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

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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 that implemented the then-recent US Supreme Court case of Jackson v Indiana, 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.’

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. 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, on the right of an indigent defendant to an independent psychiatrist to aid in the presentation of an insanity defence. I have appeared in courts at every level from police court to the US Supreme Court, in the latter ‘second-seating’ Strickland v Washington. 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.

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3 Ibid 738.


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.

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and of writing books and articles about the relationship between mental disability and the criminal trial process. 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 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. 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.

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.’ 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’), and why – even though it has been criticised fairly severely by some criminal defence lawyers – I believe that it is the only way that we can strip the sanist and pretextual façade from

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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.


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

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 19\(^{th}\) 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 neonatical 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.\(^{22}\)


\(^{20}\) 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.

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 case 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.’

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.

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. 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. 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.

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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

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 — controlled the practice (and the jurisprudence) of mental disability law, specifically in cases involving criminal law and procedure. 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. 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.

### III Sanism

Sanism 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 deindividualisation, 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

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39 Ibid.
immutable. These assumptions — that reflect societal fears and apprehensions about mental disability, persons with mental disabilities, and the possibility that any individual may become mentally disabled— ignore the most important question of all — why do we feel the way we do about ‘these’ people (quotation marks understood)?

Decisionmaking in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decisionmaking. 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. Paradoxically, while sanist decisions are frequently justified as being therapeutically based, sanism customarily results in anti-therapeutic outcomes.

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 ‘mental 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:

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41 In US law, the phrase ‘mental disability’ generally includes both mental illness (psychosocial disability) and intellectual disability.


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?


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

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Social science research confirms that mental illness is ‘one of the most – if not the most – stigmatised of social conditions.’ 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. 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.

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. 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.

As discussed above, these ends are sanist. Further, judges are not immune from sanism. ‘[E]mbedded in the cultural presuppositions that engulf us all,’ 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, 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

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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.’
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.
60 See eg, ibid 602.
64 Ibid 581.
V HEURISTICS

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

Experts are similarly susceptible to heuristic biases,\(^\text{77}\) 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.\(^\text{78}\) Also, biases are more likely to be negative; individuals retain and process negative information as opposed to positive information.\(^\text{79}\) Judges’ predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.\(^\text{80}\)

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.’\(^\text{81}\) 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-

\(^{75}\) Perlin, above n 19, 27.
\(^{81}\) 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. Through the ‘representative heuristic,’ we extrapolate overconfidently based upon a small sample size of which they happen to be aware. Through the heuristic of ‘confirmation bias,’ people tend to favour ‘information that confirms their theory over disconfirming information.’

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. 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.’ It is supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information.

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. 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.’

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

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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).


86 Perlin, above n 18, 8.


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

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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.
97 Perlin, above n 33, 1420.
we have traditionally been willing to base substantive criminal law doctrine on medieval conceptions of sin, redemption, and religiosity.\textsuperscript{100}

\textbf{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 \textit{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.\textsuperscript{101}

Consider sanism’s impact on jurors in insanity cases: Juror attitudes consistently reflect ‘sanist’ thinking,\textsuperscript{102} in insanity cases, jurors demonstrate what I have characterised as ‘irrational brutality, prejudice, hostility, and hatred toward insanity pleaders.’\textsuperscript{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.\textsuperscript{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

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\item[100] Perlin, ‘Pretexts and Mental Disability Law’, above n 10, 29.
\item[101] Perlin, above n 1, 235–36.
\item[102] Perlin, above n 82, 257.
\item[103] Perlin, \textit{The Jurisprudence of the Insanity Defense}, above n 8, 317.
\item[104] Perlin, above n 33, 1422; Perlin, above n 53, 648–51.
\end{enumerate}
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.
107 Perlin and Cucolo, Shaming the Constitution, above n 8.
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).\textsuperscript{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.\textsuperscript{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.’ \textsuperscript{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.’\textsuperscript{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.\textsuperscript{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\textsuperscript{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’).\textsuperscript{116} Therapeutic jurisprudence

\begin{itemize}
  \item \textsuperscript{110} Perlin, ‘Pretexts and Mental Disability Law’, above n 10, 663.
  \item \textsuperscript{111} Ibid 663–64.
  \item \textsuperscript{113} Michael L Perlin, “‘You Have Discussed Lepers and Crooks”: Sanism in Clinical Teaching’ (2003) 9 Clinical Law Review 683, 690.
  \item \textsuperscript{114} Ibid.
  \item \textsuperscript{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
\end{itemize}
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.\textsuperscript{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?\textsuperscript{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.”’\textsuperscript{119} ‘An inquiry into therapeutic outcomes does not mean that therapeutic concerns trump’ civil rights and civil liberties.’\textsuperscript{120}

Therapeutic jurisprudence utilises socio-psychological insights into the law and its applications,\textsuperscript{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.\textsuperscript{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’.\textsuperscript{123} That is, therapeutic jurisprudence supports an ethic of care.\textsuperscript{124} Therapeutic jurisprudence and its practitioners place great importance on the principle of a commitment to dignity.\textsuperscript{125} Professor Amy Ronner describes the ‘three Vs’: voice, validation and voluntariness,\textsuperscript{126} arguing:

\textsuperscript{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) \textit{Disputes and Dilemmas in Health Law} 91 (Federation Press, 2006) 91 (for a transnational perspective).
\textsuperscript{118} Perlin, \textit{The Hidden Prejudice}, above n 36; Perlin, above n 113.
\textsuperscript{120} Perlin, \textit{The Hidden Prejudice}, above n 36, 412; Perlin, above n 49, 782.
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 pronouncement 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.  

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The Significance of Dignity

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. 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. What individuals want most ‘is a process that allows them to participate, seeks to merit their trust, and treats them with dignity and respect.’ The right to dignity is memorialised in many state constitutions, in multiple international human rights documents, and in judicial opinions.

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. With these cases, the Court has acknowledged the importance of the role of dignity. 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.’ The Court stated that ‘to the contrary, given that defendant’s uncertain mental state, the spectacle that could well

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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.


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


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

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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.’
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.
146 Ibid 742.
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 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?

I believe that TJ requires a robust and expansive insanity defence, 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’).
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.\textsuperscript{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.

\textbf{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 \textit{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.

\textit{Visions of Johanna} – from which I drew the start of my title – ‘teeter[s] on the brink of lucidity.’\textsuperscript{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.’

\textsuperscript{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.

\textsuperscript{153} Trager, above n 16, 654.