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ON "SANISM"

Michael L. Perlin*

I. INTRODUCTION

IMAGINE the uproar if a published appellate court decision in 1974 referred to an adult person of color as a "boy." Imagine the fallout if the New York Times stated in 1964 that Plessy v. Ferguson was the lead case on the question of "separate but equal" accommodations. Imagine if, ten years after Roe v. Wade, a Congressman had been complimented for his "thoughtful" remarks when he stated that, not only was it still legal to criminalize first-trimester abortions, but that a state could also lawfully bar all women from using contraception. Imagine if left-liberal candidates in one of the most progressive legislative districts in the country ran for office on a platform of excluding racial minorities from living in that district.

These acts would quickly, and correctly, be labelled either as racist, sexist or bizarre, and would be decried by well-meaning citizens at virtually all points on the political spectrum. Yet, when we substitute "mentally disabled person" for "person of color" or "racial minority" or "woman," we let such acts pass without notice or comment.¹ In fact, when a sitting state trial court judge recently endorsed Judge Oliver Wendell Holmes' infamous dictum from Buck v. Bell, that "three generations of imbeciles are enough,"² his endorsement was greeted with total silence.³

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¹ See, e.g., State v. Johnson, 527 P.2d 1310, 1312 (Wash. 1974) (defendant was a thirty-year-old college graduate; defense counsel asserted to trial court that he was "a highly intelligent boy"); Ira Mickenberg, A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Succeeded In Its Own Right and Successfully Preserved the Insanity Defense, 55 U. Cin. L. REV. 943, 946-47 n.14 (1987) (quoting Stephen Roberts, High U.S. Officials Express Outrage, Asking for New Law and Insanity Plea, N.Y. TIMES, June 23, 1982, at B6, col. 3, which asserted that Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), overruled, United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. 1972), was the operative insanity test at the time of the Hinckley acquittal); Insanity Defense in Federal Courts: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess. at 151, 153 (1982)(statement of Cong. Lagomarsino; responsive comment by Cong. Conyers; same assertion as to operative test; also asserting that, under the Durham test, the insanity defense was expanded to include "heartburn and itching"); Michael L. Perlin, Competency, Deinstitutionalization and Homelessness: A Story of Marginalization, 28 HOUS. L. REV. 63, 93 n.173 (1991) (citing examples of demands for residential exclusion).

² 274 U.S. 200, 207 (1927).

³ Robertson, Letter to the Editor, 11 DEV. IN MENTAL HEALTH LAW 4 (Jan.-June 1991).
These examples are not exceptional. They reflect, rather, an irrational prejudice, an "ism," of the same quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry that have been reflected both in our legal system and in the ways that lawyers represent clients. This prejudice, which I will call "sanism," similarly infects both our jurisprudence and our lawyering practices. It reflects what civil rights lawyer Florynce Kennedy has characterized as "the pathology of oppression."

Sanism is as insidious as other "isms" and is, in some ways, more troubling, since it is largely invisible and largely socially acceptable. Further, sanism is frequently practiced, consciously or unconsciously, by individuals who regularly take liberal or progressive positions decrying similar biases and prejudices that involve sex, race, ethnicity or sexual orientation. Sanism is a

5. The phrase "sanism" was, to the best of the author's knowledge, coined by Dr. Morton Birnbaum. See Morton Birnbaum, The Right to Treatment: Some Comments on its Development, in MEDICAL, MORAL AND LEGAL ISSUES IN HEALTH CARE 97, 106-07 (Frank Ayd, Jr. ed., 1974); Koe v. Califano, 573 F.2d 761, 764 n.12 (2d Cir. 1978). Birnbaum's insight is discussed in Perlin, supra note 1, at 92-93. Dr. Birnbaum is universally regarded as having first developed and articulated the constitutional basis of the right to treatment doctrine for institutionalized mental patients.

I recognize that the use of the word "sanism" (based on the root "sane" or "sanity") is troubling from another perspective: the notion of "sanity" or "insanity" is a legal construct that has been rejected by psychiatrists, psychologists, and other behavioralists for about 150 years. Nevertheless it is used here, in part, to reflect the way that inaccurate, outdated and distorted language has confounded the underlying political and social issues, and to demonstrate, ironically, how ignorance continues to contribute to this bias. See Morton Birnbaum, The Right to Treatment, 46 A.B.A. J. 499 (1960).

6. Birnbaum, supra note 5, at 107 (quoting Kennedy); See also id. at 106 ("It should be clearly understood that sanists are bigots.").

Sanism is also demonstrated by those attempting to illuminate how "political correctness" can inappropriately stereotype other groups. Thus, in the course of Douglas Laycock's criticism of Wendy Brown's purportedly biased depictions of beer-drinking, men's magazine-reading, hunting club members, Laycock implicitly exempts "psychopaths" from his proscription: "There are indeed people in our society who have no more respect for humans than for animals. We call them psychopaths and when they act on their impulses and we catch them, we lock them up." Douglas Laycock, Vicious Stereotypes in Polite Society, 8 CONST'L COMMENTARY 395, 399 (1991) (criticizing Wendy Brown, Guns, Cowboys, Philadelphia Mayors, and Civil Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 YALE L.J. 661, 666-67 (1989)).

On the impossibility of using "sociopathy" or "psychopathy" as a meaningful diagnostic category, see Barefoot v. Estelle, 463 U.S. 880, 918-24 (1983) (Blackmun, J., dissenting); Michael L. Perlin, The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss?", 29 ARIZ. L. REV. 1, 24 n.215, 43-44 n.407 (1987). On the specific behavioral criteria that must be found to support a diagnosis of "anti-social personality disorder" (the diagnostic category closest to public concepts of sociopathy or psychopathy), see Emily Campbell, The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?, 69 NEB. L. REV. 190, 198-206 (1990). See generally ROBERT D. HARE, PSYCHOPATHY: THEORY AND RESEARCH (1970); Robert D. Hare, Comparison of Procedures for the Assessment of Psychopathy, 53 J. CONSULTING & CLIN. PSYCHOLOGY 7 (1985); Robert D. Hare et al., Male Psychopaths and Their Criminal Careers, 56 J. CONSULTING & CLIN. PSYCHOLO. 710 (1988); Phillip Raskin & Robert D. Hare, Psychopathy
form of bigotry that “respectable people can express in public.”

Like other “isms,” sanism is based largely upon stereotype, myth, superstition, and de-individualization. To sustain and perpetuate sanism, we use pre-reflective “ordinary common sense” (OCS) and other cognitive-simplifying devices such as heuristic reasoning in an unconscious response to events both in everyday life and in the legal process. The way that some members of the Senate Judiciary Committee obsessively focused on Anita Hill’s alleged psychiatric disorders in an effort to discredit her testimony charging Judge Clarence Thomas with sexual harassment reflects this stereotyping at its most insidious level.

The practicing bar, courts, legislatures, professional psychiatric and psychological associations, and the academic community are all largely silent about sanism. A handful of practitioners, lawmakers, scholars, and judges have raised lonely voices, but the topic is simply off the agenda for most of these groups. As a result, mentally disabled individuals, “the voiceless, those persons traditionally isolated from the majoritarian democratic poli-
ical system," are frequently marginalized to an even greater extent than are others who fit within the Carolene Products\textsuperscript{13} definition of "discrete and insular minorities."\textsuperscript{14}

This article argues that we must confront our system's sanist biases,\textsuperscript{15} identify sanist practices, and articulate the roots of sanist behavior. We must enter into a dialogue with the final group of unempowered clients, those individuals institutionalized because of mental disability, and those individuals in the community who have been subject to sanist prejudices. We can then collaboratively educate legislators, judges, litigators, and scholars as to the dimensions of the problem in question.

This article will proceed as follows: I will initially discuss the meaning of stereotypes and the concomitant historical development of other "isms" (racism, sexism, etc.). Then, I will explore issues surrounding sanism. First, I will consider sanism's historic roots and explain its development and how public attitudes regularly reflect and perpetuate sanism. Then, I will focus briefly on how sanist behavior permeates both statutory and case law as well as the actual lawyering process in a way that further marginalizes the clientele in question.\textsuperscript{16} Next, I will discuss the implications of the reality that these sanist patterns have escaped the notice of virtually all commentators and policymakers in the field.

I will conclude by offering some modest recommendations for change. First, we must openly discuss, among ourselves and with all other players in this arena, the underlying issues. We must create a new research and scholarship agenda that includes inquiry into the way that sanist behaviors permeate case and statutory law, judicial behavior and public discourse, and the reasons we allow it to do so.\textsuperscript{17} We must restructure the provision of counsel


\textsuperscript{15} For one important example of this recognition, see \textit{Final Report: Task Force on Stigma and Discrimination} (N.Y. State Office of Mental Health, Mar. 6, 1990) [hereinafter Stigma Task Force]. "In many ways, the mental health system itself is based on discriminatory premises which reinforce negative stereotypes, thus denying service recipients their basic civil and human rights." \textit{Id.} at 10 (emphasis added).


to mentally disabled persons, reeducate such counsel, both substantively and attitudinally, and empower mentally disabled clients. Finally, we must educate judges and legislators to confront sanist biases that infect the drafting of statutes or the writing of opinions.

II. THE DEVELOPMENT OF OTHER “ISMS”

A. “ISMIC” BEHAVIOR

I. On Stereotyping

Stereotypes are the “attribution of general psychological characteristics to large human groups.” According to the social psychologist Gordon Allport, stereotypes are attitudes that result in “gross oversimplification of experience and in prejudgments.” The first step of forming stereotypes is categorization: in order for us to be able to single out and treat members of a social group in a discriminatory way, we must be able to attribute some identifiable features that classify them as group members. The separation of others into categorized groups is enough to trigger psychological processes leading to intergroup prejudice, which Allport defines as “an antipathy based upon a faulty and inflexible generalization.” This act of separation is frequently at the basis of what can be called “ismic” behavior.

Operating as “relatively rigid and oversimplified or biased perception[s] . . . of an aspect of reality,” stereotypes efficiently, however inaccurately,

21. ALLPORT, supra note 4, at 20. On the significance of categorization in this context, see MINOW, supra note 12, at 21.
22. ALLPORT, supra note 4, at 9. For earlier formulations, see WALTER LIPPMAN, PUBLIC OPINION (1922); Daniel Katz & Kenneth Brady, Racial Stereotypes in One Hundred College Students, 28 J. ABNORMAL & SOC. PSYCHOL. 280 (1933).
24. Arthur G. Miller, Historical and Contemporary Perspectives on Stereotyping, in IN THE
generalize in ways that have little basis in individual fact or practical experience. These generalizations, based upon preconceived and misinformed opinions about the nature of difference, make little reference to actual information, and imply cause-and-effect relationships that do not exist. They operate in the same way as do other fundamental cognitive errors that frequently lead to distorted and systematically erroneous decisions, relying on exaggeration, emotionally-toned intergroup labels, dichotomization and over generalization.

Ironically, stereotypes also help us restructure and impose order upon the world in ways that reduce anxiety and lend an appearance of legitimacy and "self-evident truth to what we have invented." "Our internal, mental representation of the world become the world. We act as if this world were real, external to ourselves . . . ." 

Labels accompany stereotypes. These labels stigmatize, assign negative associations to outsiders, complicate "any effort to resist the denigration implied by difference," and prevent the labeler from understanding the perspective of the outsider. Labels are especially pernicious, for they frequently lead labeled individuals to internalize negative expectations and social practices that majoritarian society identifies as characteristically endemic to the labeled group. From these labels, "categorizations assume a life of their own."
Through the use of stereotypes and labels, any act that fails to follow standards set by a dominant group becomes a deviation. We structure polarized and dichotomized categories: if a positive image is of an industrious, intelligent, knowledgeable, law-abiding and responsible self, the correlative negative image is of a lazy, unintelligent, immoral, ignorant, criminal, shiftless other. Thus, historically, we have negatively stereotyped blacks, women, Asians, Jews, Catholics, gays and lesbians, Indians, physically disabled persons, physically unattractive persons and others. These stereotypes have often been premised upon political, scientific, religious and cultural theories that, in turn, relied on other distorted stereotypes and characterizations.

These historical stereotypes, often brought together in a “web,” came to serve as the basis of a legitimating ideology that perpetrated the mythology and rationalized racial, sexual and religious oppression. These stereotypes led to yet others: the separated and stigmatized others were seen as “different, deviant and morally weak” or as individuals “without hope or dignity.”

Judges have consistently employed these stereotypical assumptions. The Supreme Court’s decision in City of New York v. Miln, which upheld a statute requiring shipmasters to report their passengers’ occupations, specifically equated the potential “moral pestilence of paupers” with the potential “physical pestilence” that could arise from “infectious articles” or crewmembers “laboring under an infectious disease.”


37. Gilman, supra note 29, at 240. This “web” leads individuals to conflate negative stereotypes of different “others” in a way that further perpetuates exclusion discrimination. See Note, Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance, 100 HARV. L. REV. 2035, 2051-52 (1987); Katherine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 847 (1990) (questioning whether some feminist writing attributes to all women “the interests and experiences of a particular group of women — namely white, and otherwise privileged women”).

38. See Crenshaw, supra note 35, at 1370-71 & 1370-71 nn.147-51; Johnson, supra note 35, at 1637 (“bias against black defendants is based upon subconscious stereotypes”).


40. Ross, supra note 39, at 1507.
41. 36 U.S. (11 Pet.) 102 (1837).
42. Id. at 142-43.
these have led to widespread feelings of both social and judicial helplessness, a fear that the social problems we face are somehow beyond remediation.\textsuperscript{43} The use of stereotypes precludes empathic behavior. We think of the stereotyped as "'them' and not 'us' [and we are therefore] less likely to share in their pain and humiliation."\textsuperscript{44} Lynne Henderson defines empathy as encompassing three interrelated phenomena:

(1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion).\textsuperscript{45} We are more likely to empathize in an unreflective way with people like ourselves;\textsuperscript{46} yet, because empathic understanding involves the "recognition of and regard for the other,"\textsuperscript{47} empathy can operate to blunt stereotyped thinking that fails to imagine another's alternative perspectives.\textsuperscript{48}

No one is immune from the use of stereotypes, least of all lawyers. According to Stanley Brodsky and his colleagues:

Trial lawyers recognize that jury selection in both civil and criminal actions is typically based on long-standing stereotypes, assumed to identify preexisting attitudes and biases. Women are said to be empathic; men are not. Accountants, engineers, and military officers are thought of as punitive and not people-oriented. Social workers, teachers, liberal Protestants, and most Jews are described as good jurors for the defense in criminal case and for the plaintiffs in civil cases. Catholics, fundamental Christians, and Orthodox Jews are not . . . . [T]rial lawyers who represent the state in criminal cases, and the defense in civil cases . . . should pick jurors with the "six Rs": religious, racist, rigid, righteous, Republican, and repressed.\textsuperscript{49}

The law's treatment\textsuperscript{50} of minority groups, giving that phrase its broadest

\textsuperscript{43.} Ross, \textit{supra} note 39, at 1509-13.
\textsuperscript{44.} \textit{Id.} at 1542; see also Minow, \textit{supra} note 11, at 3-4: Sometimes, classifications express and implement prejudice, [and] intolerance for difference. [W]hen we respond to persons' traits rather than their conduct, we may treat a given trait as a justification for excluding someone we think is "different." We feel no need for further justification: we attribute the consequences to the differences we see.
\textit{Id.}

\textsuperscript{45.} Lynne E. Henderson, \textit{Legality and Empathy}, 85 Mich. L. Rev. 1574, 1579 (1987); see also \textit{id.} at 1580 n.29.


\textsuperscript{47.} Henderson, \textit{supra} note 45, at 1586.

\textsuperscript{48.} Minow, \textit{supra} note 30, at 51 n.201. On our faulty and unstated assumptions about difference, see Minow, \textit{supra} note 12, at 50-74 (difference is intrinsic, not a comparison; the norm need not be stated; the observer can see without a perspective; other perspectives are irrelevant; the status quo is natural, uncoerced, and good).


\textsuperscript{50.} The acts of judges, legislators, jurors, lawyers, and, in some cases, forensic expert
possible Carolene Products "Footnote 4" reading has frequently been based on the most inflexible generalizations and the most polarized categories. As will be discussed next, inappropriate stereotypes and categorizations have led historically to discriminatory legislation, judicial decisions and lawyering practices. As Professor Sheri Lynn Johnson has argued, either prejudice or discrimination may be present without the other, and official discrimination may be inhibited despite virulent prejudice. "Where discrimination is not legally or socially approved, social scientists predict it will be practiced only when it is possible to do so covertly and indirectly. On the other hand, discrimination may be engaged in without the presence of prejudiced attitudes when it will lead to social approval."  

Although "isms" such as racism, sexism, and anti-Semitism have since been officially repudiated, the distorted categorizations still frequently dominate our thought processes and decisionmaking. These same distorted thought processes and socially-approved prejudices still dominate our discourse when the subject deals with mental disability.

B. ON SPECIFIC "ISMS"

1. Introduction

American legal history reflects a persistent and unrelenting pattern of statutes and court decisions that are based on racial, sexual, sexual orientation and ethnic stereotypes. This section will discuss issues of race in the legal setting, and then briefly refer to biases faced by other stereotyped and marginalized groups. The common thread of this discussion is the way that "ismic" behavior regularly pervades the law.

2. Race Stereotypes in the Legal Setting

All components of the legal system, especially the courts, "must bear a heavy share of the burden of American racism." To an "outrageous and humiliating extent, American lawyers, judges and legislators created, witnesses are included. The role of those law enforcement agencies vested with specific power to protect the rights of institutionalized mentally disabled individuals is beyond the scope of this article. See Robert D. Dinerstein, The Absence of Justice, 63 NEB. L. REV. 680 (1984).


52. See MINOW, supra note 12, at 7-11. "Law has failed to resolve the meaning of equality for people defined as different by the society." Id. at 9.


54. Hovencamp, supra note 36, at 624.
perpetuated, and defended racist American institutions. 65 Historically, racist laws enforced segregation in education, accommodations, transportation and social organizations, 66 and enforced two-tiered citizenship in the courts in such areas as testimonial exclusion, 57 jury selection, 58 bar membership, 59 and intermarriage. 60

In the past, supporters of segregationist and racist laws drew regularly on pseudoscientific theories to buttress their arguments. 61 Narrow and distorted stereotypes regularly grounded both the legal arguments and the underlying explanatory theories offered in support of such laws. 62 In all cases, the "istic" behavior, frequently operative on an unconscious level, 63 legitimized the ideology, perpetuating the mythology and rationalizing the oppression. 64

Remnants of the segregated, two-tiered system remain today in such areas as selective criminal prosecution 65 and susceptibility to the death pen-

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55. Id.
63. See Henderson, supra note 45, at 1607 (partially quoting Kluger, supra note 61, at 595), discussing response of Supreme Court Justice Reed to District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953), which held segregation of restaurants in the District of Columbia unlawful. "[Mr. Justice Reed] had difficulty with [the John R. Thompson case] because he did not like the notion that a nigra [sic] can walk into the restaurant at the Mayflower Hotel and sit down... right next to Mrs. Reed."
64. Crenshaw, supra note 35, at 1370-71.
alty, as well as in other aspects of the criminal justice system. While civil rights reforms have eliminated much of the formal and symbolic subordination to which blacks were previously subjected, much of the material subordination remains. Today's on-going debate on affirmative action, race consciousness, and quotas, therefore, makes it impossible for us to ignore race, because the debate underscores the incontrovertible fact that many whites refuse to see blacks as "full members and equal partners in society." George Bush's cynical and vicious manipulation of the Willie Horton image in the 1988 Presidential election, David Duke's strong showing in the 1991 gubernatorial election in Louisiana, and Pat Buchanan's recent comments about the specter of one million immigrant "Zulus" suggest that these stereotypes remain dangerously near the surface today.

3. Other "Isms" in the Legal Setting

Our legal history reveals similar patterns of court decisions, statutes and lawyering practices reflecting sexist, anti-Semitic, anti-Catholic, anti-


Asian, anti-Native American, homophobic, disability based, and ageist attitudes. In each instance, reliance on pseudoscience, culture and stereotypes reifies the ultimate subordination of the group targeted by the “ism.” In some cases, the subordinating practices are aimed at those sub-


79. See generally Gilman, supra note 29; Lawrence, supra note 29, at 374.
ject to multiple stereotypes;\textsuperscript{80} often, classism\textsuperscript{81} further contaminates the pro-
cess.\textsuperscript{82} Although more recent legislation and court decisions have blunted
the symbolic weight of some of these patterns, evidence of material subordi-
nation remains,\textsuperscript{83} and many stereotypes continue to dominate both legal and
political discourse.\textsuperscript{84}

C. THE RESPONSE OF THE LEGAL SYSTEM

1. Introduction

After a time, all components of the legal system respond, however slowly,
to “isms” and stereotypes. Frequently jolted by a cataclysmic, conscience-
shocking event,\textsuperscript{85} and bolstered by both analytic scholarship and moving,
personal stories,\textsuperscript{86} legislation is passed in an effort to ameliorate some of the
most wretched excesses of the underlying behavior.\textsuperscript{87} Courts may then re-


\textsuperscript{81} See infra notes 85-93 and accompanying text.


\textsuperscript{83} See \textit{Perlin}, supra note 1, at 66.

\textsuperscript{84} See David Luban, \textit{Difference Made Legal: The Court and Dr. King}, 87 MICH. L. REV. 2152, 2156 (1989) (considering impact of \textit{Martin Luther King, Why We Can’t Wait}, 77, 79 (1963) (Dr. Martin Luther King’s jail letter)).

respond in activist ways (if they perceive themselves as minoritarian), or in conservative ways (if they view themselves as majoritarian).88 Some lawyers pay no attention to such responses; others change their behavior either directly or indirectly. Direct changes may include articulating codes and standards that prohibit "ismic" behavior,89 while indirect changes may involve adopting more empathic modes of interpersonal connections and attempting to "put themselves in the shoes" of the stereotyped-other.90 The Supreme Court now concedes that private bias may be "outside the reach of the law," but warns that "the law cannot, directly or indirectly, give [such bias] effect."91 These belated responses, however, cannot extinguish the residue of "ismic" behavior on the parts of the various actors in the legal system, including legislators who write statutes, judges who try cases and hear appeals, and lawyers who represent clients. Such actors reflect "dominant, conventional morality"92 and their preexisting social values can "taint their perceptions" during consideration of cases involving "ismic" biases.93

2. Judicial Bias94

Judges most frequently come from the middle and upper classes. They are disproportionately male, white, Protestant, middle-aged and well-educated.95 This more privileged background has been looked upon as one of


91. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that reality of private biases and the potential injury were impermissible considerations when divesting a mother of her child because of the mother's remarriage to a person of another race). The author contends that this ban has been read to include the deinstitutionalization of the homeless in Perlin, supra note 1, at 138-42; see also James Wilson, Reconstructing Section Five of the Fourteenth Amendment to Assist Impoverished Children, 38 CLEV. ST. L. REV. 391, 438 (1990) (courts have a duty to root out unconstitutional prejudices).

92. Wojciech Sadurski, Conventional Morality and Judicial Standards, 73 VA. L. REV. 339, 341 (1987); Perlin, Myths, supra note 9, at 704-06; Perlin, OCS, supra note 9, at 31-36.


the reasons that such judges are more likely to believe police officers than criminal defendants,\(^\text{96}\) are slow to take discrimination claims by a variety of ethnic groups seriously,\(^\text{97}\) and are less likely to show empathy in cases involving sexual minorities.\(^\text{98}\) Similarly judges ignore a range of voices and narratives of subordinated groups,\(^\text{99}\) fail to acknowledge the significance of their own perspective,\(^\text{100}\) and readily accept a model of an economically-efficient, rational man.\(^\text{101}\) Reported cases offer countless examples of racial, sexual and religious bias,\(^\text{102}\) that raise questions concerning "cost to public confidence" if we would be "willing to be honest about the possible racial biases of our judges."\(^\text{103}\)

This is not to say that there are no constraints on "ismic" behavior in the legal system. Some appellate judges have "struck out against the inhumanities of existing law"\(^\text{104}\) in ways that have led to systemic law reform.\(^\text{105}\) Other judges have sensitively dismantled some of the older and more pernicious stereotypes and limited the impact of "ismic" behavior in individual

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98. Henderson, supra note 45, at 1638-50 (discussing Bowers), "[Bowers] bristles with emotion, to be sure, but it is the emotion of hate, not that of empathy." Id. at 1638. See also Katheryn D. Katz, Majoritarian Morality and Parental Rights, 52 Alb. L. Rev. 405, 465 (1988) (Judges "rely on their own views of what is or should be the prevailing morality.").


102. For an exhaustive analysis of race bias, see Judge A. Leon Higginbotham, Racism in American and South African Courts: Similarities and Differences, 65 N.Y.U. L. Rev. 479 (1990); see also In re Stevens, 31 Cal.3d 403, 645 P.2d 99 (1982) (judge used phrases "nigger," "coon," and "jungle bunny"); Peek v. State, 488 So. 2d 52 (Fla. 1986) (judge in capital punishment case called black defendant's family "niggers"). Matter of Pearson, 386 S.E.2d 249 (S.C. 1989) (judge called individual a "nigger lover"). The implications of Peek (and the state Supreme Court's tepid response) are discussed in Radelet & Pierce, supra note 66, at 32.


105. See, e.g., 1 Perlins, supra note 16, § 1.03, at 5-15; Perlins, Institutionalization, supra note 14, at 1249-54 (discussing how civil rights cases led to first judicial reform of mental disability law system).
Scholars are now turning to narrative to highlight prejudice and bias and to analyze experience and culture through individual stories. In short, in many areas of the law where stereotypes and "ismic" behavior have long dominated legal discourse, there is now a substantial counterweight. This counterweight, however, is largely missing in the area of "sanism," and the "pathology of oppression" still dominates legal discourse involving mental disability.

III. SANISM

A. Roots

The roots of sanism are deep. From the beginning of recorded history, mental illness has been inextricably linked to sin, evil, God's punishment, crime, and demons. Evil spirits were commonly relied upon to explain abnormal behavior. The "face of madness... haunts our imagination." People with mental illness were considered beasts; a person who lost his capacity to reason was seen as having lost his claim "to be treated as..."


108. Institutionalized mentally disabled individuals remain largely invisible to the rest of society. They have little or no political leverage, and rarely have powerful political allies or interest groups to take up their cause. See, e.g., Anthony Lewis, Enforcing Our Rights, 50 GEO. WASH. L. REV. 414, 420 (1982); see generally 1 PERLIN, supra note 16, § 1.03, at 7; Michael L. Perlin, Rights of Ex-Patients in the Community: The Next Frontier?, 8 BULL. AM. ACAD. PSYCHIATRY & L. 33, 34 (1980).

On rights as empowerment for both the institutionalized mentally disabled and oppressed racial minorities, see Patricia S. Williams, Alchemical Notes: Restructuring Ideals from Deconstructed Rights, HARV. C.R.-C.L. L. REV. 401, 416 (1987):

"For slaves, sharecroppers, prisoners and mental patients... the experience of poverty and need is fraught with the realization that they are dependent "on the uncertain and fitful protection of a world conscience"... For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one's status from human body to social being..."


a human being."\textsuperscript{112}

Mental illness is a dominant model of pathology. According to Sander Gilman:

\[\text{[T]he most elementally frightening possibility is the loss of control over the self, and loss of control is associated with loss of language and thought perhaps even more than with physical illness. Often associated with violence (including aggressive sexual acts), the mad are perceived as the antitheses to the control and reason that define the self. Again, what is perceived is in large part a projection: for within everyone's fantasy life there exists . . . an incipient madness that we control with more or less success.}\textsuperscript{113}

These profound images allow us to see the mentally ill individual as "the Other." They animate our "keen . . . desire to separate 'us' and 'them' "\textsuperscript{114} they allow us to use the label of "sickness" as reassurance that the "Other," seen as "both ill and infectious, both damaged and damaging,"\textsuperscript{115} is not like us.\textsuperscript{116}

We respond to these images by perpetuating reductionist symbolic stereotypes of mental illness that reify social, cultural, medical, behavioral and political myths. These stereotypes color the way we treat people with mental illness and the way we think about mental illness.\textsuperscript{117} Such stereotypes are encouraged by media distortions\textsuperscript{118} and exacerbated by our reliance on cognitive heuristics and "ordinary common sense" (OCS).\textsuperscript{119}


\textsuperscript{115} Gilman, \textit{supra} note 29, at 130.

\textsuperscript{116} See Perlin, \textit{supra} note 29, manuscript at 91 n.278 (citing sources). On the way that our perceptions of individuals as members of outsider groups affects criminal justice policies, see Jonathan Kelley & Joan Braithwhite, \textit{Public Opinion and the Death Penalty in Australia}, 7 JUS. Q. 529 (1990).


Stereotypes of mental illness are frequently conflated with stereotypes of race, sex and ethnicity. Disorder and the loss of control is associated with outsider groups such as racial and religious minorities. Gilman thus locates the “structural relationship between madness and blackness... in antiquity,” and traces the historical roots of the belief that Jews, like women, “possessed a basic biological predisposition to specific forms of mental illness.”

Sanist, racist and sexist stereotypes remain frequently grounded in similar sorts of eugenic and cultural pseudoscience in ways that reflect broader sets of public attitudes. For example, black students have historically been more readily assigned to special education classes than have white students. In the past, all post-natal women were seen as mentally impaired. Still other studies show that decisions to hospitalize are positively related to behavioral stereotypes of race and sex. These conflations sug-


120. GILMAN, supra note 29, at 24-25.

121. Id. at 142, 148. On the perceived link between mental retardation and miscegenation, see James W. Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 419 n.23 (1985).


125. Debra P. v. Turlington, 730 F.2d 1405, 1414 (11th Cir. 1984).


127. Sarah Rosenfeld, Sex Roles and Societal Reactions to Mental Illness: The Labeling of “Deviant” Behavior, 23 J. HEALTH & SOC. BEHAV. 18 (1982) (in commitment context, both men and women receive more severe societal reaction when their deviation is inconsistent with traditional sex role norms); Sarah Rosenfeld, Race Differences in Involuntary Hospitalization: Psychiatric vs. Labeling Perspectives, 25 J. HEALTH & SOC. BEHAV. 14 (1982) (more coercive conditions under which nonwhites enter treatment accounts for greater involuntary hospitalization rate). On the relationship between institutionalization and women's social and political status, see Hendrick Hartog, Mrs. Packard on Dependency, 1 YALE J.L. & HUMAN. 79, 92 (1988).
gest the power of the underlying stereotypes and force us to reconsider mental disability law developments in their context.

B. PUBLIC ATTITUDES

Society fears, victimizes and brutalizes people with mental illness. Mentally disabled individuals have been subject to "[a] regime of state-mandated segregation and degradation ... that in its virulence and bigotry rivaled, and indeed paralleled, the worst excess of Jim Crow."128 Persons labeled as mentally ill or mentally retarded face pervasive prejudice and discrimination. The stigmatic label of "ex-patient" makes obtaining housing and employment significantly more difficult.129 The public is now convinced, despite an impressive array of evidence to the contrary, that homelessness is largely a problem of mental illness, and that, if mental patients had never been granted their modest amount of civil rights, homelessness would largely disappear as a social phenomenon.130 People with mental disabilities are seen as individuals with an "immutable difference that set them apart from the rest of society, and thus warrant different legal treatment."131

People with mental disabilities have largely been invisible and without political power.132 Hidden for decades in large, remote institutions, their stories have never been incorporated into our social fabric or consciousness.133 While there are now "black seats" in Congress (and a "gay seat" in the New York City council), the idea of an "ex-patient's seat" in any gen-

130. See generally Perlin, supra note 1 (addressing the misconception of homeless suffering from mental illness); Special Issue: Homelessness, 46 AM. PSYCHOL. 1108-1252 (1991) (collection of articles addressing the social problem of homelessness).
131. MINOW, supra note 12, at 107.
132. See Robert A. Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455, 462 (1984) (whether we "are inescapably obliged to regard retarded people as members of their community" is an issue raised by cases such as Younberg v. Romeo, 457 U.S. 307 (1982) and Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981)).
133. There is now a significant body of literature by ex-patients. See, e.g., JUDI CHAMBERLIN, ON OUR OWN: PATIENT-CONTROLLED ALTERNATIVES TO THE MENTAL HEALTH SYSTEM (1978). In addition, there is some modest recognition of the role of ex-patients' groups in law reform litigation and political reform activity. See Neal Milner, The Right to Refuse Treatment: Four Case Studies of Legal Mobilization, 21 LAW & SOC'Y REV. 447 (1987) [hereinafter Milner I]; Neal Milner, The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups, 8 LAW & POL'Y 105 (1986) [hereinafter Milner II]. Yet, it does not appear that these stories have had a major impact on the consciousness of the general public. On the other hand, the recent passage of the Americans With Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West Supp. 1992), may lead to greater public awareness of the "stories" of physically disabled individuals. See, e.g., Birnbaum, No Voice for the Disabled, VILLAGE VOICE, Nov. 5, 1991 (letter to the editor). "The Voice, while standing firm behind most minorities and oppressed groups, seems to ignore the political, social, and civil issues concerning persons with disabilities." Id. at 5.
ally elected public body is beyond comprehension to most of us.\textsuperscript{134} Frequently deprived of the vote\textsuperscript{135} or the right to be parents,\textsuperscript{136} removed from political discourse,\textsuperscript{137} and often invisible to their own attorneys,\textsuperscript{138} people with mental disabilities remain a largely hidden,\textsuperscript{139} fragmented,\textsuperscript{140} and disenfranchised minority. When they are depicted in the news or entertainment media, it is inevitably in a negative or distorted manner.\textsuperscript{141}

This marginalization has served as a Petri dish for sanist social attitudes, which in turn have led to sanist myths, behaviors, and a sanist environment.\textsuperscript{142} As with other stereotypic myths, sanism is the result of rigid cate-


\textsuperscript{135} See 2 PERLIN, supra note 16, § 7.21, at 655 n.514. Over thirty years ago, researchers discovered that mental patients were no more “illogical, inconsistent, or unprepared” to vote than a similar sample of individuals who had never been institutionalized. See Marguerite Hertz et al., \textit{Mental Patients and Civil Rights: A Study of Opinions of Mental Patients on Social and Political Issues}, 2 J. HEALTH & HUM. BEHAV. 251, 258 (1961).

\textsuperscript{136} See generally Hayman, supra note 119, and compare id. at 1221 (no reason to believe that mentally retarded parents are unable to meet the emotional needs of their children).

\textsuperscript{137} See, e.g., Roy P. van den Brink-Budgen, \textit{Liberal Dialogue, Citizenship and Mentally Handicapped Persons}, 34 POLIT. STUD. 374 (1980); McCluskey, supra note 76, at 863. For comprehensive surveys of the history of legislation that has excluded the mentally disabled from the political process, see BRUCE D. SALES ET AL., \textit{MENTAL DISABILITY AND THE LAW} (3d ed. 1985); SAMUEL J. BRAKEL ET AL., \textit{MENTAL DISABILITY AND THE LAW} (3d ed. 1985) [hereinafter BRAKEL].

\textsuperscript{138} See generally Perlin & Sadoff, supra note 16; Perlin, \textit{Fatal Assumptions}, supra note 16; Pinsley, \textit{A Wild Week at Bellevue Murder Trial, MANHATTAN LAWYER, Oct. 31-Nov 6, 1989}, at 1 (criminal defense lawyer did not know if his client had been medicated for a court appearance; “I don’t talk to [the defendant],” the lawyer said. “We got enough psychotics in this courtroom.”).

\textsuperscript{139} Of course, other mentally disabled individuals, the deinstitutionalized homeless mentally ill, are all too visible to many citizens. See Perlin, supra note 1, at 106-08.

\textsuperscript{140} Within the advocacy community, it is well known that certain disabled groups wish to distance themselves from others (i.e., groups advocating for developmentally disabled individuals emphasize that their clients are not mentally ill (thus avoiding the dangerousness stereotype); those advocating for mentally ill persons often focus on their clients’ intellectual capacities and potential (thus separating themselves from mentally retarded individuals)). One of the most troubling moments of my career as a public interest litigator came when I suggested to a representative of an advocacy group seeking to ameliorate conditions of institutionalized autistic children that he seek out a certain state senator to introduce legislation on behalf of his clientele. “Not Senator X,” he quickly replied, “He’s the captive of the retardates! (sic).” Compare Seide v. Prevost, 536 F. Supp. 1121 (S.D.N.Y. 1982) (action by Board of Visitors of children’s psychiatric hospital to enjoin opening of homeless shelter).


\textsuperscript{142} Compare Doe v. Colautti, 592 F.2d 704, 711 (3d Cir. 1979). “Although the mentally
gorization and overgeneralization, created to "localize our anxiety, to prove to ourselves that what we fear does not lie within." Sanist myths are unlike other myths, though, in a critical way; whereas most other myths deal with populations that possess fairly immutable qualities (e.g., race, sex), all of us could become mentally ill. This, as much as any other reason, may account for the level of public virulence experienced in this area.

These are a few of the sanist myths that dominate our social discourse:

1. Mentally ill individuals are "different," and, perhaps, less than human. 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

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144. See Perlin, Myths, supra note 9, at 721-24; see also Bruce J. Winick, Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zinermon v. Burch, 14 INT'L J.L. & PSYCHIATRY 169 (1991), reprinted in ESSAYS IN THERAPEUTIC JURISPRUDENCE 83, 102 (David Wexler & Bruce J. Winick eds., 1991) (hereinafter ESSAYS) ("The difference between "crazy" and normal people is not as great as commonly is supposed."). For a stark example of difference in the way mentally disabled persons are treated, even after death, see, e.g., Joan Gallen, Mental Patients Finally Put to Rest With Dignity, THE NEWS TRIBUNE (Woodbridge, N.J.) Oct. 10, 1991 (nearly 1000 patients buried on New Jersey state hospital grounds in unmarked graves); David Corcoran, Graves Without Names for the Forgotten Mentally Retarded, N.Y. TIMES, Dec. 9, 1991, at B6 (850 residents of New York state school for mentally retarded similarly buried).

145. See generally GILMAN, supra note 29. This description is borrowed, almost verbatim, from Professor Peggy Davis's quotation of Gordon Allport's, see supra note 4, at 196-98, description of black stereotypes, see Davis, supra note 35, at 1561, and from Thomas Ross's characterization of public attitudes toward the poor, see Ross, supra note 39, at 1503, 1507. See also Ross, supra note 39, at 1516: "The Justices of the contemporary Court have resurrected the rhetorical theme of the moral weakness of the poor. They have relied on the initial step of separating the poor from us and labeling them as deviant. And the plea of judicial helplessness has also returned to prominence."

On the way that "positive" images of the mentally retarded (such as amiability) are consistent with stereotypical perceptions of ethnic minorities and women, see Robert F. Williams, Perceptions of Mentally Retarded Persons, 21 EDUC. & TRAINING OF THE MENTALLY RETARDED 13, 18 (1986); cf. McCluskey, supra note 76, at 870 (discussing how seemingly-positive images may express harmful stereotypes in context of disabled children and telethon broadcasts); see also Elizabeth R. OuYang, Women with Disabilities in the Work Force: Outlook for the 1990's, 13 HARV. WOMEN'S L.J. 13, 18 (1990).


147. Stevens v. Dobs, Inc. 483 F.2d 82 (4th Cir. 1973), discussed supra note 62. Compare,
2. Most mentally ill individuals are dangerous and frightening. They are invariably more dangerous than non-mentally ill persons, and such dangerousness is easily and accurately identified by experts. At best, people with mental disabilities are simple and content, like children. Either parens patriae or police power supply a rationale for the institutionalization of all such individuals.

3. Mentally ill individuals are presumptively incompetent to participate in “normal” activities, to make autonomous decisions about their lives (especially in areas involving medical care), and to participate in the political arena.


Inside, Powers was met by the strong warm odor of mental illness. Though there was no way to quantify or determine whether such a smell actually existed, among themselves all Secret Service Agents acknowledged it. Over the years, when investigating persons making threats against the life of the President, Powers had searched hundreds of... rooms... looking for... evidence. Though some places were more pungent than others, each had at least a hint of the scent... best described... as a combination of nervous perspiration and dead human skin: the odor of schizophrenia.

Id. 148. Steven Schwartz, Damage Actions as a Strategy for Enhancing the Quality of Care of Persons With Mental Disabilities, 17 N.Y.U. REV. L. & SOC. CHANGE 651, 681 (1989-90). On the artificiality of the distinction between mentally ill and medically ill individuals, see Winick, in ESSAYS, supra note 144, at 102 (criticizing Zinermon v. Burch, 494 U.S. 113, 133 n.18 (1990)).

149. See Stephen Rachlin, The Limits of Parens Patriae, in FOR THEIR OWN GOOD? ESSAYS ON COERCIVE KINDNESS 1, 5 (Aaron Rosenblatt ed., 1988); Eric Doherty, Misconceptions About Mentally Ill Patients, 146 AM. J. PSYCHIATRY 131 (1989) (letter to editor) (discussing the perception of dangerousness of persons with mental disabilities); Hayman, supra note 119, at 1220 (research shows no correlation between mental retardation and violence); Matter of M.M.B., 431 N.E.2d 329 (1988) (text available on WESTLAW) (“It is difficult to separate evidence of mental illness from evidence of dangerousness, because all persons have their own concepts of the effects of mental illness.”). Compare Hayman, supra note 118, at 1220 (research shows no correlation between mental retardation and violence); Perlin, Myths, supra note 9, at 693-96; Linda Teplin, The Criminality of the Mentally Ill: A Dangerous Misconception, 142 AM. J. PSYCHIATRY 593, 597-98 (1982) (“The stereotype of the mentally ill as dangerous is not substantiated by our data.”).


151. Early insanity tests established a mental age of seven years as the baseline for criminal responsibility. See 6 & 7 Edw. II 109 (Selden Society 1313-14); see also Jane E. Ainsworth, Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing Juvenile Court, 69 N.C. L. REV. 1083, 1098 n.94 (1991) (a child, like an insane person, cannot commit a crime). Compare, David C. Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy, 38 EMORY L.J. 1005, 1034-35 (1989) (children as young as 15 may be competent to decide whether or not to seek commitment to mental hospitals) (discussing studies reported in Lois A. Weithorn & Susan B. Campbell, Treatment Decisions, 53 CHILD DEV.EL. 1589, 1596 (1982).

152. See generally 1 PERLIN, supra note 16, Chapter 2 (discussing commitment theories).

153. As a matter of law, incompetency cannot be presumed as a result of either mental illness or institutionalization. In re Labelle, 728 P.2d 138, 146 (1986). Furthermore, there is “no necessary relationship between mental illness and incompetency which renders [mentally
4. If a person in treatment for mental illness declines to take prescribed antipsychotic medication, that decision is an excellent predictor of (1) future dangerousness and (2) need for involuntary institutionalization.154

5. Mental illness can easily be identified by lay persons and matches up closely to popular media depictions. It comports with our common sense notion of crazy behavior.155

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.156

7. Mentally ill individuals should be segregated in large, distant institutions because their presence threatens the economic and social stability of residential communities.157
8. The mentally disabled person charged with crime is presumptively the most dangerous potential offender, as well as the most morally repugnant one. The insanity defense is used frequently and improperly as a way for such individuals to beat the rap; insanity tests are so lenient that virtually any mentally ill offender gets a free ticket through which to evade criminal and personal responsibility. The insanity defense should be considered only when the mentally ill person demonstrates objective evidence of mental illness.

9. Mentally disabled individuals simply don’t try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint.

10. If do-gooder, activist attorneys had not meddled in the lives of people with mental disabilities, such individuals would be where they belong (in institutions), and all of us would be better off. In fact, there’s no reason
for courts to involve themselves in all mental disability cases.\textsuperscript{164}

While I have described these attitudes as public attitudes, it is clear that they pervade all components of the legal system as well. Judges "are embedded in the cultural presuppositions that engulf us all."\textsuperscript{165} Their discomfort with social science,\textsuperscript{166} or with any other system that may appear to challenge law's hegemony over society, makes them skeptical of new thinking and allows them to take deeper refuge in heuristic thinking and flawed, non-reflective "ordinary common sense," both of which reflect the myths and stereotypes of sanism.\textsuperscript{167} Legislators respond, and, according to some, pander to constituent outcry.\textsuperscript{168} Lawyers and jurors clearly are the public, and their views are often identical with those expressed in the myths.\textsuperscript{169} Neither expert witness nor mental health professionals are immune from the myths' powers and sway.\textsuperscript{170}

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Most astonishingly, even when we are informed that our views are biased and based upon myths, we simply demur, and say, in effect, “It doesn’t matter. This is still the way I feel.”

C. THE SANIST LEGAL SYSTEM

1. Sanist Legislators

Legislators have traditionally responded to socially-expressed fears by enacting laws that focus on the perceived differentness of people with mental disabilities in almost all aspects of social intercourse. In the community, mentally disabled individuals have been treated differently in matters of political participation, interpersonal relationships, economic freedom, and other civil rights. In the institutionalization process, mentally disabled individuals were regularly denied counsel, hearings, and the full panoply of due process rights that accompany other processes through which liberty could be lost, and were subject to commitment on a variety of paternalistic bases.

Historically, once mentally disabled individuals were institutionalized, they were regularly deprived of virtually all civil rights, most notably their right to autonomy in medication decisionmaking. In the criminal justice system, the mentally disabled were doubly cursed as “mad” and “bad”, and were regularly consigned to lifetime commitments in maxi-


Beyond the scope of this paper is an important collateral inquiry: the way that these individual clinician biases may mirror sanist biases (recast in language of “benevolent paternalism”) in the public positions of such professional groups as the American Psychiatric Association or the American Psychological Association. See Douglas Mossman & Michael L. Perlin, Psychiatry and the Homeless Mental Ill: A Reply to Dr. Lamb, 149 AM. J. PSYCHIATRY 951 (1992).

171. See Perlin, Myths, supra note 9, at 640-46.

172. For example, mentally disabled persons were often precluded from voting, serving on juries, or running for office. See 2 PERLIN, supra note 7, § 7.21, at 655; SALES, supra note 137, at 99-112; John Parry, Decision Making Rights Over Persons and Property, in BRAKEL, supra note 136, at 435-47.


174. Laws limited mentally disabled persons’ capacity to contract or bequeath money. See SALES, supra note 137, at 54-61; Parry, supra note 172, at 438-41.

175. Laws limited mentally disabled persons’ access to housing, automobile licensure and welfare entitlements. See SALES, supra note 137, at 113-29; Parry, supra note 172, at 441-44; 2 PERLIN, supra note 16, § 7.21, at 654-57.


177. 2 PERLIN, supra note 16, §§ 4.02-.04, at 3-19.

178. Id.

Proprietary and procedural standards for the insanity defense are needed and social disabled persons in a wide variety of employment, educational, civic, medical, and educational settings.

Disabled persons in a wide variety of employment, educational, civic, medi-
cs with Disabilities Act still acted Patients' Bills of Rights to provide some level of civil rights to those institutionalized.

Indiana, and more recently, the Americans with Disabilities Act (ADA) forbade discrimination against mentally disabled persons in a wide variety of employment, educational, civic, medical and social settings.

Yet, sanism still pervades the legislative process. Debates on charged issues such as former mental patient's right to purchase a firearm, or the appropriate substantive and procedural standards for the insanity defense are still saxist texts; all the myths referred to earlier are repeated, reified and re-legitimated.

Soon after states revised their civil commitment laws to include new "reform" laws, once again widening the scope of this paper is a consideration of federal government entitlement and benefit statutes.

Beyond the scope of this paper is a consideration of federal government entitlement and benefit statutes. See generally Leonard Rubenstein et al., Protecting the Entitlement of the Mentally Disabled: The SSDE/SSI Legal Battles of the 1980's, 11 INT'L J. L. & PSYCHIATRY 269 (1988).


See Perlin, supra note 29, manuscript at 8-19; supra notes 1 & 153.


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185. 1 PERLIN, supra note 16, § 2.16, at 130-38.
189. 42 U.S.C. §§ 12101-12213 (Supp. II 1990). See generally 2 PERLIN, supra note 16, § 6.44A, at 77-81 (Supp. 1991); Nancy Lee Jones, Overview and Essential Requirements of the Americans With Disabilities Act, 64 TEMP. L. REV. 471 (1991); Cook, supra note 123. Many key sections of the ADA have just gone into effect. It will be necessary to consider carefully the response of the courts, the legislature, and, most importantly, the general public so as to determine whether the Act will significantly ameliorate sanist attitudes. On the social effect of the legal suppression of discrimination, see Johnson, supra note 35, at 1650 (discussed supra note 53 and accompanying text).
190. See Perlin, supra note 29, manuscript at 8-19; supra notes 1 & 153.
commitment net, were passed.\(^{192}\) When expert witnesses openly subverted stricter laws in light of their own self-referential concepts of morality,\(^{193}\) the legislatures remained largely silent.

In the months after John Hinckley's insanity acquittal, Congress returned the federal insanity defense to a more restrictive version of the \textit{M'Naghten} right-and-wrong test, one that was seen as outdated at the time of its original promulgation in 1843.\(^{194}\) At the same time, states endorsed the guilty but mentally ill verdict, despite nearly unanimous criticism that the defense was little more than a meretricious sham.\(^{195}\)

Reports of the substandard level of counsel available to patients facing institutionalization were met with thundering silence.\(^{196}\) When patients were deinstitutionalized without access to community mental health services, legislators failed to rewrite funding statutes to ensure such patients had access to such services.\(^{197}\) Even the ADA contains certain limitations specifically excluding individuals with certain psychological or physiological conditions from coverage.\(^{198}\)

In short, just as Kimberlé Crenshaw found in her study of laws and stereotypes affecting racial attitudes and behaviors,\(^{199}\) while much of the formal and symbolic subordination to which mentally disabled individuals have been subjected has been eliminated, the material subordination largely remains. The legislature serves as a mirror for the public, and, in doing so, perpetuates myth and stereotypes.

2. Sanist Courts

As I have previously argued, judges reflect and project the conventional morality of the community. Like the rest of society, judges take refuge in


194. Perlin, \textit{Myths}, \textit{supra} note 9, at 637-39; \textit{id.} at 638 n.173 (citing sources).


199. \textit{See} Crenshaw, \textit{supra} note 35, at 1370-77, \textit{discussed supra} at notes 64 \& 68 and accompanying text.
flawed "ordinary common sense," heuristic reasoning and biased stereotypes to justify their sanist decisions. While Justice Holmes' infamous and florid language in *Buck v. Bell* is rarely repeated, judicial decisions in all areas of mental disability law continue to reflect and perpetuate sanist stereotypes. The myths are cherished by trial judges, appellate judges, Supreme Court justices, and, especially, by the Chief Justice of the United States.

Individuals labelled incompetent for one purpose are presumed incompetent for all other purposes, and many judges question whether it is even possible to distinguish between different kinds of incompetencies. If a person subject to civil commitment refuses to take medication, a constitutional right in most jurisdictions, that refusal is often seen as a presumptive indicator of dangerous behavior and the need for institutionalization. Adherence to involuntary civil commitment statutory criteria is subverted by fears that strict construction of those laws will lead inexorably to homeless-


202. *But see supra* note 3 and accompanying text (discussing Robertson, *supra* note 3 and sitting trial judge's endorsement of Holmes' *dictum*).

203. None is perhaps as chilling as the following story: Sometime after the trial court's decision in *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) (granting involuntarily committed mental patients a limited right to refuse medication), I had occasion to speak to a state court trial judge about the *Rennie* case. He asked me, "Michael, do you know what I would have done had you brought *Rennie* before me?" (the *Rennie* case was litigated by counsel in the N.J. Division of Mental Health Advocacy; I was director of the Division at that time). I replied, "No," and he then answered, "I'd've taken the son-of-a-bitch behind the courthouse and had him shot."


205. See, e.g., United States v. Charters, 863 F.2d 302, 310 (4th Cir. 1988) (en banc), cert. denied, 494 U.S. 1016 (1990); Thomas Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* 273 (1986); Perlin, *supra* note 88, at 987-88; David Wexler, *Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian Commitment Codes*, reprinted in *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* 165, 170 (David Wexler ed., 1990) [hereinafter *Therapeutic Jurisprudence*] (discussing courts' historically improper equation of serious mental illness with "incompetence, grave disability and committability"); Winick, *supra* note 153. It was my experience as a trial lawyer that, once a question was raised as to a witness's or litigant's competency in any area, her veracity was inevitably placed in question.

ness. The minimalist "substantial professional judgment" test is endorsed in a wide variety of institutional cases so that only the most arbitrary and baseless decisionmaking can be successfully challenged. Even when court decisions reject sanist myths and stereotypes, the enforcement of such decisions is frequently only sporadic.

Criminal trial process caselaw is riddled with sanist stereotypes and myths. Examples include the following:

- 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 imparied," or defendants who have been found guilty but mentally ill (GBMI);

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211. Other decisions are pretextual and based on phantasmic reasoning. In a recent case, turning on whether a defendant had the requisite specific intent to attempt to rob a bank, the trial court refused to allow the county jail psychiatrist to testify that he had been prescribing antipsychotic medication for the defendant for a specific time period, reasoning that such testimony might "be interfering with the treatment of [other] prisoners in jails because [other] prisoners might ask for more drugs to create the impression that they need more drugs." United States v. Still, 856 F.2d 671, 672 (9th Cir. 1988). Nothing in the case suggests that there was ever any evidence that spoke remotely to this issue; nonetheless, the Ninth Circuit affirmed as "not manifestly erroneous." Id. See Perlin, supra note 166, at 135 (discussing Still as an example of judicial pretextuality).
212. See Wainwright v. Greenfield, 474 U.S. 284, 297 (1986) (Rehnquist, J., concurring); State v. Clayton, 656 S.W.2d 344, 350-51 (Tenn. 1983); Perlin, OCS, supra note 9, at 66-67. Similar standardized views of "craziness" are employed in civil cases. See St. Louis S.W. Ry. Co. v. Pennington, 553 S.W.2d 436, 448 (Ark. 1977) (recovery for mental anguish of adult survivors of wrongful death victims allowed where survivors demonstrated that they suffered "more than the normal grief").
• the incessant confusion and conflation of substantive mental status
tests;\textsuperscript{216}
• the determination that an insanity acquittee’s need for medication ren-
ders him not “fully recovered” so as to be eligible for outpatient care or
conditional release;\textsuperscript{217}
• the appropriateness of continuing an insanity acquittee’s mental hospi-
tal confinement when he is no longer mentally ill but remains dangerous to
others;\textsuperscript{218}
• the use of language such as “lunatic” in recent published opinions;\textsuperscript{219}
• the refusal in insanity cases to provide jury instructions that NGRI
defendants face long-term post-acquittal commitment;\textsuperscript{220} and
• the characterization of the allocation of treatment resources for GBMI
defendants as “not . . . helpful” or a “waste.”\textsuperscript{221}

Perhaps just as troubling is judicial ignorance about laws that affect men-
tally disabled persons. A Louisiana commitment order was reversed where a
trial court judge was unaware that state mental health advocacy services
were available to provide representation to indigent individuals facing invol-
untary civil commitment.\textsuperscript{222} A Texas study revealed that a significant
number of judges did not know of a state statutory patient-psychotherapist
privilege.\textsuperscript{223} Other courts with little public attention, have regularly entered
commitment orders without any precedent statutory authority.\textsuperscript{224}

To be sure, not all judges write in this voice. Some nonsanist opinions
such as Judge Johnson’s \textit{Wyatt v. Stickney}\textsuperscript{225} decision are firmly rooted in a
rights and empowerment model.\textsuperscript{226} Others like Justice Blackmun’s dissent in

individuals’ lessened capacity for moral development prohibit their execution, see \textit{Penry}, 492 U.S. at 345 (Brennan, J., concurring in part and dissenting in part).
\textsuperscript{216} See Buttrum v. Black, 721 F. Supp. 1268, 1295 (N.D. Ga. 1989), aff’d, 908 F.2d 695
(11th Cir. 1990). \textit{See generally RONALD ROESCH & STEPHEN GOLING, COMPETENCY TO
STAND TRIAL 15-17 (1980).}
\textsuperscript{217} People v. De Anda, 170 Cal. Rptr. 830, 832-33 (1980), discussed in David Wexler,
\textit{Inappropriate Patient Confinement and Appropriate State Advocacy, LAW & CONTEM. PROBS.
193 (Spring 1982), reprinted in THERAPEUTIC JURISPRUDENCE, supra note 205, at 347, 350-
51.}
\textsuperscript{218} State v. Foucha, 563 So. 2d 1138, 1141 (La. 1990), rev’d, 112 S. Ct. 1780 (1992) (Loui-
siana statute sanctioning such continued confinement unconstitutional). \textit{Compare id. at 1800
(Thomas J., dissenting) (arguing on behalf of statute’s constitutionality).}
\textsuperscript{219} Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987) (quoting Shuler v. Wain-
wright, 491 F.2d 1213, 1223 (5th Cir. 1974)).
\textsuperscript{220} State v. Neely, 819 F.2d 249, 256 (N.M. 1991).
\textsuperscript{221} Robinson v. Solem, 432 N.W.2d 246, 249 (S.D. 1988).
\textsuperscript{222} In re C.P.K., 516 So. 2d 1323, 1325 (La. Ct. App. 1987).
\textsuperscript{223} Daniel W. Shuman & Myron S. Weiner, \textit{The Privilege Study: An Empirical Examina-
tion of the Psychotherapist-Patient Privilege, 60 N.C. L. REV. 893 (1982), reprinted in THERA-
PEUTIC JURISPRUDENCE, supra note 205, at 75, 103.}
\textsuperscript{224} Wexler, supra note 217, reprinted in THERAPEUTIC JURISPRUDENCE, supra note 205,
at 348.
\textsuperscript{226} \textit{See Minow, supra note 12, at 131-45; see also Johnson, supra note 108, at 356-58.
Harper,\textsuperscript{228} and the New Jersey Supreme Court's opinion in State v. Krol\textsuperscript{229} specifically rebut sanist myths. Still, others, such as Justice Stevens' dissent in \textit{Pennhurst II},\textsuperscript{230} Justice Stevens' and Marshall's separate opinions in \textit{Cleburne},\textsuperscript{231} and Judge Kaufman's use of a "Gulag archipelago" metaphor in a Second Circuit case involving a mentally disabled prisoner,\textsuperscript{232} express eloquent outrage at institutional conditions flowing inevitably from our sanist society. Yet others, such as Justice Stevens' dissent in \textit{Pennhurst}, \textit{\textsuperscript{230}} Justice Stevens' and Marshall's separate opinions in \textit{Cleburne},\textsuperscript{231} and Judge Kaufman's use of a "Gulag archipelago" metaphor in a Second Circuit case involving a mentally disabled prisoner,\textsuperscript{232} express eloquent outrage at institutional conditions flowing inevitably from our sanist society. Yet others, such as Judge Brotman's class action opinion in \textit{Rennie v. Klein},\textsuperscript{233} express true empathy and understanding about the plight of institutionalized mentally disabled persons. A handful of judges, of whom David Bazelon is the finest example, have spent their careers rooting out sanist myths and stereotypes, and raising the legal system's consciousness about sanism's impact on all of society.\textsuperscript{234} Judges in less known cases have also shown real sensitivity to the underlying issues.\textsuperscript{235}

These examples, however, are clearly the minority. Sanism regularly and relentlessly infects the courts in the same ways that it infects the public discourse.

3. Sanist Lawyers

Surveying the role of counsel in cases involving mentally disabled individuals a decade ago, Dr. Robert L. Sadoff and I observed:

Traditionally, sporadically-appointed counsel . . . were unwilling to pursue necessary investigations, lacked . . . expertise in mental health problems, and suffered from "rolelessness," stemming from near total capitulation to experts, hazily defined concepts of success/failure, inability to generate professional or personal interest in the patient's dilemma, and lack of a clear definition of the proper advocacy function. As a result, counsel . . . functioned "as no more than a clerk, ratifying the events that transpired, rather than influencing them.\textsuperscript{236}

Commitment hearings were meaningless rituals, serving only to provide a false coating of respectability to illegitimate proceedings.\textsuperscript{237} In one famous survey, representation by attorneys was so bad that a patient had a better

\begin{footnotes}
\footnotetext[228]{494 U.S. 210, 236 (1990).}
\footnotetext[229]{494 U.S. 210, 236 (1990).}
\footnotetext[230]{344 A.2d 289 (N.J. 1975).}
\footnotetext[232]{City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 452 (1985) (Stevens, J., concurring); \textit{id.} at 455 (Marshall, J., concurring in part and dissenting in part).}
\footnotetext[233]{United States \textit{ex rel.} Schuster v. Vincent, 524 F.2d 153, 154 (2d Cir. 1975).}
\footnotetext[234]{476 F. Supp. 1294 (D.N.J. 1979). "Medicine has not yet found a cure for the terrible pain of mental illness. The law cannot assist in this endeavor. But the Constitution can and does prevent those who have suffered so much at the hands of nature from being subjected to further suffering at the hands of man." \textit{Id.} at 1309.}
\footnotetext[235]{See Wald, \textit{supra} note 104, at 627 (Bazelon one of the "greatest appellate judges"); Heathcote W. Wales, \textit{The Rise, the Fall, and the Resurrection of the Medical Model}, 63 GEO. L.J. 87 (1974). Judge Bazelon "invited the world of mental health professions and criminologists into his courtroom" to extend "his courtroom back into the world." \textit{Id.} at 104. See \textit{generally} Bazelon, \textit{supra} note 11; David Bazelon, \textit{Veils, Values and Social Responsibility}, 37 AM. PSYCHOL. 115 (Feb. 1982).}
\footnotetext[236]{See e.g., S.H. v. Edwards, 860 F.2d 1045, 1053 (11th Cir.) (Clark, J., dissenting), cert. \textit{denied}, 491 U.S. 905 (1989), \textit{vacated}, 880 F.2d 1203 (11th Cir. 1989).}
\footnotetext[237]{Hiday, \textit{supra} note 16, at 164 (footnotes omitted).}
\end{footnotes}
chance to be released at a commitment hearing if he appeared pro se.\textsuperscript{238} Merely educating lawyers about psychiatric techniques and psychological nomenclature did not materially improve lawyers' performances because attitudes did not change.\textsuperscript{239} Counsel was especially substandard in cases involving mentally disabled criminal defendants.\textsuperscript{240}

In the past ten years, the myth has developed that organized, specialized and aggressive counsel is now available to mentally disabled individuals in commitment, institutionalization and release matters. The availability of such counsel is largely illusory, and in many jurisdictions, the level of representation remains almost uniformly substandard.\textsuperscript{241} This representation of mentally disabled individuals falls far short of even the most minimal model of "client-centered counseling."\textsuperscript{242} What is worse, few courts seem even to notice.\textsuperscript{243}

Counsel's failure here is inevitable, given the bar's abject disregard of both consumer groups (made up predominately of former recipients, voluntary and involuntary, of mental disability services) and mentally disabled individuals, many of whom have written carefully, thoughtfully and sensitively about these issues.\textsuperscript{244} This inadequacy further reflects sanist practices on the parts of the lawyers representing mentally disabled individuals, as well as the political entities vested with the authority to hire such counsel. Although a handful of articulate scholars are beginning to take this issue seriously,\textsuperscript{245}


\textsuperscript{240} See David Bazelon, Questioning Authority: Justice and Criminal Law 49 (1988); Perlin, \textit{Myths}, supra note 9, at 654. A survey conducted by Harvard Medical School revealed that the "great majority" of defense counsel interviewed were unaware of the operative competency to stand trial criteria. 3 Perlin, \textit{supra} note 16, § 14.10, at 239 (citing study). For a particularly shocking example of poor counsel in a death penalty case involving a mentally disabled criminal defendant, see Alvord v. Wainwright, 469 U.S. 956 (1984) (Marshall, J., dissenting from denial of grant of certiorari).


\textsuperscript{244} On the involvement of consumer groups in important patients' rights litigation, see 1 Perlin, \textit{supra} note 16, § 1.03, at 8 n.34; Milner I, \textit{supra} note 133; Milner II, \textit{supra} note 133. \textit{See generally Challenging the Therapeutic State: Critical Perspectives on Psychiatry and the Mental Health System}, 11 J. MIND & BEHAV. 1 (1990) (symposium issue).

\textsuperscript{245} See, e.g., Stanley S. Herr, \textit{Representation of Clients With Disabilities: Issues of Ethics
the questions raised here do not appear to be a priority agenda item for litigators or for most academics writing in this area.246

4. Sanist Scholars

The legal academy is not immune from sanist criticisms. While scholars writing from a wide variety of perspectives have begun to look at stories and personal narratives told by women, racial and sexual minorities and other disenfranchised individuals, the stories of mentally disabled individuals rarely are told in the pages of law reviews.247 Traditional constitutional law courses rarely include the study of cases involving constitutional rights of mentally disabled individuals.248

Articles discussing the “continuing revolution in . . . the structure of the curriculum” at American law schools do not even mention mental disability law.249 Tenure-track professors know that articles about mental disability law topics do not augur a fast path to tenure. Most law reviews are mildly interested in, but far from eager to solicit and publish, mental disability law scholarship.250 In short, the study and teaching of mental disability law are marginalized in the same way that mentally disabled individuals are marginalized. The news here is not that the academy is sanist (for why should professors be immune from the pernicious impact of bias and stereotypes), but that, with some major and important exceptions,251 very little attention is being paid to mental disability law.

IV. SOME CONCLUDING RECOMMENDATIONS

First, the underlying issues must be discussed openly. Jan Costello’s wonderful story about her exasperation at coming under attack at cocktail par-
ties when other guests find out that, in her pre-professorial life, she was a patients' rights litigator should serve as a prod to all of us to bear witness to sanist acts by colleagues, other professionals, the legal system, and the public at large. Her story and others like it should cause us to speak up — at the faculty lunch table, on the train, at the bait and tackle shop — wherever and whenever sanist stereotypes are employed. Second, a new scholarship agenda that critically examines the questions in this paper must be developed. In it, we should explore the potential application of Martha Minow's social relations approach to a wide variety of sanist issues as well as the application of therapeutic jurisprudence constructs to these questions. Third, we must listen to the voices of the institutionalized and others who have been involuntary consumers of mental health services, and their stories must be integrated into our consciousness. We must include them in this dialogue that directly affects their lives. We should consider the perspective of families of the mentally disabled and carefully weigh what role they should have in our attempting to create this new dialogue.

Fourth, we must find ways to attitudinally educate counsel for people with mental disabilities so that representation becomes more than the hollow shell that it now all too frequently is. We must restructure the provision of counsel to insure that mentally disabled individuals are no longer represented by, in Judge Bazelon's famous phrase, "walking violations of the Sixth Amendment." Finally we must educate judges, legislators and other policy makers about the roots of sanism, the malignancy of stereotypes and the need to emphatically consider alternative perspectives.

This prescriptive list is brief, but it is a necessary first step if we are to make any headway in fighting the "pathology of oppression" faced by all individuals seen as mentally disabled.

252. The general implications of Costello's story are discussed in Perlin, supra note 163, and in Perlin, supra note 1, at 126 n.377.

253. For an excellent example, see Stigma Task Force, supra note 15.

254. See supra note 251.

255. Groups such as the Coalition for Fundamental Rights and Equality of Ex-patients and the National Mental Health Consumers' Association have regularly been filing amicus briefs in the United States Supreme Court for nearly a decade. See NAPS Members Active at Alternatives '91, NAPS News (Fall 1991), at 1.


259. Birnbaum, supra note 5, at 107.