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# Therapeutic Jurisprudence: The "Sanist" Factor - An Interdisciplinary Approach

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## THERAPEUTIC JURISPRUDENCE: THE “SANIST” FACTOR – AN INTERDISCIPLINARY APPROACH

### INTRODUCTION

In a post-modern collaborative inquiry, Professor Michael L. Perlin and Professor Pamela Champine expose and assess the pervasive impact of the “sanist” factor – an unconscious thought pattern – on legal procedure and determinations in their respective disciplines, Mental Disability Law and the Law of Wills.<sup>1</sup>

#### I. THINGS HAVE CHANGED

In “*Things Have Changed*”: *Looking at Non-Institutional Mental Disability Law Through the Sanist Filter*, Professor Perlin explores Mental Disability Law as it interfaces with, and is compromised by, the manifest and latent forms of the sanist dynamic. He defines sanism as “an irrational prejudice of the same quality as other irrational prejudices that cause and are reflected in prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry.”<sup>2</sup> He is primarily concerned with how predominantly unconscious socially-enforced attitudes toward the “mentally disabled” frequently infect a broad range of Mental Disability jurisprudence.<sup>3</sup> Operating through social-psychological process – cultural myth, belief systems, and cognitive and heuristic distortion – sanism informs individual and public opinion, expectation and decision-making.<sup>4</sup> In effect, sanist thought – an outcome of interpersonal learning experience (e.g., family, community, media contexts) and the brain’s perceptual propensity to misconstrue information (e.g., over-

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1. Michael L. Perlin, “*Things Have Changed*”: *Looking at Non-Institutional Mental Disability Law Through the Sanist Filter*, 46 N.Y.L. SCH. L. REV. 535 (2003); Pamela Champine, *The Sanist Will*, 46 N.Y.L. SCH. L. REV. 547 (2003).

2. See Perlin, *supra* note 1, at n.2; see also MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL*, at xviii-xix (2000).

3. See Michael Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990); see also PERLIN, *supra* note 2, at 3 (describing “something happens in mental disability law that distorts the litigation, the fact-finding, and the appellate process. This “something negatively affects all participants:”).

4. See Perlin, *supra* note 1, at n.4; see also PERLIN, *supra* note 2, at 16 (describing heuristic fallacies and reliance on “ordinary common sense” (OCS)).

generalization, selective attention, closure) – influences significant (real-world) strategy and action.

Everyday sanism is witnessed in the tendency of human beings to act upon and create self-fulfilling predictions about others. In so doing, biased preconceptions about “the other” (individuals or groups) dictate what people see and how they react. This is a closed-loop that precludes nonconforming and inconsistent information; a reality check and an opportunity for novel or unexpected outcomes. Sanist expectations, such as culturally accepted notions of what it means to be “crazy” and/or “incompetent,” can infiltrate and corrupt the goals of Mental Disability Law as well as other legal spheres.<sup>5</sup>

From this pivotal position, Perlin perceives judicial and legislative organization as impermissibly limited by pretextual and sanist constructions as they act through hierarchical and power-attributions embedded in dominant cultural pattern and structure.<sup>6</sup>

He points out that unconscious prejudice thrives in a wide range of social settings, notwithstanding elitist or professional groups charged with significant decision-making responsibility, e.g., lawyers, judges and legislators. Perlin challenges Mental Disability Law at civil, criminal and legislative levels by asking for a heightened objectivity rooted to the enlightened parameters of legal principle and promise.

#### A. *Expanding the Legal Scope: A New Paradigm*

Perlin’s assessment of Mental Disability Law criticizes a relatively restrictive paradigm, one narrowly aimed at institutionalized populations. Seeking to break through this myopic legal confinement, he addresses meaningful areas of non-Constitutional, non-institutionally based civil law. For example, he wants to apply the sanist and pretextual critique to a legally broadened arena, one that can encompass the everyday world of civil affairs and negotiation – the Law of Contracts, Property, Domestic Relations, and Wills and Trusts.<sup>7</sup> As a result, Perlin calls for a heightened scrutiny that would protect the rights of mentally disabled persons in contexts outside the traditional Constitutional and institutional scope.

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5. See Michael L. Perlin, *On Sanism*, 46 SMU L. REV. 373 (1992).

6. See Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEG. ISS. 59-79 (1999).

7. See Perlin, *supra* note 1, at nn. 18-23, see also 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL ch. 7A-7C (2d ed. 1998).

With this information-generating leap – the difference that makes a difference – a new paradigm can begin to take shape. This more integrative and porous consideration views Mental Disability Law as intra-active, e.g., interfacing with other disciplines and sources of investigation. For Perlin, an interdisciplinary common ground is a way to explore and challenge diverse social classifications and discriminatory impact.<sup>8</sup> By incorporating a “collective wisdom” – law, psychology, sociology and other disciplines – a multi-focused inquiry can aim to support needed change in legal procedure and intervention. In this way, protection is broadened to include vulnerable and select populations, such as the mentally disabled, the economically disadvantaged, and the individuals stigmatized through racial, ethnic, age, and/or other culturally-relevant identifications and memberships. In effect, a broadened weltanschauung does justice to the socio-legal fabric and the rules, rituals and principles of reciprocity that organize it.<sup>9</sup>

### B. *Therapeutic Jurisprudence*

Perlin concludes his paper with a nod toward the doctrine of therapeutic jurisprudence: a psycho-social-legal framework that demands an enhanced role for legal intervention – one that acts as a change-oriented therapeutic agent.<sup>10</sup> Significantly, he perceives that all legal endeavor have a therapeutic jurisprudence, or change-oriented poten-

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8. See generally Perlin, *supra* note 1, at nn. 54-56; see also DAVID WEXLER & BRUCE WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991) (defining therapeutic jurisprudence as the concept reflecting the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or anti-therapeutic consequence); DAVID WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* 3 (1990) (stating that “modern mental health law has not profited from a truly interdisciplinary cooperation and interchange. . .from having the knowledge, theories, and insights of the mental health disciplines help ‘shape’ the law”); David Wexler, *Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian Commitment Codes*, *INT’L J. L. & PSYCHIATRY* 9 (1986) (applying family systems and psychological research in an overview of civil libertarian commitment codes and believing they have greater therapeutic potential than paternalistic laws).

9. JULIE MAGNO ZITO, JOZSEF BITRAI & THOMAS J. CRAIG, *Toward a Therapeutic Jurisprudence Analysis of Medication Refusal in the Court Review Model*, *ESSAYS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 8, at 935 (describing therapeutic jurisprudence as a concept intended to analyze the results of legal-social interface: “[t]herapeutic jurisprudence. . .a dialogue that respects the organizing principles, training, and technical language of many disciplines”); CLAUDE LEVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* (1967) (exploring the principles of reciprocity. . .always at work).

10. See Keri Gould & Michael L. Perlin, “Johnny’s in the Basement/Mixing Up His Medicine”: *Therapeutic Jurisprudence and Clinical Teaching*, 24 *SEATTLE U. L. REV.* 337, 366-

tial. This is where judicial decision-making and legislative enactment foster social justice and appropriate protection – for example, where legal intervention supports out-patient treatment programs, as well as health, housing, and employment opportunities. Perlin’s intellectual and moral call for a vital therapeutic orientation cuts through the vast terrain of legal commitment and ideal and bridges well with Professor Champine’s illuminating observations.

## II. THE SANIST WILL

Professor Champine’s inquiry outlines the challenges that lay ahead in the Law of Wills. Her concerns strongly unite with those presented by Professor Perlin. Accordingly, she documents pretextual and sanist bias as it takes form in the interpersonal complexities that frequently surround issues of testamentary capacity and probate process.<sup>11</sup>

### A. A Digression: *The Culture of Wills*

In Dickens’ *Bleak House*, pretextual determinants inhabit the world of testamentary litigation:

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it, innumerable people have died out of it; Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why. . .but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.<sup>12</sup>

Testamentary conflict frequently reflects latent pretextual and sanist proclivity. A review of cases reveals the effect of unconscious bias

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71 (discussing therapeutic jurisprudence, referring to DAVID WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990)).

11. See *infra* text notes at 4-5 (CHAMPINE, describing sanist and pretextual issues in the law of testamentary capacity).

12. CHARLES DICKENS, *BLEAK HOUSE* 4 (Bantam Books 1983) (1853).

on issues, opinions and dispositions. For example, in *In re Strittmater* (1947),<sup>13</sup> one medical witness diagnosed the never-married decedent, Louisa Strittmater, as “paranoid” and the lower Court found that the proof demonstrated “incontrovertibly her morbid aversion to men and feminism to a neurotic extreme.” The same Court ignored any evidence of credibility, although “in her dealings with her lawyer and her bank – and others—she was entirely reasonable and normal;”<sup>14</sup> where a prejudiced Court of Appeals set aside decedent’s probate, holding that “It was her paranoic condition, especially her insane delusions about the male. . .that led her to leave her estate to the National Women’s Party.”<sup>15</sup>

This is a classic illustration of pretextual and sanist proclivity: Court deference to the expert medical witness, disparagement of the marginal feminist group and de-humanization of the testatrix through an absence of appreciation for her capacities, for example, her ability to manage specific business and financial transactions.

In *In re Honigman*<sup>16</sup>, the decedent cut off his wife from a life use of her minimal statutory share. In the dissent, Judge Feld speaks for a more flexible, psychologically fair assessment: “I am willing to assume that the proof demonstrates the testator’s belief that his wife was unfaithful was completely groundless and unjust. However, that is not enough; it does not follow from this fact that the testator suffered from such a delusion as to stamp him mentally defective or as lacking in capacity to make a will.”<sup>17</sup>

These cases demonstrate the impact of sanism on judicial analysis and procedure. In effect, latent forms of prejudice – e.g., gender bias, marital and family values and preconceptions regarding mental functioning – prevent the legal participants (court, lawyers, expert witnesses) from reaching appropriate resolutions that protect the rights and dignity of the testator.

### B. *The Gap: Between Theory and Practice*

#### 1. Sanist Influence

In *The Sanist Will*, Professor Champine shares Professor Perlin’s concern for the discriminatory impact of sanism on legal procedure and decision-making. She discerns a critical gulf between judicial “purpose” (the aims of law) and “actual” probate process (what really

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13. *In re Strittmater*, 53 A.2d 205 (1947).

14. *Id.*

15. *Id.*

16. *In re Honigman*, 203 N.Y.S.2d 859 (1960).

17. *Id.* at 863.

happens).<sup>18</sup> Along this line, she draws attention to a significant conflict between (1) law-making – guided by rational motive and ideals (e.g., the need for protective testamentary capacity and standards) and (2) testamentary interpretation and implementation – where bias acts undermine a higher legal intention.

According to Champine, participants in the legal system, as well as expert witnesses and family members, hold mainstream beliefs. These predominantly unconscious preconceptions – in regard to the elderly or other marginal populations – unwittingly taint judicial procedure and outcome. That is, mutually condoned, culturally-shared expectations frequently distort the probate process. This is most likely to exist where witnesses (or relevant others) agree to agree, inadvertently denigrating the crazy, senile or inept person. In turn, when biased and subjectively held cultural conceptions deny the testator's cognitive or decision-making capacities, they place particularistic notions over testator rights. When, for example, traditional or class-based family values – loyalty or obligation – pervade the probate process, they can operate to discriminate against the actual testator's plan.

## 2. A Call for Strict Scrutiny

Because Champine believes that legal purpose can be skewed or undermined through unconscious preconception, she asks that close scrutiny be applied to legal process that can inadvertently violate testamentary intention.<sup>19</sup> Along this line, she urges the court to apply a “strict doctrine” standard to the area of testamentary mistake.<sup>20</sup> In effect, she is asking the court to effectuate the testator's wishes against undermining legal considerations.

Champine perceives that a paternalistic position can be helpful in protecting the rights of the elderly or other vulnerable populations. However, she cautions against pretextual and sanist influence – authoritative intrusion with demeaning or prejudicial motive. For example, she points to the court's customary deference toward “family provision” resolutions – paternalistic settlement that frequently reflects personal values that undermine more objective standards of testamentary inquiry.<sup>21</sup>

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18. See Champine, *supra* note 1, at Part II.

19. See *id.* at Part II(A), II(A)(2)(a).

20. See *id.*

21. See *id.* (Requirement of Capacity stating “The focus o the desire to provide for family members of incompetent testators rather than the protection of the testamentary

Focusing on bias, Champine also warns against the unforeseen effects of well-intentioned “judicial models.” She points, for example, to pre-mortem probate – an experimental approach that includes family and legal participation. She warns that this broadened will-protective process can inadvertently lead to direct or surreptitious influence by adversely affected participants. In this ironic way, the model is susceptible to creating the same discriminatory impact that it seeks to prevent.<sup>22</sup>

In *Methods of Evaluating Capacity*, Champine speaks again to the potential for prejudice in the court’s misuse of expert testimony, lay testimony and dispositive plan. Most significantly, her criticism of the dispositive plan points to a heightened need for vigilance, where courtroom participants (e.g., judge, jury, witness) react from unconscious identifications and value-laden expectations.<sup>23</sup>

#### CONCLUSION

In their search to find genuinely meaningful responses to crucial concerns, Professors Perlin and Champine undertake a novel interdisciplinary approach – a joint effort – to demand that legal inquiry challenge the basis for capacity determinations and legal implementation. They build their case through culturally informed investigation that weeds out the psychosocial determinants inherent to pretextual and sanist impact. Both papers address the need for a model of jurisprudence that falls under the rubric of a therapeutic jurisprudence model. Throughout the inquiry, the authors suggest that the legal role has, as its highest purpose, a principle of justice that must challenge “anti-therapeutic” forces, where legal aim and procedure can work together to create a more forceful tool for individual rights, social change and positive, therapeutic agency.

Both Professors present legal operation as systemically interactive and integrative: acting in circular fashion and accommodating to – and assimilating with – the broad overtime micro and macro dynamics of cultural organization and predictability. The challenge presented is a difficult one: how to create a direction for legal scrutiny that can assess legal principle and implementation from an increasingly de-

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freedom of marginally competent testators is, however, sanist”); *see also id.* at Part II(A)(2)(a).

22. *See id.* at Part II.

23. *See id.* (describing potential for prejudice in dispositive plan, lay testimony and expert testimony).



tached position of interdisciplinary judgment and psychosocial critique.

Professor Richard Sherwin's intriguing historical analysis of socio-cultural-legal interface appears to address the core issues that ignite today's analysis:

The task of evaluating discrete claims to truth and justice requires a variety of meaning-making skills and techniques. Familiarity with the use and effects of these cultural cognitive tools . . . assists advocates, decision makers, and the public alike. It allows people to self-reflectively ask, what reality will my judgment preserve or call into being? What values, beliefs and feelings do I authorize (or deny) in the course of formulating and communicating judgment in one way as opposed to another? Does my understanding rest upon the claims of factual truth or higher legal principle? Does it affirm the value of individual dignity or the punitive impulse of just retribution? Does it thrill to the detective's revelation concerning "whodunit" or to the mythic uplift of the hero's quest?<sup>24</sup>

Professors Perlin and Champine both call for a "higher legal principle," offering an uplifting intellectual and moral call to assess and challenge the status quo. Both professors strive to affirm the law's ultimate mission – to care about and honestly protect individual rights and human dignity.<sup>25</sup>

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24. RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* 237 (2000).

25. *Marbury v. Madison*, 1 Cranch 137, 163 (1803) (Chief Justice John Marshall stating "The very essence of civil liberty was the right of every individual to claim protections of the laws, wherever he receives an injury. . . The government of the United States has been emphatically termed a government of law and not of men. . . It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right").