2000

A Law of Healing

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I. INTRODUCTION

The idea of law as a healing agent may strike many as the ultimate oxymoron. The legal system, and lawyers, have been targeted in recent years as the prime example of what’s wrong with this country: lawyers are, or so it’s said, too contentious, too nit-picking, too quick to encourage the avoidance of responsibility, too formalistic, too money-hungry; the list goes on and on.¹ Since these are all stereotypes, it does not matter much that some of the depictions are inherently inconsistent. For example, lawyers are criticized for simultaneously being ACLU “bleeding heart liberals,” and for being interested only in becoming richer and richer.² Talk show hosts in need of a quick laugh can always rely on a lawyer-bashing story. Hosts of cocktail parties in need of a conversation boost can count on a lawyer horror story to bring out the wallflowers. It sometimes seems that the only time, former Vice President Dan Quayle ever connected with the public was when he turned his attention to the evils of lawyers.³

The idea of the law as a healing agent might sound bizarre to many. How can a system that prides itself on adversariness heal? The profession that conjures up television images of, variously, F. Lee Bailey, Johnny Corcoran, Melvin Belli, hundreds of Wall Street plutocrats earning eight figures yearly, and pictures of poorly-toupeped guys on bus station placards advertising themselves as “the king of torts.” How can this make sense?

One of the most interesting quiet revolutions in the law in the past decade has been the work of a handful of legal scholars, especially that of David Wexler and Bruce Winick, whose work has resulted in the creation of a new jurisprudence—a jurisprudence of healing. Wexler and Winick have created the term “therapeutic jurisprudence” to encompass their studies of law as a potentially therapeutic agent. Therapeutic jurisprudence presents a new model by which the ultimate

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¹ A simple WESTLAW search in the database “JLR” of “PUBLIC PERCEPTION” /S LAWYER ATTORNEY /S NEGATIVE” is illuminating.
impact of case law and legislation that affects individuals with mental disabilities can be assessed. Therapeutic jurisprudence recognizes that substantive rules, legal procedures and lawyers' roles may have either therapeutic or anti-therapeutic consequences and questions whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while preserving due process principles.

From its roots in the legal academy, therapeutic jurisprudence has been embraced and endorsed by judges, by practitioners, and by mental health professionals. It has led logically—either directly or indirectly—to such offshoots as preventive law, holistic law, creative problem solving and others. Substantively, it has expanded far beyond its mental disability law roots into such areas as jury reform, workers' compensation, domestic violence, and labor arbitration.

Therapeutic jurisprudence offers the promise of creating a "law of healing." However, if this capacity to heal is to have a transformative impact, this promise must be realized.


effect on mental disability, there are other forces that must be addressed. Mental disability law has been shaped by insidious and omnipresent forces—by "sanism," the irrational prejudices that cause, and are reflected in, prevailing social attitudes toward persons with mental disabilities, and those so perceived, and by "pretextuality," the courts' acceptance—either implicit or explicit—of testimonial dishonesty and their decisions to engage in dishonest decisionmaking in mental disability law cases. It is impossible to understand this area of the law without understanding the pernicious impact of these factors. On the other hand, therapeutic jurisprudence offers a path by which sanism and pretextuality may, eventually, be neutralized, so that mental disability law may eventually become a law of healing.

This article will proceed in this manner. First, I will look briefly at the state of how we think about the law and lawyers. Then, I will discuss therapeutic jurisprudence, explain its roots, and consider a flavor of some its most recent inquiries (both in and outside of mental disability law). Next, I will touch on its interconnectedness with other "new jurisprudences" (such as preventive law), and reflect on these relationships. After that, I will turn my attention to sanism and pretextuality, and will explain how their corrosive effects have poisoned much of mental disability law. Finally, I will offer some thoughts as to the importance of the creation of a law of healing.

16. Although TJ has expanded far beyond the borders of mental disability law, see, e.g., 1 PERLIN, supra note 4, § 2D-3, at 540 (2d ed. 1998), this paper is limited solely to mental disability law issues.


See e.g., Robert Benham & Ansley Barton, Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration, 12 GA. ST. U. L. REV. 623, 624 (1996) ("Law, along with medicine and theology, should be considered a healing profession"); Robert Yazzie, "Hochi Nahashtilii"—We Are Now In Good Relations: Navajo Restorative Justice, 9 ST. THOMAS L. REV. 117, 123-24 (1996) (describing how traditional Navajo justice "leads to healing of the body, the mind and the spirit"); Steven Keeva, Re-Envisioning the Practice of Law, 63 TEX. B.J. 40, 40 (2000) (discussing law as a "healing profession").

On the significance of therapeutic jurisprudence in this regard, see Bruce Winick, Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 PSYCHOL., PUB. POLY & L. 505, 506 (1998) ("Therapeutic jurisprudence is a field of social inquiry that focuses on law's healing potential"); Jeffrey Harrison, Class, Personality, Contract, and Unconstitutionality, 35 WM. & MARY L. REV. 445, 495 (1994) ("[therapeutic jurisprudence asks] to what extent can law have a healing effect?").
II. THE STATE OF THE PROFESSION

First, the bad news.21 Writing recently in the GEORGETOWN JOURNAL OF LEGAL ETHICS, Professor Susan Daicoff reports:

The legal profession is at a crossroads. Public opinion of attorneys and the legal system is very low, dissatisfaction among lawyers both professionally and personally is widely known, substance abuse and other psychological problems are almost twice as frequent among attorneys as in the general population, attorney discipline cases and malpractice suits appear to be common, and the lack of civility and "professionalism" among attorneys is frequently discussed. Some say these problems have always been present and have not necessarily increased in recent years. However, others suggest that these phenomena are reaching crisis proportions. The problems seem to fall into three categories: professionalism, public opinion, and lawyer dissatisfaction. Together, these three problems form a "tripartite crisis" in today's legal profession.22

The legal profession has been stereotyped as "incompetent and unethical" for decades.23 Lawyers are criticized for being too aggressive,24 too "Rambo-like,"25 too willing to exacerbate wounds and disrupt relationships,26 not sufficiently public-minded27 and lacking a sense of social responsibility,28 "symbols of everything crass and dishonorable in American public life,"29 and, in my favorite metaphor,
"devil[s] in pinstripe suits." And this doesn't even touch on the nightly Letterman/Leno monologues. This is not a pretty picture, and is one that should concern lawyers and non-lawyers alike.

III. THE ROLE OF THERAPEUTIC JURISPRUDENCE

Enter David Wexler and Bruce Winick. The most important and exciting new jurisprudential insights into mental disability law jurisprudence of the last two decades have come from their development of the construct of therapeutic jurisprudence.

Therapeutic jurisprudence stems from a variety of sources. First, changes in the judicial temperament over the past two decades have created the appearance that the seemingly endless expansion of civil rights in earlier cases involving the constitutional and civil rights of mentally disabled persons had come to a stuttering halt, and that federal courts could no longer be looked to as the last bastion of patients' rights. Second, changes in the political and social climate—the residue of the Reagan years—eliminated any sort of political consensus that might have once supported the proposition that amelioration of the lives of mentally disabled individuals was a positive social goal. Next, the development of more sophisticated behavioral and empirical research began to shed some important light on the roots of mental disability and the reasons for some previously misunderstood behavior of persons with mental disabilities. Finally, other developing sophisticated schools of jurisprudence (e.g., law and economics, feminist jurisprudence, critical

32. And it is a picture that I expect bothers those of us who—like me—made the call 30 years ago to devote our careers to public interest law practice even more, because, we think, "Damn, they can't be saying those awful things about us, can they?" But whether they are, or they're not, the point is that the law—at the turn of the century—is not seen by any significant segment of the public as being a law that heals. On the special dilemmas faced in this context by the lawyer whose practice reflects ideological commitment to political or social causes, see Yoav Dotan, Public Lawyers and Private Clients: An Empirical Observation on the Relative Success of Cause Lawyers, 21 LAW & POL'Y 401 (1999).
33. This section is adapted from PERLIN, supra note 19.
legal studies, critical race studies) have begun to examine the entire legal system through a series of new and critical lenses and filters. Therapeutic jurisprudence may be seen as another alternative school in this intellectualist tradition.

Recent therapeutic jurisprudence articles and essays have thus considered such matters as the insanity acquitted conditional release hearing, health care of mentally disabled prisoners, the psychotherapist-patient privilege, incompetency labeling, competency decision-making, juror decisionmaking in malpractice and negligent release litigation, competency to consent to treatment, competency to seek voluntary treatment, standards of psychotherapeutic tort liability, the effect of guilty pleas in sex offender cases, correctional law, health care delivery, "repressed memory" litigation, the impact of scientific discovery on substantive criminal law doctrine, and the competency to be executed. 38

Within the past few months, other articles have been published dealing with such questions as the treatment of prisoners with severe mental disorders, threats of violence from "obsessional harassers," the impact of mental health professionals testifying about their patients. 39 While these are fresh, stimulating and provocative ideas, at least six caveats need to be added to any therapeutic jurisprudence analysis.

First, and most important, it is clear that an inquiry into therapeutic outcomes does not mean that therapeutic concerns "trump" civil rights and civil liberties. David Wexler underscores this: the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns." 40 Therapeutic jurisprudence does not, cannot and must not be simply an elaborate academic justification for, in Nicholas Kittrie's famous phrase, "a return to the therapeutic state." 41 Consideration of therapeutic jurisprudence issues cannot be used as an excuse to return to the days of the 1950's when courts were comfortable simply with a "hands-off" policy toward mental hospitals and their residents. 42

42. See generally 1 PERLIN, supra note 4, § 1-2.1, at 7 (2d ed. 1998). For standard articulations of the
Therapeutic jurisprudence has not developed as a means by which mental health professionals can avoid legal accountability or by which civil libertarian principles can be subverted. In a paper on the therapeutic jurisprudence implications of the right to refuse decision-making, for example, Deborah Dorfman, the one notable public interest law attorney who writes seriously and thoughtfully about all of this, emphasizes that a therapeutic jurisprudence inquiry will force us to step back from our treatment choices, and “assess . . . why we are making this choice” in an effort to determine if society is really being driven by purported therapeutic outcomes or as a means of “reliev[ing . . . the] anxieties that the mentally ill instill within us.”

In the same vein, a paper by Bruce Winick demonstrates how decisions such as Riggins v. Nevada, expanding the right to refuse treatment by implicitly focusing on the nature of choice in the construction of a treatment refusal calculus, will set up “expectancies of positive outcomes that predictably will increase patient motivation and treatment compliance, enlarging the chances that treatment will be successful.”

Second, familiarity with therapeutic jurisprudence cannot be limited to the worlds of the small circle of law professors and academic psychologists writing in this area. If therapeutic jurisprudence is to be meaningful, there must be a concentrated outreach to members of the practicing bar, frequent forensic witnesses, and to clinicians. Third, therapeutic jurisprudence must consider the perspective of clients and consumers of mental health services. In this way, those who are involved in, or are the subjects of, the litigation that deals with individuals with mental disabilities can share their insights into how the therapeutic, anti-therapeutic or atherapeutic aspects of the justice system actually play out. Those of us who write in this field can and must learn from them.

John Petrila has exposed the failure to explicitly incorporate the perspective of both the voluntary and involuntary consumer of mental health services in crafting a therapeutic jurisprudence perspective as a

document, see e.g., Banning v. Looney, 213 F. 2d 771 (10th Cir. 1954), cert. den., 348 U.S. 854 (1954); Siegel v. Ragen, 180 F.2d 785, 788 (7th Cir. 1950). Justice Thoma's dissent in Helling v. McKinney, 509 U.S. 25 (1993) (questioning constitutional underpinnings of doctrine articulated in Estelle v. Gamble, 429 U.S. 97 (1976), and right of incarcerated prisoners to medical care) appears to wistfully long for a return to this jurisprudence.

43. Dorfman, supra note 7, at 819.
46. For the most recent important collection of TJ writings, see KEY, supra note 4.
potentially serious gap in the therapeutic jurisprudence methodology. Joel Haycock speaks to this directly: "the success of therapeutic jurisprudence will depend in part on the degree to which it empowers the objects of therapeutic and judicial attention." This is a challenge that therapeutic jurisprudence can and must meet.

One of the most important, but all-too-often-hidden, developments of the past quarter-century has been the creation of a robust, vital, and important ex-patients’ movement. Such groups represent all points on the political spectrum—from the conservative, family-focused, treatment-oriented branches of the National Alliance for the Mentally Ill to radical, anti-psychiatry groups such as Project Release or the Network Against Psychiatric Assault—but they share the common thread of highlighting and exposing the stigma, the prejudice and the mindless stereotyping that dominates so much of the mental health policy debates. University of Cincinnati Professor John Steffen has suggested that the “recovery movement” is premised on “responsibility, self-determination, hope and the quality of life.” If there is to be a law of healing, I can think of no better place to start.

Let me turn to the mental health law system with one example. Over 20 years ago, John Ensminger and Thomas Liguori wrote a piece on the therapeutic aspects of the civil commitment process, an essay reprinted in Professor Wexler’s first collection of therapeutic jurisprudence essays. Not until the present time, with Bruce Winick

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48. Joel Haycock, Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law, 20 NEW ENG. J. ON CIV. & CRIM. CONFINEMENT 301, 317 (1993) (emphasis added) (“the success of therapeutic jurisprudence will depend in part on the degree to which it empowers the objects of therapeutic and judicial attention”).
49. See, e.g., Final Report: Task Force on Stigma and Discrimination (N.Y. State Office of Mental Health, Mar. 6, 1990). “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.
50. A caveat: I expect that some of the most articulate spokespersons for groups on the political left such as Judi Chamberlin or Rae Unzicker would take issue with the descriptor as implicitly conceding the existence of an illness from which “recovery” was possible. See, e.g., Rae E. Unzicker, From The Inside, in BEYOND BEDLAM: CONTEMPORARY WOMEN PSYCHIATRIC SURVIVORS SPEAK OUT 13 (Jeanine Grobe ed., 1995).
51. E-mail from Professor John Steffen, University of Cincinnati Department of Psychology, to Michael L. Perlin (Sept. 24, 1999) (on file with author).
52. At the time Ensminger and Liguori wrote this article, they were colleagues of mine in the NJ Department of Public Advocate’s Division of Mental Health Advocacy. See Michael L. Perlin, Mental Patient Advocacy by a Patient Advocate, 54 PSYCHIATRIC Q. 169 (1982).
returning to this question, 54 has another author significantly built on their insights about how the commitment process actually works, the effect it has on the individuals subject to commitment, and how state hospital employees respond to the litigational process. 55 Additional involvement of both legal and mental health practitioners in the therapeutic jurisprudence enterprise would help insure that there are meaningful "real world" results from any academic efforts in this field.

It is essential that therapeutic jurisprudence incorporate the viewpoints and perspectives of the eventual consumers 56 of mental health services—those who involuntarily and voluntarily 57 enter the mental health system. Again, there is now a vibrant and growing body of literature 58 by former recipients of mental health services. For years, the mental health system and the judiciary have ignored this perspective 59—a willful blindness that is even more perplexing in light of the findings of Professor Tom Tyler that perceptions of systemic fairness are driven, in large part, by "the degree to which people judge that they are treated with dignity and respect." 60 The next generation

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54. See Bruce J. Winick, Therapeutic Jurisprudence and the Civil Commitment Hearing, 10 J. CONTEMP. LEG. ISSUES 57 (1999).

55. For two other important perspectives on the question, compare Paul S. Appelbaum, Civil Commitment from a Systems Perspective, 16 LAW & HUM. BEHAV. 61 (1992) (suggesting new functionally independent system to assume all civil commitment responsibilities now shared by mental health and judicial systems), with Joel Haycock, et al., Thinking About Alternatives to the Current Practice of Civil Commitment, 20 N. ENG. J. ON CIV. & CRIM. CONFINEMENT 265 (1994) (suggesting mediation as an alternative means of resolving involuntary civil commitment cases).


57. See, e.g., Zinermon v. Burch, 494 U.S. 113 (1990) (holding that a voluntary patient could proceed with § 1983 damages action against state hospital officials for allowing him to sign voluntary admissions forms at a time when they should have known he was incompetent to do so).


60. Tom R. Tyler, The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings, 46 SMU L. REV. 433, 442 (1992). See also id. at 444 (noting that these findings "have especially important implications for the study of commitment hearings"). For other important related readings on procedural justice in this context, see, e.g., Norman G. Poythress, Procedural Preferences, Perceptions of Fairness, and Compliance with Outcomes, 18 LAW & HUM. BEHAV. 361 (1994); P. Christopher Earley & E. Allan Lind, Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments, 52 J.
of therapeutic jurisprudence scholarship must incorporate these perspectives.\(^6\)

Fourth, the recent literature shows how therapeutic jurisprudence can be employed as a servant of law reform, by illuminating the therapeutic and anti-therapeutic effects of rules that drive behavior in other institutional and litigational systems. By way of example, Daniel Shuman looks at the tort system,\(^6\)\(^2\) and concludes that there is a "common agenda" shared by tort law and therapeutic jurisprudence,\(^6\)\(^3\) raising a provocative list of questions that tort scholars need to consider in the continued development of tort-compensation jurisprudence.\(^6\)\(^4\)

A consistent pattern of association between reduction of post-accident pathology and "a shorter time between accident and settlement, a longer time after [the] settlement of the lawsuit, and having less severe symptomatology after the accident"\(^6\)\(^5\) in and of itself suggests the importance of therapeutic jurisprudence to tort law.

Fifth, recent developments demonstrate how therapeutic jurisprudence can be a powerful interpretive tool to make vivid the "stories" of individuals in other areas of the law. Keri Gould's examination of the federal sentencing guidelines provision that permits departure from presumptive sentencing terms when the defendant "turns rat"\(^6\)\(^6\) takes therapeutic jurisprudence into new and totally uncharted waters. The questions that she asks provides an important research agenda for sophisticated criminal law scholars and empiricists.\(^6\)\(^7\) Similarly, Murray Levine's empirical analysis of the


\(^5\)See Petrilia, supra note 47, at 903-04; Haycock, supra note 48, at 317.


\(^8\)See id. at 755-57.


impact of mandatory child abuse reporting by therapists demonstrates the complexity and ambiguity of the underlying issues, and shows how a law written with an ostensibly therapeutic purpose\textsuperscript{68} can result in feelings of anger and betrayal on the part of therapists and have significantly anti-therapeutic outcomes.\textsuperscript{69}

Sixth, other important papers contextualize these developments in two very different but complimentary ways: within the world of forensic mental health law practice, and within the larger legal process. David Wexler provides another enticing menu of alternative legal and behavioral areas which cry out for therapeutic jurisprudence analysis. He explicitly calls for an "expansion of the reach of therapeutic jurisprudence beyond the conventional contours of mental disability law" so as to serve as "an [eventual] instrument of law reform."\textsuperscript{70} Robert Sadoff considers the entire school of therapeutic jurisprudence from the important perspective of a practicing forensic psychiatrist, although his insights are equally applicable to the other mental health professions as well, and demonstrates how therapeutic jurisprudence inquiries must extend far beyond the mental disability law borders.\textsuperscript{71} This perspective forces us to consider a reality that is too often glossed over in legal scholarship: that therapeutic jurisprudence will also restructure the contours of forensic testimony and of the relationship between fact-finders and expert witnesses, a relationship already shaped to a large extent by constitutional dictates and statutory limitations as well as by self-imposed professional restrictions on expertise.\textsuperscript{72}

\textbf{IV. OTHER JURISPRUDENTIAL CONSTRUCTS}

Therapeutic jurisprudence is not the only new jurisprudential construct that is likely to promote a law of healing. Preventive law is, according to Professor Wexler, a modality of law practice that involves careful client interviewing and counseling, and careful planning and drafting to avoid legal conflicts and disputes. It emphasizes the
importance of "periodic legal checkups," and seeks to identify legal soft spots—potential trouble points. Preventive law thus seeks to develop strategies to avoid or minimize potential and sometimes anticipated legal problems.\(^7\)

Holistic law, according to the movement's founder William van Zwerdyn, embodies "the understanding of our common Source, our undivided spirituality, the inter-connectedness of all things, and the differences between us that gives our uniqueness or individuality. Holism includes viewing the whole—the greater picture of people and events."\(^7\) Finally, creative problem solving "combines law, sociology, social anthropology, and behavioral sciences (particularly cognitive psychology, group dynamics, and decision-making) in a holistic fashion," constructing problems as multidimensional with interconnected causes, often requiring non-legal or multidisciplinary solutions.\(^7\)

There are other new approaches as well. Professor A.J. Stephani has informed me of the growing interest in the Cincinnati bar in "collaborative law," spearheaded by two federal judges. That interest was recently reflected in a two-day training session on how lawyers can work together to solve client problems "without prompting adversarial actions and reactions."\(^7\)

Finally, healing can sometimes only come with apologies. In an absolutely fascinating new article, Professor Jonathan Cohen contrasts the advice we, as parents, give children when they, for instance, damage a neighbor's house playing baseball, and the advice we, as lawyers, give clients who inflict similar damage.\(^7\) The contrast between the first set of prescriptions—apologize and make amends—and the second set of proscriptions—deny responsibility—is his launching pad for an analysis of when and why we should advise clients to apologize, a potentially-

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\(^7\) Janet Weinstein, _Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice_, 74 WASH. L. REV. 319, 322 n.9 (1999) (quoting James M. Cooper, _Towards a New Architecture: Creative Problem Solving and the Evolution of Law_, 34 CAL. W. L. REV. 297, 312 (1998)).

Professor Carrie Menkel-Meadow titles her recent thoughtful article, _Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General_, 49 J. LEG. EDUCATION 14 (1999). In this article, she sets out an agenda to incorporate such problem-solving skills into all three years of the law school curriculum. Happily, her piece was published in the _JOURNAL OF LEGAL EDUCATION_, the only journal sent to every American law professor. I hope that Professor Menkel-Meadow’s article is read widely and taken seriously.

\(^7\) E-mail from A.J. Stephani, Director of Glenn M. Weaver Institute of Law and Psychiatry and Adjunct Professor University of Cincinnati College of Law, to Michael L. Perlin (Sept. 3, 1999) (on file with author).

\(^7\) See Jonathan Cohen, _Advising Clients to Apologize_, 72 S. CAL. L. REV. 1009 (1999).
healing strategy that would certainly strike many trial lawyers with abject terror.

V. SANISM AND PRETEXTUALITY

Each of these options offers new, provocative, exciting and innovative approaches toward the creation of a law of healing. And each is worthy of our careful attention and consideration. But I do not believe that any law of healing can serve to redeem mental disability law unless we take seriously the pernicious and corrosive effects of sanism and pretextuality.78 In the more than a quarter of a century that I have worked, taught, thought and written about this area, two overarching issues dominate and overwhelm the subject matter: mental disability law is sanist,79 and mental disability law is pretextual.80 I am further convinced, beyond any doubt, that it is impossible to truly understand anything about mental disability law—the doctrine, the debate, the discourse, the decisions, the dissents—without first coming to grips with this reality. I am equally convinced that the apparent contradictions, internal inconsistencies and cognitive dissonances of mental disability law cannot be understood without understanding the power and pervasiveness of these concepts. And, if we are to conceive of law as a “healing agent,” we cannot do this unless we deal with the roots, the causes and the effects of sanism and pretextuality.81

A. Sanism and the Judicial Process

First, we need to think about sanism and the judicial process. Judges are not immune from the impact of sanism. “[E]mbedded in the cultural presuppositions that engulf us all,”82 judges express discomfort with social science— or any other system that may appear to challenge

78. See generally PERLIN, supra note 19.
80. See supra note 18 and accompanying text; Perlin, supra note 20.
81. The following section is largely adapted from Michael L. Perlin, “Half-Wracked Prejudice Leaped Forth”: Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did, 10 J. CONTEMP. LEG. ISSUES. 3 (1999).
83. The discomfort that judges often feel in having to decide mental disability law cases is often palpable. See, e.g., Michael L. Perlin, Are Courts Competent to Decide Questions of Competency? Stripping the Facade
law's hegemony over society—and skepticism about new thinking. This discomfort and skepticism allows judges to take deeper refuge in heuristic thinking and flawed, non-reflective "ordinary common sense," both of which continue the myths and stereotypes of sanism. Judges reflect and project the conventional morality of the community, and judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes. Their language demonstrates bias against individuals with mental disabilities and contempt for the mental health professions.

Courts often appear impatient with mentally disabled litigants, ascribing their problems with the legal process to weak character or poor resolve. Thus, a popular sanist myth is that "[m]entally disabled individuals simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint." We assume that "[m]entally ill individuals are presumptively incompetent to participate in 'normal' activities [and] to make autonomous decisions about their lives (especially in areas involving medical care)."

Sanist thinking allows judges to avoid difficult choices in mental disability law cases; their reliance on non-reflective, self-referential alleged "ordinary common sense" contributes further to the pretextuality that underlies much of this area of the law. Such reliance

From United States v. Charters, 38 U. Kan. L. Rev. 957, 991 (1990) (court's characterization in United States v. Charters, 863 F.2d 302, 310 (4th Cir. 1988) (en banc), cert. den., 494 U.S. 1016 (1990), of judicial involvement in right to refuse antipsychotic medication cases as "already perilous ... reflects the court's almost palpable discomfort in having to confront the questions before it").


85. See id.; Perlin, supra note 37, at 618-30.

86. See Perlin, supra note 17, at 400-04.


89. Perlin, supra note 17, at 396; see, e.g., J.M. Balkin, The Rhetoric of Responsibility, 76 Va. L. Rev. 197, 248 (1990) (Hinckley prosecutor suggested to jurors "if Hinckley had emotional problems, they were largely his own fault"); see also State v. Duckworth, 496 So.2d 624, 635 (La. Ct. App. 1986) (no error (juror who felt defendant would be responsible for actions as long as he "wanted to do them" not excused for cause).

90. Perlin, supra note 17, at 394.
makes it even less likely that judicial decisions\(^1\) in right to refuse treatment cases reflect the sort of "dignity" values essential for a fair hearing.\(^2\) Some judges simply "rubber stamp" hospital treatment recommendations in right to refuse cases.\(^3\) Other judges are often punitive in cases involving mentally disabled litigants,\(^4\) and their decisions frequently reflect "textbook" sanist attitudes.\(^5\)

At its base, sanism is irrational. Any investigation of the roots or sources of mental disability jurisprudence must factor in society's irrational mechanisms that govern our dealings with mentally disabled individuals.\(^6\) The entire legal system makes assumptions about persons with mental disabilities—who they are, how they got that way, what makes them different, what about them lets us treat them differently, and whether their conditions are immutable.\(^7\) These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we may become mentally

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91. Where the fact-finder is a nonjudicial officer, the problems discussed here are probably accentuated further. 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, 331-32 (1992) (psychiatrists-as-fact-finders more likely to take paternalistic positions in right to refuse cases).


93. Courts and commentators have regularly discussed "dignity" in a fair trial context both in cases involving mentally disabled criminal defendants and in other settings. See, e.g., Marquez v. Collins, 11 F.3d 1241, 1244 (5th Cir. 1994) ("Solemnity ... and respect for . . . individuals are components of a fair trial"); Heffernan v. Norris, 48 F.3d 331, 337 (8th Cir. 1995) (Bright, J., dissenting) ("[T]he forced ingestion of mild-altering drugs not only jeopardizes an accused's rights to a fair trial, it also tears away another layer of individual dignity"); Keith D. Nicholson, Would You Like More Salt With That Wound? Post-Sentence Victim Allocation in Texas, 26 ST. MARY'S L.J. 1103, 1129 (1995) (for trial to be fair, "it must be conducted in an atmosphere of respect, order, decorum and dignity befitting its importance both to the prosecution and the defense"); see also Tyler, supra note 60, at 444 (significance of dignity values in involuntary civil commitment hearings); Deborah A. Dorfman, Effectively Implementing Title I of the Americans With Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis, 8 J. L. & HEALTH 105, 116 (1993-94) (same).

94. Cf. Perlin, supra note 17, at 401 n. 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."


96. See generally Perlin, supra note 37; Perlin, supra note 38.

disabled. The most important question of all—why we feel the way we do about these people—is rarely asked.

These conflicts compel an inquiry into the extent to which social science data does, or should, inform the development of mental disability law jurisprudence. After all, if we agree that mentally disabled individuals can be treated differently because of their mental disability, or because of behavioral characteristics that flow from that disability, it would appear logical that this difference in legal treatment is—or should be—founded on some sort of empirical data base that confirms both the existence and the causal role of such difference. Yet, we tend to ignore, subordinate or trivialize behavioral research in this area, especially when acknowledging that such research would be cognitively dissonant with our intuitive—albeit empirically flawed—views. The steady publication stream of new, comprehensive research does not promise a change in society's attitudes.

B. Pretextuality and the Forensic Mental Health System

What about pretextuality? The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders. Experts frequently testify in

98. See, e.g., Joseph Goldstein & Jay Katz, Abolish the "Insanity Defense"—Why Not? 72 YALE L.J. 853, 868-69 (1963); Perlin, supra note 36, at 108 (on society's fears of mentally disabled persons); id. at 93 n.174 ("[W]hile race and sex are immutable, we all can become mentally ill, homeless, or both. Perhaps this illuminates the level of virulence we experience here") (emphasis in original). On the way that public fears about the purported link between mental illness and dangerousness "drive the formal laws and policies governing mental disability jurisprudence." John Monahan, Mental Disorder and Violent Behavior: Perceptions and Evidence, 47 AM. PSYCHOLOGIST 511, 511 (1992).

99. See PERLIN, supra note 37, at 6-7 (asking this question). Cf. Carmel Rogers, Proceedings Under the Mental Health Act 1992: The Legalisation of Psychiatry, 1994 N.Z. L.J. 404, 408 ("Because the preserve of psychiatry is populated by 'the mad' and 'the loonies,' we do not really want to look at it too closely—it is too frightening and maybe contaminated.").


102. For the most comprehensive research on predictions of violence, for example, see John Monahan, The Scientific Status of Research on Clinical and Actuarial Predictions of Violence, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, §§ 7-2.0 to 7-2.4, at 300 (David Faigman et al. eds., 1997).

accordance with their own self-referential concepts of “morality” and openly subvert statutory and caselaw criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional standards as prerequisites for an incompetency to stand trial finding. Often this testimony is further warped by a heuristic bias. Expert witnesses sometimes succumb to the seductive allure of simplifying cognitive devices in their thinking, and employ such heuristic gambits as the vividness effect or attribution theory in their testimony.

This testimony is then weighed and evaluated by frequently-sanist fact-finders. Judges and jurors, both consciously and unconsciously, frequently rely on reductionist, prejudice-driven stereotypes in their decisionmaking, thus subordinating statutory and caselaw standards as well as the legitimate interests of the mentally disabled persons who are the subject of the litigation. Judges’ predispositions to employ the same types of heuristics as do expert witnesses further contaminate the process.

I believe that these two concepts have controlled—and continue to control—modern mental disability law. And, just as importantly—perhaps, even more important—they continue to exert this control invisibly. This invisibility means that the most important aspects of mental disability law—not just the law “in the books,” but, more importantly, the law in action and practice—remains hidden from public discussions about mental disability law.

C. The Illusions of Mental Disability Law

We must also ponder another reality: the fact that, in many ways, mental disability law is a giant trompe l’oeil illusion. From one perspective it is a topic of great interest to the Supreme Court and other appellate courts, and its “cutting-edge” issues sound much like the “cutting-edge” issues of other areas of constitutional law, including, for example,
allocations of burdens of proof, scope of the liberty clause, and categorizations for "heightened scrutiny" purposes.

From another perspective, however, mental disability law is a topic dealt with on a daily basis by trial courts across the country in a series of unknown cases involving unknown litigants, where justice is often administered in assembly-line fashion. Sophisticated legal arguments are rarely made, expert witnesses are infrequently called to testify, and lawyers all too often provide barely-perfunctory representation. From this perspective, mental disability law is often invisible, both to the general public and to the academy.

Furthermore, although Supreme Court doctrine and "high theory" give us needed building blocks, they do not—cannot—describe what really happens in involuntary civil commitment cases, in competency to stand trial determinations, in recommitment hearings for insanity acquittees, in individual challenges to the imposition of unwanted antipsychotic medication. For us to truly understand what mental disability law is all about, it is vital that we think about these questions.

In mental disability law, there is a wide gap between law-on-the-books and law-in-action. Such a gap probably exists in every area of the law. But in mental disability law, the omnipresence of sanism and pretextuality make the gap even more problematic.

Mental disability law suffers from both over- and under-attention. A handful of sensational criminal cases—Hinckley, Colin Ferguson, John DuPont, the Unabomber—are, by nature of the facts of the underlying crime or identity of the victim, subject to intense analysis and scrutiny. The mental disability law issues raised in these cases—the insanity defense, competence to stand trial, competence to waive counsel—are reported as if they typify other cases involving the same issue, as well as cases involving other aspects of mental disability law. Civil cases are
rarely the focus of so much interest, but court decisions in a handful of cases involving potential professional liability—*Tarasoff v. Regents of the University of California*115 is, by far, the most famous—are disseminated widely to professional audiences. Their holdings—and concomitant significance for practitioners—are regularly over-exaggerated and distorted.116

On the other hand, the overwhelming number of cases involving mental disability law issues are "litigated" in pitch darkness. Involuntary civil commitment cases are routinely disposed of in minutes behind closed courtroom doors.117 Right to refuse treatment hearings often honor the letter and spirit of decisions such as *Rivers v. Katz*118—articulating the broadest right-to-refuse-treatment opinion ever decided in any American jurisdiction—with little more than lip service.119 Nearly 90% of all insanity defense cases are "walkthroughs"—stipulated on the papers.120 The complex issues of mental disability law are rarely raised in the garden variety tort case brought by a mentally disabled plaintiff.121

Often, constitutional doctrines articulated by the Supreme Court in mental disability law cases are ignored. The Supreme Court has held, on more than one occasion, that the right to refuse treatment is protected, at least in part, by the liberty clause of the Fourteenth Amendment.122 Yet, in case after case, a patient’s apparent desire to enforce or vindicate this constitutional right is relied upon as evidence

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116. For example, more than three-quarters of the clinicians surveyed reported that the issuance of warnings was the sole acceptable means of protecting potential victims and avoiding *Tarasoff* liability. See David J. Givelber et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 465 (1984), discussed in Perlin, supra note 62, at 54.

117. See, e.g., *HOLSTEIN*, supra note 113. The Supreme Court has noted that the average time for involuntary civil commitment hearings was 9.2 minutes. See Parham v. J.R., 442 U.S. 584, 609 n.17 (1979).

118. 495 N.E.2d 337 (N.Y. 1986) (state constitutional right to refuse treatment).

119. See, e.g., cases discussed in 2 PERLIN, supra note 4, § 3B-7.2c, at 283-84 n.990 (2d ed. 1999) (citing cases).


in support of the patient's involuntary civil commitment. The Supreme Court has on several occasions held that the possibility of side effects (especially irreversible neurological side effects such as tardive dyskinesia) is a factor to be considered in determining whether the Fourteenth Amendment has been violated in an individual case. Yet, an examination of the universe of reported individual right to refuse treatment cases shows that side effects are rarely, if ever, mentioned. The Supreme Court has stated, albeit in dicta, that "many psychiatric predictions of future violent behavior by the mentally ill are inaccurate." Yet, such predictions are offered—frequently in minimalist ways that are subject to no meaningful cross-examination or challenge—daily in civil commitment courts across the country.

State legislatures craft elaborate commitment codes, often mandating the need for an "overt act" as a predicate to commitment. Yet, the expression of wishes, desires or the recitation of fantasies has been relied upon as a basis for commitment in individual cases. The right to counsel is provided for in virtually every state commitment statute. That right is often honored only in the breach; lawyers representing patients—and, just as importantly, those representing mentally disabled criminal defendants—often reflect Judge Bazelon's worst nightmare of "walking violations of the Sixth Amendment."

125. See, e.g., 2 PERLIN, supra note 4, §§ 3B-7.2b to 7.2c (2d ed. 1999) (citing cases).
129. See, e.g., People v. Stevens, 761 P.2d 768, 775 n.12 (Colo. 1988) (en banc) (relying on presumed sexually inappropriate dress and manner—"posing provocatively in front of a mirror in the hospital day room in a tight-fitting leotard"—as sufficient evidence of a patient's danger to self to support her order of commitment); State v. Hass, 566 A.2d 1181, 1185 (N.J. Super. Ct. Law Div. 1988) (holding that a patient's sexual fantasies can serve as confirmatory evidence supporting his need for treatment under state Sexual Offenders Act).
130. See ROBERT LEVY & LEONARD RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 74 (1996); see generally 1 PERLIN, supra note 4, § 2B-3.1, at 197-201 (2d ed. 1998) (citing cases).
State legislatures pass broad-based "Patients’ Bills of Rights," purporting to provide inpatients with the same bundle of civil and constitutional rights mandated in a series of federal class action/law reform cases litigated in the early 1970’s. Yet, there has been virtually no follow-up litigation seeking to give life to, implement, or construe these laws. Moreover, trial courts regularly refuse to consider right to treatment issues in the context of individual commitment cases. And Congress has passed the Americans with Disabilities Act (ADA), and, in doing so, buttressed the substantive anti-discrimination provisions of the Act with findings that appear to provide—at the least—Equal Protection safeguards for covered individuals. Yet, the ultimate impact of the Supreme Court’s recent decision in *Olmstead v. L.C.*—finding a qualified right to community treatment for some persons institutionalized by reason of mental disability—is still far from clear. In a series of papers, I have begun to explore whether *Olmstead* will have a potentially transformative impact on the way that persons with mental disabilities, especially those who have been institutionalized, are treated; but it is certainly premature to come to even tentative conclusions at this time. In addition, of all the other academics who write about the ADA, only Peter Blanck and Susan Stefan have made the link between the statute and the corrosive impact of sanist prejudice.

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133. See 1 PERLIN, § 2C-8.1, at 507-09 (2d ed. 1998), and 1 id., § 2C-8.1, at 27 (2d ed.) (1999 Supp.) (citing cases).

134. See e.g., Perlin, *Sanist Attitudes*, supra note 81; Michael L. Perlin, "*Make Promises by the Hour*: Sex, Drugs, the ADA, and Psychiatric Hospitalization,” 46 DEPAUL L. REV. 947 (1997).


136. See PERLIN, supra note 19.

137. See 1 PERLIN, supra note 81.


Supreme Court cases are also routinely ignored, sometimes for decades. In 1990, in *Zinermon v. Burch*, the Court ruled that there must be some sort of a due process hearing, even if a modest one, before a patient's voluntary application for hospitalization could be accepted. Yet, only a few states have amended their court rules or voluntary admission statutes to comply with *Zinermon*'s mandate and, again, there has been virtually no follow-up litigation. Even more astonishingly, in 1972—a full quarter-century ago—the Court ruled in *Jackson v. Indiana* that a criminal defendant who was incompetent to stand trial could not be housed indefinitely in a maximum security forensic facility because of that status unless it appeared likely that he would regain his competence to stand trial within the "foreseeable future." Yet, twenty-five years later, nearly half the states have still not implemented *Jackson*.

Criminal court prosecutors often compound the problems. "Find this man not guilty by reason of insanity," they warn jurors, "and he will walk away a free man after a few weeks of 'country club' treatment." The reality, of course, is far different. Insanity acquittees spend almost double the amount of time in maximum security forensic settings that defendants convicted of like charges serve in prison. In one study, California defendants found not guilty by reason of insanity in cases involving nonviolent offenses were confined for periods nine times as long as individuals found guilty of similar offenses. The Supreme Court decision in *Shannon v. United States*, which held that, as a matter of federal criminal procedure, the defendant had no right to have the jury informed about the possible consequences of a not guilty by reason of insanity verdict, will only increase the amount of pretextuality in

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141. See 1 PERLIN, supra note 4, § 2C-7.2a, at 490 n.1373 (2d ed. 1998) (citing cases).
143. Id. at 738.
decisionmaking in this area of the law.\textsuperscript{149} And insanity defense matters are but a small fraction of criminal cases in which sanism and pretextuality flourish.\textsuperscript{150}

This area of the law is further infected by an excess of finger-pointing and blame-attribution. Some clinicians and hospital administrators are quick to blame "the law" to explain many of the failures of institutional mental health care. Staff at major inpatient psychiatric hospitals publicly state that their "hands are tied," and that they are unduly frustrated by laws that are overly-protective of patients' civil liberties but that ignore, or are counter-productive to, their clinical and medical needs. These allegations have become the "script" of much contemporary mental disability law policy. Yet, in addition to being inflammatory and confrontative, such allegations are also largely baseless. A while ago, I received a phone call from the editorial desk of a major metropolitan newspaper, asking about a local cause celebre—an apparently randomly violent, former mental patient who was allegedly victimizing a block of a New York City neighborhood well known for its traditional adherence to liberal social causes.\textsuperscript{151} My caller told me that, in answer to his question as to why this individual was not committable in a state psychiatric hospital, he had been told by hospital staff that such commitment required proof of a "recent overt act."

I told him that was the standard in several jurisdictions, but it was emphatically not a prerequisite for commitment in his state (and, in fact, that test had been specifically rejected by the state's appellate courts).\textsuperscript{152} Indeed, New York courts made it eminently clear that a recent overt act is not required, and a challenge to that standard had failed in the federal appellate courts over a decade earlier.\textsuperscript{153} My caller was quite reasonably

\textsuperscript{149} For recent cases, see PERLIN, supra note 4, \S 15.16A, at 413 n.372.42 (1999 Cum Supp.). In the recent notorious murder trial of Andrew Goldstein (the so-called "New York Subway Pusher"), a holdout juror, a former social worker who had mentally ill clients, accused those favoring conviction of basing their votes on fears that a mental hospital would quickly release Mr. Goldstein if he was found to be insane and by a desire to avenge the death of the victim, Kendra Webdale. See David Rohde, Subway Jury Deadlocks; Mistrial Ruled, N.Y. TIMES, Nov. 3, 1999, at B1.

\textsuperscript{150} See, e.g., Michael L. Perlin & Keri K. Gould, Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines, 22 AM. J. CRIM. L 431, 451 (1995) ("[i]n each [reported Federal Sentencing Guidelines case in which mental disability was an issue], without exception, the U.S. Attorney's Office opposed the use of mental disability as a mitigating factor"). On the ways that jurors process social science evidence (and mitigating mental disability evidence) in death penalty cases, see Perlin, supra note 131, at 216-21; Perlin, Sanit Litig, supra note 79, at 260-65.


\textsuperscript{153} We are of the opinion that such a requirement [of an overt act] is too restrictive and not necessitated by substantive due process. The lack of any evidence of a recent overt act, attempt or threat, especially in cases where the individual has been kept continuously on certain medications, does not necessarily diminish the likelihood that the individual poses
perplexed as to why he had been given this misinformation.154

So what explanation is there for all of this? There is, in short, often a huge gap between what mental disability law appears to be, and what it actually is. This gap is widened further by the reality that we—lawyers, professors, psychologists, psychiatrists, expert witnesses, clinicians, jurors, the press, the public—know very little about what really happens in most mental disability law cases.155

D. The Relationship Between Sanism, Pretextuality, and Therapeutic Jurisprudence

Finally, I need to emphasize that I do not believe that consideration of therapeutic jurisprudential values should end new inquiries into the behavior of the mental disability law system. While the therapeutic jurisprudence construct is an enormously useful one and an excellent organizing tool, it does not answer all the questions before us. In order to understand the motivations of the responses of judges, lawyers and litigators to the mental disability law system, it is also necessary to look at the influence of sanism and pretextuality.

There has not yet been a systematic investigation into the reasons why some courts decide cases therapeutically and others anti-therapeutically. I believe that the answer may be found, in significant part, in sanism. Sanism is such a dominant psychological force that it (1) distorts “rational” decisionmaking, (2) encourages (on at least a partially-unconscious level) pretextuality and teleology,156 and (3) prevents decisionmakers from intelligently and coherently focusing on questions that are meaningful to therapeutic jurisprudential inquiries.

The types of sanist decisions that I have discussed operate in an ostensibly atherapeutic world; although some decisions may be, in fact, therapeutic and others may be, in fact, anti-therapeutic,157 these

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154. I discuss the implications of this interchange extensively in Michael L. Perlin, Back to the Past: Why Mental Disability Law “Reforms” Don’t Reform (reviewing JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES (1992) 4 CRIM. L FORUM 403, 403-05 (1993)).

155. For a recent thoughtful evaluation of these issues in a mediation context, see Sharon Flower, Resolving Voluntary Mental Health Treatment Disputes in the Community Setting: Benefits of and Barriers to Effective Mediation, 14 OHIO ST. J. ON DISPUTE RES. 881 (1999).


157. For example, I believe that the decision in State v. Krol, 344 A.2d 289 (N.J. 1975) (expanding procedural due process protection rights at the post-insanity acquittal commitment hearing) is therapeutic and the decision in Jones v. United States, 463 U.S. 354 (1983) (restricting such rights) is anti-therapeutic. See
outcomes seem to arise almost in spite of themselves. In short, we cannot make any lasting progress in "putting mental health into mental health law" until we confront the system’s sanist biases and the ways that these sanist biases blunt our ability to intelligently weigh and assess social science data in the creation of a mental disability law jurisprudence.

These constructs need to be considered in the context of any therapeutic jurisprudence inquiry, since, unless we determine why the law has developed as it has, it will make little difference if we determine whether it is developing in a therapeutically correct manner. In short, even if the legal system were to come to grips with all therapeutic jurisprudence issues in all aspects of mental disability law, these additional inquiries would still be required. While I am thus convinced that therapeutic jurisprudence is an absolutely essential tool for the reconstruction of mental disability law, if it is to truly illuminate the underlying system, we must not fail to place it in the social and political context of why and how mental disability law has developed, including the conscious and unconscious motivations that have contributed to the law’s development.

It is necessary to explicitly consider the relationship between therapeutic jurisprudence, sanism and pretextuality. I believe that it is only through these perspectives that the “doctrinal abyss” that appears to define mental disability law jurisprudence can be understood. Therapeutic jurisprudence—by forcing us to focus consciously on the therapeutic and anti-therapeutic outcomes of court decisions, statutes, rules and roles—illuminates the way that pretextuality and sanism drive the mental disability law system. Recent literature advances this ongoing enterprise by reminding us that scholars and researchers in this area partially fulfill the role of systemic archaeologists who continue to

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159. See Wexler I, supra note 4.


161. For an especially rich example of the integration of therapeutic jurisprudence and pretextuality theory, see Dorfman, supra note 7, and Dorfman, supra note 92.
unearth new discoveries that explain how and why the mental disability law system operates as it does.\(^{162}\)

Of course, no matter how closely we embrace therapeutic jurisprudence—or preventive law or holistic lawyering or creative problem solving—pain is often unavoidable. The late Professor Robert Cover began his brilliant essay, *Violence and the Word*, with these frightening words, "Legal interpretation takes place in a field of pain and death."\(^{163}\) More recently, Marcus Dubber, in a sobering and provocative piece on capital punishment, explains the law’s role in “the central problem of modern punishment since the enlightenment: justifying the infliction of punitive pain on a fellow human being.”\(^{164}\) And there is very little that therapeutic jurisprudence can do to assuage this pain (although the question of whether a currently-incompetent death row inmate can be given antipsychotic medication to make him competent to be executed\(^{165}\) is a question that screams out for analysis using these interpretive tools).\(^{166}\) But for virtually all other aspects of mental disability law, therapeutic jurisprudence must be used as an interpretive tool if a law of healing is ever to become a possibility.

**VI. CONCLUSION**

I began this article with some thoughts about the state of the legal profession, and how the public views lawyers and lawyering. And it was *not* a pretty picture that I painted. For those of us who take seriously the fact that a significant number of the our fellow citizens view us this way, this is a sobering indictment, and, even conceding some hyperbole, there

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162. *See supra* text accompanying notes 4-15.
166. *See* Bruce J. Winick, *Competency To Be Executed: A Therapeutic Jurisprudence Perspective*, 10 *Behav. Sci. & L.* 317, 328-37 (1992). The Supreme Court once granted certiorari to resolve the question of whether the Eighth Amendment prohibits states from forcibly medicating death row inmates to make them competent to be executed but eventually remanded that case in light of its decision in *Washington v. Harper*, 494 U.S. 210 (1990). *See* Perry v. Louisiana, 498 U.S. 38 (1990); *see generally* 3 *PERLIS, supra* note 4, § 17.06B, at 536 n. 192.64 (1999 Cum. Supp.) (discussing *Singleton v. Norris*, 964 S.W.2d 366 (1998), order denying rehearing (1998) (stay of execution ordered on question of whether state could mandatorily medicate defendant with antipsychotic drugs in order to keep him from being danger to himself and others when collateral effect was to render him competent to be executed), following stay, 992 S.W.2d 768 (1999) (state had burden to administer antipsychotic medication as long as prisoner was alive and was either a potential danger to himself or others; collateral effect of the involuntary medication—rendering him competent to understand the nature and reason for his execution—did not violate due process)).
are certain allegations that ring true. But I do not believe the situation is hopeless. For I believe that a law of healing is possible, that the phrase should not make anyone's list of favorite oxymorons, and that therapeutic jurisprudence is one of the key paths that we must take if we are to create such a body of law. And, beyond this, if we are to look at mental disability law, the use of therapeutic jurisprudence is the one way—in my mind, the only way—to eradicate the pain and the poison of sanism and pretextuality in the law. If we can start thinking about this, then we can make some true progress toward this important and mutual goal.