vivid than Dr James Grigson's typical performance as an example of pretextual testimony?[108] Elsewhere, I have said this about sanism and the death penalty:

> Sanism in the death penalty decision-making process mirrors sanism in the context of insanity defence decision-making. Such decision-making is often irrational, rejecting empiricism, science, psychology, and philosophy, and substituting in its place myth, stereotype, bias, and distortion. It resists educational correction, demands punishment regardless of responsibility, and reifies medievalist concepts based on fixed and absolute notions of good and evil and of right and wrong.[109]

And all of this must be contextualised with what we know about how heuristics and OCS similarly contaminate these areas of practice. False OCS drives insanity defence practice; the vividness heuristic leads to death penalty decisions and to incompetency determinations. One example: Research reveals that, in determining the likely future dangerousness of defendants found incompetent to stand trial, and thus in need of institutionalisation, 'expert' evaluations frequently

---

[105] Perlin, above n 33, 1423.

[106] *United States v Hamilton*, 949 F2d 190, 193 (6th Cir 1991). See generally, Michael L Perlin, 'I Expected It to Happen/I Knew He'd Lost Control': The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5' (2015) *Utah Law Review* 881, 906–07 (discussing Hamilton in this context).

[107] Perlin and Cucolo, *Shaming the Constitution*, above n 8.

[108] Michael L Perlin, 'Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law' (1994) 20 *New England Journal of Criminal and Civil Confinement* 369, 379–80. The author discusses the 'scandalous' story of Dr Grigson in, inter alia, Perlin, above n 35, 1440, 1447–48. Dr Grigson was known universally in the US as 'Dr Death.' See, eg, Ron Rosenbaum, *Travels with Dr Death and Other Unusual Investigations*, (Penguin Books, 1st ed, 1991) 206, (profiling Dr Grigson and referring to him as 'the legendary forensic psychiatrist known as "Dr. Death"').

[109] Michael L Perlin, 'The Executioner's Face Is Always Well-Hidden: The Role of Counsel and the Courts in Determining Who Dies' (1996) 41 *New York Law School Law Review* 201, 227.

rely not on the examiners' experience or knowledge but on the facts of the act upon which the defendant was originally indicted (a blunder that, of course, ignores the fact that an incompetent defendant may be factually innocent of the underlying charge).[110] Also, the valid and reliable evidence informs us of discrepancies between the criteria actually employed by the examiners, such as seriousness of the crime, and the criteria that the examiners reported as informing their decisions, such as presence of impaired or delusional thinking.[111]

I have written often about the impact of these factors on the representation of persons with mental disabilities. Thirty 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.' [112]

The availability of adequate and effective counsel to represent this population – both in criminal and civil matters – is largely illusory; in many jurisdictions, the level of representation remains almost uniformly substandard, and, even within the same jurisdiction, the provision of counsel can be 'wildly inconsistent.'[113] Without the presence of effective counsel, substantive mental disability law reform recommendations may turn into 'an empty shell.' Representation of mentally disabled individuals falls far short of even the most minimal model of 'client-centred counselling.' What is worse, few courts even seem to notice.[114]

In short, we cannot begin to understand what happens in court in cases involving criminal defendants with mental disabilities until we confront these poisons. I turn next to what I believe is the only potential path to redemption.

VIII THERAPEUTIC JURISPRUDENCE[115]

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence ('TJ').[116] Therapeutic jurisprudence

[110] Perlin, 'Pretexts and Mental Disability Law', above n 10, 663.

[111] Ibid 663–64.

[112] Michael L Perlin and Robert L Sadoff, 'Ethical Issues in the Representation of Individuals in the Commitment Process' (1982) 45 *Law and Contemporary Problems* 161, 164.

[113] Michael L Perlin, '"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching' (2003) 9 *Clinical Law Review* 683, 690.

[114] Ibid.

[115] This section is generally adapted from Michael L Perlin, 'Yonder Stands Your Orphan with His Gun': The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes' (2013) 46 *Texas Tech Law Review* 301 (2013); Michael L Perlin and Alison J Lynch, 'All His Sexless Patients': Persons with Mental Disabilities and the Competence to Have Sex (2014) 89 *Washington Law Review* 257, and Perlin and Lynch, above n 35. Further, it distills the author's work over the past two decades, beginning with Michael L Perlin, What is Therapeutic Jurisprudence? (1993) 10 *New York Law School Journal of Human Rights* 623.

[116] See, eg, David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); David B Wexler and Bruce J Winick, *Law in a Therapeutic Key: Recent Developments in Therapeutic*

recognises that the law – potentially a therapeutic agent – can have therapeutic or anti-therapeutic consequences for individuals involved in both the civil and criminal justice systems.[117] It asks this question: can or should legal rules, procedures, and lawyer roles be reshaped to enhance their therapeutic potential while, at the same time not subordinating principles of due process?[118] From the outset, one of the creators of this field of scholarship/theory has been clear: 'the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."'[119] 'An inquiry into therapeutic outcomes does not mean that therapeutic concerns trump' civil rights and civil liberties.'[120]

Therapeutic jurisprudence utilises socio-psychological insights into the law and its applications,[121] and is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[122] TJ has thus been described as '…a sea-change in ethical thinking about the role of law…a movement towards a more distinctly relational approach to the practice of law…which emphasises psychological wellness over adversarial triumphalism'.[123] That is, therapeutic jurisprudence supports an ethic of care.[124]Therapeutic jurisprudence and its practitioners place great importance on the principle of a commitment to dignity.[125] Professor Amy Ronner describes the 'three Vs': voice, validation and voluntariness,[126] arguing:

Jurisprudence (North Carolina Academic Press, 1996); Bruce J Winick, *Civil Commitment: A Therapeutic Jurisprudence Model* (Carolina Academic Press, 2005); David B Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review* 17; Perlin and Cucolo, above n 1, § 2–6.

[117] See Perlin, above n 83, 912; Kate Diesfeld and Ian Freckelton, 'Mental Health Law and Therapeutic Jurisprudence' in Ian Freckelton and Kate Peterson (eds) *Disputes and Dilemmas in Health Law* 91 (Federation Press, 2006) 91 (for a transnational perspective).

[118] Perlin, *The Hidden Prejudice*, above n 36; Perlin, above n 113.

[119] David B Wexler, 'Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship' (1993) 11 *Behavioral Sciences and the Law* 17, 21. See also, eg, David Wexler, 'Applying the Law Therapeutically' (1996) 5 *Applied and Preventative Psychology* 179.

[120] Perlin, *The Hidden Prejudice*, above n 36, 412; Perlin, above n 49, 782.

[121] Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' (2008) 30 *Thomas Jefferson Law Review* 575, 582.

[122] Susan Daicoff, 'The Role of Therapeutic Jurisprudence Within The Comprehensive Law Movement' in Daniel P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession*' (Carolina Academic Press, 2006) 365. On the relationship between therapeutic jurisprudence, procedural justice and restorative justice, see generally, Perlin, *A Prescription for Dignity*, above n 8.

[123] Warren Brookbanks, Therapeutic Jurisprudence: Conceiving an Ethical Framework (2001) 8 *Journal of Law and Medicine* 328, 329–30.

[124]See eg, Bruce J Winick and David B Wexler, 'The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic (2006) 13 *Clinical Law Review* 605, 605–07; David B Wexler, Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering (2007) 48 *Boston College Law Review* 597, 599; Brookbanks, above n 123. The use of the phrase dates to Carol Gilligan, *In a Different Voice* (Harvard University Press, 1982).

[125] See Bruce J Winick, *Civil Commitment: A Therapeutic Jurisprudence Model* (Carolina Academic Press, 2005) 161. See generally, Perlin, *A Prescription for Dignity*, above n 8; Michael L Perlin, 'There Are No Trials Inside the Gates of Eden': Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence' in Bernadette McSherry and Ian Freckelton (eds) *Coercive Care: Law and Policy* (Routledge, 2013) 193.

[126] Amy D Ronner, 'The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome' (2008) 24 *Touro Law Review* 601, 627. On the importance of 'voice,' see also, Freckelton, above n 121, 588.

> What 'the three Vs' commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behaviour in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions. [127]

A *The Significance of Dignity*[128]

It is also necessary to focus more closely on TJ's commitment to *dignity*, and to consider the meaning of *dignity* in the legal process.[129] Treating people with dignity and respect makes them more likely to view procedures as fair and the motives behind law enforcement's actions as well-meaning.[130] What individuals want most 'is a process that allows them to participate, seeks to merit their trust, and treats them with dignity and respect.'[131] The right to dignity is memorialised in many state constitutions,[132] in multiple international human rights documents,[133] and in judicial opinions.[134]

It is important to note that, in several landmark decisions, the US Supreme Court has struck down both criminal and civil statutes that humiliate and shame.[135] With these cases, the Court has acknowledged the importance of the role of dignity.[136] Elsewhere, the Court has specifically recognised the shame that can result when dignity is not present. In *Indiana v Edwards*, the Court held that 'a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defence without the assistance of counsel.'[137] The Court stated that 'to the contrary, given that defendant's uncertain mental state, the spectacle that could well

---

[127] Amy D Ronner, Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles' (2002) 71 *University of Cincinnati Law Review* 89, 94–95; See generally, Amy D Ronner, *Law, Literature and Therapeutic Jurisprudence* (Carolina Academic Press, 2010).

[128] This section is partially adapted from. Perlin and Lynch, above n 36, 147–49.

[129] See generally, Perlin, *A Prescription for Dignity*, above n 8.

[130] See eg, Tamar Birckhead, 'Toward a Theory of Procedural Justice for Juveniles' (2009) 57 *Buffalo Law Review* 1147.

[131] Luther T Munford, 'The Peacemaker Test: Designing Legal Rights To Reduce Legal Warfare' (2007) 12 *Harvard Negotiation Law Review* 377.

[132] See John D Castiglione, 'Human Dignity under the Fourth Amendment' (2008) 4 *Wisconsin Law Review* 655.

[133] See Astrid Birgden and Michael L Perlin, 'Where the Home in the Valley Meets the Damp Dirty Prison': A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings' (2009) 14 *Aggression & Violent Behavior* 256.

[134] See Erin Daly, 'Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right' (2011) 37 *Ohio Northern University Law Review* 381.

[135] Perlin and Weinstein, above n 36, 16–19.

[136] See, eg, *Lawrence v Texas*, 539 US 558, 578–79 (2003).

[137] *Indiana v Edwards*, 554 US 164, 176 (2008) (citing *McKaskle v Wiggins*, 465 US 168, 176–77 (1984) (finding a pro se defendant's Sixth Amendment right to conduct his own defense was not violated by unsolicited participation of standby counsel)).

result from his self-representation at trial is at least as likely to prove humiliating as ennobling.'[138] So, what is the value of TJ in this context? I have argued in the past that it can be used as a 'redemptive tool in efforts to combat sanism, as a means of strip[ping] bare the law's sanist façade.'[139] The founders of therapeutic jurisprudence – David Wexler and Bruce Winick – have written about how the current insanity acquittee retention system and the entire incompetency system violate basic TJ tenets.[140] Let me consider these issues in more depth solely from the perspective of the insanity defence to make my points more clearly.

I have been critical (and remain critical) of the ways that insanity acquittee release/ recommitment hearings have been conducted (on issues ranging from the lack of adequate counsel to the perfunctory ways judges treat these matters to the sanism and pretextuality reflected in the positions of prosecutors in their efforts to oppose lessening of restraints or changes of conditions of confinement or release).[141] On the question of whether the defence is consonant with TJ principles, I draw on the words of my hero, the late Judge David Bazelon: 'By declaring a small number not responsible, we emphasize the responsibility of others,'[142] concluding that 'the existence of the defence gives coherence to the entire fabric of criminal sentencing.'[143] By punishing nonresponsible defendants, 'we diminish all the rationales of punishment of the others whom we believe to be responsible for their crimes.'[144]

Indeed, in *Clark v Arizona*, [145] holding that a state's insanity test that was couched solely in terms of capacity to tell whether an act is right or wrong did not violate due process,[146] the Supreme Court came perilously close to condoning the punishment of such nonresponsible defendants. In criticising that decision, I have said:

> Almost 25 years ago, Judge David Bazelon, writing in the *American Psychologist*, argued that the courts should 'open the courthouse doors' to mental health professionals, warning that they should 'never hand over the keys.'[147] They may now not be slammed shut, but it is fair to say that after *Clark*, Judge Bazelon's dreams have now been, for the foreseeable future, dashed.[148]

---

[138] *Indiana v Edwards*, 554 US 164, 176 (2008). See Perlin and Cucolo, above n 1, §2-6.3.2 (The Supreme Court's focus on dignity and the perceptions of justice are, perhaps, its first implicit endorsement of important principles of therapeutic jurisprudence in a criminal procedure context); see generally, Perlin and Weinstein, above n 135, 11–18. See also, *Helen L v DiDario*, 46 F3d 325, 335 (3d Cir 1995), cert den, 516 US 813 (1995): '[t]he [Americans with Disabilities Act] is intended to ensure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner that shunts them aside, hides, and ignores them.'

[139] Perlin, above n 34, 591, quoting, in part, Perlin, above n 36, *The Hidden Prejudice*, 301.

[140] David B Wexler, 'Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process', in David B Wexler & Bruce J Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991) 199; Bruce Winick, 'Ambiguities in the Legal Meaning and Significance of Mental Illness' in Bruce J Winick (ed) *Therapeutic Jurisprudence Applied: Essays on Mental Health Law* (Carolina Academic Press, 1997) 93.

[141] See eg, Perlin, above n 1, 236; see generally, Perlin, above n 33.

[142] Perlin, above n 36, *The Hidden Prejudice*, 293, quoting David L Bazelon, *Questioning Authority: Justice and the Criminal Law* (Knopf, 1988) 2.

[143] Perlin, above n 36, *The Hidden Prejudice*, 293.

[144] Ibid 293–94.

[145] 548 US 735 (2006).

[146] Ibid 742.

[147] David Bazelon, 'Veils, Values, and Social Responsibility' (1982) 37 *American Psychologist* 115.

[148] Perlin and Cucolo, above n 1, §14-1.2.8.

In an article about the role of counsel in insanity and incompetency cases, I listed multiple issues that, from a TJ perspective, needed additional focus. Consider this list:

- If a defendant is, in fact, incompetent to stand trial, that means that he does not have sufficient present ability to consult with his lawyer with a reasonable degree of 'rational understanding' and or a 'rational as well as factual understanding of the proceedings against him;' how can TJ principles be invoked in such a case?
- If a defendant is initially found to be incompetent to stand trial, will the lawyer act as most lawyers and consider him to be *de facto* incompetent for the entire proceeding (as a significant percentage of lawyers do act for *any* client who is institutionalised)?
- If a defendant is found to be incompetent to stand trial, will the lawyer assume that he is also guilty of the underlying criminal charge?
- What are the issues that a lawyer must consider in addition to the client's mental state in assessing whether or not to invoke an incompetency determination?
- What are the TJ implications for a case in which the incompetency status is not raised by the defendant, but, rather, by the prosecutor or the judge?
- Are there times when TJ principles might mandate not raising the incompetency status (for example, in a case in which the maximum sentence to which the defendant is exposed is six months in a county workhouse but is in a jurisdiction in which defendants who are incompetent to stand trial are regularly housed in maximum security forensic facilities for far longer periods of time than the maximum to which they could be sentenced)?
- What are the TJ implications of counselling a defendant to plead or not to plead the insanity defence?
- Can a defendant who pleads NGRI ever, truly, take responsibility?
- Does the fact that the insanity-pleading defendant must concede that he committed the *actus reus* distort the ongoing lawyer-client relationship?
- To what extent do the ample bodies of case law construing the ineffectiveness assistance of counsel standard established by the US Supreme Court in *Strickland v Washington*[149] even consider the implications of TJ lawyering?
- To what extent does the pervasiveness of sanism make it obligatory for lawyers in such cases to educate jurors about both sanism and why sanism may be driving their decisionmaking, and to what extent should lawyers in such cases embark on this educational process using TJ principles?[150]

I believe that TJ requires a robust and expansive insanity defence,[151] and demands a reconsideration of the policies that punish defendants for raising the defence, that reject testimony as to the causal relation between mental disability and the commission of otherwise-criminal acts, and that incarcerate 'successful' insanity pleaders in maximum security forensic institutions for

[149] 466 US 668, 689 (1984) ('whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result').

[150] Michael L Perlin, 'Too Stubborn To Ever Be Governed By Enforced Insanity': Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases' (2010) *33 International Journal of Law & Psychiatry* 475, 477–78.

[151] See Perlin, *The Jurisprudence of the Insanity Defense*, above n 8, 417, 419–37, discussing how therapeutic jurisprudence can be employed to 'make the incoherent [insanity defense] coherent.'

far longer than the maximum sentence for the underlying crime, often (in the US, at least) a trivial one.[152] I am convinced, after spending over 40 years representing and working closely with persons with serious mental disabilities in the criminal justice system, it is the only way that we can begin to eradicate the poison of sanism that contaminates our criminal justice system.

IX CONCLUSION

Nothing in this paper should be much of a surprise, especially to veteran criminal defence lawyers. Or even to those who may not be *that* veteran. My son has been a PD for six years (first in Trenton, now in Brooklyn). When we discuss his cases, the judges, the DAs, the court personnel, all is deadeningly familiar to me. I have been thinking about these issues for over 40 years now, and am hoping that these observations and suggestions will be of some help to those who care about these issues.

Visions of Johanna – from which I drew the start of my title – 'teeter[s] on the brink of lucidity.'[153] Many of the court proceedings in which I was involved in my career representing this population teetered on that exact brink. I am again hoping that, as our clients, like 'infinity,' 'go up on trial,' we can help provide some of what Dylan sought in the next line of the verse: what 'salvation must be like after a while.'

[152] TJ is also, in my view, the best and only option for changing the culture that condones the brutal treatment of mentally ill defendants in prison settings. See Perlin, 'God Said to Abraham/Kill Me a Son', above n 35.
[153] Trager, above n 16, 654.