1992

On Sanism

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Recommended Citation
SMU Law Review, Vol. 46, Issue 2 (Fall 1992), pp. 373-408

ON "SANISM"

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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[4] 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.[5] It reflects what civil rights lawyer Florynce Kennedy has characterized as "the pathology of oppression."[6]

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.[7] Sanism is a

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4. The classic study is GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1955).

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.").

7. *See, e.g.*, DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS 188-89 (1984) (discussing role of paradigmatically liberal Congresswoman Elizabeth Holtzman in attempting to block group homes for the mentally retarded from opening in her district).

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. PSYCHOL. 710 (1988); Phillip Raskin & Robert D. Hare, *Psychopathy*

form of bigotry that "respectable people can express in public."[8] 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[9] 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.[10]

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,[11] but the topic is simply off the agenda for most of these groups. As a result, mentally disabled individuals,[12] "the voiceless, those persons traditionally isolated from the majoritarian democratic polit-

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and Detection of Deception in a Prison Population, 15 PSYCHOPHYSIOLOGY 126 (1978). There is no database of studies that examines violent recidivism in such individuals. *See also* Grant J. Harris et al., *Psychopathy and Violent Recidivism*, 15 LAW & HUM. BEHAV. 625, 626 (1991).

8. *Cf.* J. Michael Bailey & Richard Pillard, *Are Some People Born Gay?*, N.Y. TIMES, Dec. 17, 1991, at A21 (arguing that homophobia is the only form of bigotry that can be so expressed).

9. I explain how these approaches have distorted our insanity defense policies in Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599 (1990) [hereinafter Perlin, *Myths*], and Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990) [hereinafter Perlin, *OCS*].

10. *See* Allessandra Stanley, *Erotomania: A Rare Disorder Runs Riot — In Men's Minds*, N.Y. TIMES, Nov. 10, 1991, at 2; Steve Wick, *Psychoanalysis Via TV: She's Not Crazy*, NEWSDAY, Oct. 16, 1991, at 21; Rupert Cornwell, *Out of the West: Mysteries of Sex Too Much for America*, THE INDEPENDENT, Oct. 6, 1991, at 11; *To The Witness*, N.Y. TIMES, Oct. 17, 1991, at A26 (editorial); Stanley Greenspan & Nancy Thorndike Greenspan, *Lies, Delusions and Truths: The Abuse of Psychiatry in the Thomas Hearings*, WASH. POST, Oct. 29, 1991, at 6; Peter Breggin, *Abuse of Privilege*, 7 TIKKUN, Jan.-Feb. 1992 at 17. The Hill/Thomas case is not the only recent example. *See* Goldwater v. Ginsberg, 414 F.2d 324, 328-30 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (on Barry Goldwater); *Psychologists Cleared in Remarks on Dukakis*, WASH. TIMES, Dec. 11, 1989, at A6; Anthony Flint, *Boards Ends Inquiry of Psychologists*, BOSTON GLOBE, Dec. 9, 1989, at 29 (on Kitty Dukakis).

11. *See, e.g.*, Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 22 (1987); David L. Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897 (1975); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (mentally retarded individuals subjected to "history of unfair and often grotesque mistreatment"); *Id.* at 462 (Marshall, J., concurring in part and dissenting in part) ("virulence and bigotry" of state-mandated segregation of the institutionalized mentally retarded "rivaled, and indeed paralleled, the worst excesses of Jim Crow").

By this article, I hope to join these voices. This paper is also partially located in the psychology of jurisprudence described in Gary B. Melton, *The Significance of Law in the Everyday Lives of Children and Families*, 22 GA. L. REV. 851 (1988).

12. The question of whether "mental illness" exists as a discrete disability is bypassed here. *See* THOMAS SZASZ, THE MYTH OF MENTAL ILLNESS (1961). For the purposes of this article, what is important is that individuals are treated differently because of others' perceptions that they are "different" based on their mental status. On the role of difference in this area in general, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

ical system," are frequently marginalized to an even greater extent than are others who fit within the *Carolene Products*[13] definition of "discrete and insular minorities."[14]

This article argues that we must confront our system's sanist biases,[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.[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.[17] We must restructure the provision of counsel

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13. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

14. Michael L. Perlin, *Institutionalization and the Law*, in PSYCHIATRIC SERVICES IN INSTITUTIONAL SETTINGS 75, 77 (American Hosp. Ass'n ed., 1978) [hereinafter Perlin, *Institutionalization*]. *See generally* Aviam Soifer, *Listening and the Voiceless*, 4 MISS. C. L. REV. 319 (1984) (reasoning that the legal system remains unaware of the particular concerns of people with mental disabilities). *Carolene Products* is discussed more broadly in Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A. L. REV. 1249, 1250-51 (1987) [hereinafter Perlin, *Last Frontier*].

15. For one important example of this recognition, see *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." *Id.* at 10 (emphasis added).

16. Here, the article will consider the ethical issues involved in the representation of mentally disabled persons and discuss judicial attitudes toward vigorous advocacy on behalf of such persons. *See e.g.*, 2 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL §§ 8.20-23, at 805-22 (1989) [hereinafter 2 PERLIN]; Michael L. Perlin & Robert Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBS. 161 (1982); Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992) [hereinafter Perlin, *Fatal Assumption*].

17. *Cf.*, Perlin, *Fatal Assumption*, *supra* note 16, at 58-59 (calling for similar scholarly inquiries into the effectiveness and role of counsel in the representation of mentally disabled individuals, and relying upon Ingo Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 47 (1987) and Henry J. Steadman, *Mental Health Law and the Criminal Offender: Research Directions of the 1990's*, 39 RUTGERS L. REV. 323 (1987)).

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

1. On Stereotyping

Stereotypes are the "attribution of general psychological characteristics to large human groups."[18] According to the social psychologist Gordon Allport, stereotypes are attitudes that result in "gross oversimplification of experience and in prejudgments."[19] 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.[20] The separation of others into categorized groups is enough to trigger psychological processes leading to intergroup prejudice,[21] which Allport defines as "an antipathy based upon a faulty and inflexible generalization."[22] This act of separation is frequently at the basis of what can be called "ismic" behavior.[23]

Operating as "relatively rigid and oversimplified or biased perception[s] . . . of an aspect of reality,"[24] stereotypes efficiently, however inaccurately,

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18. Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 81-82 (1969).

19. Gordon W. Allport, *Attitudes*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY, 798, 809 (Carl Murchison ed., 1967).

Although this article stresses the social psychological view of stereotyping, that is by no means the only helpful theoretical construct of prejudice. "Authorizationism" and the "authoritarian personality" are discussed in this context in Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375-77 (1985) [hereinafter Delgado, *Fairness*]; Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 372 (1991). *See generally* T. W. Adorno et al., THE AUTHORITARIAN PERSONALITY (1964); Michael L. Perlin, Authoritarianism, The Mystique of Ronald Reagan and the Future of the Insanity Defense (unpublished manuscript on file with the author). On Allport's break with this school of thought, see Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, *in* READING ABOUT THE SOCIAL ANIMAL 283, 285 (Elliot Aronson ed., 1984). Regardless of the terminology or the academic discourse, "all subfields document the existence and prevalence of the same phenomenon." Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1161 n.70 (1991).

20. David L. Hamilton, *Cognitive Biases in the Perception of Social Groups*, *in* COGNITION AND SOCIAL BEHAVIOR, 81, 83 (John S. Carroll & John W. Payne eds., 1976); *see also* Michael Billig & Henri Tajfel, *Social Categorization and Similarity in Intergroup Behavior*, 3 EUR. J. SOC. PSYCHOL. 27 (1973); Willem Doise & Anne Sinclair, *The Categorization Process in Intergroup Relations*, 3 EUR. J. SOC. PSYCHOL. 145 (1973).

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).

23. *See* Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849 (1990).

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.[25] They operate in the same way as do other fundamental cognitive errors that frequently lead to distorted and systematically erroneous decisions,[26] relying on exaggeration, emotionally-toned intergroup labels, dichotomization and over generalization.[27]

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."[28] "Our internal, mental representation of the world become the world. We act as if this world were real, external to ourselves . . . ."[29]

Labels accompany stereotypes. These labels stigmatize, assign negative associations to outsiders, complicate "any effort to resist the denigration implied by difference,"[30] and prevent the labeler from understanding the perspective of the outsider.[31] 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.[32] From these labels, "categorizations assume a life of their own."[33]

EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING 1, 4 (Arthur G. Miller ed., 1982).

25. *Id.*; Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 602 n.12 (1988); Anita Cava, *The Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 32 (1990); Joshua A. Fishman, *An Examination of the Process and Function of Social Stereotyping*, 43 J. SOC. PSYCH. 27, 31 (1956).

26. *See* Perlin, *OCS*, *supra* note 9, at 12-22; Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial By Heuristics*, 15 LAW & SOC'Y REV. 123 (1981).

27. ALLPORT, *supra* note 4, at 178, 191, 400-08; Pettigrew, *supra* note 19, at 286.

28. MINOW, *supra* note 12, at 179.

29. SANDER L. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS 240 (1985). On the role of the unconscious in the creation of stereotypes, see Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027-29 (1988); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1986). On the role of the unconscious in the development of the criminal law, see Perlin, *Myths*, *supra* note 9; Michael L. Perlin, Mental Illness, Crime, and the Culture of Punishment (unpublished manuscript on file with author).

30. Martha Minow, *1984 Forward: Justice Engendered*, 101 HARV. L. REV. 10, 38 (1987); GILMAN, *supra* note 29, at 12, 18-35.

31. Minow, *supra* note 30, at 51 n.201; *Stigma Task Force*, *supra* note 15, at 1-2.

32. Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318, 1333 (1989); Barry Glassner, *Labeling Theory*, *in* THE SOCIOLOGY OF DEVIANCE 71 (Michael Rosenberg et al. eds, 1982); LAMAR TAYLOR EMPEY, AMERICAN DELINQUENCY: ITS MEANING AND CONSTRUCTION 341-68 (1978); Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 805-07, 820-26 (1988); Robert W. Sweet, *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389 (1991).

33. Delgado, *Fairness*, *supra* note 19, at 1381. "[W]hat enables people to reject members of other races is the supportive (unconscious and automatic) bias elicited by categorization." *Id.* (quoting Knud S. Larson, *Social Categorization and Attitude Change*, 111 J. SOC. PSYCH. 113, 114 (1980)).

Through the use of stereotypes and labels, any act that fails to follow standards set by a dominant group becomes a deviation.[34] 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.[35] 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.[36]

These historical stereotypes, often brought together in a "web,"[37] came to serve as the basis of a legitimating ideology that perpetrated the mythology and rationalized racial, sexual and religious oppression.[38] These stereotypes led to yet others: the separated and stigmatized others were seen as "different, deviant and morally weak"[39] or as individuals "without hope or dignity."[40]

Judges have consistently employed these stereotypical assumptions. The Supreme Court's decision in *City of New York v. Miln*,[41] 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."[42] Stereotypes such as

34. C. Ronald Chester, *Perceived Relative Deprivation as a Cause of Property Crime*, 22 CRIME & DELINQ. 17, 22 (1976), *cited in* Christine L. Wilson, *Urban Homesteading: A Compromise Between Squatters and the Law*, 35 N.Y.L. SCH. L. REV. 709, 714-15 n.38 (1990).

35. Kimberlé W. Crenshaw, *Race Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1372 (1988); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1561 (1989); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1645 (1985).

36. *See generally* STEPHEN J. GOULD, THE MISMEASURE OF MAN 20-145 (1981) (study of the history of intelligence tests, personality tests, craniometry, and ability-testing); *see also* Herbert Hovencamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624; Steven Hartwell, *Understanding and Dealing with Deception in Legal Negotiation*, 6 OHIO ST. J. ON DISP. RESOL. 171, 175 n.15 (1991); Nicole H. Rafter, *The Social Construction of Crime and Crime Control*, 27 J. RES. CRIME & DELINQ. 376, 379 (1990).

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").

39. Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1503 (1991); *see also*, Perlin, *supra* note 1, at 72 (discussing popular images of homeless persons as "lazy, degenerate bums," or "crazy, possibly dangerous people who ought to be put away"); *see generally* MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE (1989); HARRELL R. RODGERS, POVERTY AMID PLENTY: A POLITICAL AND ECONOMIC ANALYSIS (1979).

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.[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."[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).[45]

We are more likely to empathize in an unreflective way with people like ourselves;[46] yet, because empathic understanding involves the "recognition of and regard for the other,"[47] empathy can operate to blunt stereotyped thinking that fails to imagine another's alternative perspectives.[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.[49]

The law's treatment[50] of minority groups, giving that phrase its broadest

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43. Ross, *supra* note 39, at 1509-13.

44. *Id.* at 1542; *see also* Minow, *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.

Id.

45. Lynne E. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987); *see also id.* at 1580 n.29.

46. *Id.* at 1581 n.35, 1584. On the way that much "common sensical" thinking is prereflective and self-referential, see Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737 (1988); Perlin, *OCS*, *supra* note 9, at 22-38.

47. Henderson, *supra* note 45, at 1586.

48. Minow, *supra* note 30, at 51 n.201. On our faulty and unstated assumptions about difference, see MINOW, *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).

49. Stanley L. Brodsky et al., *Jury Selection in Malpractice Suits: An Investigation of Community Attitudes Toward Malpractice and Physicians*, 14 INT'L J.L. & PSYCHIATRY 215, 215 (1991).

50. The acts of judges, legislators, jurors, lawyers, and, in some cases, forensic expert

possible *Carolene Products* "Footnote 4" reading,[51] 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.[52] 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."[53]

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."[54] To an "outrageous and humiliating extent, . . . American lawyers, judges and legislators created,

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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).

51. For important contemporary perspectives on *Carolene Products*, see Bruce R. Ackerman, *Beyond Caroline Products*, 98 HARV. L. REV. 713 (1985); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); Louis Lusky, *Footnote Redux: A Caroline Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); Daniel A. Farber & Phillip P. Frickey, *Is Caroline Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685 (1991); Bradley P. Hogin, *Equal Protection, Democratic Theory, and the Case of the Poor*, 21 RUTGERS L.J. 1 (1989). For a fascinating and relevant historical reading by the drafter of the footnote (Professor Louis Lusky, then Justice Stone's law clerk), see Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942) (discussing how, in the context of the World War II war effort, discrimination against and stereotyping of racial and religious minorities was harmful to the national interest).

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.

53. Johnson, *supra* note 35, at 1650.

54. Hovencamp, *supra* note 36, at 624.

perpetuated, and defended racist American institutions."[55] Historically, racist laws enforced segregation in education, accommodations, transportation and social organizations,[56] 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 "ismic" 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.*

56. *Id.* at 624-25; *see also* Henderson, *supra* note 45, at 1593-1609; GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 (1971); GILBERT T. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW (1910); Harold H. Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CAL. L. REV. 1 (1964).

57. J.A.C. Grant, *Testimonial Exclusion Because of Race: A Chapter in the History of Intolerance in California*, 17 UCLA L. REV. 192 (1969).

58. S.W. Tucker, *Racial Discrimination in Jury Selection in Virginia*, 52 VA. L. REV. 736 (1966).

59. Michael Rustad & Thomas Koenig, *The Impact of History on Contemporary Prestige Images of Boston's Law Schools*, 24 SUFFOLK U. L. REV. 621, 634-35 (1990).

60. Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421 (1988).

61. *See generally* GILMAN, *supra* note 29; GOULD, *supra* note 36, at 30-72, 174-234. *See also* Lawrence, *supra* note 29, at 374, *citing*, J. BLUM, PSEUDOSCIENCE AND MENTAL ABILITY 30-72, 99-103 (1978); THOMAS GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 5, 62-63 (1963); RICHARD KLUGER, SIMPLE JUSTICE 84-86 (1976).

On the other hand, the question has been raised to whether racially-motivated fear may be seen as a legitimating defense in criminal law. *See* Michael A. Tesner, Note, *Racial Paranoia as a Defense to Crimes of Violence: An Emerging Theory of Self-Defense or Insanity?*, 11 B.C. THIRD WORLD L.J. 307 (1991); *cf.* Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420 (1988). On the relationship between this sort of fear and media/entertainment stereotypes, see Allen S. Hammond, *Diversity and Equal Protection in the Marketplace: The Metro Broadcasting Case in Context*, 44 ARK. L. REV. 1063, 1086-87 (1991).

62. *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."

On the specific roots of the linkage between sexual stereotypes and racial stereotypes, see GILMAN, *supra* note 29 at 109-27. On the prejudice associated with an equally odious stereotype (that non-whites possess an "offensive odor") and its place in the justification of segregationist practices, see Stevens v. Dobs, Inc., 483 F.2d 82, 82-88 (4th Cir. 1973) (minority individual seeking to rent apartment turned down purportedly because of "peculiar odor").

63. *See* Johnson, *supra* note 29, at 1017.

64. Crenshaw, *supra* note 35, at 1370-71.

65. McClesky v. Kemp, 481 U.S. 279 (1987); Samuel Cameron, *Race and Prosecution Expenditures*, 19 REV. BLACK POL. ECON. 79 (1990); Tonya K. Hernandez, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845 (1990); Johnson, *supra* note 29.

alty,[66] as well as in other aspects of the criminal justice system.[67] 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.[68] 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."[69] 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,[70] anti-Semitic,[71] anti-Catholic,[72] anti-

66. Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991); Anthony Amsterdam, *Race and the Death Penalty*, 7 CRIM. JUST. ETHICS 2 (1988).

67. *See, e.g.*, Ronald L. Poulson, *Mock Juror Attribution of Criminal Responsibility: Effects of Race and the Guilty But Mentally Ill (GBMI) Verdict Option*, 20 J. APPLIED SOC. PSYCHOL. 1596 (1990); Patricia Van Voorhis et al., *The Impact of Race and Gender on Criminal Officers' Orientation to the Integrated Environment*, 28 J. RES. CRIM. & DELINQ. 472 (1991).

68. *See* Robert J. Cottrol, *A Tale of Two Cultures: On Making the Proper Connections Between Law, Social History and the Political Economy of Despair*, 25 SAN DIEGO L. REV. 989 (1988); Crenshaw, *supra* note 35, at 1377. On the related question of racial discrimination as an animator of juror bias, see Johnson, *supra* note 35, at 1637. On the way that visibility can "lock" racial minorities to stereotypes, see Otey v. Common Council of Milwaukee, 281 F. Supp. 264, 270 n.8 (E.D. Wis. 1968).

69. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COL. L. REV. 1061, 1125 (1991).

70. *See, e.g.*, GENDER DIFFERENCES: THEIR IMPACT ON PUBLIC POLICY (Mary Lou Kendrigan ed., 1991); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (1989); Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOL. 1049 (1991); Susan M. Okin, *Justice and Gender*, 16 PHIL. & PUB. AFF. 42 (1987); Judith Resnik, *On the Bias Feminist Reconsideration of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Elizabeth M. Schneider, *The Dialectic of Rights and Politics' Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

71. *See, e.g.*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 99-100 (1976); Harry First, *Competition in the Legal Education Industry*, 53 N.Y.U. L. REV. 311 (1978) Rustad & Koenig, *supra* note 59, at 635. For case law examples, see United States v. Lane, 883 F.2d 1484, 1499-1500 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990) (anti-Semitic comments by co-defendant); State v. Millstein, 513 A.2d 1253, 1256-58, *cert. denied*, 518 A.2d 72 (1986) (defendant not deprived of fair trial when prosecutor referred to arson as "Jewish lightning"); State v. Levitt, 176 A.2d 465, 466-67 (1961) (anti-Semitic comment by jurors).

72. Barbara A. Perry, *The Life and Death of the "Catholic Seat" on the United States Supreme Court*, 6 J.L. & POL. 55 (1989) (discussing Pierce v. Society of Sisters, 286 U.S. 510 (1925)); Dale E. Carpenter, Note, *Free Exercise and Dress Codes: Toward a More Consistent Protection of a Fundamental Right*, 63 IND. L.J. 601, 617, n.112 (1988).

Asian,[73] anti-Native American,[74] homophobic,[75] disability based,[76] and ageist[77] attitudes.[78] In each instance, reliance on pseudoscience, culture and stereotypes reifies the ultimate subordination of the group targeted by the "ism".[79] In some cases, the subordinating practices are aimed at those sub-

73. *See, e.g.*, Arneja v. Gildar, 541 A.2d 621, 622 (D.C. 1988) (anti-Asian comments by lawyer to adversary); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1943-47 (1991) (discussing Chinese exclusion cases and Japanese internment cases); Charles McClain, *Of Medicine, Race and American Law: The Bubonic Plague Outbreak of 1900*, 13 LAW & SOC. INQUIRY 447 (1988).

74. Yasuhide Kawashima, *Forced Conformity: Puritan Criminal Justice and Indians*, 25 KAN. L. REV. 361 (1977); Jill Norgren, *Protection of What Rights they Have: Original Principles of Federal Indian Law*, 64 N.D. L. REV. 73 (1988); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249 (1987); Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167 (1991).

75. David Bernstein, *From Penthouses to AIDS Hospices: Neighbors' Irrational Fears of Treatment Facilities for Contagious Diseases*, 22 COLUM. HUM. RTS. L. REV. 1 (1990); John E. Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus And Its Impact on Minorities*, 1 YALE J.L. & HUMAN. 205 (1989); Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 CIV. LIBERTIES REV. 19 (1979); Arthur Leonard, *From Law: Homophobia, Hetrosexism and Judicial Decision Making*, 1 J. GAY & LESBIAN PSYCHOTHERAPY 65 (1991); Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988). *Compare* State v. Dunne, 590 A.2d 1144 (1991) (defendant's request for nonjury trial premised on desire to present insanity defense involving "abnormal homosexual fantasies") *with Man On Crime Spree Kills Gay Man*, THE TRENTONIAN, Nov. 7, 1991, at 18 (defendant claimed he killed victim "because he hates homosexuals").

76. *See* Chiari v. League City, 920 F.2d 311, 313 (5th Cir. 1991)(employee with Parkinson's Disease); *see also* David M. Engel & Alfred S. Konefsky, *Law Students With Disabilities: Removing Barriers in the Law School Community*, 38 BUFF. L. REV. 551 (1990); Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863 (1988).

77. William S. Geimer, *Juvenileness: A Single-Edged Constitutional Sword*, 22 GA. L. REV. 949 (1988); Howard B. Gelt, *Psychological Considerations in Representing the Aged Client*, 17 ARIZ. L. REV. 293 (1974); Jessica D. Silver, *From Baby Doe to Grandpa Doc: The Impact of the Federal Age Discrimination Act on the "Hidden" Rationing of Medical Care*, 37 CATH. U. L. REV. 993 (1988); Charles R. Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293 (1988); Weithorn, *supra* note 32; *cf.* Suzanne Meeks, *Age Bias in The Decision-Making Behavior of Clinicians*, 21 PROF. PSYCHOL.: RES. & PRAC. 279 (1990).

78. For examples of "ismic" behavior targeting other groups, see, *e.g.*, Frazier v. Heebe, 788 F.2d 1049 (5th Cir. 1986), *rev'd*, 482 U.S. 641 (1987) (out-of-state attorneys); Welsh v. Boy Scouts of America, 742 F. Supp. 1413, 1416 n.1 (N.D. Ill. 1990) (non-believers in Supreme Being); Johnson, *supra* note 35, at 1638; Note, *supra* note 32; Soifer, *supra* note 74, at 255, 264-65 (sailors); Ellen Wertleib, *Individuals With Disabilities in the Criminal Justice System: A Review of the Literature*, 18 CRIM. JUST. & BEHAV. 332, 333 (1991); Leslie A. Zebrowitz & Susan M. McDonald, *The Impact of Litigants' Baby-Facedness and Attractiveness on Adjudications in Small Claims Court*, 15 LAW & HUM. BEHAV. 603 (1991) (all dealing with physical unattractiveness). On the relationship between mental, disability and *irrational* self-perceptions of physical unattractiveness, see Alison Bass, *When the Looking Glass Reflects a Distorted Self-Image: In Little Known Disorder, Patients See Themselves As Grotesquely Flawed*, BOSTON GLOBE, Oct 21, 1991, at 27. *See generally* LAWRENCE H. FUCHS, THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE (1990).

79. *See generally* GILMAN, *supra* note 29; Lawrence, *supra* note 29, at 374.

ject to multiple stereotypes;[80] often, classism[81] further contaminates the process.[82] Although more recent legislation and court decisions have blunted the symbolic weight of some of these patterns, evidence of material subordination remains,[83] and many stereotypes continue to dominate both legal and political discourse.[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,[85] and bolstered by both analytic scholarship and moving, personal stories,[86] legislation is passed in an effort to ameliorate some of the most wretched excesses of the underlying behavior.[87] Courts may then re-

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80. *But see* Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 42 (1989) (characterizing black movement and women's movement as "two distinct and often warring social movements"). *Compare* Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723 (1991) (discussing Scales-Trent's insight):

> Part of the problem, I believe, stems from the ways that the women's movement and the movement for racial justice have each framed goals of equal treatment in terms set by the very legal system that excludes them. The movement for racial justice looks to the treatment of white people and the women's movement looks to the treatment of men. This approach lends large significance to the categories already prevailing in legal rules, and makes departures from those categories seem problematic.

Id. at 731.

81. On how the ways that we look to poverty to help shape our stereotypes, see generally Ross, *supra* note 39.

82. *See, e.g.*, Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989); Regina Austin, *Sapphire Bound*, 1989 WIS. L. REV. 539 (1989); Taunya L. Banks, *Women and AIDS — Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351 (1989-90) (discussing race, class and sex); Gary A. Debele, *The Due Process Revolution and the Juvenile Court: The Matter of Race in the Historical Evolution of a Doctrine*, 5 LAW & INEQ. 513 (1987) (discussing race, age and class); Freedman, *supra* note 23 (discussing race, sex and sexual orientation); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Slavin, *The Social World and Political Community of Head-Injured People: Difference by Gender and Family Life Cycle*, *in* GENDER DIFFERENCES, *supra* note 70, at 189 (discussing physical disability and gender).

Compare MACKINNON, *supra* note 70, at 63-67 (discussing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (challenge to Pueblo tribal rule preventing women who marry out of the tribe from passing their rights in common land on to their children)). MacKinnon's reading is criticized as "solipsistic and even manipulative" in Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 LAW & SOC. INQUIRY 373, 386 (1991).

83. *See infra* notes 85-93 and accompanying text.

84. For a particularly vivid example of the use of gay stereotypes in the judicial decision-making process, see Bowers v. Hardwick, 478 U.S. 186 (1986) (statute prohibiting consensual sodomy not unconstitutional). *Compare* Steffan v. Cheney, 780 F. Supp. 1 (D.C. Cir. 1991) (rational basis exists to sustain policy excluding gays from armed services). *See generally* Bailey & Pillard, *supra* note 8 ("respectable people" can publicly express their homophobia).

85. *See* Perlin, *supra* note 1, at 66.

86. *See* David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2156 (1989) (considering impact of MARTIN LUTHER KING, WHY WE CAN'T WAIT 77, 79 (1963) (Dr. Martin Luther King's jail letter)).

87. *See* CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

spond 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 Bias*[94]

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

88. *See* Perlin, *Last Frontier*, *supra* note 14, at 1256-59; Michael L. Perlin, *Are Courts Competent to Decide Competency Questions?, Stripping the Facade from* United States v. Charters, 38 KAN. L. REV. 957, 998-99 (1990); David Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate Over Political Structure*, 59 S. CAL. L. REV. 451 (1986); Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community From Itself*, 70 MINN. L. REV. 611 (1986).

89. *See, e.g.*, NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT 44-57 (1986), *reprinted in* 10 MENT. & PHYS. DIS. L. RPTR. 409, 464-77 (1986); LINDSAY G. ARTHUR ET AL., INVOLUNTARY CIVIL COMMITMENT: A MANUAL FOR LAWYERS AND JUDGES 9-11 (1988).

90. *See generally* Henderson, *supra* note 45, at 1605-06. On the role of empathy in lawyers' interpersonal contacts with clients, DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

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.

93. Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 118-20 (1988); Perlin, *OCS*, *supra* note 9, at 59.

94. On judicial bias in criminal cases in general, see Judge Hugh W. Silverman, *Judicial Bias*, 33 CRIM. L.Q. 486 (1990).

95. *See* Peter J. Hammer, Note, *Free Speech and the "Acid Bath": An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment*, 87 MICH. L. REV. 499, 505 (1988). *See also* Charles A. Johnson et al., *The Salience of Judicial Candidates and Elections*, 59 SOC. SCI. Q. 371 (1978); Joel B. Grossman, *Social Backgrounds and Judicial Decisions: Notes for A Theory*, 29 J. POL. 334 (1967). On the way judges are "deliberately removed from society," and thus more likely to be out of touch with practical concerns, see David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1707 (1991).

the reasons that such judges are more likely to believe police officers than criminal defendants,[96] are slow to take discrimination claims by a variety of ethnic groups seriously,[97] and are less likely to show empathy in cases involving sexual minorities.[98] Similarly judges ignore a range of voices and narratives of subordinated groups,[99] fail to acknowledge the significance of their *own* perspective,[100] and readily accept a model of an economically-efficient, rational man.[101] Reported cases offer countless examples of racial, sexual and religious bias,[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."[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"[104] in ways that have led to systemic law reform.[105] Other judges have sensitively dismantled some of the older and more pernicious stereotypes and limited the impact of "ismic" behavior in individual

96. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970) ("Trial judges . . . are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book."); *see also* Tracey Maclin, *Constructing Fourth Amendment Principles From the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669 (1988).

97. Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797 (1990).

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."), *discussing* L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (denying lesbian mother custody).

99. Delgado & Stefancic, *supra* note 73, at 1929-34.

100. MINOW, *supra* note 12, at 69-70; Bartlett, *supra* note 37, at 855 n.99 (discussing Minow's work); *see, e.g.*, United States v. Kras, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting). "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live." *Id.*

101. Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1212 (1990); Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AMER. U. L. REV. 7 (1991); *see also* Melton, *supra* note 11, at 853; Gary B. Melton, *Law, Science, and Humanity: The Normative Foundation of Social Science in Law*, 14 LAW & HUM. BEHAV. 315 (1990).

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.

103. Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1953 (1988); *see generally* Lawrence, *supra* note 29. On the role of racial bias in judicial qualification matters, see John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. REV. 237, 259-60 (1987).

104. Judge Patricia M. Wald, *Disembodied Voices—An Appellate Judge's Response*, 66 TEX. L. REV. 623, 627 (1988).

105. *See, e.g.*, 1 PERLIN, *supra* note 16, § 1.03, at 5-15; Perlin, *Institutionalization*, *supra* note 14, at 1249-54 (discussing how civil rights cases led to first judicial reform of mental disability law system).

cases.[106] Scholars are now turning to narrative to highlight prejudice and bias and to analyze experience and culture through individual stories.[107]

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,"[108] 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.[109] Evil spirits were commonly relied upon to explain abnormal behavior.[110] The "face of madness . . . haunts our imagination."[111] 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

106. *See, e.g.*, Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982); United States v. Lavallie, 666 F.2d 1217 (8th Cir. 1981) (anti-Indian prejudice); High Tech Gays v. Defense Indus. Security Clearance Off., 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990); Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991) (homophobia); United States v. Weiss, 930 F.2d 185, 200 (2d Cir. 1991) (Restani, J., dissenting), *cert. denied*, 112 S. Ct. 133 (1991) (anti-Semitism).

107. Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 972, 973-75 (1991).

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):

> [F]or 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 . . . [.]

Id. *See generally* Sheri Lynn Johnson, *Confessions, Criminals and Community*, 26 HARV. C.R.-C.L. L. REV. 328, 357-58 (1991) (discussing Professor Williams' insights).

109. *See, e.g.*, JOHN BIGGS, THE GUILTY MIND: PSYCHIATRY & THE LAW OF MEDICINE 26 (1955); WALTER BROMBERG, FROM SHAMAN TO PSYCHOTHERAPIST: A HISTORY OF THE TREATMENT OF MENTAL ILLNESS 63-64 (1975 ed.); MICHAEL MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 64-65 (1984); JUDITH NEAMAN, SUGGESTION OF THE DEVIL: THE ORIGINS OF MADNESS 31, 50, 144 (Anchor ed., 1975). *See generally* Perlin, *supra* note 29, manuscript at 29-51. On the similar ways that mental retardation has been seen as God's means of punishing sin or as a manifestation of evil, see WOLF WOLFENSBERGER, NORMALIZATION: THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES 12-25 (1972); Marie Appelby, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 7 B.C. THIRD WORLD L.J. 109, 115 (1987).

110. GEORGE ROSEN, MADNESS IN SOCIETY: CHAPTERS IN THE HISTORICAL SOCIOLOGY OF MENTAL ILLNESS 12, 33 (1969 ed.).

111. MICHAEL FOUCAULT, MADNESS AND CIVILIZATION 15 (1965).

a human being."[112]

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

> [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.[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' ";[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,"[115] is not like us.[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.[117] Such stereotypes are encouraged by media distortions[118] and exacerbated by our reliance on cognitive heuristics and "ordinary common sense" (OCS).[119]

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112. Andrew T. Scull, *Moral Treatment Reconsidered: Some Sociological Comments on an Episode in the History of British Psychiatry, in* MADHOUSES, MAD DOCTORS, AND MADMEN: THE SOCIAL HISTORY OF PSYCHIATRY IN THE VICTORIAN ERA 105, 108-09 (Andrew T. Scull ed., 1981).

113. GILMAN, *supra* note 29, at 23-24. On the false stereotype of the mentally ill person as a sexual molester of small children, see People v. McAlpin, 812 P.2d 563, 570-71 (1991).

114. CHRISTOPHER HARDING & RICHARD W. IRELAND, PUNISHMENT: RHETORIC, RULE AND PRACTICE 105 (1989).

115. GILMAN, *supra* note 29, at 130.

116. *See* Perlin, *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, *Public Opinion and the Death Penalty in Australia*, 7 JUST. Q. 529 (1990).

117. Perlin, *supra* note 1, at 111-12; Perlin, *Myths*, *supra* note 9, at 618-23, 706-31. *See generally Stigma Task Force*, *supra* note 14. On the cultural grounding of stereotypes of "mentally healthy women," see Denise LeBoeuf, Note, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 HARV. WOMEN'S L.J. 83, 86 (1988). On the way that "insanity has served as a metaphor for our nation's fears of its own craziness," see Herbert A. Eastman, *Metaphor and Madness, Law and Liberty*, 40 DEPAUL L. REV. 281, 283 (1991).

118. Three days prior to the presentation of the paper upon which this article is based, my hometown newspaper reported a hospital suicide with this headline: *Jailed Psycho Kills Self With Pen Through Eye*, TRENTONIAN, Jan. 3. 1992, at 4. On the media distortions in this context in general, see Mark S. Kaufman, *"Crazy" Until Proven Innocent: Civil Commitment of the Mentally Ill Homeless*, 19 COLUM. HUM. RTS. L. REV. 333, 363 (1988); David A. Snow et al., *The Myth of Pervasive Mental Illness Among the Homeless*, 33 SOC. PROBS. 407, 407-08 (1986). *See generally* Henry Steadman & Joseph Cocozza, *Selective Reporting and the Public's Misconception of the Criminally Insane*, 41 PUB. OPIN. Q. 523, 531 (1971-78).

119. *See* Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329 (1992); Perlin, *OCS*, *supra* note 9, at 12-28; Saks & Kidd, *supra* note 26; Sherwin, *supra* note 46, at 737-39. Parallels are found in all aspects of the treatment of people labelled mentally retarded. *See, e.g.*, James Ellis, *Mental Retardation at the Close of the 20th Century:*

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.[120] Gilman thus locates the "structural relationship between madness and blackness . . . in antiquity,"[121] and traces the historical roots of the belief that Jews, like women, "possessed a basic biological predisposition to specific forms of mental illness."[122]

Sanist, racist and sexist stereotypes remain frequently grounded in similar sorts of eugenic and cultural pseudoscience[123] in ways that reflect broader sets of public attitudes.[124] For example, black students have historically been more readily assigned to special education classes than have white students.[125] In the past, all post-natal women were seen as mentally impaired.[126] Still other studies show that decisions to hospitalize are positively related to behavioral stereotypes of race and sex.[127] These conflations sug-

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A New Realism, 28 MENTAL RETARDATION 263 (1990); Robert Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201 (1990); MINOW, *supra* note 12, at 110-39. James T. Hogan, Note, *Community Housing Rights for the Mentally Retarded*, 3 DET. COLL. L. REV. 869, 872-74 (1987).

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).

122. GILMAN, *supra* note 29, at 162. On the important question of cultural variance in the diagnosis and treatment of mental illness, see Horacio Fabrega, Jr., *An Ethnomedical Perspective of Anglo-American Psychiatry*, 146 AM. J. PSYCHIATRY 588 (1989); George S. Howard, *Culture Tales: A Narrative Approach to Thinking, Cross-Cultural Psychology, and Psychotherapy*, 46 AM. PSYCHOL. 187, 194-95 (1991); Lloyd H. Rogler, *The Meaning of Culturally Sensitive Research in Mental Health*, 146 AM. J. PSYCHIATRY 296 (1989). On the relationship between cultural bias and mistreatment of the mentally disabled, see Hayman, *supra* note 118, at 1228.

123. *See* Lawrence, *supra* note 29, at 373-74. On the explicit link between governmental-sanctioned racial and disability-based segregation, see Thomas M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 399-407 (1991).

124. *See, e.g.*, Martha Livingston Bruce et al., *Poverty and Psychiatric Status*, 48 ARCH. GEN. PSYCHIATRY 470 (1991) (relationship between psychiatric disorder and social class); Kirk Heilbrun et al., *Comparing Females Acquitted by Reason of Insanity, Convicted, and Civilly Committed in Florida, 1977-1984*, 12 LAW & HUM. BEHAV. 295 (1988) (relationship between gender, age and race and insanity defense success); Robert Weinstock et al., *Psychiatric Patients and AIDS: The Forensic Clinician Perspective*, 35 J. FORENSIC SCI. 644 (1990) (whether psychiatric hospitals should be allowed to refuse admissions to persons with AIDS).

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

126. Kimberly Waldron, Note, *Postpartum Psychosis as an Insanity Defense: Underneath a Controversial Defense Lies a Garden Variety Insanity Defense Complicated By Unique Circumstances For Recognizing Culpability*, 21 RUTGERS L.J. 669, 680-81 (1990). On the relationship between stereotypes of the "mad" and the "bad" infanticidal woman, see Anih Wilcyzynski, *Images of Women Who Kill Their Infants: The Mad and the Bad*, 2 WOMEN & CRIM. JUST. 71 (1991).

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 Dependencey*, 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 gener-

128. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part & dissenting in part).

129. Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination and Activism*, 44 J. SOC. ISSUES 3 (1988); Gary B. Melton & Ellen G. Garrison, *Fear, Prejudice and Neglect: Discrimination Against Mentally Disabled Persons*, 42 AM. PSYCHOL. 1007, 1007 (1987); Okolo & Guskin, *Community Attitudes Toward Community Placement of Mentally Retarded Persons*, *in* 12 INT'L REV. RES. IN MENTAL RETARD. 26 (N.R. Ellis & N.W. Bray eds., 1984); Stewart Page, *Psychiatric Stigma: Two Studies of Behavior When the Chips Are Down*, 2 CANAD. J. COMMUN. MENTAL HEALTH 13 (1983).

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 Youngberg 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.[134] Frequently deprived of the vote[135] or the right to be parents,[136] removed from political discourse,[137] and often invisible to their own attorneys,[138] people with mental disabilities remain a largely hidden,[139] fragmented,[140] and disenfranchised minority. When they are depicted in the news or entertainment media, it is inevitably in a negative or distorted manner.[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.[142] As with other stereotypic myths, sanism is the result of rigid cate-

134. On the importance of congressional "black seats," see Julius L. Crockett, *Special Report: What Color Is the Constitution? The Summer of '64, When Young American Men and Women Fought and Smiled, Struggled and Died, and Won, in America*, 15 HUM. RTS. 14, 15 (1988). In New York City, an openly homosexual man was elected in a 1991 city council election. The gay council member, Tom Duane, represents Manhattan's Third District which includes portions of the Greenwich Village, Chelsea and Soho neighborhoods. *See* Michael Spencer, *Gay Candidates Face Off in Single-Issue N.Y. Race*, WASH. POST, Sept. 11, 1991. On the increase in openly gay candidates in state and local political elections, see Lisa Leff, *Gay Cause Is Gaining Attention*, WASH. POST, Aug. 26, 1986.

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., *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).

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).

137. *See, e.g.*, Roy P. van den Brink-Budgen, *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., MENTAL DISABILITY AND THE LAW (3d ed. 1985); SAMUEL J. BRAKEL ET AL., MENTAL DISABILITY AND THE LAW (3d ed. 1985) [hereinafter BRAKEL].

138. *See generally* Perlin & Sadoff, *supra* note 16; Perlin, *Fatal Assumptions*, *supra* note 16; Pinsley, *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.").

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.

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).

141. *See, e.g.*, Steven E. Hyler et al., *Homicidal Maniacs and Narcissistic Parasites: Stigmatization of Mentally Ill Persons in the Movies*, 42 HOSP. & COMMUN. PSYCHIATRY 1044 (1991); Fred S. Berlin & Martin H. Malin, *Media Distortion of the Public's Perception of Recidivism and Psychiatric Rehabilitation*, 148 AM. J. PSYCHIATRY 1572 (1991); *see also* Gregory Leong et al., *Dangerous Mentally Disordered Criminals: Unresolvable Societal Fear?*, 36 J. FORENS. SCI. 210, 210 (1991) (caricature of "psychotic criminal . . . strikes terror in the mind of the common person"). *See generally* Douglas Biklen, *The Culture of Policy: Disability Images and Their Analogues in Public Policy*, 15 POL. STUD. J. 515 (1987).

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."[143] 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.[144] They are erratic, deviant, morally weak, sexually uncontrollable, emotionally unstable, superstitious, lazy, ignorant and demonstrate a primitive morality.[145] They lack the capacity to show love or affection.[146] They smell different from "normal" individuals,[147] and are somehow worth

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ill have been the victims of stereotypes, the disabilities imposed on them have often reflected that many of the mentally ill do have reduced ability for personal relations, for economic activity, and for political choice." *Id.* at 711. On the fallacy of using the "abnormal persons" approach in this context, see MINOW, *supra* note 12, at 105-07 (discussing majority opinion in City of Cleburne), and *id.* at 130, "abnormal persons are remnants or re-creations of a feudal hierarchical order."

143. GILMAN, *supra* note 29, at 240; *see Stigma Task Force, supra* note 15, at 1:

> Individuals experience stigma and discrimination after they have been labelled "mentally ill" by society or by the mental health system. . . . Once people are labelled mentally ill, regardless of the precipitating cause, they are categorized and treated as members of a single group who are assumed implicitly to be more alike than different . . . .
>
> The stereotyping and the subsequent response to people with mental illness or psychiatric disabilities are based on unexamined assumptions. These assumptions are negative and affect our social response.

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).

146. Susan Stefan, *Whose Egg Is It Anyway? Reproductive Rights of Incarcerated Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405, 448-49 (1989), *discussing In re* MacDonald, 201 N.W.2d 447, 450 (Iowa 1972). See generally Hayman, *supra* note 119.

147. Stevens v. Dobs, Inc. 483 F.2d 82 (4th Cir. 1973), discussed *supra* note 62. *Compare*,

less.[148]

2. Most mentally ill individuals are dangerous and frightening.[149] They are invariably more dangerous than non-mentally ill persons, and such dangerousness is easily and accurately identified by experts.[150] At best, people with mental disabilities are simple and content, like children.[151] Either *parens patriae* or police power supply a rationale for the institutionalization of all such individuals.[152]

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.[153]

GERALD PETIEVICH, PARAMOUR 260 (1991) (describing St. Elizabeth's Hospital in Washington, D.C.):

> 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) ("[T]he stereotype of the mentally ill as dangerous is not substantiated by our data.").

150. *Compare* JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 60 (1981) (psychiatrists wrong two out of three times); Bruce Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974)(questioning the reliability of psychiatric evaluations); Perlin, *Myths*, *supra* note 9, at 693-96.

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-Imaging 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 DEVEL. 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]

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ill persons] unable to provide informed consent to medical treatment." Davis v. Hubbard, 506 F. Supp. 915, 935 (N.D. Ohio 1980); Perlin, *supra* note 1, at 113-14; Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15 (1991), *reprinted in* ESSAYS, *supra* note 143, at 41, 46-50. The word "competency" encompasses many judicial statutes; a finding of incompetency (or competency) for one does not necessarily imply a similar finding for any other. *See* Perlin, *supra* note 88, at 967. *Compare* Thomas Grisso & Paul S. Appelbaum, *Mentally Ill and Non-Mentally Ill Patients' Abilities to Understand Informed Consent Disclosures for Medication*, 15 LAW & HUM. BEHAV. 377, 385-86 (1991) (test results do not support generalized presumptions about capacities of mentally ill patients to understand informed consent); Campbell v. Talladega City, Bd. of Ed., 518 F. Supp. 47, 55 (N.D. Ala. 1981) (school's failure to offer student full range of appropriate tests may have stemmed from "widely held social stereotypes concerning the abilities of retarded citizens").

154. 1 PERLIN, *supra* note 16, § 3.45 nn. 726.1-726.3, at 46-47 (Supp. 1991); Michael L. Perlin, *Reading the Supreme Court's Tea Leaves: Predicting Judicial Behavior in Civil and Criminal Right to Refuse Treatment Cases*, 12 AM. J. FORENS. PSYCHIATRY 37, 52-59 (1991); Theresa Scheid-Cook, *Commitment of the Mentally Ill to Outpatient Treatment*, 23 COMMUN. MENT. HEALTH J. 173, 180-81 (1987).

155. State v. Van Horn, 528 So. 2d 529, 530 (Fla. Dist. Ct. App. 1988) (discussing probativeness of lay witnesses' "perception of [defendant's] normality"); Walter Bromberg & Henry M. Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM. L. & CRIMINOLOGY 729, 738 (1952) (contrasting lay perceptions of "insanity" with actual attributes of schizophrenia); Perlin, *Myths*, *supra* note 9, at 727, n.608 (discussing Battalino v. People, 199 P.2d 897, 901 (1948) (defendant not insane where there was no evidence of a "burst of passion with paleness, wild eyes and trembling")).

156. On the ways that negative characterization of mental illness and mentally ill are used by prosecutors in criminal trial summations, see Thomas M. Fleming, Annotation, *Negative Characterization or Description of Defendant by Prosecutor During Summation of Criminal Trial, As Found for Reversal, New Trial, Or Mistrial - Modern Cases*, 88 A.L.R. 4th 8 (1991); Randy V. Cargill, *"Hard Blows" Versus "Foul Ones": Restrictions on Trial Counsel's Closing Argument*, ARMY LAW., Jan. 1991, at 20, 26. On the descriptions used by members of Congress to describe mentally disabled individuals ("the demented," "the deranged," "lunatics," "madmen," "idiots and morons," "psychopaths and nincompoops"), see Motion for Leave to File and Brief of *Amicus* N.J. Dep't of the Public Advocate and ACLU, U.S. Dep't of Treasury v. Galioto, 477 U.S. 556 (1986) (No. 84-1904) (quoting legislative debate on 1968 gun control legislation).

For a fascinating counterpoint, compare *Paramount Denies Wrongdoing in 'Crazy People' Campaign*, PSYCHIATRIC NEWS, May 18, 1990, at 9 (mental health and patient advocacy groups claim credit for persuading Hollywood studio to "kill" offensive ad campaign), to Judi Chamberlin, *Warning: This Article Is Intended to be Provocative*, NAPS NEWS, Spring 1990, at 6 (ex-patient activist argues that groups' anti-stigma efforts are "misdirected"; use of phrase "crazy" not "a slur").

157. *See, e.g.*, N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 551 F. Supp. 1165, 1185 (E.D.N.Y. 1982):

8. The mentally disabled person charged with crime is presumptively the most dangerous potential offender, as well as the most morally repugnant one.[158] The insanity defense is used frequently and improperly as a way for such individuals to beat the rap;[159] insanity tests are so lenient that virtually any mentally ill offender gets a free ticket through which to evade criminal and personal responsibility.[160] The insanity defense should be considered only when the mentally ill person demonstrates objective evidence of mental illness.[161]

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.[162]

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.[163] In fact, there's no reason

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> [T]he larger the facility the less likely it is that residents will become part of the community and will be accepted by their neighbors. Larger community facilities exacerbate community opposition to and fear of the retarded. This is because neighbors have more difficulty adjusting to a large group of individuals who appear to be different, and have more difficulty breaking down stereotypes in order to see these residents are individuals who happen to be retarded.

See generally 2 PERLIN, *supra* note 16, § 7.22, at 657-70; Robert L. Schonfeld, *"Five Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded*, 16 FORDHAM URB. L.J. 1 (1987-88) (discussing creation of large, institutional communities for people with mental disabilities).

158. Richard Rogers, *APA's Position on the Insanity Defense: Empiricism Versus Emotionalism*, 42 AM. PSYCHOL. 850, 845 (1987). On the way that insanity acquittees are viewed as "the most despised and feared group in society," see Deborah C. Scott et al., *Monitoring Insanity Acquittees: Connecticut's Psychiatric Security Review Board*, 41 HOSP. & COMMUN. PSYCHIATRY 980, 982 (1990).

159. *Compare* Moore v. State, 525 So. 2d 870, 871 (Fla. 1988) (juror who rejected insanity defense as basis for exculpatory criminal defense not excused for cause) (reversing conviction), *with* Boblett v. Commonwealth, 396 S.E.2d 131, 135 (Va. Ct. App. 1990) (no abuse of discretion where trial court refused to excuse for cause juror who indicated he might have difficulty voting for an NGRI verdict). *See generally* HENRY J. STEADMAN, BEATING A RAP? DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL (1979); Perlin, *Myths*, *supra* note 9, at 727-30. On the extent to which the public is misinformed about the insanity defense, see Valerie P. Hans, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 CRIM. 393 (1986); Valerie P. Hans & Dan Slater, *"Plain Crazy": Lay Definitions of Legal Insanity*, 7 INT'L J.L. & PSYCHIATRY 105, 111 (1984).

160. *See, e.g.*, Richard Jeffrey & Richard A. Pasewark, *Altering Opinions About the Insanity Plea*, 11 J. PSYCHIATRY & L. 29 (1983); Richard A. Pasewark & Deborah Seidenzahl, *Opinions Concerning the Insanity Plea and Criminality Among Mental Patients*, 7 BULL AM. ACAD. PSYCHIATRY & L. 199 (1979); Hans, *supra* note 159, at 393 (discussing the public's lack of information on the insanity plea).

161. Lawrence T. White, *The Mental Illness Defense in the Capital Penalty Hearing*, 5 BEHAV. SCI. & L. 411, 417 (1987); Perlin, *supra* note 29, manuscript at 112-14.

162. *See, e.g.*, State v. Duckworth, 496 So. 2d 624, 635 (La. Ct. App. 1986) (juror who felt defendant would be responsible for action as long as he "wanted to do them" not excused for cause) (no error); J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 238 (1990) (Hinckley prosecutor suggested to jurors "if Hinckley had emotional problems, they were largely his own fault"); Charles Krauthammer, *Nature Made Me Do It*, WASH. POST, May 11, 1990, at A27 (decrying use of "medical alibis"); *cf.* MINOW, *supra* note 12, at 47 (discussing the over-significance that we attribute to traits "that are largely or entirely beyond the control of the individuals who are identified by them").

163. Perlin, *supra* note 1, at 98-108; Perlin, *Book Review*, 8 N.Y.L. SCH. J. HUM. RTS. 557, 559-60 (1991) (reviewing ANNE BRADEN JOHNSON, OUT OF BEDLAM: THE TRUTH ABOUT

for courts to involve themselves in all mental disability cases.[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."[165] Their discomfort with social science,[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.[167] Legislators respond, and, according to some, pander to constituent outcry.[168] Lawyers and jurors clearly *are* the public, and their views are often identical with those expressed in the myths.[169] Neither expert witness nor mental health professionals are immune from the myths' powers and sway.[170]

DEINSTITUTIONALIZATION (1990)). *Compare* S.M. Saccomando Burke, *Deinstitutionalization Has Failed — Miserably*, WASH. POST, Apr. 11, 1989, at A26 (letter to editor); James P. McGrath, *A Hoax Called "Deinstitutionalization"*, WASH. POST Oct. 19, 1989, at A26 (letter to editor blaming patients' rights lawyers for deinstitutionalization failures).

164. This myth owes a great debt to the Supreme Court's decision in Parham v. J.R., 442 U.S. 584, 605-06 (1979) (characterizing civil commitment hearings for juveniles as "time-consuming procedural minuets"). *Compare* Michael L. Perlin, *An Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger's "Time-Consuming Procedural Minuets" Theory in* Parham v. J.R., 9 BULL. AM. ACAD. PSYCHIATRY & L. 149 (1981). On the proposition that civil commitment cases should be heard by separate administrative courts, see Paul S. Appelbaum, *Civil Commitment From a Systems Perspective*, 16 LAW & HUM. BEHAV. 71 (1992).

165. Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 332 (1991).

166. Perlin, *OCS*, *supra* note 9, at 59-61; Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 133-37 (1991); *see also* Randolph N. Jonakait, *Forensic Science: The Need for Regulation*, 4 HARV. J.L. & TECH. 109, 167-68 (1991).

167. Perlin, *OCS*, *supra* note 9, at 61-69; Perlin, *Myths*, *supra* note 9, at 718-30.

168. On the way that legislators perceive jurors' attitudes, see Perlin, *supra* note 29, manuscript at 95 n.293. On the way that legislative reform may be nothing more than "an intellectual charade played for the benefit of an uninformed public," see Richard Rogers, *Assessment of Criminal Responsibility: Empirical Advances and Unanswered Questions*, 15 J. PSYCHIATRY & L. 73, 78 (1987) (insanity defense reform). *See generally* Judie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1 (1988).

169. On juror use of heuristic reasoning in decisionmaking, see Julian Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 UCLA L. REV. 637, 661 (1978); *see* Perlin, *OCS*, *supra* note 9, at 39-53; Morrison Torrey, *When Will We Be Believed: Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1050 (1991); *see also* Caton F. Roberts & Stephen L. Golding, *The Social Construction of Criminal Responsibility and Insanity*, 15 LAW & HUM. BEHAV. 349, 372 (1991) (jurors' pre-existing attitudes toward insanity defense strongest predictor of individual verdicts).

170. *See, e.g.*, Jean C. Beckham et al., *Decision Making and Examiner Bias in Forensic Expert Recommendations for Not Guilty by Reason of Insanity*, 13 LAW & HUM. BEHAV. 79 (1989); Stephen L. Deitschman et al., *Self Selection Factors in the Participation of Mental Health Professionals In Competency for Execution Evaluations*, 15 LAW & HUM. BEHAV. 287, 299-300 (1992); Robert Homant & Daniel B. Kennedy, *Judgment of Legal Insanity as a Function of Attitude Toward the Insanity Defense*, 8 INT'L L.J. & PSYCHIATRY 67 (1985); Perlin, *supra* note 154, at 135-36; Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationship*, 9 BEHAV. SCI. & L. 111, 118-19 (1991); Richard Rogers, *supra* note 157, at 844; Richard Rogers & Christoper D. Webster, *Assessing Treatability in Mentally Disordered Of-*

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."[171] It is no wonder that these sanist attitudes pervade statutes, court decisions, and lawyering practices and thus infect all aspects of mental disability law.

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,[172] interpersonal relationships,[173] economic freedom,[174] and other civil rights.[175] 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.[176]

Historically, once mentally disabled individuals were institutionalized, they were regularly deprived of virtually all civil rights,[177] most notably their right to autonomy in medication decisionmaking.[178] In the criminal justice system, the mentally disabled were doubly cursed as "mad" and "bad",[179] and were regularly consigned to lifetime commitments in maxi-

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fenders, 13 LAW & HUM. BEHAV. 19 (1989); Jack Zusman & Robert Simon, *Differences in Repeated Psychiatric Examinations of Litigants to a Lawsuit*, 140 AM. J. PSYCHIATRY 1300 (1983).

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.

173. Laws limited the rights of mentally disabled persons to marry, to raise children, and to exercise reproductive autonomy. *See* SALES, *supra* note 137, at 62-76, 85-87; Samuel J. Brakel, *Family Laws*, *in* BRAKEL, *supra* note 137 at 508-10, 515-20; Hayman, *supra* note 119; Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 3 J. FORENS. PSYCHIATRY — (forthcoming 1992).

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.

176. 1 PERLIN, *supra* note 16, § 2.04, at 46-48.

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

178. *Id.*

179. *See, e.g.*, Ellen Hochstedler, *Twice-cursed? The Mentally Disordered Criminal Defendant*, 14 CRIM. JUST. & BEHAV. 251 (1987).

mum security facilities.[180] These facilities were generally the worst available institutions in the state.[181]

I speak here in the mostly-past tense. After the civil rights revolution of the '50s and '60s reached people with mental disabilities in the 1970s, lawmakers belatedly began to recognize the grotesque conditions to which mentally ill patients were subjected in institutional settings. Following decisions such as *Wyatt v. Stickney*,[182] *O'Connor v. Donalson*[183] and *Jackson v. Indiana*,[184] most states narrowed civil commitment standards[185] and enacted Patients' Bills of Rights to provide some level of civil rights to those still institutionalized.[186] Federal legislation[187] mandated a modest level of access to counsel for those institutionalized,[188] 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.[189]

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 sanist texts; all the myths referred to earlier are repeated, reified and relegitimated.[190] Soon after states revised their civil commitment laws to comport with constitutional requirements, legislators indicated that the "pendulum had swung too far,"[191] and new "reform" laws, once again widening the

180. *See, e.g.*, N.J. STAT. ANN. § 2A: 163-3 (West 1975), *declared unconstitutional* in State v. Krol, 344 A.2d 289 (N.J. 1975). *See generally* 1 PERLIN, *supra* note 16, § 2.10, at 88-86.

181. *See, e.g.*, Scott v. Plante, 532 F.2d 939 (3d Cir. 1976) (discussing conditions in New Jersey's V Room Building).

182. 325 F. Supp. 781 (M.D. Ala. 1971) (subsequent citations omitted). *See generally* 2 PERLIN, *supra* note 16, §§ 4.07-.19, at 29-111. On the specific impact of *Wyatt* in this context, see *The Wyatt Standards: An Influential Force in State and Federal Rights*, 28 HOSP. & COMMUN. PSYCHIATRY 374 (1977).

183. 422 U.S. 563 (1975). *See generally* 1 PERLIN, *supra* note 16, § 2.12, at 99-110.

184. 406 U.S. 715 (1972). *See generally* 1 PERLIN, *supra* note 16, § 2.08, at 75-79.

185. 1 PERLIN, *supra* note 16, § 2.16, at 130-38.

186. *Id.* § 11.03, at 953-58. *See generally* Martha A. Lyon et al., *Patients' Bills of Rights: A Survey of State Statutes*, 6 MENT. DIS. L. RPTR. 178 (1982).

187. 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).

188. *See, e.g.*, 42 U.S.C. §§ 6000-6081 (Supp. II 1990) (Developmental Disabilities Assistance and Bill of Rights Act), *discussed in* 2 PERLIN, *supra* note 16, § 9.13, at 899-91; 42 U.S.C. § 10801 (1988) (Protection and Advocacy for the Mentally Ill Act), *discussed in* 2 PERLIN, *supra* note 16, § 8.16, at 797-99.

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 Requirement 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.

191. *See* Mary L. Durham & John Q. LaFond, *The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment*, 3 YALE LAW & POL'Y REV. 395, 398 (1985); Perlin, *Fatal Assumptions*, *supra* note 16, at 56 n.105, discussing *inter*

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 *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

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alia, Daniel W. Shuman, *Innovated Statutory Approaches to Civil Commitment: An Overview and Critique*, 13 LAW, MED. & HEALTH CARE 284, 286 (1985).

192. *See, e.g.*, R. Michael Bagby & Leslie Atkinson, *The Effects of Legislative Reform on Civil Commitment Admission Rates*, 6 BEHAV. SCI. & L. 45 (1988); R. Michael Bagby, *The Effects of Legislative Reform on Admission Rates to Psychiatric Units of General Hospitals*, 10 INT'L J.L. & PSYCHIATRY 383 (1987).

193. *See* Perlin, *supra* note 166, at 135-36; Perlin, *supra* note 170, at 119-20, discussing *inter alia*, Paul Chodoff, *The Case of Involuntary Hospitalization of the Mentally Ill*, 133 AM. J. PSYCHIATRY 496 (1976).

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

195. *See, e.g.*, Linda C. Fentiman, *"Guilty But Mentally Ill": The Real Verdict Is Guilty*, 26 B.C. L. REV. 601 (1985); Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985). *Compare* Ira Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943 (1987).

196. *See* Perlin & Sadoff, *supra* note 16, at 164; Virginia A. Hiday, *The Attorney's Role in Involuntary Civil Commitment*, 60 N.C. L. REV. 1027 (1982). On the limited role of the Protection and Advocacy Act as a potential ameliorating device, see Perlin, *Fatal Assumptions*, *supra* note 16, at 54-55.

197. *See* Perlin, *supra* note 1, at 106 n.253 (discussing K.C. v. State, 771 P.2d 774 (Wyo. 1989), and Board of Supervisors v. Superior Court, 254 Cal. Rptr. 905 (Cal. Ct. App. 1989)).

198. *See, e.g.*, 42 U.S.C. § 12208 (act inapplicable to, *inter alia*, transvestites, kleptomaniacs, and compulsive gamblers).

199. *See* Crenshaw, *supra* note 35, at 1370-77, *discussed supra* at notes 64 & 68 and accompanying text.

flawed "ordinary common sense," heuristic reasoning[200] and biased stereotypes to justify their sanist decisions. While Justice Holmes' infamous and florid language in *Buck v. Bell*[201] is rarely repeated,[202] judicial decisions in all areas of mental disability law continue to reflect and perpetuate sanist stereotypes.[203] The myths are cherished by trial judges, appellate judges, Supreme Court justices, and, especially, by the Chief Justice of the United States.[204]

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.[205] 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.[206] Adherence to involuntary civil commitment statutory criteria is subverted by fears that strict construction of those laws will lead inexorably to homeless-

200. *See generally* Perlin, *OCS*, *supra* note 9.

201. "Three generations of imbeciles are enough." 274 U.S. 200, 207 (1927). For contemporaneous reevaluations of this opinion, the factual record in *Buck*, and Justice Holmes' personal view, see Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986); Stephen S. Gould, *Carrie Buck's Daughter*, 2 CONST'L COMMENTARY 331 (1985); Paul A. Lombardo, *Three Generations, No Imbeciles New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30 (1985); Mark R. Killenbeck, Comment, *We Have Met the Imbeciles and They Are Us: The Courts and Citizens With Mental Retardation*, 65 NEB. L. REV. 768 (1986).

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."

204. *See* Perlin, *Myths*, *supra* note 9, at 711-31; Perlin, *OCS*, *supra* note 9, at 61-69, discussing Justice Rehniquist's opinions in Wainwright v. Greenfield, 474 U.S. 284, 297 (1986) (concurring), and Ake v. Oklahoma, 470 U.S. 68, 90-91 (1985) (dissenting), and concluding that, to Rehnquist, a defendant was not " 'crazy' [if] he did not 'look' crazy." Perlin, *OCS*, *supra* note 9, at 66.

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.

206. *In re* Melas, 371 N.W.2d 653, 655 (Minn. Ct. App. 1985); Matter of J.B., 705 P.2d 598, 602 (Mont. 1985); 1 PERLIN, *supra* note 16, § 3.45, at 341 n.741; *id.* at 48 (Supp. 1991); Perlin, *supra* note 154, at 49-50. *Compare* Mary L. Durham & John Q. La Fond, *A Search for the Missing Premise of Involuntary Therapeutic Commitment: Effective Treatment of the Mentally Ill*, 40 RUTGERS L. REV. 303 (1988), *reprinted in* THERAPEUTIC JURISPRUDENCE, *supra* note 200, at 133, 154 (literature review suggests that from 21-70% of patients studied who were treated with drugs do no better than those given placebos).

ness.[207] The minimalist "substantial professional judgment" test[208] is endorsed in a wide variety of institutional cases so that only the most arbitrary and baseless decisionmaking can be successfully challenged.[209] Even when court decisions reject sanist myths and stereotypes, the enforcement of such decisions is frequently only sporadic.[210]

Criminal trial process caselaw is riddled with sanist stereotypes and myths.[211] Examples include the following:

- reliance on a fixed vision of popular, concrete, visual images of "craziness";[212]
- an obsessive fear of feigned mental states;[213]
- a presumed absolute linkage between mental illness and dangerousness;[214]
- 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);[215]

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207. *See* Perlin, *supra* note 1, at 116-17 n.308 (discussing *In re* Melton, 565 A.2d 635, 649 (D.C. 1989) (Schwelb, J., dissenting), *hearing granted & opinion vacated*, 581 A.2d 788 (D.C. 1990), *superseded on rehearing*, 597 A.2d 892 (D.C. 1991)).

208. *See* Youngberg v. Romeo, 457 U.S. 307, 323 (1982).

209. *See* United States v. Charters, 863 F.2d 302, 313, *questioned in* Perlin, *supra* note 88, at 935.

210. *See, e.g.*, Perlin, *Fatal Assumptions*, *supra* note 16, at 47-48, (discussing lack of implementation of Jackson v. Indiana, 406 U.S. 715 (1972), in applying the due process clause to proceedings on post-incompetency to stand trial commitment). *See* Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 U.S.L.A. L. REV. 921, 940-41 (1985) (Ten years after *Jackson*, half the states had still not implemented the Supreme Court's decree.); Wertleib, *supra* note 78, at 336 (nonimplementation continues).

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").

213. *See* Lynch v. Overholser, 369 U.S. 705, 715 (1962); United States v. Brown, 478 F.2d 606, 611 (D.C. Cir. 1973), *as discussed* in Peter Margulies, *The Pandemonium Between the Mad and the Acquittees After* Jones v. United States, 36 RUTGERS L. REV. 793, 806-07 n.85 (1984).

214. *See* Jones v. United States, 463 U.S. 354, 365 (1983); Overholser v. O'Beirne, 302 F.2d 852, 861 (D.C. Cir. 1961).

215. Penry v. Lynaugh, 492 U.S. 302 (1989) (mental retardation); Commonwealth v. Faulkner, 595 A.2d 28, 38 (Pa. 1991) (substantial mental impairment), *cert. denied*, 112 S. Ct. 1680 (1992); Harris v. State, 499 N.E.2d 723 (Ind. 1986) (GBMI); *see also* People v. Crews, 522 N.E.2d 1167 (Ill. 1988) (permissible to sentence GBMI defendant to post-life expectancy term), *cert. denied*, 492 U.S. 925 (1989). *Compare* Ford v. Wainwright, 477 U.S. 399 (1986) (barring execution of the currently insane). On the question of whether mentally retarded

- the incessant confusion and conflation of substantive mental status tests;[216]
- the determination that an insanity acquittee's need for medication renders him not "fully recovered" so as to be eligible for outpatient care or conditional release;[217]
- the appropriateness of continuing an insanity acquittee's mental hospital confinement when he is no longer mentally ill but remains dangerous to others;[218]
- the use of language such as "lunatic" in recent published opinions;[219]
- the refusal in insanity cases to provide jury instructions that NGRI defendants face long-term post-acquittal commitment;[220] and
- the characterization of the allocation of treatment resources for GBMI defendants as "not . . . helpful" or a "waste."[221]

Perhaps just as troubling is judicial ignorance about laws that affect mentally 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 involuntary civil commitment.[222] A Texas study revealed that a significant number of judges did not know of a state statutory patient-psychotherapist privilege.[223] Other courts with little public attention, have regularly entered commitment orders without any precedent statutory authority.[224]

To be sure, not all judges write in this voice. Some nonsanist opinions such as Judge Johnson's *Wyatt v. Stickney*[225] decision are firmly rooted in a rights and empowerment model.[226] Others like Justice Blackmun's dissent in *Barefoot v. Estelle*,[227] Justice Stevens' partial dissent in *Washington v.*

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individuals' lessened capacity for moral development prohibit their execution, see *Penry*, 492 U.S. at 345 (Brennan, J., concurring in part and dissenting in part).

216. *See* Buttrum v. Black, 721 F. Supp. 1268, 1295 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990). *See generally* RONALD ROESCH & STEPHEN GOLDING, COMPETENCY TO STAND TRIAL 15-17 (1980).

217. People v. De Anda, 170 Cal. Rptr. 830, 832-33 (1980), *discussed in* David Wexler, *Inappropriate Patient Confinement and Appropriate State Advocacy*, LAW & CONTEM. PROBS. 193 (Spring 1982), *reprinted in* THERAPEUTIC JURISPRUDENCE, *supra* note 205, at 347, 350-51.

218. State v. Foucha, 563 So. 2d 1138, 1141 (La. 1990), *rev'd*, 112 S. Ct. 1780 (1992) (Louisiana statute sanctioning such continued confinement unconstitutional). *Compare id.* at 1800 (Thomas J., dissenting) (arguing on behalf of statute's constitutionality).

219. Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987) (quoting Shuler v. Wainwright, 491 F.2d 1213, 1223 (5th Cir. 1974)).

220. State v. Neely, 819 P.2d 249, 256 (N.M. 1991).

221. Robinson v. Solem, 432 N.W.2d 246, 249 (S.D. 1988).

222. *In re* C.P.K., 516 So. 2d 1323, 1325 (La. Ct. App. 1987).

223. Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1982), *reprinted in* THERAPEUTIC JURISPRUDENCE, *supra* note 205, at 75. 103.

224. Wexler, *supra* note 217, *reprinted in* THERAPEUTIC JURISPRUDENCE, *supra* note 205, at 348.

225. 325 F. Supp. 781 (M.D. Ala. 1971); 334 F. Supp. 1341 (M.D. Ala. 1971); 344 F. Supp. 373 (M.D. Ala. 1972); 344 F. Supp. 387 (M.D. Ala. 1972) (subsequent citations omitted).

226. *See* MINOW, *supra* note 12, at 131-45; *see also* Johnson, *supra* note 108, at 356-58.

227. 463 U.S. 880, 916 (1983).

Harper,[228] and the New Jersey Supreme Court's opinion in *State v. Krol*[229] specifically rebut sanist myths. Still, others, such as Justice Stevens' dissent in *Pennhurst II*,[230] Justice Stevens' and Marshall's separate opinions in *Cleburne*,[231] and Judge Kaufman's use of a "Gulag archipelago" metaphor in a Second Circuit case involving a mentally disabled prisoner,[232] express eloquent outrage at institutional conditions flowing inevitably from our sanist society. Yet others, such Judge Brotman's class action opinion in *Rennie v. Klein*,[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.[234] Judges in less known cases have also shown real sensitivity to the underlying issues.[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."[236]

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

228. 494 U.S. 210, 236 (1990).

229. 344 A.2d 289 (N.J. 1975).

230. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 126 (1984).

231. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 452 (1985) (Stevens, J., concurring); *id.* at 455 (Marshall, J., concurring in part and dissenting in part).

232. United States *ex rel.* Schuster v. Vincent, 524 F.2d 153, 154 (2d Cir. 1975).

233. 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." *Id.* at 1309.

234. *See* Wald, *supra* note 104, at 627 (Bazelon one of the "greatest appellate judges"); Heathcote W. Wales, *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." *Id.* at 104. *See generally* Bazelon, *supra* note 11; David Bazelon, *Veils, Values and Social Responsibility*, 37 AM. PSYCHOL. 115 (Feb. 1982).

235. *See, e.g.*, S.H. v. Edwards, 860 F.2d 1045, 1053 (11th Cir.) (Clark, J., dissenting), *cert. denied*, 491 U.S. 905 (1989), *vacated*, 880 F.2d 1203 (11th Cir. 1989).

236. Perlin & Sadoff, *supra* note 16, at 164 (footnotes omitted).

237. Hiday, *supra* note 196, at 1030.

chance to be released at a commitment hearing if he appeared *pro se*.[238] Merely educating lawyers about psychiatric techniques and psychological nomenclature did not materially improve lawyers' performances because attitudes did not change.[239] Counsel was especially substandard in cases involving mentally disabled criminal defendants.[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.[241] This representation of mentally disabled individuals falls far short of even the most minimal model of "client-centered counseling."[242] What is worse, few courts seem even to notice.[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.[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,[245]

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238. Elliott Andalman & David Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and a Proposal*, 45 MISS. L.J. 43, 72 (1974).

239. Norman B. Poythress, Jr., *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony*, 2 LAW & HUM. BEHAV. 1, 15 (1978).

240. *See* DAVID BAZELON, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW 49 (1988); Perlin, *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, *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*).

241. *See* Perlin, *Fatal Assumption*, *supra* note 16, at 49-52.

242. The standard text is BINDER & PRICE, *supra* note 90; *see also* DAVID BINDER ET AL., LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1991). For important critiques, see Anthony V. Alfieri, *Essay: The Politics of Clinical Knowledge*, 35 N.Y.L. SCH. L. REV. 7 (1990); Robert Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

243. *See, e.g.*, *In re* C.P.K., 516 So. 2d 1323, 1325 (La. Ct. App. 1987) (trial court did not know of existence of state Mental Health Advocacy service). *But cf.*, State *ex rel.* Memmel v. Mundy, 249 N.W.2d 573 (Wis. 1977), setting out duties of adversary counsel in involuntary civil commitment cases. There is now some empirical data suggesting that patients represented by public defender organizations generally obtain significantly more favorable outcomes in contested involuntary civil commitment cases than do patients represented by private counsel hired on short-term contracts. *See* Mary L. Durham & John Q. La Fond, *The Impact of Expanding a State's Therapeutic Commitment Authority*, *reprinted in* THERAPEUTIC JURISPRUDENCE, *supra* note 205, at 121-22; Mary L. Durham & John Q. La Fond, *The Empirical and Policy Implications of Broadening the Statutory Criteria for Civil Commitment*, 3 YALE L. & POL'Y REV. 395 (1985).

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

245. *See, e.g.*, Stanley S. Herr, *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-

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and Control, 17 N.Y.U. REV. L. & SOC. CHANGE (1991); Stanley S. Herr, *The Future of Advocacy for Persons with Mental Disabilities*, 39 RUTGERS L. REV. 443 (1987); Peter Margulies, *"Who Are You To Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990); Schwartz, *supra* note 148; Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515 (1987).

246. *See* Perlin, *Fatal Assumption*, *supra* note 16, at 58-59 (recommending research agenda on this issue).

247. For an important and eloquent recent exception in a parallel area of disability law, see REED MARTIN, EXTRAORDINARY CHILDREN, ORDINARY LIVES: STORIES BEHIND SPECIAL EDUCATION CASE LAW (1991).

248. *Cf.* Fredrick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 400 n.2 (1985) ("To generalize about constitutional law from certain particular topics within a course somewhat artificially named 'Constitutional Law' runs a serious risk of distortion.").

249. *See, e.g.*, David Barnhizer, *The Revolution in American Law Schools*, 37 CLEV. ST. L. REV. 227 (1989).

250. *See* Thomas L. Hafemeister, *Comparing Law Reviews For Their Amenability to Articles Addressing Mental Health Issues: How to Disseminate Law Related Social Science Research*, 16 LAW & HUM. BEHAV. 219 (1992).

251. I do not want to overstate the case. Martha Minow's application of the social relations approach to cases involving the mentally disabled, MINOW, *supra* note 12, at 114-20, David Wexler's and Bruce Winick's ground breaking work on "therapeutic jurisprudence," THERAPEUTIC JURISPRUDENCE, *supra* note 205; ESSAYS, *supra* note 144, and the work of Gary Melton, Michael Saks, Dan Shuman, Stephen Morse and others in developing a psychology of jurisprudence are important exceptions.

ties when other guests find out that, in her pre-professorial life, she was a patients' rights litigator[252] 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.[253] 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.[254] 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.[255] We must include them in this dialogue that directly affects their lives.[256] 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.[257]

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."[258] 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.[259]

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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.

256. *See*, in related contexts, Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC'L CHANGE 659 (1988-89); Joel F. Handler, *Dependent People, the State and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 99 (1988); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC'L CHANGE 535 (1988-89).

257. *See* Richard Tessler et al., *Patterns of Contact of Patients' Families With Mental Health Professionals and Attitudes Toward Professionals*, 42 HOSP. & COMMUN. PSYCHIATRY 929 (1991); Agnes B. Hatfield, *Families as Advocates for the Mentally Ill: A Growing Movement*, 32 HOSP. & COMMUN. PSYCHIATRY 641 (1981); Thomas J. Craig et al., *Family Support Programs in a Regional Mental Health System*, 38 HOSP. & COMMUN. PSYCHIATRY 459 (1987).

258. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 2 (1973).

259. Birnbaum, *supra* note 5, at 107.