"Mr. Bad Example": Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root Out Sanism in the Representation of Persons with Mental Disabilities

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"MR. BAD EXAMPLE": WHY LAWYERS NEED TO EMBRACE THERAPEUTIC JURISPRUDENCE TO ROOT OUT SANISM IN THE REPRESENTATION OF PERSONS WITH MENTAL DISABILITIES

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I. INTRODUCTION

As co-authors, our experiences practicing law across several states have informed our approach to the issue of persuasion in ways that teaching and creating scholarship on these questions alone could not. They form the bases of the thesis that we put forth in this article: The representation of persons with mental disabilities is infected—often, fatally infected—by sanism.1 Sanism leads to paralytic rolelessness on the part of many persons who represent this population,

* Professor Emeritus of Law; Founding Director International Mental Disability Law Reform Project, New York Law School; Co-founder, Mental Disability Law and Policy Associates. Before becoming a professor, I spent thirteen years as a lawyer representing persons with mental disabilities, including three years in which I focused primarily on such individuals charged with crime. In my role as Deputy Public Defender in Mercer County, New Jersey, I represented several hundred individuals at what was then (offensively) characterized as the "maximum security hospital for the criminally insane," both in individual cases and in class actions. For more information, see Dixon v. Cahill, No. L30977/y-71 P.W. (N.J. Super. Ct. Law Div. 1973), reprinted in Michael L. Perlin & Heather Ellis Cucolo, Mental Disability Law: Civil and Criminal § 19-8 (3d ed. 2016). I continued to represent this population for a decade as Director of the New Jersey Division of Mental Health Advocacy and Special Counsel to the New Jersey Public Advocate. In those roles, I supervised thousands of individuals' civil commitment and periodic review hearings, and litigated a range of class action law reform cases. I also second sat the case of Strickland v. Washington, 466 U.S. 668 (1984), which established a constitutional effectiveness of counsel standard in criminal cases.

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1 See infra notes 42–102 and accompanying text.
makes negative case outcomes nearly inevitable, and is the cause of much of the frustration that befalls those who try to provide adequate representation in these cases. One solution—perhaps the only meaningful solution—is the consideration of and the adoption of therapeutic jurisprudence (TJ) principles by counsel representing such clients. These precepts offer a radically different perspective on the provision of counsel—whether the case is a civil commitment case, institutional reform case, criminal case, or civil case that, on its surface, appears to have nothing to do with “mental disability law.” TJ is, and can be, a way to implement positive psychology through the litigation relationship and can be a critically important tool of persuasion in all aspects of the lawyer-client relationship, case negotiations, and the courtroom process. TJ provides a ready-made toolkit for lawyers representing this population, as it allows and encourages them to focus on the critical concepts of voluntariness, voice, and validation, and is buttressed by what has been referred to in other contexts as the “ethic of care.” A TJ approach fits perfectly within the framework of the broader concept of the “psychology of persuasion.”

In this article, we draw on our experiences and observations as practitioners and scholars, and consider how the TJ toolkit can enhance the representation of persons with mental disabilities in all aspects of the legal system. We hope that readers will see that TJ is the perfect means for optimizing the psychology of persuasion in such representation. First, we will discuss the lawyer's role and the conflicts that inevitably arise when lawyers represent persons with mental disabilities. Second, we will discuss the meaning of sanism, and how sanism dominates the entire representational process in such cases. Third, we will discuss how the conflicts and the poison of sanism taint the lawyer-client relationship. We will subsequently discuss the meaning of TJ, and finally synthesize the material within the context of the psychology of persuasion, especially as it relates to the concept of validation.

Our title comes, in part, from Warren Zevon's song, “Mr. Bad Example.” The song, a totally dysphoric life story of the narrator, includes this couplet: “Of course I went to law school and took a law degree/ And counseled all my clients

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2 See infra notes 42–102 and accompanying text.
3 See infra notes 109–10 and accompanying text.
4 See infra notes 118–27 and accompanying text.
5 See infra notes 16–41 and accompanying text.
6 See infra notes 42–52 and accompanying text.
7 See infra notes 53–102 and accompanying text.
8 See infra notes 103–27 and accompanying text.
9 See Warren Zevon, Mr. Bad Example (Warner Bros. Records 1991) ("I'm very well acquainted with the seven deadly sins. I keep a busy schedule trying to fit them in. I'm proud to be a glutton, and I don't have time for sloth. I'm greedy, and I'm angry, and I don't care who I cross.").
to plead insanity." Although this is certainly poetic license, it has more than a grain of truth—albeit, no doubt unconsciously on Zevon's part.

An insanity plea is often a very bad option for a criminal defendant. For example, Jones v. United States, one of the United States Supreme Court's worst decisions in mental disability law, involved an insanity plea for a defendant whose underlying charge was attempted shoplifting. The plea was apparently entered without the defendant being aware of the plea or its ramifications, leading to long-term incarceration served in maximum security institutional confinement. Jones "illuminated the Court's antipathy toward insanity pleaders" and resulted in large part from the abjectly ineffective assistance of counsel provided by Jones' trial lawyer. He was, indeed, a "bad example" for all of us, and we use Warren Zevon's lyrics as a reminder of what can happen if counsel does not take seriously clients with mental disabilities.

II. REPRESENTATION OF PERSONS WITH MENTAL DISABILITIES

If there is one characteristic that underscores the problems that are faced by lawyers who represent persons with mental disabilities, it is "rolelessness." One of the co-authors (MLP) identified this problem over thirty years ago, and the problem still persists today. In many jurisdictions, there has been little or no improvement in the intervening years since he first stated that

[T]raditional, sporadically-appointed counsel in mental health cases [were] unwilling to pursue necessary investigations, lack[ed] ... expertise in dealing with mental health problems, and . . . suffered from “rolelessness,” stemming from near total capitulation to experts, hazily defined concept[s] of success/

10 Id.
13 See generally Jones, 463 U.S. 354. The insanity defense was entered into pursuant to a stipulation and at the initial retention hearing defense counsel presented no evidence. See id. at 360; see also Wisdom Is Thrown Into Jail, supra note 12, at 357–58.
14 See, e.g., Wisdom Is Thrown Into Jail, supra note 12, at 357–58; There’s No Success Like Failure, supra note 12, at 1276.
16 This section is largely adapted from Michael L. Perlin & Heather Ellis Cucolo, Mental Disability Law: Civil and Criminal §§ 6.2, 6.6.2 (3d ed. 2016).
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 transpire[d], rather than influencing them.” 17

Additionally, there was rarely any serious exploration of basic legal questions dealing with the factual basis of a client’s dangerousness, 18 the thoroughness of the evaluating physician’s medical examination, or the existence of possible available alternatives to inpatient hospitalization. 19 Expert testimony was also rarely challenged, 20 and it seemed as though virtually all counsel took the position that they had “no choice but to trust the psychiatrist.” 21 As a result, commitment hearings became “an empty ritual,” 22 accomplishing no more than adding a “falsely reassuring patina of respectability to the proceedings.” 23

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18 In virtually all jurisdictions, the current standard for involuntary civil commitment is mental illness and, as a result of that mental illness, danger to one’s self or others. See, e.g., N.J. Cr. R. 4:74-7(f).

19 See Virginia Hiday, The Attorney’s Role in Involuntary Civil Commitment, 60 N.C. L. Rev. 1027, 1030 (1982) (citation omitted); see also Andalman & Chambers, supra note 17, at 43–44; Wexler et al., supra note 17, at 52, 54.


21 Fred Cohen, The Function of the Attorney and the Commitment of the Mentally Ill, 44 Tex. L. Rev. 424, 450 (1966) (citation omitted); see also Perlin & Sadoff, supra note 17, at 165. When one of the co-authors (MLP) was on the New Jersey Supreme Court Committee on Civil Commitments, he had a conversation with then Chief Justice Richard J. Hughes and one of the psychiatrists at the state hospital whom he regularly cross-examined at hearings involving defendants at New Jersey’s maximum security forensic facility. The doctor told the Chief Justice, “Mr. Perlin tortures me with this unnecessary cross-examination.” The Chief Justice asked, “Why is it unnecessary?” The doctor responded, “I can look in their eyes and tell if they are crazy and dangerous. That’s all the trial judge needs to know.”

22 Hiday, supra note 19, at 1030; see also Cohen, supra note 21, at 448.

23 Hiday, supra note 19, at 1030; see also Andalman & Chambers, supra note 17, at 72.
Why do lawyers experience these role conflicts in representing individuals in the civil commitment process? We can think of at least eight separate explanations. First, many lawyers assume that hospitalization is inevitably beneficial for persons with mental disabilities and fail to take into account such factors as iatrogenic illness, the conditions that are prevalent in many of the public psychiatric facilities to which patients are regularly committed, and the severity of the side effects often caused by the administration of psychotropic medication.

Second, because the hospital is a closed system, hospital administrators almost exclusively control systemic issues such as access to patients, times, locations, and communications, creating a power imbalance. As a result, counsel may find it virtually impossible to develop a lawyer-client relationship, to develop proofs, or to discover witnesses.

Third, although case law and statutes forbid a presumption of incompetency because of a patient's institutionalization, counsel's perception of the patient-client's credibility remains a major issue. It is axiomatic that an attorney's doubt,


25 Iatrogenic illness refers to an illness caused by a doctor or a hospital. See Barry R. Furrow, The Problem of Medical Error: The Institution as Toxin, 9 Medico-Legal Watch 67 (Jan. 2000).


27 See Perlin & Cucolo, supra note 16, § 8-2, at 8-15 to 8-16 ("As a result of the prevalence of these side effects as well as a variety of other causes, patients and their counsel began to seek judicial relief as a means of either terminating or altering unwanted medical treatment." (citations omitted)).


29 There is an important analogy here that has never, to the best of our knowledge, been discussed in literature. We know that there is a positive relationship between a criminal defendant being bailed prior to trial and his subsequently being acquitted or receiving a non-custodial sentence. See Michael L. Perlin & Meredith R. Schriver, "You Might Have Drugs at Your Command": Reconsidering the Forced Drugging of Incompetent Pre-Trial Detainees From the Perspectives of International Human Rights and Income Inequality, 8 Alb. Gov't L. Rev. 381, 383 n.12 (2015) (discussing State v. Johnson, 294 A.2d 245, 251 n.6 (N.J. 1972) ("[A]n accused who has been detained in jail between his arraignment and the final adjudication of his case is more likely to receive a criminal conviction or jail sentence than an accused who has been free on bail.")) and Anne Rankin, The Effect of Pretrial Detention, 39 N.Y.U. L. Rev. 641, 641-43, 655 (1964) (showing a connection between continuous detention and unfavorable outcomes, such as conviction). Of course, all individuals facing civil commitment are institutionalized prior to their commitment hearing.

30 See Perlin & Cucolo, supra note 16, §§ 6-6.2, at 6-84.
whether or not explicitly articulated, about the client’s credibility may have a devastating effect at trial, especially in cases such as involuntary commitments, where a finding of mental illness is an element of proof.

Fourth, the very nature of total institutionalization demands a special degree of ingenuity and persistence on counsel’s part if he or she is to track down and interview witnesses. Although an institutionalized patient may find it physically impossible to produce coworkers, friends, neighbors, or character witnesses to testify at a commitment hearing there may be other people available, such as hospital staff members, outside therapists, or other patients, who could provide favorable testimony on the patient’s behalf. If counsel is not sufficiently persistent, these witnesses will remain unfound and representation of the client may be incomplete.

Fifth, the attorney’s self-perceived “rolelessness” breeds serious confusion. Notwithstanding case law, attorneys often view commitment proceedings as non-adversarial and somehow different from other cases. Because the attorney often cannot identify with the client, distance is created, further imperiling the attorney-client relationship. Also, unlike a typical criminal trial, resulting in a guilty or not guilty finding, or in a civil case, where a cause of action is found either to exist or not to exist, a civil commitment hearing does not fit into a discrete paradigm. Because the attorney may be incapable of perceiving whether the case was a victory or a loss, the attorney’s ambivalence may increase.

Sixth, attorneys who possess scant knowledge about psychiatric decision-making, diagnoses, and evaluation tools will be seriously impeded in their cross-examination of expert witnesses and in their evaluation of expert testimony.

31 See, e.g., Hiday, supra note 19, at 1039 (a study showed only 2.3% of all appointed counsel challenged a finding of mental illness).

32 See Addington v. Texas, 441 U.S. 418 (1979) (establishing “clear and convincing evidence” as the minimum burden of proof at commitment hearings); see generally Robert Rubinson, Constructions of Client Competence and Theories of Practice, 31 Ariz. St. L.J. 121 (1999). In all of the eleven years that one of the co-authors (MLP) litigated and supervised commitment/retention hearings, he never came in contact with a single state hospital doctor who paid the slightest bit of attention to the New Jersey statute that specifically forbade that presumption.


34 See Hiday, supra note 19, at 1036 (attorneys “agreed overwhelmingly with the statement, ‘Representing respondents in civil commitment cases should be different from representing other kinds of clients since hospitalization may be in the best interest of the client.’”).

Although one study shows that, with respect to sporadically appointed counsel, mere knowledge of psychiatric techniques may make virtually no difference in a case's outcome,\textsuperscript{36} such knowledge is an initial building block to effective representation of counsel.\textsuperscript{37}

Seventh, there are external constraints on counsel who represent individuals at involuntary civil commitment hearings that are not faced by other attorneys. For example, "tremendous pressures are often placed upon counsel by mental health professionals, family members, and other members of the community to allow the state to 'help' the mentally ill person by [acquiescing in the process of] institutionalization."\textsuperscript{38} In over forty years that MLP has been a lawyer, these were the only cases in which he received communications from family members of his clients asking if he could find a way to lose their relatives' cases.

Finally, attorneys often deal ineffectively with what they perceive as their clients' "differentness,"\textsuperscript{39} as they are not accustomed to developing relationships with clients who may be passive, frightened, inarticulate, and unaware of their possible options. Beyond this, because a patient's demeanor may be considered different, an attorney may feel foolish or awkward in representing a client's views because the attorney fears the judge might ascribe those views to the attorney.\textsuperscript{40}


\textsuperscript{37} In discussing his experiences training lawyers about mental illness, Dr. Norman Poythress concluded that the "trained" lawyers' behavior in court was not materially different from that of "untrained" lawyers because the former group's attitudes toward their clients had not changed. He noted that mere knowledge of cross-examination methods "did not deter them from taking [the] more traditional, passive, paternal stance towards the proposed patients." \textit{Psychiatric Expertise}, supra note 36, at 15. As one trainee noted: "I really enjoyed your workshop, and I've been reading over your materials and its [sic] all very interesting, but this is the real world, and we've got to do something with these people. They're sick." \textit{Psychiatric Expertise}, supra note 36, at 15.

\textsuperscript{38} Eric S. Engum & Daniel J. Cuneo, \textit{Attorney's Role as Advocate in Civil Commitment Hearings}, 9 \textit{J. Psychiatry & L.} 161, 162 (1981). The authors also note "lack of funds" and "crushing caseloads" as two other "primary determinants" that "tend to shape the role of counsel in commitment proceedings." \textit{Id.}


\textsuperscript{40} This conflict becomes more significant in light of the court's view of the entire process. See Thomas K. Zander, \textit{Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt}, 1976 \textit{Wis. L. Rev.} 503, 516 (1976) (80\% of surveyed Wisconsin judges endorsed the "best interests" model and 12\% adopted the adversary position).
This "differentness" may engender acute embarrassment that inevitably will diminish the scope and quality of the attorney's advocacy.41

It is this final piece of "rolelessness" that we must focus on more carefully. We believe this attitude by counsel—feeling foolish or awkward presenting a client's view to the court and fearing the judge might ascribe the client's characteristics to the lawyer—are pure manifestations of what we call "sanism," a factor that poisons the lawyer-client relationship and the entire legal process.

III. SANISM42

Sanism is an "irrational prejudice of the same quality and character as other irrational prejudices that cause, and are reflected in, prevailing social attitudes such as racism, sexism, homophobia, and ethnic bigotry. . . ."43 Sanism reflects discrimination on the basis of one's mental state or condition.44 Sanism—"the pervasive stigma that befalls persons with mental disabilities"45—permeates the legal process both in cases in which mental capacity is a central issue, and those in which such capacity is a collateral question.46 It affects all participants in the mental disability law system, including litigants, fact finders, counsel, and expert and lay witnesses, and its corrosive effects have warped all aspects of mental disability law, involuntary civil commitment law, anti-discrimination law institutional law, tort law, and all aspects of the criminal process.47 Sanism also reflects what civil rights lawyer Florynce Kennedy has characterized as the "pathology of oppression."48

Attorneys, courts, legislatures, professional psychiatric and psychological associations, and academic scholarship are all largely silent on the issue of sanism.

41 See Representing Individuals, supra note 17, at 505.
44 See Sanism in Clinical Teaching, supra note 42, at 718; see also Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial (2000) [hereinafter The Hidden Prejudice].
48 Id. at 259.
A handful of practitioners, lawmakers, scholars, and judges have raised lonely voices, but the topic is simply "off the agenda" for most people.49 As a result, individuals with mental disabilities—the voiceless, those persons traditionally isolated from the majoritarian democratic political system"50—are frequently marginalized to an even greater extent than are others who are marginalized by the courts and society in other ways.51 To illustrate, sanist lawyers distrust their clients with mental disabilities, trivialize their clients' complaints, fail to forge authentic lawyer-client relationships with such clients, reject their clients' potential contributions to case-strategizing, and take adverse case outcomes less seriously.52 Each of these failures is addressed separately.

A. Distrust of the Client

One of the basic building blocks of mental disability law is the principle that incompetence cannot be presumed either because of mental illness or because of a past history of institutionalization.53 Furthermore, there is "no necessary relationship between mental illness and incompetency which renders [mentally ill persons] unable to provide informed consent to medical treatment."54 As stated forcefully by the New York Court of Appeals:

We conclude however, that neither the fact that appellants are mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being.55

Additionally, publications by the MacArthur Foundation's Network on Mental Health and the Law dramatically conclude that mentally ill patients are not always incompetent to make rational decisions and that they are not inherently


50 On "Sanism", supra note 39, at 375 (citation omitted).

51 On "Sanism", supra note 39, at 375 (citation omitted).

52 See Sanism in Clinical Teaching, supra note 42, at 695.

53 See, e.g., In re LaBelle, 728 P.2d 138, 146 (Wash. 1986) (en banc).


more incompetent than patients who are not mentally ill. In fact, "on any given measure of decisional abilities, the majority of patients with schizophrenia did not perform more poorly than other patients and nonpatients."

In short, the presumption in which courts have regularly engaged—that there is both a de facto and de jure presumption of incompetency to be applied to medical decision making—appears to be based on an empirical fallacy. Yet, lawyers distrust their clients with mental disabilities, both in cases in which mental disability is a central issue and in those in which mental disability is collateral. Lawyers assume, for example, that a criminal defendant with mental disabilities is not competent to decide whether to plead insanity or to plead other fact-based defenses. In more than one-third of insanity defense cases, "the attorneys appear[ed] to have preempted their clients' participation in the decision-making process." Such lawyers apply an equivalent assumption of incompetency when representing civil clients with mental disabilities, and that assumption certainly rears its head if the client is institutionalized. For instance, "ward psychiatrists demonstrate a propensity to equate incompetent with makes bad decisions and to assume, in face of statutory and case law, that incompetence in decision making can be presumed from the fact of institutionalization." Like mental health professionals, these lawyers treat their clients as "patients that are sick."

Lawyers, of course, are not the only professionals who share these views. An article published in a police management journal included a focus on how police


57 Grisso & Appelbaum, supra note 56, at 169.

58 For a full discussion, see Sanism in Clinical Teaching, supra note 42, at 695–96; see also, e.g., Jeffrey Swanson et al., Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?, 66 Md. L. Rev. 94, 135 (2006).


60 See Michael L. Perlin, "I Ain't Gonna Work on Maggie's Farm No More": Institutional Segregation, Community Treatment, the ADA, and the Promise of Olmstead v. L.C., 17 T.M. COOLEY L. REV. 53, 64 (2000) ("A series of behavioral myths has emerged suggesting that persons with mental disabilities are deviant, worth less than 'normal' individuals, disproportionately dangerous, and presumptively incompetent.").

61 Perlin & Dorfman, supra note 56, at 121.

officers employ stereotypes in dealing with persons with mental disabilities in almost the same way as lawyers. According to the article, "[o]fficers' stereotypes of mentally disturbed people included the idea that it is not possible to have a meaningful conversation with such people," and that "officers hold on to the ideas that mentally disturbed people are completely irrational and cannot be reasoned with." The parallels to what we have discovered about lawyers in this context are frightening.

The attitudes displayed by such lawyers are also echoed in case law. On the question of determining whether a witness is competent to testify, the influential case of Sinclair v. Wainwright states the controlling legal standards:

[I]f a patient in a mental institution is offered as a witness, an opposing party may challenge competency, whereupon it becomes the duty of the court to make such an examination as will satisfy the court of the competency of the proposed witness. And if the challenged testimony is crucial, critical or highly significant, failure to conduct an appropriate competency hearing implicates due process concerns of fundamental fairness.

The assumption that institutionalization ought to inevitably lead to a competency challenge is seriously flawed and is demonstrated by relevant scientific research. Nevertheless, it is clear that many courts will continue to follow this doctrine, sub silentio, especially in criminal cases.

B. Trivialization of the Client's Complaints

Clients often have complaints. They may complain about the way a case is progressing, the impact the litigation is having on their lives, or a plethora of other matters, many of which are only tangentially connected to the lawyer-client relationship.
relationship. Oftentimes, they may also have complaints about the conditions of their confinement in hospitals, the deprivation of their civil rights, and the dehumanizing reality of being institutionalized.  

If a presumably-mentally competent client complains to a lawyer, we can expect (or at least hope) that the lawyer will take the complaint relatively seriously, if for no other reason than that the failure to do so may trigger a disciplinary investigation. But if the client has a mental disability, or is perceived as having a mental disability, such complaints are often trivialized, ignored, or mocked.

How do we know this? Scholarly research supports the notion that individuals with mental illness do not receive equal representation due to sanism on the part of their attorneys and judges overseeing the case. A critical component of the lawyer-client relationship is ensuring that client input into the representation is integrated into the attorney's case strategy. In cases involving individuals with mental disabilities, sanism frequently prevents attorneys from giving client input the same weight, giving those clients less control in how their case proceeds.

Not only is this phenomenon documented in sanism research, but we have also experienced it firsthand in our own practices. For the forty-plus years that MLP has been a member of the bar, devoting his practice and consultation almost exclusively to issues of mental disability law, he has witnessed such behavior and heard such comments by countless lawyers, many of whom (e.g., criminal defense lawyers and civil legal aid lawyers) should know better. In addition, in her two plus years as a practicing lawyer, AJL has had sadly identical experiences. She has found that clients with mental disabilities often have to work harder for equal, effective, and adequate representation. This is not primarily because they present such radically difficult or different legal issues for attorneys; rather, it is because, first and foremost, they must convince an attorney that they are somehow worthy of equal advocacy. Clients with mental disabilities are seen as an annoyance, and their problems are viewed as simply not as important.

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71 See Sanism in Clinical Teaching, supra note 42, at 697.
72 See generally Perlin & Sadoff, supra note 17; Perlin & Cucolo, supra note 16, §§ 6-6-6.4, 6-68-6-96; see also, e.g., Andalman & Chambers, supra note 17; State ex rel. Memmel v. Mundy, No. 441-417 (Cir. Ct., Milwaukee Cty., Wis., Aug. 18, 1976); Leslie Scallet, The Realities of Mental Health Advocacy: State ex rel. Memmel v. Mundy, in MENTAL HEALTH ADVOCACY: AN EMERGING FORCE IN CONSUMERS' RIGHTS 79, 81 (Louis E. Kopolow & Helene Bloom eds., 1977); Cohen, supra note 21, at 448; Henry Weihofen, Mental Health Services for the Poor, 54 CAL. L. REV. 920, 939 (1966). For a brilliant journalistic recounting, see SUSAN SHEEHAN, IS THERE NO PLACE ON EARTH FOR ME? (2d ed. 1983).
74 The parallels here to the way hospital staff refer to patients who seek to assert their rights as "pesky," see SHEEHAN, supra note 72.
Therefore, persuasion in these cases is not just the job of the attorney. It is first the job of the client who must convince the attorney to take on the case, to believe his or her retelling of the facts, and to be viewed as warranting the same level of representation as a client without a mental disability.\textsuperscript{75} This need for persuasion is tied to sanism on the part of the attorney. Not just laypersons, but also attorneys, judges, and treatment professionals see clients with mental disabilities as more persuasive when they have fewer obvious symptoms—and fewer visual symptoms—of mental illness.\textsuperscript{76}

Sanism overshadows persuasion in many ways, and attorneys need to be prepared, just as the clients are, to fight not only bias due to being a criminal defendant or a person subject to involuntary civil commitment or to guardianship, but also bias in the form of being seen as disabled or disempowered.\textsuperscript{77} Those types of judgments made by jurors require even greater skill on the part of the attorney to overcome. In fact, in most cases involving clients with mental disabilities, attorneys need to be even more skilled in persuasive argument technique because there is often so much bias directed at their clients—biases that are rarely, if ever, questioned.\textsuperscript{78}

This is particularly apparent when a client chooses to speak for himself or herself in the context of formal testimony to a court or even in a less formal setting where he or she is expressing an opinion about an issue related to his or her treatment or legal outcome.\textsuperscript{79} The sanist and paternalistic attitudes of opposing counsel, judges, jury members, doctors, and administrators can almost be palpable. A shift occurs in the room, signifying that what the individual has to say is less important due to his or her status as a mentally disabled person, immediately putting him or her at a disadvantage. This shift is why, more than ever, attorneys representing this population need not only effective advocacy skills training, but also training in the realm of TJ to directly rid them of conscious or unconscious sanist biases. If a client is rarely seen as persuasive and compelling

\textsuperscript{75} See \textcite{sheehan}, supra note 72.

\textsuperscript{76} See \textcite{perlin}, supra note 72, for a detailed discussion of the role of sanism in the courtroom.

\textsuperscript{77} See \textcite{chamallas}, supra note 71, for a discussion of how sanism impacts the legal process.

\textsuperscript{78} See \textcite{holstein}, supra note 70, for a discussion of how sanism affects the representation of clients with mental disabilities.

\textsuperscript{79} See \textcite{perlin}, supra note 72, for a discussion of how sanism impacts the legal process.
on his own, the attorney must be prepared to pick-up the slack and overcompensate due to the sanism that is present in many hospitals and courtrooms.

C. Effects on the Lawyer-Client Relationship

If lawyers do not take their clients or their clients’ legal problems seriously, lawyers may not forge the sort of lawyer-client relationship that is the aspirational goal of the practice of law. Certainly, doubting your client’s competence (and/or veracity) and trivializing your client’s complaints will not advance building such a relationship. Because persons with mental disabilities are trivialized and the essence of their basic humanity is often questioned, adverse case outcomes are simply not taken as seriously.

MLP has previously written about the importance of judicial recognition of the humanity of this population:

Nearly thirty years ago, when I was the director of the New Jersey Division of Mental Health Advocacy, I litigated a case that changed my life. That case—Falter v. Veterans Administration—was about the way veterans with mental illness (at that time, especially Vietnam veterans) were treated at the Veterans Administration (“VA”) Medical Center in Lyons, New Jersey. Following the litigation in the Falter case, the VA promulgated the first Patients’ Bill of Rights on behalf of persons

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80 On sanism in hospitals, see Mark A. Hall, Law, Medicine, and Trust, 55 Stan. L. Rev. 463 (2002).


82 See, e.g., Robert MacCrata, Educating a Changing Profession: From Clinic to Continuum, 64 Tenn. L. Rev. 1099, 1130 (1997).

83 Perhaps the first case to take this issue seriously was Lessard v. Schmidt. See Lessard v. Schmidt, 349 F. Supp. 1078, 1101–02 (E.D. Wis. 1972), vacated, 414 U.S. 473 (1974) (stating the “conclusion that due process is mandated at involuntary civil commitment hearings is fortified by medical evidence that indicates that patients respond more favorably to treatment when they feel they are being treated fairly and are treated as intelligent, aware, human beings.” Some years ago, one of the co-authors wrote that this passage “seems to qualify as one of the true judicial forerunners of therapeutic jurisprudence.” Michael L. Perlin et al., Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?, 1 Psychol. Pub. Pol’y & L. 80, 90 (1995)).

in its facilities, and attention was paid to substantive areas of patients' rights that all too often were previously ignored.

But what has lasted with me most vividly from Falter was one line of Judge Harold Ackerman's initial decision: "[In this opinion], I am referring to how [plaintiffs] are treated as human beings." I read that line in the slip opinion, and for a moment, my breath stopped. Prior to that time, I had been representing persons with mental disabilities for nearly a decade, and litigated other class actions that truly had a vast impact on the New Jersey mental health system. But never before had a judge written a line like this in an opinion in one of my cases.

In problematic lawyer-client relationships of the sort we are discussing here, lawyers will be prone to dismiss or ignore the client's view about the course of litigation. For example, the selection of a theory of the case, pre-trial discovery, case strategizing, choice of witnesses, structuring of cross-examination, and choice of remedy may all be adversely affected. Such suggestions are rarely taken seriously.

Another voice that is typically ignored is that of "psychiatric survivor groups." For at least thirty-five years, formerly hospitalized individuals and their supporters have formed an important role in the reform of the mental health system and in test case litigation. Yet, there is little evidence that these groups are taken seriously either by lawyers or academics.

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85 Perlin & Douard, supra note 84; see Falter v. Veterans Admin., 632 F. Supp. 196, 203 (D.N.J. 1986) (stating that "[i]n December 1982, the V.A. Patients' Bill of Rights was promulgated.").
86 Perlin & Douard, supra note 84; see id. at 203–08 (noting the patients' rights such as rights to privacy while using telephones, to privacy in reading mail, to visitation, and to attend religious services).
87 Perlin & Douard, supra note 84; see Falter, 502 F. Supp. at 1185.
88 Perlin & Douard, supra note 84.
90 Survivor groups generally have opposed the constitutionality or application of involuntary civil commitment statutes, see Project Release v. Prevost, 722 F.2d 960 (2d Cir. 1983), or supported the right of patients to refuse the involuntary administration of psychotropic drugs, see Rennie v. Klein, 653 F.2d 836, 838 (3d. Cir. 1981), but also have involved themselves in a far broader range of litigation. See, e.g., Colorado v. Connelly, 479 U.S. 157 (1986) (discussing the impact of severe mental disability on the Miranda waiver. The Committee on the Fundamental Rights and Equality of Ex-Patients [FREE] filed amicus brief on behalf of respondent.).
At its base, sanism is irrational. Any investigation of the roots or sources of mental disability jurisprudence must factor in society's irrational mechanisms for dealing with mentally disabled individuals. The entire legal system and virtually all of society makes assumptions about persons with mental disabilities—who they are, how they got that way, what makes them different, what there is about them that allows us to treat them differently, and whether their conditions are immutable. These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we ourselves may become mentally disabled. The most important question of all—why do we feel the way we do about these people?—is rarely asked.

D. Likely Outcomes

Sanist lawyers who distrust their clients are inevitably going to be less persuasive than lawyers who trust their clients and who authentically represent their views. As a result, negative case outcomes will be taken less seriously. This should be clear to all, but probably requires us to concede that this is utterly “under the radar” for most lawyers. This summer, MLP had the opportunity to observe three problem-solving courts in New Zealand: a youth court, a homelessness court,

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93 See generally THE HIDDEN PREJUDICE, supra note 44.

94 See, e.g., Michael L. Perlin, Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization, 28 HOUS. L. REV. 63, 93 n.174 (1991) (stating that "while race and sex are immutable, we all can become mentally ill, homeless, or both. Perhaps this illuminates the level of virulence we experience here.").


96 See SANISM IN CLINICAL TEACHING, supra note 42, at 695–97. MLP had occasion to speak to private counsel who had been assigned to represent a patient in a county in which the New Jersey Division of Mental Health Advocacy (which the co-author then directed) did not represent patients. The assigned counsel asked MLP, "Why is the State wasting money to pay me to do this bullshit?"
and a drug court. In blogging about these visits, he concluded glowingly, "Simply put, I have never, in such a short period of time, had the honor to observe such examples of therapeutic jurisprudence in action," adding that,

In my entire career as a lawyer—spanning over [forty] years, practicing in NJ and NY—I have only seen a handful of judges that ran their courtroom with the level of dignity that I observed and that showed the defendants and all others who came before them the level of respect that I saw here.

But this blog post omitted one vivid negative experience. Virtually all of the representation was provided by local public defenders, legal aid lawyers, or "duty lawyers" (a group regularly assigned to represent defendants in court). One lawyer was clearly there involuntarily, having been appointed to represent one of the defendants who had been charged with drug offenses in the homelessness court. He barely spoke to his client, his disdain was apparent, and at the bail hearing, he said, "Your honor, my client is very volatile." At first blush, this was dumbfounding, but on the briefest consideration, it was utterly reflective of the behavior of lawyers who do not care about the potential for negative outcomes for their clients. Ironically, the presiding judge subsequently emailed the author, relating that he bailed the defendant out in two days when a "safe house" became available. The judge stated, "[s]he is there at the moment and getting good support from her social worker." The defendant's lawyer would not have shown this level of concern for his client.

Generally, laypeople are shocked when we tell them that an institutionalized individual has just as much a right as any other person to representation in commitment proceedings, and is able to actually have a similar amount of control over the way his or her case is presented by the attorney. Attorneys are also generally surprised that we allow our clients to voice their opinions to us, and under appropriate circumstances to the judge, and use those opinions as the basis for their cases.

98 Id.
99 E-mail from Judge Anthony Fitzgerald to Michael L. Perlin (Sept. 14, 2015) (on file with author).
100 Laypeople are also shocked when they find out that, in the context of our representation, we advocate for the sexual autonomy of our clients. When one of the co-authors (MLP) spoke about this topic to a public audience at the Florida Mental Health Institute (part of the University of South Florida in Tampa) some years ago, an audience member (from the general public) leapt to his feet, and denounced him: "Professor Perlin, you are an agent of the devil!" At a New York City hospital presentation, a nurse folded her arms across her chest, and announced, "Professor, you are the very embodiment of evil!" A nurse at a New Jersey state hospital told him, "God explicitly forbids what you are talking about," the nurse adding that she "would pray for [Michael's] soul."
Persuasion, in all its forms, is important here as well. As seen in the context of criminal law, there are multiple levels of bias and sanism that attorneys encounter in this particular form of advocacy. Additionally, the reactions given when this topic is discussed make it clear that persuasiveness will not only come from helping others understand the individual circumstances of clients, but from seeing and understanding the larger issues involved in this particular topic.

Some seven years ago, MLP stated: “Over the past fifteen years, I have frequently spoken about issues related to psychiatric patient sexuality. I have grown accustomed to the ‘There he goes again!’ eye-rolling I get from colleagues when I tell them that I write and think about the issues related to institutionalized patients having sex.”101 During several talks on this topic, MLP has noted how faculty colleagues reacted when he embarked on this line of advocacy and scholarship, and its connection to sanism:

I was sitting at my faculty lunch table, and conversation turned to upcoming presentations that we would soon be doing. My colleagues mostly take left-liberal positions on a wide variety of issues, and are generically the exact mix of retro ‘60s generationists and early baby boomers that you’d expect. They (appropriately) are quick to criticize any behavior that is racist, sexist, ethnically bigoted or homophobic. Rush Limbaugh would probably view them as one of his worst “politically correct” horror fantasies. I’m not terribly out of place in this group.

[W]hen it got to be my turn, I said that I was going to be speaking about the right of institutionalized mentally disabled persons to sexual interaction. All conversation came to a screeching halt. “Michael, are you serious?” “Are you crazy (sic)?” “Michael, even for you, you’ve gone too far!” “What are you going to say next: that they can get married?!?” Et cetera.102

Keep these attitudes in mind—especially in the context of the politics of those who were expressing them—as we turn to therapeutic jurisprudence.

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101 Sexual Autonomy, supra note 92, at 483.
102 Sanism in Clinical Teaching, supra note 42, at 703.
IV. THERAPEUTIC JURISPRUDENCE (TJ)\textsuperscript{103}

TJ "asks us to look at law as it actually impacts people's lives"\textsuperscript{104} and focuses on the law's influence on emotional life and psychological well-being.\textsuperscript{105} The ultimate aim of TJ is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.\textsuperscript{106} There is an inherent tension in this inquiry, but Professor David Wexler clearly identifies how it must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."\textsuperscript{107} Again, it is vital to keep in mind that "[a]n inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."\textsuperscript{108}

In its aim to use the law to empower individuals, enhance rights, and promote well-being, TJ has been described as "a sea-change in ethical thinking about the role of law[,] . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism."\textsuperscript{109} That is, TJ supports an ethic of care.\textsuperscript{110}

\textsuperscript{103} See generally Big Police, supra note 66.
\textsuperscript{110} See, e.g., Winick & Wexler, supra note 109, at 605–07; David B. Wexler, Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic
We cannot lose sight of the fact that there is often an inherent bias against litigants with mental disabilities, and the greater the bias, the more essential it is for lawyers to rely on TJ in representation. MLP recently wrote an article with a colleague about representing the most hated of all clients (those alleged to be sexually violent predators) and made the following comment about TJ:

Those very variables that make SVPA [sexually violent predator act] litigation different—the need for lawyers to be able to understand, contextualize and effectively cross-examine experts on specific actuarial tests; the need for lawyers to recognize when an expert witness is needed to rebut the state's position, and the need for lawyers to understand the potential extent of jury bias (making the ideal of a fair trial even more difficult to accomplish)—all demand a TJ approach to representation and to litigation.111

In another piece, he explored the TJ-based conversations a lawyer should have with other disfavored clients (those who raise the incompetency status or who plead insanity).112 Some of the potential TJ-based conversations include:

- If a defendant is, in fact, incompetent to stand trial, that means that he does not have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and or a rational as well as factual understanding of the proceedings against him; how can TJ principles be invoked in such a case?

- If a defendant is initially found to be incompetent to stand trial, will the lawyer act as most lawyers and consider him to be de facto incompetent for the entire proceeding (as a

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significant percentage of lawyers do act for any client who is institutionalized)?

- If a defendant is found to be incompetent to stand trial, will the lawyer assume that he is also guilty of the underlying criminal charge?

- What are the issues that a lawyer must consider in addition to the client’s mental state in assessing whether or not to invoke an incompetency determination?

- What are the TJ implications for a case in which the incompetency status is not raised by the defendant, but, rather, by the prosecutor or the judge?

- Are there times when TJ principles might mandate not raising the incompetency status (for example, in a case in which the maximum sentence to which the defendant is exposed is six months in a county workhouse but is in a jurisdiction in which IST defendants are regularly housed in maximum security forensic facilities for far longer periods of time than the maximum to which they could be sentenced)?

- What are the TJ implications of counseling a defendant to plead or not to plead the insanity defense?

- Can a defendant who pleads NGRI ever, truly, take responsibility?

- Does the fact that the insanity-pleading defendant must concede that he committed the actus reus distort the ongoing lawyer-client relationship?

- To what extent do the ample bodies of case law construing the ineffectiveness assistance of counsel standard established by the US Supreme Court in Strickland v. Washington\(^{113}\) even consider the implications of TJ lawyering?

- To what extent does the pervasiveness of sanism make it obligatory for lawyers in such cases to educate jurors about both sanism and why sanism may be driving

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\(^{113}\) See Strickland v. Washington, 466 U.S. 668, 686 (1984) (stating, “whether counsel’s conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result.”).
their decisionmaking, and to what extent should lawyers in such cases embark on this educational process using TJ principles?114

One of the central principles of TJ is a commitment to dignity.115 Professor Amy Ronner describes voice, validation, and voluntariness as the “three Vs” and116 argues:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.117

The question to be considered is this: To what extent can TJ be employed with the psychology of persuasion so as to eradicate sanism in the representation of persons with mental disabilities?

V. THE PSYCHOLOGY OF PERSUASION

In the call for papers emerging from the University of Wyoming College of Law Symposium on the Psychology of Persuasion, the organizers laid down their charge:

Good advocates need to understand basic principles of cognitive psychology in order to craft the most persuasive arguments they can to support their client’s cause. Scholars who are currently

114 See Too Stubborn, supra note 112, at 477-78.
working in this area are invited to present their work and lead discussions of how judges and juries process information and reach decisions, and how lawyers can use that knowledge to become more effective advocates.\textsuperscript{118}

We agree 100% with the significance of this approach, and will use it as a springboard for the topic that we have chosen to address: How lawyers can use TJ as a means for eradicating sanism in their representation of persons with mental disabilities. We focus here on the principle of validation, which we believe is of critical importance from two perspectives. First, as we have already indicated, validation is an integral part of TJ: "If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation."\textsuperscript{119} This is one of the sine qua non of TJ and can never be far from the mindset of the TJ inspired lawyer.

Over fifteen years ago, the late Professor Bruce Winick, along with Professor David Wexler, a founder of TJ, stated: "Dealing with clients about such issues is challenging work; it demands a high degree of psychological skill and judgment and the ability to listen to the client, to make the client feel comfortable, to communicate empathy, and to understand the social psychology of persuasion."\textsuperscript{120} Remarkably, that is the only mention in the legal literature of the psychology of persuasion in this context.

Beyond this, it is necessary to consider how validation is at the forefront of the psychology of persuasion. Central to the psychology of persuasion is social validation.\textsuperscript{121} Social validation means that we are significantly more likely to take action when we see others, especially those who are similar to us take the same action.\textsuperscript{122} We need to consider this in the context of the issues we raised earlier about the conflicts lawyers often have in the representation of clients with mental disabilities. If one juror makes a disparaging, sanist remark about such an individual, how persuasive will that remark be to the other jurors? If one lawyer in a law office makes such a remark (especially if it is a senior lawyer), how persuasive will that be to the other lawyers? We must keep this phenomenon

\begin{itemize}
\item \textsuperscript{118} Call for Proposals, UNIVERSITY OF WYOMING COLLEGE OF LAW (2015), https://perma.cc/D7LZ-F9GM.
\item \textsuperscript{119} Ronner, supra note 117, at 94.
\item \textsuperscript{120} Bruce J. Winick, Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing a Therapeutic Jurisprudence/Preventative Law Model, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1064 (1999).
\item \textsuperscript{121} In ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION (2006), Robert Cialdini uses the phrase "social validation" as a principle that "governs what it is that we decide constitutes correct behavior in a group setting." Id. at 116.
\item \textsuperscript{122} See Cordell M. Parvin, Unlocking the Secrets to Developing Your Future Rainmakers, 54 PRAC. L. 17, 22 (Oct. 2008), https://perma.cc/Y8A3-S42P.
\end{itemize}
of social validation in our minds, and use it in different ways to best insure that the legal process is authentically valid for the client base of which we speak. This is why TJ is immensely beneficial and necessary, especially for education of legal professionals.\(^\text{123}\)

TJ allows for several end goals: it targets sanism, sets up a legal system where the therapeutic benefit of legal solutions is not just discussed but actually made to be a targeted outcome, and teaches attorneys and judges how to appropriately interact with individuals with mental disabilities in all stages of the trial process. By doing these things, TJ enhances the likelihood that counsel will provide authentically effective representation for clients with mental disabilities.

Further, we believe it is profitable to turn our attention to the schools of positive criminology and positive psychology, both of which are potentially excellent sources for enhancing the psychology of persuasion. Professor David B. Wexler has recently argued that TJ is “remarkably (but not at all surprisingly) consistent with the school of ‘Positive Criminology,’ [which is] ‘oriented to human strengths, resilience, and positive encounters that can assist individuals in abstaining from crime and deviant behaviors.”\(^\text{124}\) As Professor Wexler and Tali Gal, an Israeli criminologist and lawyer, explained: Positive criminology “goes against the focus of much of the research which highlights ‘goodness’ in relation to normative people and ‘badness’ in relation to law-breakers, offering an alternative research agenda that focuses on goodness in the lives of offenders, victims, and those at risk of become either.”\(^\text{125}\) Similarly, “positive psychology is ‘the scientific study of the strengths and virtues that enable individuals and communities to thrive’—in short, the rigorous study of human flourishing.”\(^\text{126}\)

It emphasizes positive experiences and traits, and studies how people flourish, focusing on an individual’s well-being and the “good life.”\(^\text{127}\)

\(^{123}\) See Winick & Wexler, supra note 109.


VI. Conclusion

Lawyers should draw on the insights that TJ can provide in our efforts to be psychologically persuasive in the hopes that the end result will be a new paradigm for the representation of persons with mental disabilities. By validating clients, giving them a voice, and insuring that their actions are authentically voluntary, TJ can best strip the sanist façade from the representation of persons with mental disabilities, and solve the "rolelessness" dilemma that bedevils practicing lawyers in such circumstances. The shift to TJ will be psychologically persuasive. It will allow lawyers to engage in meaningful collaborative conversations with their clients and provide lawyers with skills and strategies through which they can effectively rebut sanism in the courtroom. It will also offer a blueprint as to how the attorney-client relationship can be restructured to enhance dignity and respect, and in the words of Judge Ackerman in the Falter case, take seriously how we treat the population as "human beings."

In "Mr. Bad Example," Warren Zevon also sings, "I don't care who gets hurt." The willful blindness exhibited by most lawyers in the representation of the population that we are discussing here is the functional equivalent of the lawyer not caring "who gets hurt." We hope that the ideas we discussed in this article will lead more lawyers to realize exactly who is hurt when they allow sanism to infect their representation. If this happens, we will have accomplished what we have set out to do.

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128 See Michael L. Perlin, "Baby, Look Inside Your Mirror": The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities, 69 U. Pitt. L. Rev. 589, 591 (2008) (discussing how TJ "might be a redemptive tool in efforts to combat sanism, as a means of 'strip[ping] bare the law's sanist façade ...','" (first alteration in original)).


130 See Warren Zevon, Mr. Bad Example (Warner Bros. Records 1991); see also supra notes 9-10 and accompanying text.