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Pretexts and Mental Disability Law: The Case of Competency

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Pretexts and Mental Disability Law: The Case of Competency

MICHAEL L. PERLIN*

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I. Introduction

Anyone who has spent any time in criminal trial courts is familiar with the following scenario. An undercover officer swears that on a certain date he was on narcotics surveillance duty on the corner of two streets in a "well-known high-crime area." At that time (generally late at night), he observed John Jones (now the defendant), standing under a dimly illuminated street light on the other side of the block. Recognizing Jones as a "long-time drug user and seller," the officer crossed the street to confront Jones. When Jones saw the plainclothed officer, he responded by "making furtive gestures" and dropping a handful of small glassine packets (packets that the officer quickly recognized as potentially containing heroin). Before the officer could either properly identify himself as a policeman, or place the defendant under arrest and administer the Miranda warnings, the defendant spontaneously blurted out an uncoerced confession: "That's heroin, and it's mine."

Predictably, the police officer's testimony proves unimpeachable on cross-examination. Basically, all the defense counsel can ask is, "Officer, you're lying aren't you?". The witness then replies, "No I'm not, counselor." The defendant's motion to suppress is shortly denied. Soon thereafter, the defendant pleads guilty to a drug offense.

This is the famous "dropsy" scenario that transpires regularly in urban courthouses throughout the country. Did these events really transpire this way? Of course not.

This entire scenario is pretextual.¹ The defendant never dropped the packets voluntarily, and never "spontaneously" blurted out, "It's

my heroin.” Everybody knows that—the police officer, the prosecutor, the defense counsel, the defendant, the judge, and ultimately the appellate court that will eventually uphold the suppression denial and subsequent conviction (in the rare case of an appeal). Yet, the legal system condones, and perhaps encourages, this entire web of deceit and pretextuality.

What does this have to do with competency and mental disability law? Plenty. My thesis is simple: the entire relationship between the legal process and mentally disabled litigants is often pretextual. This pretextuality is poisonous. It infects all players, breeds cynicism and disrespect for the law, devalues participants, reinforces shoddy lawyering, invites blase judging, and, at times, promotes perjurious and corrupt testifying. The reality is well known to frequent consumers of judicial services in this area: to mental health advocates and other


2. For a recent important empirical study confirming this view, see Myron W. Orfield, Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. CoI. L. Rev. 75, 100-07 (1992) (86% of judges, public defenders and prosecutors questioned, including 77% of judges, believe that police officers fabricate evidence in case reports at least “some of the time”; 92% (including 91% of judges) believe that police officers lie in court to avoid suppression of evidence at least “some of the time”).

3. By “pretextual,” I mean simply that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decisionmaking. See 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 (1991) [hereinafter Perlin, Morality]. This is apparent specifically where witnesses, especially expert witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends.” Sevilla, supra note 1, at 840; cf. Edwin J. Butterfoss, Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court’s Fourth Amendment Pretext Doctrine, 79 Ky. L.J. 1 n.1 (1990-91) (defining “pretexts” to include situations where “the government offers a justification for activity that, if the motivation of the [police] officer is not considered, would be a legally sufficient justification for the activity” as well as for those activities for which the preferred justification is “legally insufficient”).

public defender/legal aid/legal service lawyers assigned to represent patients and mentally disabled criminal defendants, to prosecutors and state attorneys assigned to represent hospitals, to judges who regularly hear such cases, to expert and lay witnesses, and, most importantly, to the mentally disabled person involved in the litigation in question.

This Article concentrates primarily on two types of cases: involuntary civil commitment matters and incompetency to stand trial determinations. In the latter, the relevance of "competency" is self-evident; it defines the proceeding in question. In the former, it may appear to be somewhat more attenuated. This Article demonstrates that contested commitment cases regularly turn on a very specific question of competency (and one rarely mentioned in inpatient commitment statutes): is the patient sufficiently competent to "do the right thing," namely, take prescribed antipsychotic medication in a community setting? If he is seen as a good self-medication risk, he is then competent to exercise medical decisionmaking autonomy (and, not coincidentally, is less likely to be found in need of involuntary civil commitment). If he is not, this reflects a level of incompetency that frequently is translated immediately to a finding of a need for institutionalization. Competency is reduced to a sterile cause-and-effect cell where a prediction that a patient is not likely to take medication in the community (evidence of his incompetency to make "correct" decisions) becomes the dispositive evidence at the involuntary civil commitment hearing, a proceeding that would appear to necessarily focus on a host of other questions.

The testimony of forensic experts and decisions of legislators and fact-finders reflect the pretexts of the forensic mental health system.

4. A person cannot be tried for a criminal offense if he does not have "sufficient present ability to consult with his lawyer with a reasonable degree of understanding . . . [and] a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). A conviction of a defendant who is mentally incompetent to stand trial under this test violates due process. See Pate v. Robinson, 383 U.S. 375, 385 (1966).

5. Such statutes generally require that the person subject to commitment be mentally ill, and, as a result of such mental illness, dangerous to himself or to others. See generally 1 Michael L. Perlin, Mental Disability Law: Civil and Criminal, §§ 2.06, 2.17-19 (1989) [hereinafter Perlin, Civil & Criminal].


7. On the relationship between commitment and an individual's inability to engage in "a rational decisionmaking process regarding the acceptance of medical treatment," see 2 Perlin, Civil & Criminal, supra note 5, § 5.40, at 332-34 (discussing A.E. v. Mitchell, 724 F.2d 864 (10th Cir. 1983), which construed Utah Code Ann. § 64-7-36(10)(c) (Supp. 1983)).

Experts frequently testify according to their own self-referential concepts of "morality," and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional standards as prerequisites for an incompetent to stand trial finding. Often, heuristic bias further warps this testimony. Expert witnesses—like the rest of us—suc-
cumb to the meretricious allure of simplifying cognitive devices in their thinking, and employ such heuristic gambits as the vividness effect or attribution theory in their testimony. 

Frequently, fact-finders employ sanism in weighing and evaluating this testimony. Judges and jurors, consciously or unconsciously, often rely on reductionist, prejudicial stereotypes in their decision-making, subordinating statutory and case law standards as well as the legitimate interests of the mentally disabled persons who are the sub-
jects of the litigation. Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.

This combination of sanist experts and courts helps create a sys-
tem which: (1) accepts dishonest testimony unthinking;

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10. See, e.g., Perlin, Morality, supra note 3, at 135-36.

11. See, e.g., People v. Doan, 366 N.W.2d 593, 598 (Mich. Ct. App. 1985) (expert testified that defendant was "out in left field" and went "bananas").


larly subverts statutory and case law standards; and (3) raises unsurmountable barriers that ensure the allegedly "therapeutically correct" social outcome and avoidance of the worst-case-disaster-fantasy, the false negative. In short, the mental disability law system often deprives individuals of liberty disingenuously and for reasons that have no relationship to case law or to statutes.

This aspect of the mental disability law system is astonishingly "underconsidered" by advocates,\(^{15}\) scholars and professional associations alike. Examining the way that "moral" experts testify in "sanist" courts promotes better understanding of the extent of the prevailing pretexts. This understanding will encourage new strategies for confronting the underlying biases, creating a new structure, and developing a new research agenda through which these issues can be examined openly.

Part II of this Article briefly considers the role of pretexts in the legal system and attempts to extract certain attributes of these pretexts that may apply to the forensic mental health system. Next, Part III discusses the role of experts, both from the perspectives of heuristic biases and the proferring of "moral" testimony. Then, Part IV considers the roles of judges and jurors in mental health cases and the impact of sanism on their decisionmaking. Finally, Part V analyzes the ways that these factors have created a pretextual mental disability law system and concludes by recommending a new structure for challenging heuristics, "morality," and sanism, and for dismantling pretextuality.

II. PRETEXTS IN THE LEGAL SYSTEM

A. Introduction

It may sound presumptuous or nihilistic to say that our legal system condones or encourages (or even demands) pretextuality; I do not mean to be either. The fact that the phrase "mere pretext" appears in over 2000 reported state and federal cases\(^{16}\) suggests that, at the least, pretexts are a matter with which the legal system has more than a passing familiarity.

Pretextuality is two-sided. There are areas in which courts willingly accept dishonesty on the part of participants in the legal and legislative process. On the other side of the coin, there are areas in which courts erect unsurmountable barriers so as to guard against

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what is perceived of as malingering, feigning or otherwise misusing the legal system. Both types of pretexts infect all areas of the legal system, but their pernicious impact is especially problematic in the trial of mental disability cases.

B. Explaining Pretextuality

The pretextuality paradigm testimony in “dropsy” cases fulfills a defined police purpose and is condoned as an acceptable “necessary evil” required to solve “the basic problems of police work.” Because the goal is perceived as both legitimate (putting criminals in jail and preventing future crime) and necessary (as a means of mediating against “improper” liberal rules of law imposed by the Supreme Court), courts condone “deviant lies.” There also is often a moral justification offered for these actions. Because of their unique experiences with criminals, police officers feel that they “know” the factual guilt or innocence of arrestees and can therefore appropriately shape their testimony to serve a greater social good. The courts are compliant “partners in crime.” A recent empirical study suggests that judges refuse to follow the law and suppress evidence due to their “personal sense of ‘justice.’” As one state’s attorney pointed out, “[w]hen judges apply the exclusionary rule, they feel they are doing something wrong.”

Pretextuality extends far beyond the question of police lies. Pretextuality results from our condonation of legal fictions. Legal fictions “propounded with a complete or partial consciousness of [their] falsity” or “false statement[s] recognized as having utility” are centuries-old devices courts use as a means to sidestep legislation deemed, in Blackstone’s words, “so intolerably mischievous [but which] the legislature would not then consent to repeal.”

Courts use these fictions to falsely interpret the true meaning of

17. Perlin, Fatal Assumption, supra note 15, at 57 n.113; Perlin, Morality, supra note 3, at 133-35.
21. Orfield, supra note 2, at 121 (emphasis added).
22. LON FULLER, LEGAL FICTIONS 9 (1967).
legislation through alleged legislative intent,\textsuperscript{24} or to read imaginary unarticulated legislative assumptions into statutes in efforts to sustain such laws by a "rationality" standard.\textsuperscript{25} Attacked by Bentham as subterfuges for legislation, "instruments of judicial power," and "wilful falsehood[s]" through which the judiciary "steal[s] legislative power,"\textsuperscript{26} they remain in use, sanctioned by the Supreme Court in a wide variety of subject matters.\textsuperscript{27}

The acceptance of legal fictions creates ambivalence toward concepts of law and justice.\textsuperscript{28} Toleration of "sleight of hand" in the law's theoretical bases breeds cynicism and fosters an atmosphere of systemic manipulation by litigants, legislators, litigators, and courts.\textsuperscript{29} Now we are blind to their "evident strangeness," having become inured to the use of such fictions.\textsuperscript{30} Such fictions, traditionally employed in cases involving substantive questions of property and commercial law and procedural questions of personal jurisdiction,\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{24} See, e.g., Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870 (1930) (discussing legislative intent as a "transparent and absurd fiction"); cf. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509-10 (1989) (assuming a common understanding on the part of each Congressperson as to meaning of legislation is a "benign fiction."); See generally George A. Costello, Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History, 1990 Duke L.J. 39.


\item \textsuperscript{27} For recent examples, see Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 2611 (1990) (right to die); United States v. Dalm, 494 U.S. 596, 622 (1990) (Stevens, J., dissenting) (gift tax refund recoupment process); Carden v. Arkoma Assocs., 494 U.S. 185, 202-03 (1990) (O'Connor, J., dissenting) (determining partnership residency in diversity cases); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 644 (1989) (Blackmun, J., dissenting) (applying property forfeiture statute in narcotics enterprise case).


\item \textsuperscript{29} Stephen Wizner, What Is a Law School?, 38 Emory L.J. 701, 705 (1989).


\item \textsuperscript{31} Sinclair, supra note 23. See generally Moglen, supra note 30.
\end{itemize}
are no longer limited to such private law questions.

Two public law examples are illustrative. The legal fiction of "substituted judgment" is at the heart of the Supreme Court's decision in the *Cruzan* case and in all courts' "right to die" decision-making. It also pervades the law of mental patients' right to refuse antipsychotic drug treatment. In an entirely different area of the law, the legal fiction of "territorial exclusion" drives the law that governs the detention of aliens lacking proper entry documentation. One example is that of an excludable alien, who is incarcerated in an American prison, yet who is fictively deemed not to actually be within the territorial jurisdiction of the United States.

Legal fictions are seductive and dangerous. They foster an environment in which pretextual testimony, pretextual legislative activity, and pretextual court decisions "no longer strike the eye" as strange. In addition to the paradigm dropsy case (one of many aspects of constitutional criminal procedure so infected),

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pretexts contaminate legal decisionmaking in a variety of civil rights, civil liberties, and other constitutionally-grounded cases.

When a state legislator states that his introduction of a “moment of silence” bill had nothing to do with school prayer, but merely would insure that students had time for “private contemplation and inspection,” his statement is clearly pretextual.38 A state prejudgment replevin statute is pretextual when it provides a discovery mechanism not invoked by a single defendant in a 442-case sample.39 When the Supreme Court treats administrative rulings written after the enactment of the welfare rule whose constitutionality is before the court as “history” and “long-standing precedent,” that decision is pretextual.40

When courts sanction “curative” jury instructions knowing full well that the jurors have cognitively processed the damaging testimony in question, that sanctioning is pretextual.41 A court’s reading of testimony that depicts sexual coercion as reflecting the victim’s willing participation is pretextual.42 When courts exclude testimony concerning the existence of a “code of silence” among police officers deterring them from testifying in cases where other officers are charged with using excessive force in resisting arrest cases, that exclusion is pretextual.43 The Supreme Court’s expansion of clear limiting

43. Maynard v. Sayles, 817 F.2d 50, 52 (8th Cir. 1987), vacated, 831 F.2d 173 (8th Cir. 1987).
language of the Eleventh Amendment to bar certain federal cases brought by citizens against their own states is pretextual. And when courts fail to acknowledge that unconscious racism influences prosecutorial and juror decisionmaking, that failure is pretextual.

The most glaring example is *McCleskey v. Kemp*, which rejected statistical evidence proffered by the defendant to demonstrate systemic racial discrimination in prosecutors' decisions to seek the death penalty and in jurors' decisions to impose capital punishment. After *McCleskey*, a prevailing defendant must show that the decisionmakers "in his case acted with discriminatory purpose." We can expect that intelligent state prosecutors can evade the proscription of this nearly-impossible-to-fail test.

Courts are also plagued by empirical pretextuality. Courts appear willing to accept popular myths about such alleged phenomenon as the "litigation explosion," the frequent use of exaggerated testimony in personal injury and medical malpractice cases, the insubstantiality of most pro se prisoner writs, and the "flood" of constitutional tort litigation, notwithstanding the fact that empirical reality discredits each of these myths.


C. Pretexts and Mental Disability Cases

The relationship between empirical pretextuality and the trial of mental disability cases is an important and profound one. Pretextual devices, such as condoning perjured testimony, distorting readings of trial testimony, subordinating statistically significant social science data, and enacting prophylactic civil rights laws that have absolutely no "real world" impact, similarly dominate the mental disability law landscape. These devices usually flow from the same motives that inspire similar behavior by courts and legislatures in other cases.

Again, a few examples illustrate this point. Although the District of Columbia Code contains a provision that patients can seek either periodic review of their commitment or an independent psychiatric evaluation, in the first 22 years following the law's passage, not a single patient exercised his right to statutory review. While Attorney General William French Smith told Congress that the insanity


For case law concerning constitutional tort litigation, see Maine v. Thiboutot, 448 U.S. 1, 23 (1980) (Powell, J., dissenting) (prediction that decision expanding tort liability will "harass state and local officials . . . in our already overburdened courts"); cf. Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641 (1987); Ann J. Gellis, Legislative Reforms of Governmental Tort Liability: Overreacting to Minimal Evidence, 21 RUTGERS L.J. 375 (1990) (setting out reality). For the Supreme Court's most recent characterization of the "floodgates" argument, see Hudson v. McMillian, 112 S. Ct. 995 (1992) (reasoning that decision allowing assaulted prisoner to maintain § 1983 action "does not open the floodgates for filings by other inmates"). For expressions of judicial concern about constitutional tort expansion opening the "floodgates" to potential litigants, see United States v. Weissberger, 951 F.2d 392, 397 (D.C. Cir. 1991) (appealability of basis for competency evaluation); Altman v. Hurst, 734 F.2d 1240, 1244 (7th Cir. 1984) (constitutional tort action by police officer over employment matter).

defense "allows so many persons to commit crimes of violence," one of his top aides candidly told a federal judicial conference that the number of insanity defense cases was, statistically, "probably insignificant."

When a state enacts a new statutory scheme to "treat" sex offenders, but fails to hire any professionals experienced in the provision of such treatment, that new statute is pretextual.

In a case that turned on the question of whether a defendant had the requisite specific intent to attempt a bank robbery, a federal district court judge refused to allow a county jail psychiatrist to testify that he prescribed antipsychotic medications for the defendant for a particular purpose and a particular length of time. The judge reasoned that such testimony "might be interfering with the treatment of [other] prisoners in jails because [they] might ask for more drugs to create the impression they need more drugs."

The Ninth Circuit affirmed this decision as "not manifestly erroneous," even though there was no evidence anywhere in the case that spoke to this issue. Finally, and more globally, courts and commentators regularly assume that vigorous, independent, advocacy-focused counsel is now available to all mentally disabled litigants, in spite of an empirical reality that, in almost every jurisdiction, is totally to the contrary.

N.W.2d 806, 809 (N.D. 1990) (rejecting patient's argument that discharge hearings were "rare occurrence(s)").


53. Id. In another case, a testifying doctor conceded that he may have "hedged" in earlier testimony (as to whether an insanity acquittee could be released) "because he did not want to be criticized should [the defendant] be released and then commit a criminal act." Francois v. Henderson, 850 F.2d 231, 234 (5th Cir. 1988).

54. See Perlin, Fatal Assumption, supra note 15, at 40, 49, 54. Compare In re Micah S., 243 Cal. Rptr. 756, 760 (Cal. Ct. App. 1988) (Brauer, J., concurring) ("As in other areas where counsel is furnished at public expense, every petition, however meritorious, is vigorously challenged. 'Cherchez l'avocat' is the battle cry of every appellate lawyer today.") (parental rights termination case) with Elliott Andalman & David L. Chambers, Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal, 45 Miss. L.J. 43, 72 (1974) (counsel was so inadequate in sample studied that patients' chances for release from hospital were enhanced if no lawyer was present) and George E. Dix, Acute Psychiatric Hospitalization of the Mentally Ill in the Metropolis: An Empirical Study, 1968 WASH. U. L.Q.
Police officers perjure themselves in dropsy cases "to ensure that criminals do not get off on 'technicalities,'"55 and trial judges condone such behavior so as to "mediate the draconian effect of imposed-from-above constitutional decisions,"56 such as $\text{Mapp v. Ohio}$. In the same way, expert witnesses in civil commitment cases often impose their own self-referential concept of "morality" to insure that patients who "really need treatment" remain institutionalized.57 Judges accept this testimony in light of their own "instrumental, functional, normative and philosophical" dissatisfaction58 with decisions such as $\text{O'Connor v. Donaldson}$,59 $\text{Jackson v. Indiana}$60 and $\text{Lessard v. Schmidt}$.61 Just as judges, including former Chief Justice Burger, express doubt that police testimony in dropsy cases requires special scrutiny,62 they also express astonishment at the assertion that expert testimony in involuntary civil commitment cases may be factually inaccurate.63


55. Barker & Carter, supra note 1, at 69.

56. Perlin, Morality, supra note 3, at 134; see also Orfield, supra note 2, at 121 (judges refuse to suppress evidence because of: (1) their personal "sense of justice"; (2) the fear of adverse publicity; and (3) the fear that such a decision might lead to re-election difficulties). For a rare candid judicial articulation of this position, see Rogers v. State, 332 So. 2d 165, 167 (Ala. Crim. App. 1976) (quoting trial judge, "In Alabama we had sensible [criminal procedure] rules until the damn Supreme Court went crazy."). cert. denied, 332 So. 2d 168 (Ala. 1976).


58. Perlin, Morality, supra note 3, at 134.

59. 422 U.S. 563 (1975) (right to liberty).

60. 406 U.S. 715 (1972) (application of due process clause to commitments following incompetency to stand trial findings).

61. 349 F. Supp. 1078 (E.D. Wis. 1972) (application of substantive and procedural due process clauses to involuntary civil commitment process).


63. Opinion testimony by psychiatrists is "routinely and unquestioningly accepted" at involuntary commitment hearings. Marilyn Hammond, Predictions of Dangerousness in Texas: Psychotherapists' Conflicting Duties, Their Potential Liability, and Possible Solutions, 12 St. Mary's L.J. 141, 150 n.71 (1980); see also In re Melton, 597 A.2d 892, 902-03 (D.C. 1991) (asking "Where else would the doctor go for such information?" in response to a patient's argument that it was violation of the hearsay rules for witness to base his medical conclusion on factual information given him by the patient's relatives). For discussion on the application of the hearsay rules to the involuntary civil commitment process in general, see 1 Perlin,
In addition, courts fantasize about feared pretextuality in cases where anecdotal myths prevail or where unconscious values predominate. For instance, the North Carolina Supreme Court deemed a sheriff’s lay opinion that a potentially incompetent-to-stand-trial defendant learned how to feign mental illness after speaking to (presumably wily and sophisticated) state prisoners during his pre-trial incarceration more persuasive than the uncontradicted clinical testimony that the defendant was schizophrenic, mentally retarded, and suffering from acute pathological intoxication. The fear that defendants will “fake” the insanity defense to escape punishment continues to paralyze the legal system in spite of an impressive array of empirical evidence revealing: (1) the minuscule number of such cases; (2) the ease with which trained clinicians are usually able to “catch” malingering in such cases; (3) the inverse greater likelihood that defendants, even at grave peril to their life, will more likely try to convince examiners that they’re “not crazy”; (4) the high risk in pleading the insanity defense (leading to statistically significant greater prison terms meted out to unsuccessful insanity pleaders); and (5) the fact that most of the small number of insanity pleaders who are successful remain in maximum security facilities for a longer period than they would have if convicted of the underlying criminal indictment. None of this empirically-grounded evidence has had any significant impact on fact-finders in subsequent cases.

In short, mental disability law is replete with textbook examples of both conscious and unconscious pretextuality in the law. This pretextuality is reflected both consciously (in the reception and privileging of “moral” testimony that flaunts legislative criteria) and unconsciously (in the use of heuristic devices in decisionmaking, and in the application of sanist attitudes toward such decisions).


Appellate courts rarely consider whether mental disability law proceedings elicit or suppress “the truth.” For thoughtful and conflicting visions, compare the majority opinion in In re Commitment of Edward S., 570 A.2d 917 (N.J. 1990), to Judge Handler’s concurrence (statutory mandate requiring that involuntary civil commitment hearings be held in camera deemed inapplicable to cases involving insanity acquittees).

64. See Perlin, Morality, supra note 3, at 134.


III. Morality and Heuristics: The Role of Experts

A. Introduction

Expert testimony is the key to both the involuntary civil commitment and the incompetency to stand trial inquiries. While lay testimony is admissible at both types of proceedings (and may actually be dispositive in the criminal context), two critical questions turn, definitively, on the opinion of experts: (1) is a patient mentally ill, and, by nature of his mental illness, dangerous to self or others; and (2) does a defendant have a functional ability to communicate, consult and cooperate with counsel in a criminal trial. If we assume that experts are “expert” in these areas—that is, that they have expertise, knowledge and training beyond the experiences of lay persons, making it appropriate for them to testify as to their opinion on an ultimate legal question—that we have a right to expect that their testimony is informed by their training, scholarship, experience, and scientific inquiry. Bias, prejudice, anecdote, or self-referential “ordinary common sense” (“OCS”) should not taint their testimony.

This expectation has been the subject of little scholarly or judicial investigation. Experts’ testimony is premised on individual value systems (i.e., the expert “knows” what’s “really best” for the patient), or on cognitive distortions (i.e., the last time that the expert recommended release at an involuntary civil commitment review hearing, the patient subsequently was found homeless in the town’s rail station, and the local press coverage focused on the hapless expert’s trial testimony as the dispositive antecedent “cause” of the subsequent event), and, as a result, one of the most basic and important linch-

67. See, e.g., Bouchillon v. Collins, 907 F.2d 589, 594 (5th Cir. 1990); Wallace v. Kemp, 757 F.2d 1102 (11th Cir. 1985); Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984).
69. For a recent discussion in the involuntary civil commitment context, see In re Melton, 597 A.2d 892 (D.C. 1991). See generally GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 483 (2d ed. 1987).
70. See generally Richard K. Sherwin, Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions, 136 U. PA. L. REV. 729 (1988). For discussion on the role of OCS in insanity defense cases, see Perlin, Psychodynamics, supra note 12, at 24-25 n.99 (in criminal procedure context, OCS presupposes two self-evident truths: (1) everyone knows how to assess an individual’s behavior; and (2) everyone knows when to blame someone for doing wrong). The criticism is not of true “common sense” but of self-referential pronouncements made under the guise of being “common sensical,” a kind of faux common sense.
71. See infra text accompanying notes 88-94.
72. See, e.g., Perlin, Morality, supra note 3, at 137; see also Robyn M. Dawes, Experience and Validity of Clinical Judgment: The Illusory Correlation, 7 BEHAV. SCI. & L. 457, 459-60, 464-66 (1989). For a discussion concerning psychiatric fear of underprediction of
pins of the forensic mental health system comes seriously loose from its moorings.

In fact, this is a significant possibility. In order to understand the dimensions of the problem, two related and overlapping issues arise: (1) the extent to which mental health professionals' concept of morality affects their trial testimony; and (2) the extent to which they fall prey to heuristic distortions in their testimony.

B. On Morality

1. EXPERTISE AND SOCIAL VALUES

I begin with the proposition that the phrase "neutral expert" is an oxymoron. Bernard Diamond, for one, believed that a witness' unconscious identification with a "side" of a legal battle or his more conscious identification with a value system or ideological leanings may lead to "innumerable subtle distortions and biases in his testimony that spring from this wish to triumph." Even demurring to Diamond's psychoanalytic speculations, subsequent behavioral research demonstrates that the expert's opinion in insanity defense cases and civil psychic trauma trials positively correlates with the expert's underlying political ideology. In a whole range of forensic mental health fact settings, social bias "infects and hides behind scientific judgments." Ben Bursten

dangerousness as a possible animator of forensic behavior, see Barefoot v. Estelle, 463 U.S. 880, 922 n.4 (1983) (Blackmun, J., dissenting); see also Francois v. Henderson, 850 F.2d 231 (5th Cir. 1988) (discussed supra note 53).


argues that any decision as to whether a certain behavior was a product of mental illness is not a matter of scientific expertise, "but a matter of social policy." This evidence becomes even more disturbing in light of other research suggesting that even experienced forensic mental health professionals are significantly mistaken about the substantive insanity defense standards actually employed in the jurisdictions in which they practice and testify. This becomes yet more problematic when witnesses testify as to conclusions of law, either in defining the appropriate legal standard for forensic cases, or in concluding whether a patient meets that legal standard.

Other evidence suggests that variables such as race, sex, culture, political philosophy, and his degree of deference toward interviewers significantly affects clinicians' judgment of severity of patient's mental illness).
gender preference, physical attractiveness and economic status significantly affect expert testimony.\textsuperscript{80} Some other research suggests that less secure mental health professionals are preoccupied with eliciting pathology as a demonstration of their own expertise. \textit{Their} competence as examiners may rest on their ability to demonstrate incompetency on the part of the defendant.\textsuperscript{81} Finally, professionals with different education and training rely on different sets of data in doing forensic evaluations.\textsuperscript{82}

In short, both social ideology and misinformed, inaccurate information as to the substantive tests against which defendants' behavior must be measured often drive experts' conclusions. Most importantly, this tableau seemingly has arisen with little or no awareness on the part of the forensic experts themselves. Thus, when Michael Saks charged that such witnesses act like "imperial experts" who install themselves as "temporary monarch[s]" by replacing a "social prefer-


A recent study finding no racial bias in the incompetency to stand trial evaluation stage nonetheless speculated that bias may still exist at the \textit{referral} stage, questioning whether nonwhites must exhibit greater impairment to warrant referral for a competency evaluation. \textit{See} Robert A. Nicholson \& William G. Johnson, \textit{Prediction of Competency to Stand Trial: Contribution of Demographics, Type of Offense, Clinical Characteristics, and Psychological Ability}, 14 \textit{INT'L J.L. \& PSYCHIATRY} 287, 295 (1991).


ence expressed through the law and legal process with [their] own preferences," 83 the expert community did not offer heated denials. Rather, the implications of this tacit reliance on self-referential "morality" remain virtually unnoticed. This, of course, contrasts sharply with the way that scholars and judges regularly scrutinize and weigh morality value choices in a wide variety of other legal contexts, and determine whether the decisionmaking processes in those cases are pretextual. 84

2. EXPERTISE AND INVOLUNTARY CIVIL COMMITMENT

When courts and legislatures significantly tightened involuntary civil commitment ("ICC") criteria in the early 1970s, 85 a large number of prominent mental health professionals responded negatively to what they saw as "turf invasions" on the part of the courts

83. Michael J. Saks, Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts, 14 LAW & HUM. BEHAV. 291, 294 (1990); see also, e.g., Stephen J. Morse, Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law, 51 S. CAL. L. REV. 527, 619 (1978) (experts should not "propound commonsense factual or moral judgments as scientific ones").

The same question can arise in a more benign setting. Paul Appelbaum noted how, given the "extremely nebulous" standards set out in social security law, there is a "strong temptation" for sympathetic evaluators to call a patient disabled "even if that requires 'twisting the rules of justice and fairness.'" Paul S. Appelbaum, Psychiatric Ethics in the Courtroom, 12 BULL. AM. ACAD. PSYCHIATRY & L. 225, 228 (1984).


and legislatures. Dr. Paul Chodoff counseled expert witnesses against “succumb[ing] to prevailing fashion” (that is, more restrictive commitment standards) if acquiescence was not in their patients’ “best interests.” Chodoff recommended exercising “wise and benevolent paternalism,” leading to a “moral judgment” that hospitalization is appropriate for patients “incapable of voluntarily accepting help,” in spite of laws rejecting “need of treatment” as a commitment standard. Even more pointedly, after considering Ontario's amended mental health law aimed at making involuntary civil commitment standards more stringent, a prominent local psychiatrist argued that the new law had little empirical weight: “Doctors will continue to certify those whom they really believe should be certified; they will merely learn a new language.” The subsequent empirical data partially suggests that this prediction came true. Other studies


89. McCormick, supra note 57, at 717; cf. Mark R. Munetz et al., Modernization of a Mental Health Act: I. Commitment Patterns, 8 BULL. AM. ACAD. PSYCHIATRY & L. 83, 85 (1980) (after legislative reform, “do real changes result, or do people simply find new ways to do what they did before within the framework of a different law?”).

similarly confirm that involuntary civil commitment decisionmaking simply "may not rest on statutory grounds."91

It may not rest on clinically coherent grounds either. Doctors recommend hospitalization "whenever they are in doubt about a patient's potential for suicide 'since it is always better to err on the side of safety,'"92 notwithstanding empirical research concluding that it is not possible to predict suicide, even among high-risk groups of in-patients.93 This type of decisionmaking blocks access to any inquiry
discussion concerning clinician adherence to the legislatively-abandoned criteria, see Stewart Page, Civil Commitment: Operational Definition of New Criteria, 26 CAN. J. PSYCHIATRY 419 (1981). In some jurisdictions, the involuntary civil commitment rate actually increased following the supposed tightening of criteria. See R. Michael Bagby et al., Effects of Mental Health Legislative Reform in Ontario, 28 CAN. PSYCHOL. 21 (1987). See generally R. Michael Bagby & Leslie Atkinson, The Effects of Legislative Reform on Civil Commitment Admission Rates: A Critical Analysis, 6 BEHAV. SCI. & L. 45 (1988); R. Michael Bagby, The Indigenous Paraprofessional and Involuntary Civil Commitment: A Return to Community Values, 25 CAN. PSYCHOL. 167 (1984) [hereinafter Bagby, Community Values]. Studies elsewhere report similar results. See, e.g., William H. Fisher et al., How Flexible Are Our Civil Commitment Statutes?, 39 HOSP. & COMMUNITY PSYCHIATRY 711, 712 (1988) (when legislation sought to expand bases of commitment, commitment rates increased in certain vicinages by nearly 100% before the date that the new act was to have gone into effect); Munetz et al., supra note 89, at 92 ("remarkably little, if any, change found in the clinical characteristics of the patients committed") (emphasis added); Glenn L. Pierce et al., The Impact of Public Policy and Publicity on Admissions to State Mental Health Hospitals, 11 J. HEALTH POL. POL'Y & L. 41 (1986).

91. Judith S. Thompson & Joel W. Ager, An Experimental Analysis of the Civil Commitment Recommendations of Psychologists and Psychiatrists, 6 BEHAV. SCI. & L. 119, 120 (1988) (discussing considerations such as available bed space and potential liabilities); see also Virginia A. Hiday, Dangerousness of Civil Commitment Candidates: A Six-Month Follow-Up, 14 LAW & HUM. BEHAV. 551, 551 (1990) [hereinafter Hiday, Six-Month] (little dangerousness found on part of involuntary civil commitment candidates in six months following hospital release); Virginia A. Hiday, Reformed Commitment Procedures: An Empirical Study in the Courtroom, 11 LAW & SOC'Y REV. 651 (1977) (only 24% of sample of committed patients met statutory criteria); Virginia A. Hiday & Lynn N. Smith, Effects of the Dangerousness Standard in Civil Commitment, 15 J. PSYCHIATRY & L. 433, 441 (1987) (no allegations of dangerous behavior listed on affidavits in support of one-third of all applications for admission supposedly filed under dangerousness standard); Stewart Page & John L. Firth, Civil Commitment Practices in 1977: Troubled Semantics and/or Troubled Psychiatry, 24 CAN. J. PSYCHIATRY 329, 330 (1979) (80-90% of filed commitment forms failed to meet legal criteria); R.A. Richert & A.H. Moyes, Reasons for Involuntary Commitment in Manitoba and Ontario, 28 CAN. J. PSYCHIATRY 358, 358 (1983) (reporting similar 80-90% failure rates).

In the most recent investigation, researchers found that psychiatrists failed to recommend commitment for 26% of a mock sample study that met the applicable legal criteria, and recommended commitment for 20% of the sample that did not meet the criteria. R. Michael Bagby et al., Decision Making in Psychiatric Civil Commitment: An Experimental Analysis, 148 AM. J. PSYCHIATRY 28, 32 (1991).


as to whether the patient has social support in the community, a factor that is frequently associated with positive mental health outcomes.94

There is a “flip side” to this arrogation of morality. Employing the rankest form of passive-aggressive behavior,95 some mental health professionals have advised families to put their mentally ill relatives out on the streets where they will either find life so difficult that they will accept treatment or will deteriorate to the point at which there will no longer be any question as to their eligibility for involuntary civil commitment.96 To suggest that this stands both medical ethics and the legal system on their heads belabors the obvious.

What does this mean? Do the leaders of the forensic profession ask forensic witnesses to lie, just as police officers frequently do in dropsy cases, for a greater social value? That social interest purportedly involves insuring that patients who “really” need “help” receive it in spite of statutes and court decisions that require proof of dangerous behavior as a prerequisite to involuntary institutionalization.97 This is happening both explicitly and implicitly.

It seems that this arrogation of morality works in other directions as well. Susan Reed and Dan Lewis’ recent study of voluntary hospital admission patterns at several Chicago community mental health centers reveals that staff workers will deviate from their routine behavior and select certain patients for special attention (in the admission and treatment processes) if the workers feel that the spe-


96. David Wexler, Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian Commitment Codes, in Therapeutic Jurisprudence: The Law As A Therapeutic Agent 165, 182 n.100 (David Wexler ed., 1990); see also John J. Enismnger & Thomas D. Liguori, The Therapeutic Significance of the Civil Commitment Hearing: An Unexplained Potential, in Therapeutic Jurisprudence, supra, at 245, 250 (discussing decision by doctors to remove patients from medication prior to involuntary civil commitment hearings “so that overt symptomatology will reappear”); cf. In re Burton, 464 N.E.2d 530, 537-38 (Ohio 1984) (error for court to order defendant withdrawn from all psychotropic medication during incompetency to stand trial evaluation period).

97. Cf. Spohn & Horney, supra note 9, at 139 (“[A] reform that contradicts deeply held beliefs may result either in open defiance of the law or in a surreptitious attempt to modify the law.” (citing Robert T. Nakamura & Frank Smallwood, The Politics of Policy Implementation (1980))).
specific patients in question are "worth it."  

This research is troubling for two overlapping reasons. First, the assessment as to who is "worth it" is easily distorted by prejudices and overgeneralizations about race, sex, sexual preference, ethnicity and social class. Although it might optimally reflect an expert evaluation of which patient is most likely to live a productive life "on the outside" free from further behavioral episodes that might require reinstitutionalization, there is no reason to expect that this is the type of normative decisionmaking that informs the meaning of "worth." We know, for instance, that pathology is frequently overestimated in samples in which individuals do not comport with publicly-acceptable sex role behavior.  

Second, the "gatekeepers" in the Chicago study were not all trained mental health professionals. While "a few" had advanced degrees in psychology, and "some" were social workers or were trained in "something like 'rehab counseling,'" others had no apparent specialized mental health/behavioral training. Similarly, street police officers—in many cases, the true "institutional gatekeepers"—employ purportedly "common sensical" concepts of mental illness (manifested as the display of "disrespect, recalcitrance and moral

98. Susan C. Reed & Dan A. Lewis, The Negotiation of Voluntary Admission in Chicago's State Mental Hospitals, 18 J. PSYCHIATRY & L. 137, 139 (1990); see also Michael J. Churgin, An Essay on Commitment and the Emergency Room: Implications for the Delivery of Mental Health Services, 13 LAW. MED. & HEALTH CARE 297, 301 (1985) (emergency certification process not used in cases where "the individual [was] a very 'interesting' patient").

99. See Rosenfeld, Sex Roles, supra note 80.

100. For a parallel example of how "worth" is measured in other populations, see Baron, supra note 86, at 350 (patient's intelligence, personality and socioeconomic status all taken into account in determining degree of care given to patient on arrival in emergency room where death is a possibility); Laura Ryan, Note, Washington State Prison Procedure for the Forcible Administration of Antipsychotic Medication to Prison Inmates Does Not Violate Due Process, 59 U. CIN. L. REV. 1373, 1407-08 n. 225 (1991) (suggesting that Professor Baron's findings also apply to situations involving the delegation of medical decisionmaking power to prison officials, thus creating the possibility that similar illegitimate criteria will be employed; discussing Washington v. Harper, 494 U.S. 210 (1990), limiting right of convicted prisoners to refuse antipsychotic medication, and vested broad discretion in prison officials in medication decisionmaking); see also Ira Sommers & Deborah R. Baskin, The Prescription of Psychiatric Medications in Prison: Psychiatric Versus Labeling Perspectives, 7 JUST. Q. 739 (1990) (decision to medicate mildly impaired prisoners influenced by social factors, including sex and age).

101. Reed & Lewis, supra note 98, at 142. On the impact that other "gatekeepers," that is, state hospital admissions officers, have on commitment rates, see Pierce et al., supra note 90, at 52 (noting that the impact of publicity surrounding the "vivid" case significantly affected behavior of county admissions personnel, leading to disproportionately higher civil commitment rates in that county but not in other like counties). On the "vividness" heuristic, see infra part III.C.
defect”) and reshape their police reports to “magnify the subjective madness [sic] and dangerousness of their subjects” so as to insure their admission into forensic hospitals.\textsuperscript{102}

Line treatment staff often view hospitalized patients who attempt to assert their constitutional and statutory rights as “troublemakers,” and thus privilege quietly compliant patients and subordinate “difficult” patients (who are considered less “worth it”).\textsuperscript{103} This becomes even more important (and troubling) when considering the power that hospital staff frequently has over patients’ access to their counsel. If an institutionalized patient wants to contact counsel, she frequently must ask ward “line staff” personnel to place the necessary telephone call. If, for whatever reason, the staff member determines that this is “inappropriate”—for example, if the patient is labeled a “troublemaker”\textsuperscript{104}—the promise of counsel becomes little more than a hoax.

This alleged, presumptuous and oppressive “morality” of nonprofessional gatekeepers thus contributes to, and, in some cases, controls involuntary civil commitment decisionmaking.\textsuperscript{105} Expert

\textsuperscript{102} Perlin, Morality, supra note 3, at 140 (quoting Robert A. Menzies, Psychiatrists in Blue: Police Apprehension of Mental Disorder and Dangerousness, 25 CRIMINOLOGY 429, 446 (1987)); see also Bursten, supra note 77, at 95 (arresting officer has far more impact on whether mentally disabled criminal suspect is treated as “mad” or “bad” than does the entire insanity defense system); John Petrla, The Insanity Defense and Other Mental Health Dispositions in Missouri, 5 INT’L J.L. & PSYCHIATRY 81, 91 n.36 (1982) (reporting on attitudes of forensic staff toward patients, and staff’s use of OCS to deny presence of mental disability in patients); cf. Thomas L. Kuhlman, Unavoidable Tragedies in Madison, Wisconsin: A Third View, 43 HOSP. & COMMUNITY PSYCHIATRY 72, 73 (1992) (police officers “have seen many of their efforts at emergency detention circumvented by mental health professionals or commitment courts”) (emphasis added).

\textsuperscript{103} See SUSAN SHEEHAN, IS THERE NO PLACE ON EARTH FOR ME (1982). Other examples are more malignant. See, e.g., Rennie v. Klein, 720 F.2d 266, 268 (3d Cir. 1983) (attendants beat a psychotic patient while he was restrained to his bed after patient filed right to refuse treatment lawsuit).

\textsuperscript{104} Interview with Professor Keri Gould, former senior attorney for the Mental Hygiene Legal Service, New York City (March 3, 1992). Staff has similar power over voluntary patients seeking to exercise their right to leave the hospital, something that may not be done in many jurisdictions unless a 72 hour notice is given to the hospital (to give it the option of converting the patient to voluntary status). See 1 Perlin, CIVIL & CRIMINAL, supra note 5, § 3.69, at 407.

\textsuperscript{105} This does not mean that the testimonial process should exclude non-professionals. See Bagby, Community Values, supra note 90, at 169-72 (recommending that hospitals use “indigenous paraprofessionals” in the commitment process to insure proper emphasis on “cultural-contextual values” and “attenuate potential misuse of hospitals as agents of social control”). In many instances, non-professionally trained hospital staff “line” workers will have the most day-to-day knowledge of a patient’s behavior and can offer true insights into the questions typically before courts. Compare In re Miller, 362 N.Y.S.2d 628, 633 (N.Y. App. Div. 1974) (suggesting that at “not guilty by reason of insanity” (NGRI) release hearing, witnesses should include “hospital employees such as nurses, orderlies, housekeepers and other who have had daily or frequent contact with petitioner”) with People v. Bolden, 266 Cal. Rptr. 724, 727 (Cal. Ct. App. 1990) (conflicting testimony between medical doctor and psychologist,
attempts at making self-referentially "moral" decisions as to "worth" (so as to ensure access to treatment)\textsuperscript{106} and either exaggerating\textsuperscript{107} or downplaying\textsuperscript{108} certain behavioral characteristics either to insure or deprive patients of treatment further accentuates the pretextual nature of the commitment system. This also forces the concession that the doctrinal differences in substantive commitment standards that frequently are the focus of appellate "test case" litigation as well as scholarly articles---e.g., Is an overt act a necessary predicate for a dangerousness finding? Can one be "gravely disabled" without being dangerous to oneself under a \textit{parens patriae} standard?---appear even less academically significant in this context.\textsuperscript{109}

Dr. H. Richard Lamb's attack on courts for interpreting involuntary civil commitment laws too "literally"\textsuperscript{110} suggests further that there is nothing transparent or \textit{sub rosa} about the entire "morality" attack on the legal process. It is a blatant attempt to aggregate power, to subvert the law, and to privilege "expertise" over all competing social values. In short, it suggests that the entire involuntary civil commitment process may be pretextual.\textsuperscript{111} It also suggests that the courts' pre-reflective OCS on this question—that it can be "safely assume[d]" that hospitals and their medical professionals are "disinterested decisionmakers" who certainly "have no bias against the patient or against release"\textsuperscript{112}—is no more accurate than the United States Supreme Court's OCS in \textit{United States v. Leon} that there is "no

who stated NGRI acquittee would stop taking medication in outpatient program and then become violent, and recreational therapist and nursing assistant, who stated that acquittee understood value of medication and would continue to take medication in outpatient setting).

106. See Reed \& Lewis, supra note 98, at 146.
107. See Menzies, supra note 102.
108. See Petrla, supra note 102.
109. See, e.g., Perlin, \textit{Psychodynamics}, supra note 12; Perlin, \textit{Unpacking}, supra note 66 (questioning whether difference in various substantive insanity defense standards makes a "real world" difference in the way the public views the insanity defense or in the way courts treat insanity pleaders).
111. Contrast Dr. Lamb's acceptance of pretextual testimony with other scholarly inquiries focusing on the ways that other false testimony may taint the legal process. See, e.g., \textit{MICHAEL AVERY \& DAVID RUDOVSKY, POLICE MISCONDUCT, LAW AND LITIGATION} 8-5 (2d ed. 1987); J. Martin Kaplan, \textit{Children Don't Always Tell the Truth}, 35 \textit{J. FORENSIC SCI.} 661 (1990).

Another field of inquiry involves \textit{economically-oriented} "bias" in the way that the commitment process may be abused by for-profit hospitals. See, e.g., Perlin, \textit{Power}, supra note 74, at 119 (increase in for-profit psychiatric hospitals increases the number of children admitted at a time when some "[p]hysicians are pressured . . . to maintain a maximal census and thus increase profits" (discussing results reported in Richard Dalton \& Marc A. Foreman,
evidence" to suggest that judges ignore or subvert the Fourth Amend-
ment or to suggest that they have any stake in the outcomes of crim-
inal prosecutions.113

This all assumes yet another fact-not-in-evidence: that judges
actually interpret involuntary civil commitment laws “strictly,” by
imposing by-the-book burdens on hospital and state lawyers, by zeal-
ously protecting patients’ procedural rights, and by regularly dis-
missing, on so-called “legal technicalities,” “worthy” involuntary
civil commitment petitions.114 This, of course, happens rarely (if
ever). Cases are frequently decided in an expedited manner,115 coun-
sel for patients are usually passive,116 and, in some states, trial court
commitment decisions are virtually never appealed.117 More recent
evidence demonstrates further that, as length of proposed hospitaliza-
tion increases, hearings become shorter in length and less
adversarial.118

In addition, judges’ attitudes closely mimic those of Dr.
Chodoff’s “moral expert.” Michael Saks quotes from a Massachu-
setts trial judge, speaking to mental health law students and their
professors who had observed a commitment docket: “I guess you
noticed that some of these people were not fit subjects for commit-
ment under the statute. But, after all, I am a human being. I care
about what is best for these people, and I have to do what I think is
right.”119 As Saks concludes, “this judge in effect abolished the state’s
commitment laws, substituted his own, and produced the result he
wanted notwithstanding the democratic and legal processes that
existed to control these decisions.”120

Conflicts of Interest Associated With the Psychiatric Hospitalization of Children, 57 AM. J.
ORTHOPSYCHIATRY 12, 13 (1987)).
114. See Perlin, Fatal Assumption, supra note 15, at 44 n.33 (“Experienced lawyers confirm
that attempts at vigorous cross-examination and at the development of novel defenses are
frequently rebuffed—angrily—by trial judges assigned to civil commitment dockets”).
115. See, e.g., Parham v. J.R., 442 U.S. 584, 609 n.17 (1979) (statistical studies reveal that
average commitment hearing lasted from 3.8 to 9.2 minutes); Leslie Scallet, The Realities of
Mental Health Advocacy: State ex rel. Memmel v. Mundy, in MENTAL HEALTH ADVOCACY:
AN EMERGING FORCE IN CONSUMERS’ RIGHTS 79, 81 (L. Kopolow & H. Bloom eds., 1977)
(former system of representation in place in Milwaukee County operated as a “greased runway
to the county mental health center”).
117. Id. at 50 (in Virginia, from 1976 to 1986, only two reported appellate civil cases dealt
with questions of mental hospitalization).
118. Charles D. Parry & Eric Turkheimer, Length of Hospitalization and Outcome of
119. Saks, supra note 83, at 293.
120. Id.; see also Ensminger & Liguori, supra note 96, at 252 (“The judge may tell the
patient that he is [being committed] because it is the ‘benevolent thing to do,’ when he will
It is important to consider how closely this sort of “morality” comports with the “moral” message sent by Dr. Lamb, Dr. Chodoff and others to their psychiatric colleagues. Such expert witnesses could not freely testify in ways that subvert statutes and case law if the legal system did not tacitly approve.  

3. EXPERTISE AND INCOMPETENCY TO STAND TRIAL  

a. Introduction  

While the incompetency to stand trial process generally lacks the same kind of “smoking guns” that Drs. Chodoff and Lamb left in the form of suggestions about testimony in the involuntary civil commitment process, a closer examination reveals that considerations of alleged “morality” frequently drive this system as well.  

At the outset, the criminal process is recognizable as a “morality play,” a “pageant which dramatizes the differences between ‘we’ and ‘they’ by portraying a symbolic encounter between the two” that allows us to “keep peace with the public morality.” The criminal process symbolizes the existence and enforcement of social norms, and manipulates criminal defendants as part of society’s struggle for just punishment. Because the incompetency plea frequently is incorrectly viewed as a means to “undercut the [death] penalty,” and thus purportedly rob society of its right to retributive vengeance, it is not surprising that “morality” questions infuse the admissions that he would not want the patient walking around in the neighborhood he lives in."


125. Inger, supra note 123, at 911; Perlin, Unpacking, supra note 66, at 622 n.104; Louis M. Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 501 (1980).

126. Ralph Slovenko, The Developing Law on Competency to Stand Trial, 5 J. PSYCHIATRY & L. 165, 178 (1977); cf. H. STEADMAN, BEATING A RAP? DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL 8 (1979) (murder was the charge in only 15% of incompetency petitions in New York state sample).

127. See Perlin, Unpacking, supra note 66, at 628-29:

Punishment may . . . be viewed as a "ritualistic device" which conveys "moral condemnation" upon wrongdoers, and which dramatizes such condemnation through a public "degradation ceremony." . . .

Thus, punishment is clearly a socially sanctioned safety valve through which
incompetency to stand trial process."

b. How Morality Affects Incompetency Findings

"Morality" issues affect the incompetency to stand trial process in several critical ways. First, the process is subject to significant political bias. Second, the power imbalance issues that taint the entire forensic process are especially potent. Third, the fact that the inadequacy of pre-trial evaluations, cursory testimony, the misuse and misapplication of substantive standards, and the non-implementation of Supreme Court constitutional directives receive little judicial or scholarly attention suggests that specific social ends animate the entire incompetency to stand trial system.

i. Political Bias: A defendant competent to stand trial must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and . . . a rational as well as a factual understanding of the proceedings against him."128 Functionally, this means that he must have the ability to communicate, the capacity to reason "from a single premise to a simple conclusion," the ability to "recall and relate facts concerning his actions," and the "ability to comprehend instructions and advice, and make decisions based on well-explained alternatives."129

Because of the ambiguities of the Supreme Court's test and the difficulties experienced in applying these standards,130 mental health professionals have attempted to codify listings of evaluative criteria, specifying areas of mental deficiency that would render a defendant

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129. 3 PERLIN, CIVIL & CRIMINAL, supra note 5, § 14.03, at 212 (quoting Peter R. Silten & Richard Tullis, Mental Competency in Criminal Proceedings, 28 HASTINGS L.J. 1053, 1062-64 (1977) and Allen P. Wilkinson & Arthur C. Roberts, Defendants' Competency to Stand Trial, 40 P.O.F.2d 171, 187 (1974)).
incompetent to stand trial. Critics disagree with these approaches on grounds of political bias and because they attempt to "quantify the essentially unquantifiable." Thus, a defendant who completed the open-ended sentence "Jack felt that the judge . . ." with the words "was unjust" or "was wrong" or "was too harsh" or "was his enemy"—answers that a defendant with prior experience with the criminal justice system certainly might select—scored zero points on the Harvard Laboratory Instrument test, one of the most important tests in use.

Further, traditionally, judges rarely have based their ultimate decisions on "anything but the concluding statement in the psychiatric report to the court." The ultimate legal decision as to competence often has thus fallen, perhaps by default, to the examiner. Given the way that bias can and does infect the forensic evaluation, important questions arise as to the legitimacy of the entire process. This is especially problematic because examiners frequently demand a higher level of competency than is required by appellate case law. In short, any inquiry into the way that defendants are found competent or incompetent to stand trial must take into account the expert's own "moral" perspective on the operation of the process.

131. Historically, Dr. Louis McGarry and Dr. Ames Robey developed some of the most important instruments. See Ames Robey, Criteria for Competency to Stand Trial: A Checklist for Psychiatrists, 122 Am. J. Psychiatry 616 (1965); Laboratory of Community Psychiatry, Harvard Medical School, Final Report, Competency to Stand Trial and Mental Illness (1973) [hereinafter Harvard Laboratory Instrument]. For more recent efforts, see, e.g., 3 Perlin, Civil & Criminal, supra note 5, § 14.03, at 214-15 n.47 (listing other approaches).

132. See Brakel, supra note 122, at 1111-16.

133. Gerald Bennett, A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53 Geo. Wash. L. Rev. 375, 379 (1985); see also Ellis & Luckasson, supra note 68, at 428 (mentally retarded defendants may simply mimic evaluator so as to come up with "right" answers to quantified tests).

134. See generally Harvard Laboratory Instrument, supra note 131, at 75-88.

135. See also ABA Criminal Justice Mental Health Standards, Standard 7-4.1 commentary at 173 (1989) [hereinafter Mental Health Standards] ("competency to stand trial was equated with an understanding of and acceptance of an idealistic view of the criminal justice system").

136. Roesch & Golding, supra note 78, at 17.

137. See A. Louis McGarry, Competency for Trial and Due Process Via the State Hospital, 122 Am. J. Psychiatry 623, 626 (1965).

138. See supra text accompanying notes 71-72.

139. McGarry, supra note 81; Michael L. Perlin, Overview of Rights in the Criminal Process, in 3 Legal Rights of Mentally Disabled Persons 1879, 1885 (P. Friedman ed., 1979) [hereinafter Perlin, Rights].
ii. Power Imbalances: The significant power imbalances that plague the entire forensic mental health system deserve further reflection. When an employee of a public hospital or correctional agency evaluates a patient to determine whether he is incompetent to stand trial, the dilemma of “dual loyalties” or “double agency” is stark: whose interests does the examining witness truly represent?140 This is especially problematic in the case of a “notorious” defendant, whose transfer or release from maximum security confinement would be sure to engender controversy and publicity.141 It is necessary to ask whether clinicians are unduly biased by their agency relationships and whether objectivity is inevitably compromised in this set of circumstances.142 It is clear that morality issues can specifically invade the incompetency to stand trial process.

Thoughtful forensic mental health professionals are beginning to look carefully at the underlying moral and ethical issues.143 Yet, the briefest scan of the United States Supreme Court’s docket in this area over the past decade reveals that, in many systems, none of these concerns are even “on the table.” The forensic mental health system operates utterly independently of these ethical concerns.144 The well-known testimony of Dr. James Grigson in capital cases speaks for


141. Shestack, supra note 140, at 1522; see also supra note 77 (discussing NIMH report).

142. Richard Rogers, Ethical Dilemmas in Forensic Evaluations, 5 BEHAV. SCI. & L. 149, 150 (1987). In many jurisdictions, evaluating witnesses are employees of the facility to which the subject of the incompetency proceeding would be transferred if he were deemed incompetent to stand trial. It seems inevitable that agency relationships would taint the evaluators’ opinions in some of these cases.


itself.\footnote{145}

From where does this tension between ethical forensic behavior and the courts' regular sanctioning of testimony that reflects the starkest power imbalances between putatively incompetent defendants and the state stem? Perhaps from "the deeply rooted moral and religious tension which surrounds the attribution of individual responsibility for 'good' and 'evil.'"\footnote{146} A finding of incompetency may "rob" the public of the opportunity to take out its moralized societal aggression on the defendant. The tension reminds us that the relationship between "morality" and "power" factors into any constructable ultimate equation.

iii. Social Ends:\footnote{147} Obsessive fears of malingering, incessant confusion of substantive incompetent to stand trial ("IST") and "not guilty by reason of insanity" ("NGRI") standards, and unquestioning acceptance of patently inadequate testimony all contribute significantly to a judicial perspective that subordinates the legitimacy of the IST process and marginalizes potentially IST defendants. The judiciary is not, however, totally to blame; all parties to the system are culpable. Defense counsel use the incompetency process as a "bargaining chip" in plea negotiations, as a source of information for the eventual sentencing hearing, or as a "dry run" to determine whether a non-responsibility defense is viable.\footnote{148} Prosecutors use it as a means of removing from society defendants against whom they might have a weak case, or as a means of preventive detention.\footnote{149}

Experts' misuse of the process frequently "plays into" the needs of judges and counsel. Empirical studies show that mental health professionals overpredict incompetence to stand trial, primarily because of the erroneous belief that this status is synonymous with psychosis.\footnote{150} Over twenty years ago, Professors Robert A. Burt and Norval Morris set out the paradigmatic incompetency to stand trial testimonial dialogue:

\begin{footnotesize}
\begin{itemize}
\item Rationales, or "Doctrinal Abyss"?, 29 \textsc{Ariz. L. Rev.} 1 (1987) [hereinafter Perlin, Symbolic Values].
\item George E. Dix, \textit{The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics}, 5 \textsc{Am. J. Crim. L.} 151, 172 (1977) (Grigson testified at "the brink of quackery"); see also Charles P. Ewing, "Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 \textsc{Am. J.L. & Med.} 407 (1983); Perlin, Crime & Culture, supra note 127, at 52 n.162.
\item Golding, supra note 143, at 287.
\item See infra part IV.B.2.
\item MENTAL HEALTH STANDARDS, supra note 135, at 163.
\item Id. at 163-64.
\end{itemize}
\end{footnotesize}
Judge: Doctor, is he incompetent?

Psychiatrist: Your Honor, he is psychotic! 151

This is intuitively bad diagnosis, bad forensic testimony, and bad law. Yet it continues regularly. First, and perhaps foremost, it meets judicial needs. Judges are primarily concerned that incompetency assessments conform to minimal legal requirements. Accordingly, they are likely to require only that the evaluation “offer no less than what the judge has become accustomed to in past assessments.” This attitude produces disincentive for new methods that might engender uncertainty, the low card in any heuristic judge’s hand. 152 Anecdotal evidence suggests that many judges are entirely comfortable with this state of affairs in other forensic assessment situations as well. 153

Second, it appears that judges are nearly as disinterested in “the truth” in considering competency as they are in “dropsy” cases. Judges concede that they routinely grant motions for competency evaluations even when they believe: (1) the motion is intended as a trial delay tactic; (2) defense counsel misunderstands the competency criteria; and (3) the motion is “unjustified and/or unsupported.” 154

This is problematic for many reasons. Hospital evaluation staff reveal a bias against returning defendants to trial, incorrectly presuming that a defendant remains incompetent until he demonstrates his competency. 155 This leads to unnecessarily lengthy commitments that frequently exceed the maximum sentence for the crime charged and often last a patient’s lifetime. 156 Next, degrees of competency to stand


153. See Michael L. Perlin, “Pretexts Within the Forensic System: Why Are We Really Doing This This Way?”, (paper presented at Clarke Institute of Psychiatry, Toronto, Ont., Canada, June 1990, on file with author) [hereinafter Perlin, Forensic System] (recounting story told by judge to forensic psychologists at conference: “Look guys, all this other stuff is interesting and all that, but it’s not really very helpful to me. When you’re on the stand I want to know one thing: is the defendant insane or isn’t he? Just tell me that and we can backfill the details later.”); see also Norman G. Poythress, Concerning Reform in Expert Testimony: An Open Letter From a Practicing Psychologist, 6 LAW & HUM. BEHAV. 39, 41 (1982) (describing hostile judicial reaction when author-expert witness refused to testify as to ultimate question).

154. ROESCH & GOLDING, supra note 78, at 192; Roesch & Golding, supra note 130.

155. McGarry, supra note 81, at 51. Jurisdictions are split on the question of the allocation of the burden of proof at incompetency hearings. See 3 PERLIN, CIVIL & CRIMINAL, supra note 5, § 14.05, at 222-25. The Supreme Court recently held that the allocation of the burden of proof to the defendant who is asserting incompetency does not offend due process. Medina v. California, 112 S. Ct. 2572, 2577-78 (1992).

156. Bruce J. Winick, Restructuring Competency to Stand Trial, 32 UCLA L. REV. 921, 938 (1985). Although the Supreme Court declared such indeterminate commitments unconstitutional 21 years ago in Jackson v. Indiana, 406 U.S. 715 (1972), as of 1979, that case
trial, like other competencies, fall on a continuum and are almost always in flux. The all-or-nothing paradigm often demanded by courts is dissonant with the clinical realities. Finally, clinical evaluators rarely inquire into the skills that a specific defendant actually needs to stand trial. Useful questions—Will the case involve a trial or a guilty plea? Will the defense be a denial or will it raise an affirmative defense? Will it involve a Mapp or Miranda motion? Will the defendant testify?—are rarely asked. If an evaluator does not know the functions that a defendant will need to perform, then the evaluation process becomes even more of a charade.

A flawed incompetency process purports to serve other social ends as well. When Montana abolished its insanity defense, the ultimate effect was simply that courts found more defendants incompetent to stand trial who would have pled “not guilty by reason of insanity” under the prior law, and then committed them to the same maximum security forensic facilities to which they would have been sent had they been acquitted by reason of insanity. Again, use of the incompetency process served a purportedly “moral” end. Montana legislators were able to assuage angry voters who viewed the insanity defense as a means by which a defendant can improperly “beat a rap.” The dispositional result was virtually the same as if the defense had not been abolished.

4. CONCLUSION

In the types of cases discussed here, forensic witnesses frequently exhibit what is known in substantive criminal law as “wilful blind-
ness." Their suspicions as to what is really going on in the criminal trial process may be aroused, but they "deliberately omit ... further enquiries, because [they] wish ... to remain in ignorance ... ." In all these cases, courts elect not to concern themselves with the underlying issues. The cases' dispositions serve the judicial system's instrumental purposes: the quick disposition of criminal cases, the institutionalization of mentally disabled criminal defendants, and the efficient use of the criminal courts. In addition, courts and experts demonstrate the impact of cognitive dissonance—the tendency of individuals to reinterpret information or experience that conflicts with internally accepted or publicly articulated beliefs in order to avoid the unpleasant state caused by such inconsistencies. This reinterpretation is consciously rationalized through the use of cognitive heuristic devices and is unconsciously sanctioned through sanist thoughts and behavior.

C. On Heuristics

1. INTRODUCTION

Another major contributor to pretextual decisionmaking is the use of disingenuous heuristic devices by expert witnesses testifying in involuntary civil commitment and incompetency to stand trial cases and by courts in deciding such cases. Examination of case law developments in these two areas reveals the extent to which heuristic thinking permeates both the trial and the appellate processes. Although there are a few important instances in which courts have rejected this type of thinking and have approached such cases sensitively and reflectively, doctrinal developments and individual decisions are still informed largely by the cognitive distortions reflected in heuristics use.

"Heuristics" is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to oversimplify complex, information-processing tasks. The use of these heuristic devices often leads to distorted and systematically erroneous decisions, and causes decisionmakers to "ignore or misuse items of rationally useful information." The "vividness" heuristic teaches that one single, vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made. President Reagan's famous "welfare queen" anecdote is a textbook example of heuristic behavior. It is important to understand that mental health professionals are just as susceptible to the use of these devices as are judges, jurors, legislators, and lay persons.

Through the "availability" heuristic, we judge the probability or frequency of an event based upon the ease with which we recall it. Through the "typification" heuristic, we characterize a current experience by reference to past stereotypic behavior. Through the "attribution" heuristic, we interpret a wide variety of additional information to reinforce pre-existing stereotypes. Through the "myth of particularistic proofs" heuristic, we erroneously assume that case-specific (anecdotal) information is qualitatively different from base-rate (statistical) information. Through the "hindsight bias" heuristic, we exaggerate how easily we could have predicted an event beforehand. Through the "outcome bias" heuristic, we base our evaluation


of a decision on our evaluation of an outcome.\textsuperscript{170}

2. HEURISTICS AND INVOLUNTARY CIVIL COMMITMENT

Research confirms that heuristic thinking dominates the mental disability law process.\textsuperscript{171} Empirical studies demonstrate how the vividness effect distorts perceptions of civil commitment candidates, the relationship between civil commitment and the criminal process, and civil commitment outcomes.\textsuperscript{172} In these instances, "[t]he drama of a


171. In a series of papers, I have considered the power of heuristics on different aspects of the mental health disability law system. See Perlin, Psychodynamics, supra note 12 (insanity defense); Perlin, Homelessness, supra note 169 (relationship between homelessness and deinstitutionalization); Perlin, Questions, supra note 14 (right to refuse treatment); Perlin, Tea Leaves, supra note 6 (same); Michael L. Perlin, Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's, 16 Law & Psychol. Rev. 29 (1992) [hereinafter Perlin, Tarasoff] (application of Tarasoff doctrine); see also Perlin, Fatal Assumption, supra note 15, at 57-58 (on mental disability counsel's need to familiarize herself with heuristics database); Perlin, Sanism, supra note 13, at 47 (on the way that heuristic thinking leads to sanist behavior); Perlin & Dorfman, supra note 13, at 63 n.114 (on the relationship between heuristic thinking and courts' attitudes toward social science data in mental disability cases).

172. See Hiday & Smith, supra note 91, at 449 (aberrant behavior by a small number of patients in sample distorted outcome perceptions; mental health professionals significantly
few cases caused their retelling while the mundane cases faded from
memory."

Publicly salient events have dramatic impacts on involuntary
civil commitment rates, especially where (1) the vivid event is
a homicide of a stranger, (2) the actor has prior contact with the
mental health system, and (3) the mental health system either dis-
charges the patient as “cured” or declines to admit him. Furth-
more, such a single instance’s empirical effect is independent of any
legislative change that might follow such an event.

Experts often use the typification heuristic in cases that involve
the improper prescription of medication. Here, the treating doctor
“‘slots’ his patient into certain categories and prescribes a similar reg-
imen for all.” Also, clinicians significantly overestimate their diag-
nostic and predictive accuracy, and ignore supplemental means of
interpretation that might enhance their accuracy. Through use of
the attribution heuristic, this data is ignored in the mental disability
law process.

The fact that some expert witnesses, referred to as
“imperial experts” by Professor Michael Saks, “display a willingness
... to disregard what knowledge has been developed by the field from
which they claim to derive their expertise, and to substitute for that

173. Hiday & Smith, supra note 91, at 449.
174. Bagby & Atkinson, supra note 90, at 46. See generally William H. Fisher et al., supra
note 90, at 712. For an explanation of how one salient case can lead to the restructuring of an
entire body of jurisprudence, see James R. P. Ogloff, The Juvenile Death Penalty: A Frustrated
Society’s Attempt for Control, 5 BEHAVIORAL SCI. & L. 447 (1987) (discussing the scenario
preceding Vermont’s elimination of a minimum age for prosecuting children as adults in
murder cases); see also People v. Seefeld, 290 N.W.2d 123, 124 (Mich. Ct. App. 1980)
(discussing the impetus for adopting the “guilty but mentally ill” verdict).
failed to change prescription following his observation of side-effects and self-destructive
behavior by patient); Rosenfeld v. Coleman, 19 Pa. D. & C.2d 635 (C.P. Northampton County
1959) (doctor prescribed addictive drugs to help patient see nature of his addictive
personality); Perlin, Power, supra note 74, at 125 (discussing Watkins v. United States, 589
F.2d 214 (5th Cir. 1979) (doctors prescribed 50-day supply of Valium without taking medical
history or checking patient’s medical records)).
176. Perlin, Power, supra note 74, at 125 n.112 (citing sources discussing “slotting”
practices); see also, e.g., People v. Feagley, 535 P.2d 373, 397 n.31 (Cal. 1975) (state hospital
report on treatability of convicted sex offender was “mimeographed” and “very minimum-
grade form letter”).
177. David Faust, Data Integration in Legal Evaluations: Can Clinicians Deliver on Their
Premises?, 7 BEHAVIORAL SCI. & L. 469, 480 (1989) (discussing results found in Robyn M.
Dawes et al., Clinical Versus Actuarial Judgment, 243 SCIENCE 1668 (1989)); Baruch
Fischhoff, Debiasing, in JUDGMENT, supra note 170, at 422, 442; Sarah Lichtenstein et al.,
Calibration of Probabilities: The State of the Art, in JUDGMENT, supra note 170, at 306.
178. See Arkes, supra note 170, at 430-31.
their own guesses,” is also ignored.179

3. HEURISTICS AND INCOMPETENCY TO STAND TRIAL

Little is known about the role of expertise in assessing the treatability of mentally disabled criminal defendants,180 and about the accuracy of instruments that evaluate incompetency to stand trial.181 Yet these are seemingly necessary predicates of incompetency to stand trial commitments.

Research reveals that, in determining the likely future dangerousness of defendants found incompetent to stand trial, and thus in need of institutionalization,182 “expert” evaluations frequently rely not on the examiners’ experience or knowledge but on the facts of the act upon which the defendant was originally indicted. In a study of over 250 such individuals, the only variable that distinguished those determined to be dangerous from those determined not to be dangerous was the alleged crime: “The more serious the alleged crime, the more likely that the psychiatrist would find the defendant dangerous.”183 Furthermore, there was a discrepancy between the criteria actually employed by the examiners, such as seriousness of the crime, and the criteria that the examiners reported as informing their deci-


More recent studies reveal differences in the variables relied upon by psychiatrists and psychologists in reaching their decisions in insanity cases. Psychiatrists rely more heavily on the defendant’s version of the criminal incident and on the jail interview, while psychologists are more likely to consider collaborative information such as jail observations and statements by others. Beckham et al., supra note 82, at 86.
sions, such as presence of impaired or delusional thinking.\textsuperscript{184}

In reviewing these studies, Michael Bagby concludes that the discrepancy between the criteria used and those reported as being used suggests that intuitive or implicit beliefs, rather than expert knowledge, often guide examiners' decisions.\textsuperscript{185} We ignore Bagby's conclusions, however, and continue to assume that treatment of incompetency to stand trial somehow "works" and that experts have some special expertise in assessing trial competency.\textsuperscript{186}

4. HEURISTICS AND THE COURTS

Courts also regularly fall prey to heuristic behavior in mental disability law cases.\textsuperscript{187} \textit{Bouchillon v. Collins},\textsuperscript{188} a recent, extraordinarily sensitive decision by the Fifth Circuit, shows how both trial judges and counsel may succumb to heuristic reasoning. The two decisions in \textit{United States v. Charters},\textsuperscript{189} a case that severely limited the rights of federal incompetent-to-stand-trial detainees to refuse antipsychotic medication, reflect how heuristics dominate the legal thinking of some appellate judges, but not others.

a. \textit{Bouchillon v. Collins}

In \textit{Bouchillon v. Collins},\textsuperscript{190} the Fifth Circuit affirmed a district court decision granting the defendant's writ of habeas corpus on the ground that he had been incompetent to plead guilty to a robbery charge.\textsuperscript{191} Prior to the entry of the defendant's guilty plea, there was no hearing on his competence to stand trial and the defendant was not evaluated by a mental health professional. The state trial judge had relied primarily on the defendant's "demeanor at trial" in deciding to accept his plea.\textsuperscript{192}

\begin{itemize}
\item \textsuperscript{184} Cocozza \& Steadman, \textit{supra} note 183, at 1096.
\item \textsuperscript{186} Again, this must be read in light of data suggesting that clinical evaluators are often confused about the applicable legal standard and frequently misunderstand the legal issue of incompetency to stand trial, confusing it with the presence of a psychotic state. \textit{See} Winick, \textit{supra} note 78, at 125 n.180 (sources cited). \textit{See generally} Winick, \textit{supra} note 156.
\item \textsuperscript{187} \textit{See generally} Bersoff, \textit{supra} note 170. I discuss courts' use of heuristics in insanity defense decisionmaking in Perlin, \textit{Psychodynamics}, \textit{supra} note 12.
\item \textsuperscript{188} 907 F.2d 589 (5th Cir. 1990).
\item \textsuperscript{189} 863 F.2d 302 (4th Cir. 1988) (en banc), \textit{cert. denied}, 494 U.S. 1016 (1990).
\item \textsuperscript{190} 907 F.2d at 589.
\item \textsuperscript{191} The defendant was a Vietnam veteran who had been "repeatedly diagnosed" as suffering from Post-Traumatic Stress Disorder (PTSD). He also was an abused child who escaped from an orphanage at age twelve and was taken in by a prostitute who sexually abused him. \textit{Id.} at 590.
\item \textsuperscript{192} \textit{Id.} at 591.
\end{itemize}
The federal district court granted the defendant's writ application on the ground that his counsel was ineffective for failing to raise the question of his incompetency to stand trial and to proffer an insanity defense. This occurred despite counsel's awareness that his client had "mental problems," had been institutionalized, and was taking antipsychotic medication. On appeal, the Fifth Circuit found the defendant's mental condition to be "undisputed" and considered whether his illness caused him to be incompetent to stand trial. The court noted that the episodes of "'numbing' and blackouts during which he cannot be expected to exercise judgment or reason" would not necessarily be obvious to laymen. The court stressed that demeanor is not dispositive. "[T]he existence of even a severe psychiatric defect is not always apparent to laymen." A defendant "need not be catatonic, raving or frothing" to be legally incompetent.

Interestingly, the defendant's trial counsel conceded that although his client told him his entire medical history, he nonetheless dissuaded Bouchillon from pleading insanity because of his own prior unsuccessful experience with another insanity defense case in the same judicial district. The counsel admitted that he never requested his client's medical records nor talked to witnesses about his client's mental problems because the client "appeared rational."

Both the trial judge and the defense counsel in Bouchillon displayed heuristic behavior. Taking refuge in "ordinary common sense," they rejected the possibility that the defendant was mentally ill because he did not "look" mentally ill. Their acceptance of lay perceptions of demeanor evidence reflects the pernicious effect of the typification heuristic. Since Bouchillon did not resemble their perception of the "typical" mentally ill criminal defendant, they rejected the possibility that his mental illness might have made him incompetent.

193. Id.
194. Id. at 595-96.
195. Id. at 592.
196. Id. at 593.
197. Id. at 593-94 (quoting Bruce v. Estelle, 536 F.2d 1051, 1059 (5th Cir. 1976), cert. denied, 429 U.S. 1053 (1977)).
198. Id. at 594 (quoting Lokos v. Capps, 625 F.2d 1258, 1267 (5th Cir. 1980)).
199. He advised Bouchillon that "it was difficult to prove an insanity defense in Lubbock, Texas." To drive this point home he told Bouchillon about one of his recent cases in which ten members of the jury had voted for a guilty verdict despite the testimony of numerous experts, including the well-known Dr. Grigson, that his client was insane.
199a. Id. at 596 (footnote omitted).
200. Id.
201. Id.
to stand trial. In light of the lawyer's past losing effort with the insanity defense, he "slotted" the case as one in which such a defense should not be offered.202

b. United States v. Charters

In United States v. Charters, the Fourth Circuit, en banc, sharply curtailed the rights of incompetent-to-stand-trial federal detainees to refuse antipsychotic medication.203 Applying the "professional judgment" standard of Youngberg v. Romeo,204 the court limited its inquiry to whether the drugging decision was made "by an appropriate professional" and allowed for "only one question" to be asked of experts in actions proceeding from medication decisions: "was this decision reached by a process so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one?"205

The en banc court vacated an earlier panel decision in the same case which had provided detainees with significantly greater procedural and substantive due process protections. The panel had premised its conclusion on arguments grounded in the right to privacy, the right to freedom of thought process, and the right to freedom from unwanted physical intrusion.206 In rejecting the panel's reasoning, the court "revealed [its] apprehensiveness about dealing with underlying social, psychodynamic, and political issues that form the overt and hidden agendas in any right-to-refuse case."207

The en banc opinion incorporated many heuristic devices in its reading of trial testimony: availability, typification, the myth of par-

202. On the significance of visual imagery of the mentally disabled in shaping this area of jurisprudence, see Perlin, Unpacking, supra note 66, at 724-27, and sources cited, id. at 724-27 nn.591-608; see also, e.g., Rogers v. State, 514 N.E.2d 1259, 1261 (Ind. 1987) (affirming rejection of insanity plea partly because of testimony that defendant, who at first acted "nervous" with a "weird" expression, eventually appeared "calmer" and did not act "crazy"); State v. Clayton, 656 S.W.2d 344, 350 (Tenn. 1983) (conviction based on police testimony that when defendant was arrested, he "was sitting with his head down" and "looked okay," reversed where defense presented "overwhelming, even staggering, evidence" of defendant's paranoid schizophrenia); cf. Lafferty v. Cook, 949 F.2d 1546, 1555 (10th Cir. 1991) (mentally disabled defendant "may outwardly act logically and consistently but nonetheless be unable to make decisions on the basis of a realistic evaluation of his own best interests"), cert. denied, 112 S. Ct. 1942 (1992).


205. Charters, 863 F.2d at 313.


207. Perlin, Questions, supra note 14, at 966.
ticularistic proofs, and the vividness effect. It attempts to "sim-
plify one of the most complex problems facing decisionmakers,
assessing mentally disabled individuals' capacity to retain some
autonomous decisionmaking power, further reflects the pernicious
effect of the heuristic of attribution theory."

Taken together, Bouchillon and Charters demonstrate the differ-
ent ways judges can employ heuristics in deciding cases involving
incompetent criminal defendants. These same heuristics often lead
courts to trivialize, ignore, or otherwise misuse social science data in
the trial of mental disability cases.

5. HEURISTICS AND THE USE OF SOCIAL SCIENCE

Through the use of heuristics, social science data is debunked and
the outrageous, memorable case dominates the judicial process.

208. Id. at 986-87 (discussing the Charters court's reading of expert testimony that
questioned whether "any factual inquiry" into a schizophrenic patient's competency might
ever be valid).

209. Id. at 987.

210. See generally Perlin, Morality, supra note 3, at 136-37; Perlin & Dorfman, supra note
13. Courts are often suspicious of social science data, see J. Alexander Tanford & Sarah
Tanford, Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration, 66
N.C. L. REV. 741, 742-46 (1988), and are hostile to and threatened by its use. See, e.g., Ballew
v. Georgia, 435 U.S. 223, 246 (1978) (Powell, J., concurring) (challenging the "wisdom—as
well as the necessity—of Justice Blackmun's heavy reliance on numerology derived from
statistical studies" in a jury size case); see also Edward L. Rubin, The Practice and Discourse of
Legal Scholarship, 86 MICH. L. REV. 1835, 1889 (1988); Ann Woolhandler, Rethinking the
Judicial Reception of Legislative Facts, 41 VAND. L. REV. 111, 125 n.84 (1988) (quoting
DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 284 (1977)). Courts apply social
science data poorly, see Gary B. Melton, Bringing Psychology to the Legal System:
Opportunities, Obstacles, and Efficacy, 42 AM. PSYCHOLOGIST 488 (1987); David L. Suggs, The
Use of Psychological Research by the Judiciary: Do the Courts Adequately Assess the Validity of
the Research?, 3 LAW & HUM. BEHAV. 135 (1979), and are both teleological and inconsistent
in its use. See also Paul S. Appelbaum, The Empirical Jurisprudence of the United States
Supreme Court, 13 AM. J. L. & MED. 335, 341 (1988); Norbert L. Kerr, Social Science and the
U.S. Supreme Court, in THE IMPACT OF SOCIAL PSYCHOLOGY ON PROCEDURAL JUSTICE 56,

Law professors are not necessarily any better. A visiting professor presented a paper
about pornography and the first amendment at a recent faculty development seminar. I asked
him if he was familiar with recent empirical studies raising some important questions about his
basic thesis, for example, Joseph E. Scott, What Is Obscene? Social Science and the
Contemporary Community Standard Test of Obscenity, 14 INT'L J.L. & PSYCHIATRY 29
(1991); Berl Kutchinsky, Pornography and Rape: Theory and Practice?, 14 INT'L J.L. &
PSYCHIATRY 47 (1991); Judith Becker & Robert M. Stein, Is Sexual Erotica Associated with
"Well, I don't tend to think very much of empirical arguments." Most of those present
grinned and nodded. No one challenged or commented on his answer.

211. The paradigmatic example is John Hinckley's use of the insanity defense after shooting
President Reagan. See PERLIN, INSANITY DEFENSE, supra note 127, (manuscript at VI.B.-C.,
on file with author); Perlin, Psychodynamics, supra note 12; Perlin, Unpacking, supra note 66;

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Although respected scholars have cogently demonstrated that the judicial system has failed to develop methods to ensure the validity of the research upon which expert testimony is based,\(^2\) most courts remain profoundly disinterested.\(^2\) Paul Appelbaum’s analysis of the Supreme Court’s decisions in *Barefoot v. Estelle*\(^2\) and *McCleskey v. Kemp*\(^2\) persuasively demonstrates that the Court’s use of heuristic devices leads it to misinterpret some significant empirical data, to disparage other data, and to ignore yet other data.\(^2\) This occurs because the consideration of such data would have forced the Justices to take seriously arguments that ran counter to their own views.

Through the employment of heuristics, for instance, the *en banc* Charters court:

> abdicated its responsibilities to read, harmonize, distinguish, and analyze social science data on the issues before it. It not only inadequately addressed the issue of side effects, but it also failed to adequately address issues concerning competency determinations, the therapeutic value of decision making, the empirical results of an

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\(^2\) 463 U.S. 880 (1983) (testimony as to future dangerousness admissible at penalty phase in death penalty case).


\(^2\) Appelbaum, *supra* note 210; see also, e.g., Norman J. Finkel, *Socioscientific Evidence* and Supreme Court Numerology 34 (Aug. 17, 1991) (unpublished manuscript, on file with the author) (arguing that Justice Scalia’s jurisprudence “knocks the social scientist off the Eighth Amendment playing field”).

Such judicial behavior suggests that psychological reactance theory is similarly applicable to Supreme Court decisionmaking. See Bagby & Atkinson, *supra* note 90, at 58; Perlin, *Morality, supra* note 3, at 138; Perlin, *Unpacking, supra* note 66, at 610-11 n.48, 665 n.291; David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18 (1991). *See generally* BREHM & BREHM, *supra* note 170, at 30-31 (“Given that a person believes he or she has a specific freedom, any force on the individual that makes it more difficult for him or her to exercise the freedom constitutes a threat to it. Thus, any kind of attempted social influence . . . that work[s] against exercising the freedom can be defined as threats.”).
announcement of a right to refuse treatment, and the courts’ role in such processes.217

This trivialization of social science serves additional instrumental ends. It allows courts to more comfortably seek refuge in expressing common sense “morality,” to employ heuristic devices in a wide variety of cases in “uncomfortable” areas of the law, and, as the next Part demonstrates, to use sanist behavior in deciding such cases.

IV. ON SANISM

A. Introduction218

“Sanism” is an irrational prejudice of the same quality and character of other irrational prejudices that cause, and are reflected in prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.219 It infects our jurisprudence and lawyering practices.220 Sanism is largely invisible and socially acceptable. It is based primarily on stereotype, myth, superstition, and de-individualization. Sanism is perpetuated by our use of “ordinary common sense” (“OCS”) and heuristic reasoning in an unconscious response to events in everyday life and the legal process.

Judges are not immune from sanism. “[E]mbodied in the cultural presuppositions that engulf us all,”221 they express discomfort with social science,222 or any other system that may appear to challenge law’s hegemony over society, and express skepticism about new thinking. This discomfort and skepticism allows them to take deeper refuge in heuristic thinking and flawed, non-reflective, purported OCS, both of which perpetuate the myths and stereotypes of

217. Perlin, Questions, supra note 14, at 999 (footnote omitted).
218. Much of the text accompanying notes 219-31 is adapted from Perlin, Sanism, supra note 13, 373-77, 398-406.
220. The word “sanism” was probably coined by Dr. Morton Birnbaum. See Koe v. Califano, 573 F.2d 761, 764 n.12 (2d Cir. 1978); Morton Birnbaum, The Right to Treatment: Some Comments on Its Development, in Medical, Moral and Legal Issues in Mental Health Care 97, 106-07 (Frank J. Ayd ed., 1974). I discuss Birnbaum’s insight in Perlin, Homelessness, supra note 169, at 92-93. Dr. Birnbaum is widely regarded as having first developed and articulated the constitutional basis of the right to treatment doctrine for institutionalized mental patients. See Morton Birnbaum, The Right to Treatment, 46 ABA J. 499 (1960), (discussed in 2 Perlin, Civil & Criminal, supra note 5, § 4.03, at 8-13).
B. Sanism and the Court Process in Mental Disability Law Cases

Judges reflect and project the conventional morality of the community. Judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes. Their language demonstrates bias against mentally disabled individuals and contempt for the mental health professions. At least one court, without citation to authority, has found that it is less likely that medical patients will “fabricate descriptions of their complaints” than will “psychological patients.” Another court has likened psychiatric ability to predict future dangerousness to predictions made by an oncologist regarding consequences of an untreated and metastasized malignancy. This analogy ignores the overwhelming weight of clinical and behavioral literature concluding that psychiatrists are far more often incorrect in predicting dangerousness than they are correct.

Courts often appear impatient with mentally disabled litigants and attribute their problems in the legal process to weak character or
poor resolve. 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.”

One trial judge responding to a National Center for State Courts survey indicated that defendants who were incompetent to stand trial could have understood and communicated with counsel and the court “if they [had] only wanted.”

Other court decisions reject psychodynamic understanding and principles that could illuminate issues for the jurors and give them insight into the actions of mentally disabled criminal defendants.

Equally troubling is judicial ignorance about laws affecting mentally disabled persons. For example, an appellate court in Louisiana reversed a commitment order because the trial judge was not aware of a state law creating a mental health advocacy service to provide representation to indigent people facing involuntary civil commitment.

A Texas study revealed that a significant number of judges were not even aware of state statutes recognizing a patient-psychotherapist privilege. With little public attention, other courts have regularly entered commitment orders without any explicit statutory authority. Recent studies also demonstrate that judges rarely, and in some cases never, inform patients at involuntary civil commitment hearings that they have a right to counsel, a right to seek voluntary admission, or a right to appeal in the event of actual commitment.

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230. State v. Ducksworth, 496 So. 2d 624, 635 (La. Ct. App. 1986) (no error where juror who felt defendant would be responsible for actions as long as he “wanted to do them” not excused for cause); Perlin, Sanism, supra note 13, at 396; see also, e.g., J.M. Balkin, The Rhetoric of Responsibility, 76 VA. L. REV. 197, 238 (1990) (Hinckley prosecutor meant to suggest to jurors “that if Hinckley had emotional problems, they were largely his own fault”).

231. Ingo Keilitz & J. Rudy Martin, Criminal Defendants With Trial Disabilities: The Theory and Practice of Competency Assistance 90 (unpublished manuscript, on file with the author); see also H. Richard Lamb, Deinstitutionalization and the Homeless Mentally Ill, 35 HOSP. & COMMUNITY PSYCHIATRY 899, 943 (1984) (society tends to “morally disapprove of [mentally disabled] persons who ‘give in’ to their dependency needs”); cf In re Tarpley, 581 N.E.2d 1251, 1252 (Ind. 1991) (error to hold defendant in contempt of court for failing to take medication as required by outpatient commitment).

232. On the role of psychodynamics in deciding cases involving mentally disabled criminal defendants, see generally Perlin, Unpacking, supra note 66. For examples of cases, see Stan v. Dugger, 883 F.2d 900, 908 (11th Cir. 1989), aff’d in part and rev’d in part, 901 F.2d 898 (11th Cir. 1990) (testimony of psychiatrist that mentally ill people often confess to crimes they did not commit is inadmissible); Braley v. State, 741 P.2d 1061, 1064-65 (Wyo. 1987) (psychiatric expert testimony not required to explain defendant’s reactions to fear and stress).


236. One study reports that at the patient's initial hearing, fewer than one-third of judges...
All researchers in the area recognize the widespread inadequacy of counsel at involuntary civil commitment hearings. By failing to insist on adequate representation by assigned counsel, and by refusing to find error in cases that reflect the starkest denial of adequate representation, appellate courts perpetuate, condone, and encourage sanist behavior on the part of trial judges and the arbitrary abrogation of litigants' liberty in the cases in question.

1. IN INVOLUNTARY CIVIL COMMITMENT CASES

A full understanding of the involuntary civil commitment process requires consideration of more than simply the substantive and procedural limitations on commitment power. Therefore, I next discuss how sanist testimony can subvert legal standards and how this subversion relates to what currently seems to be the only important issue considered in involuntary civil commitment decisions: whether a patient is "competent" to make the "right choice" and self-medicate in the community if commitment is not ordered.

I start with three basic principles. First, individuals are presumed to be competent, and this presumption generally may not be
overcome except by a judicial determination. This articulation of a competency presumption is fairly new in the law. As recently as 1972, a federal district court invalidated a Wisconsin statute that had presumed the opposite: a civilly committed individual was presumed to be incompetent, although that presumption was rebuttable. However, the medical profession’s record of complying with this mandate of presumed competency has been significantly spotty.

Second, competency is not a “fixed state.” A person may at the same time be competent for some legal purposes and incompetent for others. Incompetency and mental illness are not identical states. As the Supreme Court of Washington noted, “the mere fact that an individual is mentally ill does not also mean that the person so affected is incapable of making a rational choice with respect to his or her need for treatment.”

Even if a person is found incompetent to stand trial, it does not mean that she is incompetent to function in society. Third, the lack of a unitary competency standard also muddles assessments of competency. The observation by Charles Lidz and his colleagues more than fifteen years ago that the search for a single test is akin to a “search for the Holy Grail” still resonates today.


246. Tremblay, supra note 244, at 538-39 n.97 (citing George J. Annas & Joan E. Densberger, Competence to Refuse Medical Treatment: Autonomy vs. Paternalism, 15 U. TOL. L. REV. 561, 564 (1984) and Sidney H. Wanzer et al., The Physician’s Responsibility Toward Hopelessly Ill Patients, 310 N. ENG. J. MED. 955 (1984) (doctors rarely follow competency mandate in non-life threatening situations or where it is unlikely that publicity will result from the decision)).

247. See Winick, supra note 78, at 102-05; see also Wexler, supra note 85, at 8-9.


250. Loren H. Roth et al., Tests of Competency to Consent to Treatment, 134 AM. J. PSYCHIATRY 279, 283 (1977); see Perlin, Homelessness, supra note 169, at 113-14 (different competency standards employed in different case categories); Perlin, Questions, supra note 14, at 967 (same).
Scholars such as Paul Appelbaum and Thomas Grisso have carefully conceptualized competency standards into four abilities: (1) to communicate choices; (2) to understand relevant information; (3) to appreciate a situation and its consequences; and (4) to manipulate information rationally. Despite this work, the response of the en banc court in *United States v. Charters* is typical. The court, in essence, threw up its hands and said that no one could possibly distinguish between competency to stand trial and competency to refuse antipsychotic medication. Other appellate courts share this futile response.

Examination of the relationship between competency, treatment refusal, and the involuntary civil commitment process reveals a paradox. Fewer than a handful of reported involuntary civil commitment cases have frontally considered right to refuse treatment claims. Most courts simply dismiss such claims as not justiciable in the involuntary civil commitment context. Yet courts routinely weigh experts' predictions of a patient's potential refusal to take antipsychotic medication in a community setting as the most probative evidence on the question of whether involuntary civil commitment is warranted. Professor David Wexler presciently noted this link almost a decade ago; yet, the academic journals have been

253. 863 F.2d at 310 (distinctions between competency states "must certainly be . . . of such subtlety and complexity as to tax perception by the most skilled medical or psychiatric professionals"); cf. Perlin, *Questions*, supra note 14, at 988 (characterizing this aspect of the court's opinion as reflecting "passive-aggressive behavior").
255. Perlin, *Tea Leaves, supra* note 6, at 49.
258. Only one reported case appears to question the empirical validity of this assumption. *See In re Richardson*, 481 A.2d 473, 479 n.5 (D.C. 1984) ("Not every instance of the outpatient's failure to take prescribed medication or attend therapy sessions justifies the conclusion that he is not cooperating with the treatment program" (citing Virginia A. Hiday & Rodney R. Goodman, *The Least Restrictive Alternative to Involuntary Hospitalization, Outpatient Commitment: Its Use and Effectiveness*, 10 J. *Psychiatry & L.* 81, 89 (1982))).
259. Wexler, * supra* note 85, at 9 ("the relationship between competence and commitment has recently surfaced in the modern but narrow context of the competence to refuse antipsychotic medication").
strangely silent on the fact that this perceived link between drug refusal and necessity for involuntary commitment has become the dominant issue in such commitment cases.

Most of the reported cases rely on psychiatric "expert" predictions as the dispositive evidence.\textsuperscript{260} Although there is widespread belief that refusal to take such medication will make some patients more dangerous,\textsuperscript{261} there is absolutely no evidence that psychiatrists have any special ability to predict community medication compliance.\textsuperscript{262} There is another body of evidence suggesting that the population (of individuals facing civil commitment or those once committed and now seeking release) is comprised of precisely those individuals that many community mental health centers do not want to treat.\textsuperscript{263}

Nevertheless, courts regularly order involuntary civil commitment when testifying experts merely find it "doubtful" that a patient will self-medicate in the community.\textsuperscript{264} For example, even though an operative state statute included a presumption that the subject of the commitment petition did not require treatment\textsuperscript{265} and that civil commitment required clear and convincing evidence of a "serious risk of harm,"\textsuperscript{266} a court affirmed a commitment order based on expert testimony that the patient would "benefit" from medication, that the

\begin{footnotes}
\item[260] For an example of a court rejecting this line of thinking, see \textit{In re J.S.C.}, 812 S.W.2d 92, 95-96 (Tex. Ct. App. 1991) (testimony that patient will deteriorate if he fails to take medication is insufficient basis upon which to sustain involuntary civil commitment determination).
\item[262] The literature reveals no studies on this question. A recent reconsideration of dangerousness studies lists over 40 factors to be considered by experts in assessing probabilities of an individual's future violence. Community medication compliance is not included. George B. Palermo et al., \textit{On the Predictability of Violent Behavior: Considerations and Guidelines}, 36 \textit{J. Forensic Sci.} 1435, 1440 (1991); see also id. at 1439 ("One should not deduce the possibility for future dangerousness from an isolated, individual trait.").
\item[264] See, e.g., \textit{In re L.B.}, 452 N.W.2d 75, 77 (N.D. 1990). In the same case, another expert had testified that the patient did not suffer from a mental illness.
\item[266] This is defined as a "[s]ubstantial deterioration in mental health which would predictably result in dangerousness to that person, others, or property, based upon acts, threats, or patterns in the person's treatment history, current condition, and other relevant factors." N.D. \textit{Cent. Code} § 25-03.1-02(10)(d) (1989).
\end{footnotes}
"only way" such medication could be provided in a supervised manner was in a "structured residential type of placement," and that "if she was discharged from the hospital, she would quit taking her medication . . . ." In another case brought under a statute requiring proof that the respondent would be "likely to attempt to physically harm himself or others . . . unless involuntary commitment is continued," the court found testimony that the individual was in need of long-term medication to help control his mental illness and that he was "unlikely" to take the medication absent extended hospitalization sufficient to order commitment.

Similarly, other courts rely upon like testimony in recommitment hearings following insanity acquittals. Courts continue commitments if such an individual "would not likely take his medication regularly as an outpatient," even where the potential danger would not be "imminent," or if there were a "high likelihood that without adequate supervision [the patient] would stop taking [his] medication.

What we may have here is a pretext within a pretext. Not only are psychiatrists encouraged by the leaders of their profession to subvert testimonial standards, but they are encouraged by the courts to share their "expertise" on an issue about which they may not be "experts." It is probably not coincidental that H. Richard Lamb, one of organized psychiatry's most visible critics of deinstitutionalization, is among those urging courts not to take commitment standards too literally. According to Lamb, there is a link between deinstitutionalization and homelessness that has been exacerbated by activist and excessively civil libertarian courts. If medication noncompliance in the community leads to deterioration and decompensation,

268. MINN. STAT. § 253B.12, subd. 4 (1982).
273. See Perlin, Forensic System, supra note 153, at 2; see also supra note 153.
and this then "causes" homelessness, psychiatrists can exert moral suasion in the forensic setting by making predictions about such deterioration at the involuntary civil commitment hearing. Whether or not psychiatrists have expertise to predict noncompliance—a power that is presumably a necessary predicate to this testimony—is neatly forgotten.

The same line of thinking affects voluntary commitment decisionmaking. Although such patients generally have an absolute right to refuse medication, invocation of that right frequently leads to a transfer to involuntary status. At hearings to determine the appropriateness of a status transfer, courts often rely on refusal to take antipsychotic medication as a sufficient basis to reject continued voluntary status or to order involuntary civil commitment.

Outpatient commitment ("OPC") cases reflect similar decision-making. Individuals unable to make informed decisions "to seek voluntary treatment or comply with recommended treatment" are thus subject to OPC. Statutes typically consider medication compliance as a criterion in the invocation of OPC, and case law appears to explicitly endorse this use of the status. If forced drugging is the "core of OPC," and if OPC's effectiveness depends on the ability of courts to compel resisting outpatients to take antipsychotic medications, then, again, it is necessary to consider the extent of the power that sanist judicial thinking may exert on the mental disability system.

This entire inquiry takes on new meaning when we consider

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275. See Perlin, Tea Leaves, supra note 6, at 50.
recent empirical studies that demonstrate how little information is given to released patients about their medication regimens and how poorly such information is processed. A recently published survey reveals that more than half the patients discharged from short-stay treatment programs, including one conducted at an Ivy League medical school's teaching hospital, did not know the name or the appropriate dosage of the antipsychotic medications prescribed for them or why they were being asked to take these medications. If patients do not have this baseline knowledge, then one more layer of pretext is added to the system.

2. IN THE INCOMPETENCY TO STAND TRIAL PROCESS

Sanist pretexts similarly infect incompetency to stand trial jurisprudence in four critical ways: (1) courts resolutely adhere to the conviction that defendants regularly mangle and feign incompetency; (2) courts stubbornly refuse to understand the distinction between incompetency to stand trial and insanity, even though the two statuses involve different concepts, different standards, and different points on the "time line"; (3) courts misunderstand the relationship between incompetency and subsequent commitment, and fail to consider the lack of a necessary connection between post-determination institutionalization and appropriate treatment; and (4) courts regularly accept patently inadequate expert testimony in incompetency to stand trial cases.

a. Fear of Faking

Malingering by mentally disabled criminal defendants is statistically rare. Research reveals that defendants attempt feigning in less than eight percent of all competency to stand trial inquiries.
Yet, in deciding incompetency to stand trial cases, courts continue to focus, in some cases almost obsessively, on testimony that raises the specter of malingering.287 The fear of such deception has “permeated the American legal system for over a century,”288 despite the complete lack of evidence that such feigning “has ever been a remotely significant problem of criminal procedure.”289 This fear is a further manifestation of judicial sanism.

b. Conflation of Standards

Trial courts continue to blur the distinction between incompetency to stand trial and insanity.290 They confuse these concepts despite countless appellate admonitions as to the differences between the two states,291 and despite different substantive standards, different behavioral criteria, and obvious temporal differences.292 Courts often ask defendants and experts irrelevant and meaningless questions that bear no relationship to the ultimate question to be decided by the court.293

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288. Perlin, Symbolic Values, supra note 144, at 98.

289. Perlin, Unpacking, supra note 66, at 714.

290. See 3 Perlin, Civil & Criminal, supra note 5, § 14.02, at 208 n.7 (sources cited).


292. For the different standards, compare 3 Perlin, Civil & Criminal, supra note 5, §§ 14.03-05 (incompetency to stand trial) with id. §§ 15.03-09 (insanity defense). For the purpose of inquiry regarding competency to stand trial, the relevant time is the time of the trial; for inquiry regarding insanity, the relevant time is the time of the crime.

293. See, e.g., Richard Arens, Insanity Defense 78-79 (1974) (reproducing transcripts of competency hearings in which the judge merely asked defendants the date, the names of the President and Vice President, and the Washington Senators’ (baseball team) standing in the American League); see also Perlin, Psychodynamics, supra note 12, at 24 n.95 (discussing Arens, supra); Poythress, supra note 92, at 218 (reporting on a case in which the court asked the forensic psychologist who had administered the MMPI test to the defendant, “Do you believe in free will?” and “Do you believe in God?”).
While much of the confusion may stem from experts' confusion about the two terms,\(^{294}\) it is clear that attorneys, trial judges, forensic witnesses, and other testifying mental health professionals equally misunderstand the core concepts.\(^{295}\) The fact that this state of affairs continues, with little or no remediation, suggests that its perpetuation continues to meet sanist aims.\(^{296}\)

c. Misunderstanding of Incompetency Commitments

Empirical studies demonstrate that trial judges misunderstand the relationship between a finding of incompetency to stand trial and subsequent hospital commitment. In a state-wide study conducted four years after the Supreme Court's decision in *Jackson v. Indiana*,\(^{297}\) almost one-half of all judges polled believed that commitment of incompetent criminal defendants to forensic hospitals should be automatic without regard to the severity of the underlying criminal offense or to the defendant's present dangerousness.\(^{298}\) A more recent national study of trial judges revealed that such hospitalization was the judicial intervention of choice in nearly ninety percent of all cases.\(^{299}\) Even in states that expressly sanction outpatient commitment as an alternative in criminal incompetency cases, judges remain reluctant to employ this mechanism due to their fear that the patient might become violent in an outpatient setting.\(^{300}\)

Unfortunately, there is no necessary correlation between such institutionalization and appropriate treatment. The starkest case is


\(^{296}\) Misstatements of the appropriate standard continue. See Lafferty v. Cook, 949 F.2d 1546, 1554 (10th Cir. 1991) (record revealed "unambiguously that the state trial court’s evaluation of [defendant’s] competency was infected by a misperception of the legal requirements set out in *Dusky*"), cert. denied, 112 S. Ct. 1942 (1992).

\(^{297}\) 406 U.S. 715, 731, 738 (1972) (incompetent criminal defendants cannot automatically be indefinitely housed in maximum security forensic facilities if it is not likely that they will regain their competency to stand trial within the foreseeable future).

\(^{298}\) Roesch & Golding, *supra* note 130, at 423-24.

\(^{299}\) Kelliltz & Martin, *supra* note 231, at 84.

that of Theon Jackson, the appellant in Jackson v. Indiana. Jackson was a mentally retarded, deaf mute individual, incapable of reading, writing or communicating in any way except through a limited knowledge of sign language. He was indicted on two counts of robbery, both apparently involving purse snatching.\footnote{Jackson, 406 U.S. at 717.} Notwithstanding testimony at his competency hearing that it was unlikely that Jackson could ever learn to read, write, or use sign language proficiently, and that it would be impossible for him to learn minimal communication skills in an Indiana state institution,\footnote{Id. at 718-19.} the trial court committed Jackson indefinitely to a state hospital “until such time as [the state] should certify to the court that ‘the defendant is sane.’”\footnote{Id. at 719 (emphasis added).}

Although the Supreme Court held in favor of Jackson, striking down such commitments as tantamount to life sentences without trial,\footnote{Id. at 731-38.} the underlying problem has not been fully ameliorated. As of seven years after the decision in Jackson, almost one-half of the states had not implemented its holding, and pre-Jackson problems “still persist[ed].”\footnote{Winick, supra note 156, at 941; see Wertlieb, supra note 80, at 336; discussion supra note 156. I discuss the significance of this finding in Perlin, Fatal Assumption, supra note 15, at 47-48. Cf. State v. Werner, 796 P.2d 610, 613 (N.M. Ct. App. 1990) (it was not error to treat dangerous patients committed pursuant to Jackson differently from civil patients).}

The commitment of defendants in incompetency to stand trial cases to forensic hospitals often triggers a “shuttle” mechanism. Defendants are treated (usually with antipsychotic drugs),\footnote{306. See 3 PERLIN, CIVIL & CRIMINAL, supra note 5, § 14.09 (cases cited).} temporarily stabilized, returned to court, found competent, and jailed to await trial. At this point, many “destabilize” and become incompetent once again.\footnote{Hester, supra note 300, at 1498; see Bruce J. Winick, Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform, 39 Rutgers L. Rev. 243, 248-49 (1987); Winick, supra note 156, at 934.} This endless cycle has been well documented,\footnote{See, e.g., Wertlieb, supra note 80, at 337 (discussing United States v. Juarez, 540 F. Supp. 1288 (W.D. Tex. 1982) (mentally retarded, incompetent-to-stand-trial defendant was not treated for over three years due to jurisdictional dispute between state and federal institutions)).} but courts have been remarkably, and uniformly, silent in their sanist non-responses.

d. Acceptance of Inadequate Testimony

Finally, courts regularly accept inadequate testimony in incom-
petency to stand trial cases. For example, in State v. Pruitt, the sole expert witness testified in conclusory terms that the defendant "suffered no mental disease or defect; and he understood the respective roles of the cast of characters at the trial, and the nature of the charges against him," yet "never indicated . . . what the defendant actually understood." Although the appellate court reversed Pruitt's conviction on other grounds, a majority of the court was satisfied that this testimony was a sufficient basis for a competency finding. In Hensley v. State, the court found no abuse of discretion on the issue of incompetency to stand trial where the defendant was able to deny the crime and name the alleged victim, despite the uncontested fact that the defendant's "testimony and actions at the competency hearing were not generally meaningful." In People v. Lopez, the appellate court held that the trial court's decision not to conduct a competency hearing was not error, notwithstanding defendant's history of hospitalization, attempted suicide, drug overdose, use of prescribed psychotropic medications, and suicidal thoughts. These and other similar cases suggest that the most minimal testimony will satisfy courts in such incompetency to stand trial inquiries.

C. Nonsanist Courts

Certainly, not all judges write in a sanist voice. Some nonsanist
opinions, such as Judge Johnson's *Wyatt v. Stickney* decisions, are firmly rooted in a rights/empowerment model. Others, like Justice Blackmun's dissent in *Barefoot v. Estelle*, Justice Stevens's partial dissent in *Washington v. Harper*, and the New Jersey Supreme Court's opinion in *State v. Krol*, specifically rebut sanist myths. Still others, such as Justice Stevens's dissent in *Pennhurst State School & Hospital v. Halderman*, Justices Stevens's and Marshall's separate opinions in *City of Cleburne v. Cleburne Living Center*, and Judge Kaufman's use of a "Gulag archipelago" metaphor in a Second Circuit case involving a mentally disabled prisoner, express eloquent outrage at institutional conditions that inevitably flow from a sanist society. Finally, some decisions express true empathy and understanding about the plight of the institutionalized mentally disabled.

A handful of judges 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. Other judges, in less known cases, have also shown real sensitivity to the underlying issues. These examples, however, clearly constitute the minority of

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317. *See generally Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law* 131-45 (1990) (discussing the application of the rights/empowerment model on behalf of the mentally ill and mentally retarded).


> 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.


cases. Sanism regularly and relentlessly infects the courts in the same ways that it infects public discourse.327

V. CONCLUSION

A. Is the System Pretextual?

So, where are we? Is the entire mental disability system one giant dropsy hearing? Is this inquiry utterly nihilistic? I have no doubt that my basic theory holds: the mental disability law process is pretextual, and its pretextuality is informed by misplaced conscious notions of “morality” and by inevitable unconscious use of cognitive heuristics and biased sanism.

Although the mental disability system’s condition is grave, I think it is not hopeless. I have argued elsewhere that the legal system, as it affects mentally disabled criminal defendants, largely has proceeded out of consciousness.328 The same proposition applies to civil commitment cases. Legal actors repeat cherished myths, disparage social science, reject alternative constructions of reality, and marginalize the mentally disabled parties before the court.329 This should not, however, lead us to the position that competency inquiries are necessarily flawed or that courts are incapable of finding the facts in an unbiased way.

Dropsy cases developed as they have because they serve both instrumental and normative purposes. By sanctioning police perjury, judges believe they are interpreting the law as it should be, in a way that serves a broad array of societal aims. By privileging “moral” testimony, judges believe that they are deciding cases as they should be decided, in a way that serves other societal aims.330

Peterson, 446 N.W.2d 669 (Minn. Ct. App. 1989); State v. Murphy, 760 P. 2d 280 (Utah 1988).

327. Two recent United States Supreme Court cases further illuminate the extent to which sanism continues to affect the Court’s decisions. Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (evaluating the appropriateness of continuing an insanity acquittee’s mental hospital commitment when he is no longer mentally ill, but remains dangerous); Riggins v. Nevada, 112 S. Ct. 1810 (1992) (determining whether medicating a defendant deprives him of a fair trial by preventing him from presenting his natural demeanor to the jury as part of his insanity defense).

328. See Perlin, Symbolic Values, supra note 144, at 98; Perlin, Unpacking, supra note 66, at 731.

329. See generally Perlin & Dorfman, supra note 13.


Like everyone else, judges watch television, read newspapers and magazines, listen to gossip, and are sometimes themselves victims. They receive the message trenchantly described in a recent book criticizing the insanity defense: “Perhaps
inquiries are especially susceptible to pretexts, morality, heuristics, and sanism. Courts are reluctant to “unpack” competency, to consider it as a collection of functional parts, and to weigh competing “stacks” of social science data that affect competency findings. Experts employ an outcome-determinative test: if they agree with the patient’s decision, then she’s competent; if not, then she’s not.

Dissenting from a panel decision reversing an involuntary civil commitment order, District of Columbia Court of Appeals Judge Schwelb cast the case in the language of the classical myth of the “Pyrrhic victory”:

Once upon a time, long, long ago, the King of Epirus defeated his Roman adversaries in a battle at Asculum. Unfortunately for him and his cause, however, a large part of his army was destroyed. “Another such victory over the Romans,” his majesty exclaimed, “and we are utterly undone.” The King’s name was Pyrrhus, and the kind of triumph which brought the winner such travail has come to be known as a Pyrrhic victory.

I am very much afraid that what Tommie Melton has won through litigation may be as counter-productive in the long run as the famous monarch’s flawed win at Asculum. Indeed, I am constrained to wonder how many of the homeless persons who live wretched and squalid lives on grates and benches and pavements in our nation’s capital are there because they have “won,” through litigation or the threat thereof, or as a result of premature deinstitutionalization, the “liberty” not to be required to take medication essential to their mental health.

This metaphor is a powerful and important one. It speaks dramatically and poetically about a desperate social problem. However, it does so in an utterly acontextual way. Although an immense data base has been available on precisely the questions Judge Schwelb frames, the opinion cites neither empirical evidence nor social science data in support of the speculations. It is a textbook heuristic.


332. Professor Keri Gould reports that a prominent expert witness made precisely this statement at a recent meeting of the Suffolk County Academies of Law and Medicine, apparently surprising none of those in attendance. Interview with Prof. Gould, supra note 104.


statement, and a perfect metaphor for the issues I have been discussing.

Courts involuntarily civilly commit individuals based on evidence that does not meet statutory criteria. Empirical research reporting this fact falls universally on deaf ears.\(^335\) Criminal defendants are shuttled through the incompetency to stand trial process for reasons having little, if anything, to do with the articulated standards of *Dusky*, *Pate*, and *Drope v. Missouri*.\(^336\) Courts continue commitments because of a fear that patients are incompetent to make one specific decision (whether or not to self-medicate), even though there is no evidence that the forensic witnesses in such cases have any special ability to predict future compliance with medication regimens.\(^337\) All of this decisionmaking proceeds on a variety of conscious and unconscious levels.

**B. Some Modest Recommendations**

So what, if anything, can be done? First, factual education alone is not enough.\(^338\) Attitudinal education is also needed.\(^339\) Both trial lawyers and expert witnesses have an important educative function.\(^340\) They must educate jurors and judges as to the facts, the law, the social science, and the cognitive theories that inform our behaviors and our attitudes. Although systemic heuristic errors may be embedded in our cognitive processes, we can at least inform judges and legislators about their pernicious power.

Next, we must consider the value of “therapeutic jurisprudence” as a model through which to assess these questions. “Therapeutic jurisprudence” studies the role of the law as a therapeutic, or anti-therapeutic, agent. It recognizes that substantive rules, legal procedures, and lawyers’ roles may have either therapeutic or anti-therapeutic consequences. It questions whether such rules, procedures,

\(^{335}\) See supra part III.B.2.

\(^{336}\) See supra note 4; see also supra part III.B.3.

\(^{337}\) See supra part IV.B.1.

\(^{338}\) See Perlin, *Fatal Assumption*, supra note 15, at 52 & n.74 (discussing Norman G. Poythress, Jr., *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony*, 2 LAW & HUM. BEHAV. 1, 15 (1978) (merely training lawyers about psychiatric techniques and psychological nomenclature made little difference in case outcomes; “trained” lawyers’ court behavior did not materially differ from that of “untrained” lawyers because their attitudes did not change)).

\(^{339}\) See Perlin, *Sanism*, supra note 13, at 330 (we must “bear witness to sanist acts ... and speak up ... when sanist stereotypes are employed”).

and roles can or should be reshaped in order to enhance their therapeutic potential while not subordinating principles of due process.  

The questions I have tried to deal with in this paper could be the source of several related therapeutic jurisprudential inquiries. If courts condone pretextuality at involuntary civil commitment and incompetency to stand trial hearings, then what therapeutic, or anti-therapeutic, impact does that have on the individuals who are subject to such hearings? If expert witnesses knowingly and openly subvert statutory and case law standards, a subversion in which courts readily collaborate, then what impact does that have? Finally, what is the impact of the domination of sanist myths on the judicial psyche?

John Ensminger and Thomas Liguori originally published their ground breaking essay on the therapeutic potential of the involuntary civil commitment hearing in 1978. There has been little follow-up work building on their insights. The addition of the questions raised in this paper to the therapeutic jurisprudence research agenda will allow researchers to consider their insights in light of the intervening fifteen years of empirical experience.

Also, counsel who represent mentally disabled litigants in trial and appellate cases need to consider these issues and to articulate them in appropriate court arguments. Notwithstanding the general lackluster performance of counsel in this area, there are enough institutionally structured and individual exceptions to inspire a measure of hope.

Finally, all of the issues on the table are crying out for more

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345. On counsel's educative function in the trial of mental disability cases in general, see Perlin, *Fatal Assumption*, *supra* note 15, at 52.

346. See id. at 49-52.

347. See 2 **Perlin, Civil & Criminal**, *supra* note 5, § 8.08 (describing state statutory programs); id. § 8.11, at 786 n.217 (discussing importance of private counsel with lead roles in major mental disability law reform cases).
empirical scrutiny. If groups such as the American Psychology-Law Society, the American Academy of Psychiatry and Law, or the International Academy of Law and Mental Health were to devote a major conference to study the results of behavioral research in this area, such a commitment would help shape the issues for all of the relevant policymakers.

These recommendations are modest. However, if we are to shed the "dropsy" model of deceit, duplicity, and deception, and replace it with a new model of openness, awareness and candor, I believe that they are an appropriate place to start.
