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Commentary: Mental Health Legislation

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The article by Margolin and Witztum deftly sets out one of the core dilemmas (perhaps, *the* core dilemma) of law and public psychiatry: the extent to which the underlying questions of commitment and "dangerousness," of autonomy and paternalism, of liberty and institutionalization can and should be regulated by legislative enactment. In writing this piece, Margolin and Witztum have done an important service for Israeli lawyers and psychiatrists by contextualizing these important issues, by presenting the evidence in a clear and coherent way, and by prodding legislators to take this often-neglected area of the law far more seriously than they ordinarily do.

Several years ago, I wrote a book that I titled, *The Hidden Prejudice: Mental Disability on Trial* (1). I chose that title because I wanted to focus on "the invisibility of the prejudice against persons with mental disability" (2). Articles such as the one written by Margolin and Witztum have the capacity to shine sunlight on that "hidden prejudice," and for that, we all should be grateful.

In this commentary, I want to supplement their article by adding a few points that I believe are deserving of further emphasis. I hope that, by doing this, I am able to bring focus on some issues that I believe are deserving of greater attention:

- the reasons *why* mental disability law is different from any other area of "law and medicine";
- the extent to which mental disability law is infected by "sanism" and "pretextuality";
- the significance of international human rights law to this entire subject-matter;
- the importance of regularized, organized counsel in the representation of persons with mental disabilities;
- the possible impact of "therapeutic jurisprudence" on the resolution of the underlying issues;

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- the role of the organized ex-patient movement in focusing attention on the ongoing and endemic mistreatment that takes place in many inpatient psychiatric institutions, and
- the practical realities of what would likely happen if there were no mental health-specific legislation.

I will address each of these in turn.

The basis of mental health law

Although it is implicit in the article, I believe it is essential to explicitly state the underlying basis of all mental health law. Society has made the conscious decision that some people who have not been convicted of crime can be forced to sacrifice their liberty because of the causal relationship between their mental illness and their perceived danger to self or others (3). This deprivation of liberty is central to public mental health law, and will always be central. And that must be emphasized in every analysis of the underlying issues. One of the perennially-confounding issues here is the ability of psychiatrists to accurately predict dangerousness (4); the authors deserve special credit for alerting the reader to this issue.

The curse of sanism and pretextuality

Mental disability law is infected by *sanism* and by *pretextuality*. Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense"(OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process (1, 5). Pretextuality defines the ways in which courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends. This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying (1, 6). Both of these factors contaminate the entire legal process, and contribute significantly to the irrationality of much of the mental disability law process, in both criminal and civil cases, affecting lawyers, judges, jurors, witnesses (both lay and expert), the media and the general public (1, 5–8). The authors, appropriately, focus on stigma (and on "legal fictions"), but I believe these factors must be given far more attention as part of this debate.

The significance of international human rights

In recent years, scholars and activists have turned their attention to the relationship between mental disability law and international human rights law (9–11). It is clear that many conditions of institutionalization — endemic to facilities around the world — violate current institutional mental health law (12).The currently-under-debate United Nations Convention on Human Rights of People with Disabilities (10) will likely make this even more explicit in coming years.

The lack of statutory law

The authors do a tremendous service in informing readers that, as of 30 years ago, a significant number of nations had no mental disability law. I would supplement that reminder by pointing out that, today, many nations still have no such law, and that in many nations where there is a law in place, it is outdated and unrelated to contemporary knowledge about mental disability (9). In short, this is a problem that has not gone away.

The role of counsel

The authors appropriately mention the availability of counsel at hearings in Israel before the District Psychiatric Board. I would supplement this mention by making note of the research that has indicated that "the assumption that individuals facing involuntary

civil commitment are globally represented by adequate counsel is an assumption of a fact not in evidence. The data suggest that, in many jurisdictions, such counsel is woefully inadequate — disinterested, uninformed, roleless, and often hostile. A model of 'paternalism/best interests' is substituted for a traditional legal advocacy position, and this substitution is rarely questioned" (13, p. 738). Israel is fortunate to have a Public Defender service that provides dedicated legal services to persons with mental disabilities "in the very best traditions of zealous advocacy and client-centered representation" (14, p. 8; 15). I believe the contrast between Israel and much of the rest of the world needs to be considered carefully in this context.

The significance of "therapeutic jurisprudence"

In recent years, scholars and researchers have increasingly been turning their attention to the importance of "therapeutic jurisprudence" (TJ) to all questions dealing with mental disability law. TJ presents a new model by which we can assess the ultimate impact of case law and legislation that affects mentally disabled individuals, studying the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or anti-therapeutic consequences, and questioning whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles (6). In a recent book, Winick, one of the founders of this school of legal thought (16), called on scholars and researchers to "harness the insights and approaches of psychology and the social sciences to better understand [civil commitment] law and to reshape it into a more effective tool to promote legal well-being" (17, p. 330).

Several of Margolin and Witztum's observations are, I think, especially ripe for a TJ analysis, such as their perceptive comment that *voluntary* patients may, in some instances, have fewer rights than involuntary patients [p. 42], and their observation that the frequency of the use of mental status defenses in criminal cases in the hopes that lesser punishment will be imposed [p. 40]) (by way of example, this latter gambit is a "high risk maneuver"; defendants who unsuccessfully raise an insanity defense are regularly subjected to far greater prison sentences than those who do not raise the issue of their mental status [18, p. 109]). I believe the application of TJ principles to these insights need to be incorporated into this debate as well.

The emergence of an ex-patients' movement

One important political development of the recent years has been the emergence of a movement through which ex-patients speak for themselves in decrying unacceptable conditions in psychiatric hospitals (10). There is a robust range of views represented (ranging from the National Alliance for the Mentally Ill [19] to the World Network of Users and Survivors of Psychiatry [20]). These groups have engaged in political organization, and have supported litigation and legislation designed to enhance patient autonomy in a range of matters relating to institutional and community treatment (21, 22). It is important that readers be aware of the existence of these groups.

Societal demands

Finally, there is one piece of *realpolitik* missing from this excellent article. My nearly-35 years of work in this area of the law have left me with the sadly-inescapable conclusion that — in large part because of the existence of sanism, which I discussed earlier — there are simply some people whom society demands be locked up, whether or not they have been charged with or have been convicted of committing a crime. The roots of the public's feelings on this question are deep-seated (23), and, in spite of the herculean efforts of many (including, by this article, Margolin and Witztum), they persist (24). As a result, I do not believe that a society that currently has a mental disability law will ever voluntarily abolish those aspects of it that provide for involuntary civil commitment. I believe that this is a (generally) unspoken undercurrent to this entire subject matter, and that it needs to be articulated here.

Having said this, I hope that my admiration for this

article is clear. We all owe Margolin and Witztum a great debt for having written it.

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