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Pretexts and Mental Disability Law: The Case of Competency

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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

1. For examples of confirmatory descriptions, see Albert W. Alschuler, *"Close Enough for Government Work": The Exclusionary Rule After* Leon, 1984 SUP. CT. REV. 309, 347-49; Tom Barker, *An Empirical Study of Police Deviance Other Than Corruption*, 6 J. POL. SCI. & ADMIN. 264 (1978); Tom Barker & David Carter, *"Fluffing Up the Evidence and Covering Your Ass": Some Conceptual Notes on Police Lying*, 11 DEVIANT BEHAVIOR 61 (1990); Fred Cohen, *Police Perjury: An Interview With Martin Garbus*, 8 CRIM. L. BULL. 363, 365 (1972); Joseph D. Grano, *A Dilemma for Defense Counsel:* Spinella-Harris *Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405, 408-09; John A. Jenkins, *The Lobster Shift: One Night in the Nation's Busiest Court*, 72 ABA J. 56 (1986); Norman G. Kittel, *Police Perjury: Criminal Defense Attorneys' Perspectives*, 11 AM. J. CRIM. JUST. 11 (1986); Michael Letwin, *Report From the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 822-23 (1990); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 95-96 n.185 (1987); Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 98 n.181 (1989); Charles M. Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 839-40 (1974). *See generally* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 11-12 nn. 27-28 (1991). On the empirical impact of such behavior, see, e.g., William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police*

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).[2] 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.[3] This pretextuality is poisonous. It infects all players, breeds cynicism and disrespect for the law, demeans participants, reinforces shoddy lawyering, invites blasé 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

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Compliance With the Law, 24 U. MICH. J.L. REF. 311 (1991); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585.

Courts have suppressed such evidence in a handful of cases. *See, e.g.*, State v. Brunori, 578 A.2d 139, 142 n.6 (Conn. App. Ct. 1990); People v. Acosta, N.Y. L.J., June 25, 1991, at 23 (N.Y. Sup. Ct. 1991); People v. Roberts, N.Y. L.J., Dec. 31, 1990, at 30 (N.Y. Sup. Ct. 1990); *cf.* People v. Berrios, 270 N.E.2d 709 (N.Y. 1971) (Fuld, J., dissenting); *see also* People v. McMurty, 314 N.Y.S.2d 194, 196-98 (N.Y. Crim. Ct. 1970) (denying suppression motion but warning about the need for "especial caution" in dropsy cases).

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. COLO. 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 proferred justification is "legally insufficient").

For the sharpest juxtaposition of views on pretextual searches, compare James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639 (1985) with John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984) and John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982) and John M. Burkoff, *Pretext Searches*, 9 SEARCH & SEIZURE L. REP. 25 (1982) and John M. Burkoff, *Rejoinder: Truth, Justice, and the American Way—Or Professor Haddad's "Hard Choices,"* 18 U. MICH. J.L. REF. 695 (1985). *See also, e.g.*, Daniel S. Jonas, Note, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791 (1989).

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.[4] 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):[5] is the patient sufficiently competent to "do the right thing," namely, take prescribed antipsychotic medication in a community setting?[6] 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.[7] 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.[8]

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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].

6. *See generally* 2 PERLIN, CIVIL & CRIMINAL, *supra* note 5, § 3.45, at 69-73 (Supp. 1992); Michael L. Perlin, *Reading the Supreme Court's Tea Leaves: Predicting Judicial Behavior in Civil and Criminal Right to Refuse Treatment Cases*, 12 AM. J. FORENSIC PSYCHIATRY 37, 49-50 (1991) [hereinafter Perlin, *Tea Leaves*].

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)).

8. *See, e.g.*, Streicher v. Prescott, 663 F. Supp. 335, 343 (D.D.C. 1987) (although the

Experts frequently testify according to their own self-referential concepts of "morality,"[9] and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment[10] or that articulate functional standards as prerequisites for an incompetent to stand trial finding.[11] Often, heuristic bias further warps this testimony. Expert witnesses—like the rest of us—succumb 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.[12]

Frequently, fact-finders employ sanism in weighing and evaluating this testimony.[13] Judges and jurors, consciously or unconsciously, often rely on reductionist, prejudicial stereotypes in their decisionmaking, subordinating statutory and case law standards as well as the legitimate interests of the mentally disabled persons who are the subjects of the litigation. Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.[14]

This combination of sanist experts and courts helps create a system which: (1) accepts dishonest testimony unthinkingly; (2) regu-

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District of Columbia Code allowed a patient to seek periodic review of commitment or independent psychiatric evaluation, in 22 years since passage of relevant statute, not a single patient exercised rights to statutory review).

9. *See, e.g.*, Cassia Spohn & Julie Horney, *"The Law's the Law, But Fair Is Fair": Rape Shield Laws and Officials' Assessments of Sexual History Evidence*, 29 CRIMINOLOGY 137, 139 (1991) (legal "reform that contradicts deeply held beliefs may result either in open defiance of the law or in a surreptitious attempt to modify the law"); *cf.* H. RICHARD UVILLER, TEMPERED ZEAL 116-18 (1988) (police sanction perjury in cases where Supreme Court has imposed constitutional rules that do not comport with officers' "own idea of fair play"). *But see* Tracey Maclin, *Seeing the Constitution from the Backseat of a Police Squad Car* (reviewing H. RICHARD UVILLER, TEMPERED ZEAL) 70 B.U. L. REV. 543, 580-82 (1990) (criticizing Uviller's view).

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").

12. *See, e.g.*, Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Health Disability Law*, 46 S.M.U. L. REV. 329 (1992); Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990) [hereinafter, Perlin, *Psychodynamics*]; Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123 (1980-81); *see also infra* text accompanying notes 167-70.

13. *See generally* Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373 (1992) [hereinafter Perlin, *Sanism*]; Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993).

14. *See generally* Michael L. Perlin, *Are Courts Competent to Decide Competency Questions?: Stripping the Facade from* United States v. Charters, 38 KAN. L. REV. 957 (1990) [hereinafter Perlin, *Questions*].

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 insurmountable barriers so as to guard against

15. On counsel's role in general, see Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992) [hereinafter Perlin, *Fatal Assumption*].

16. As of a WESTLAW search conducted on February 14, 1992.

what is perceived of as malingering, feigning or otherwise misusing the legal system.[17] 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."[18] 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),[19] 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.[20] 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.*"[21]

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"[22] 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."[23]

Courts use these fictions to falsely interpret the true meaning of

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17. Perlin, *Fatal Assumption*, *supra* note 15, at 57 n.113; Perlin, *Morality*, *supra* note 3, at 133-35.

18. *See* Barker & Carter, *supra* note 1, at 62-66.

19. *See* Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596 (quoted in People v. McMurty, 314 N.Y.S.2d 194, 196 (Sup. Ct. 1970)).

20. Peter K. Manning, *Lying, Secrecy and Social Control*, *in* POLICING: A VIEW FROM THE STREET 238 (Peter K. Manning & John Van Maaness eds., 1978).

21. Orfield, *supra* note 2, at 121 (emphasis added).

22. LON FULLER, LEGAL FICTIONS 9 (1967).

23. M.B.W. Sinclair, *The Use of Evolution Theory in Law*, 64 U. DET. L. REV. 451, 475 n.142 (1987) (quoting 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 117 [facsimile edition, published by Garland Publishing, Inc., New York and London, 1978]; *see id.* at 475 (quoting Oliver R. Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to its Growth*, 7 HARV. L. REV. 863, 870 (1930)).

legislation through alleged legislative intent,[24] or to read imaginary unarticulated legislative assumptions into statutes in efforts to sustain such laws by a "rationality" standard.[25] Attacked by Bentham as subterfuges for legislation, "instruments of judicial power," and "wilful falsehood[s]" through which the judiciary "steal[s] legislative power,"[26] they remain in use, sanctioned by the Supreme Court in a wide variety of subject matters.[27]

The acceptance of legal fictions creates ambivalence toward concepts of law and justice.[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.[29] Now we are blind to their "evident strangeness," having become inured to the use of such fictions.[30] Such fictions, traditionally employed in cases involving substantive questions of property and commercial law and procedural questions of personal jurisdiction,[31]

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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.

25. *See* John Monahan & Laurens Walker, *Empirical Questions Without Empirical Answers*, 1991 WIS. L. REV. 569, 583 (discussing McGowan v. Maryland, 366 U.S. 420 (1961), upholding Sunday "blue law" retail store closings).

26. JEREMY BENTHAM, *Preface for the Second Edition* of A COMMENT ON THE COMMENTARIES AND A FRAGMENT OF GOVERNMENT 509 (1977) (written in 1822); *see also* Jeremy Bentham, *The Elements of The Art of Packing, as Applied to Special Juries, Particularly in Cases of Libel Law, in* 5 THE WORKS OF JEREMY BENTHAM 92 (John Bowring ed., 1843); Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 4-5 (1990).

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).

28. An inquiry into the impact of lawyers behaving pretextually with clients is beyond the scope of this paper. *See, e.g.*, Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990); Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761 (1990); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990). For a clinical consideration, see Charles V. Ford et al., *Lies and Liars: Psychiatric Aspects of Prevarication*, 145 AM. J. PSYCHIATRY 554 (1988).

29. Stephen Wizner, *What Is a Law School?*, 38 EMORY L.J. 701, 705 (1989).

30. Eben Moglen, Fictional Reasoning in the Common Law Tradition: Prospects for Historical Investigation 25, Paper presented at New York Law School Faculty Development Seminar (Oct. 18, 1988).

31. Sinclair, *supra* note 23. *See generally* Moglen, *supra* note 30.

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" decisionmaking.[32] It also pervades the law of mental patients' right to refuse antipsychotic drug treatment.[33] 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.[34] 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.[35] They foster an environment in which pretextual testimony, pretextual legislative activity, and pretextual court decisions "no longer strike the eye" as strange.[36] In addition to the paradigm dropsy case (one of many aspects of constitutional criminal procedure so infected),[37] damaging

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32. *See* Cruzan v. Director, Mo. Dept. of Health, 110 S. Ct. 2841 (1990). *See generally* Harmon, *supra* note 26.

33. *See, e.g.*, Perlin, *Questions*, *supra* note 14.

34. *See* Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1743 (1989) (discussing Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986) and Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982)).

35. *See* Harmon, *supra* note 26, at 15-16, 69-70.

36. Moglen, *supra* note 30, at 25.

37. For discussions concerning the relationship between pretextuality and the availability of *Gideon*-mandated counsel, see Michael B. Mushlin, *Foreword* to Conference, Gideon v. Wainwright *Revisited: What Does the Right to Counsel Guarantee Today?*, 10 PACE L. REV. 327, 341 (1990) (Prof. Burt Neuborne explains that the legal system functions as if *Gideon* "had never been decided"); Alissa P. Worden & Robert E. Worden, *Local Politics and the Provision of Indigent Defense Counsel*, 11 LAW & POL'Y REV. 401 (1989); *see also* James J. Tomkovicz, *The Truth About* Massiah, 23 U. MICH. J.L. REF. 641 (1990). For discussions concerning its relationship to the availability of counsel in post-conviction death row appeals, see William H. Brooks, *Meaningful Access for Indigents on Death Row:* Giarratano v. Murray *and the Right to Counsel in Post-Conviction Proceedings*, 43 VAND. L. REV. 569 (1990); Geraldine Szott Moohr, Murray v. Giarratano*: A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765 (1990); Anthony Paduano & Cline A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991). For a discussion of its relationship to adequacy of counsel determinations and the availability of federal habeas corpus review, see John C. Jeffries & William J. Stuntz, *Ineffective Assistance of Counsel and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990). For a discussion concerning its relationship to *Miranda* waivers, see Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59 (1989); *see also* Stephen J. Markman & Paul Marcus, Miranda *Decision Revisited: Did It Give Criminals Too Many Rights?*, 57 UMKC L. REV. 15 (1988). For a discussion of its relationship to sentencing, see Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 LAW & HUM. BEHAV. 451 (1990). For a discussion of its relationship to prosecutorial ethics, see Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can*

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

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Prosecutors Do Justice?, 44 VAND. L. REV. 45 (1991); *see also* Monroe Freedman, *Police Perjury and the Perils of Prosecutors*, 130 N.J.L.J., Feb. 3, 1992, at 306; Randolph N. Jonakait, *Rebuttals and Rejoinder: Prosecutorial Behavior and Distorted Verdicts*, 24 CRIM. L. BULL. 254 (1988). For a discussion concerning its relationship to plea bargaining, see Stanley A. Cohen & Anthony N. Doob, *Public Attitudes to Plea-Bargaining*, 32 CRIM. L.Q. 85 (1989). *See generally* Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REF. 591 (1990); Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537 (1990).

38. May v. Cooperman, 780 F.2d 240, 243 (3d Cir. 1985) *app'l dismissed sub nom.* Karcher v. May, 484 U.S. 721 (1987).

39. Fuentes v. Shevin, 407 U.S. 67, 85 n.14 (1972).

40. Lukhard v. Reed, 481 U.S. 368 (1987).

41. *See, e.g.*, Robert R. Calo, *Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction*, 9 AM. J. TRIAL ADVOC. 21, 25-26 (1985). Some studies suggest that curative charges actually *increase* prejudice. *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 108-09 (1988); Abraham R. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 EMORY L.J. 135, 175 (1989).

42. Michael M. v. Superior Court, 450 U.S. 464, 484-85 (1981) (Blackmun, J., concurring); *see also* Kim L. Schepple, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095 (1987). For discussion on courts' pretextual misstatement of facts in general, see Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 CARDOZO L. REV. 1313 (1990).

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.[44] And when courts fail to acknowledge that unconscious racism influences prosecutorial and juror decisionmaking, that failure is pretextual.[45]

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.[46] 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.[47]

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.[48]

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44. Hans v. Louisiana, 134 U.S. 1, 18-20 (1890); *see also* Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989); George D. Brown, *Has the Supreme Court Confessed Error on the Eleventh Amendment? Revisionist Scholarship and State Immunity*, 68 N.C. L. REV. 867 (1990); Erwin Chemerinsky, *Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions During the 1988-89 Term*, 39 DEPAUL L. REV. 321 (1990).

45. *See, e.g.*, Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1985); *see also* McCleskey v. Kemp, 481 U.S. 279 (1987) (racial discrimination in death penalty decisionmaking); Batson v. Kentucky, 476 U.S. 79 (1986) (racial discrimination in prosecutor's use of peremptory challenges); Turner v. Murray, 476 U.S. 28 (1986) (racial discrimination in jury selection in death penalty cases).

46. *McCleskey*, 481 U.S. at 313.

47. *Id.* at 292. For discussion on the teleology of courts in dealing with such social science evidence in general, see Perlin, *Morality*, *supra* note 3, at 136-37. For discussion on its role in mental disability cases, see generally Perlin & Dorfman, *supra* note 13.

48. For case law concerning the "litigation explosion," see Swidryk v. St. Michael's Med. Ctr., 493 A.2d 641, 645 (N.Y. Super. Ct. Law Div. 1985) (educational malpractice case); *see also* Cunningham v. George Hyman Constr. Co., 603 A.2d 446, 450 n.10 (D.C. 1992) (time limits on workers' compensation suits); Whittington v. Ohio River Co., 115 F.R.D. 201, 204 (E.D. Ky. 1987); Inlet Assocs. v. Harrison Inn Inlet, Inc., 596 A.2d 1049, 1068 (Md. 1991) (Bell, J., dissenting) (third party action based on attorney-client advice). *Compare* John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975) *and* Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977) (setting out myths) *with* William L.F. Feltstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1981) *and* Marc Galanter, *Reading the Landscape of Disputes: What We Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 38-39 (1983) *and* Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199 (1991) *and* Henry J. Reske, *Was There a Liability Crisis?*, 75 ABA J. 46 (1989) (setting out reality). For an excellent

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.[49] While Attorney General William French Smith told Congress that the insanity

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analysis of the social implications of courts' caseload controls, see Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989).

For a discussion of testimony in medical malpractice cases, see Jones v. United States, 720 F. Supp. 355, 365 (S.D.N.Y. 1989). *Compare* Deborah Kaplan, *Courtroom Indignities*, CAL. LAW., Aug. 1985, at 72 *and* Paul R. Lees-Haley, *Personal Injury Malingering*, FOR THE DEFENSE, Feb. 1986, at 28 (setting out myths) *with* Daniel Kramer, *The Harvard Study: An Analysis*, N.Y.L.J., Mar. 7, 1990, at 1 (setting out reality). *See generally* James D. Zirin, *Is the Malpractice Cure to 'Kill All the Lawyers'?*, N.Y.L.J., Mar. 8, 1990, at 2. For a discussion of the role of symbolism in this inquiry, see F. Patrick Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform,"* 23 GA. L. REV. 295 (1989) (same).

For case law concerning prisoner writs, see Rose v. Mitchell, 443 U.S. 545, 584 (1979) (Powell, J., concurring in judgment) ("It is *common knowledge* that prisoner actions occupy a disproportionate amount of the time and energy of the federal judiciary."). *Compare* Samuel J. Brakel, *Prison Reform Litigation: Has the Revolution Gone Too Far?*, 49 CORRECTIONS TODAY 160 (1987) (setting out myths) *with* Dean J. Champion, *Some Recent Trends in Civil Litigation by Federal and State Prison Inmates*, 52 FED. PROBATION 43 (1988) (setting out reality) *and* Jim Thomas, *The "Reality" of Prisoner Litigation: Repackaging the Data*, 15 NEW ENG. J. CRIM. ON CIV. CONFINEMENT 27, 42-44 (1989) (same).

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).

49. Streicher v. Prescott, 663 F. Supp. 335, 343 (D.D.C. 1987); *cf.* In Interest of C.W., 453

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."[50] 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.[51]

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."[52] 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.[53] 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.[54]

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

50. Perlin, *Morality*, *supra* note 3, at 134 (quoting Ira Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded In Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 980 (1987) and *Proceedings of the Forty-Sixth Judicial Conference of the District of Columbia Circuit*, 111 F.R.D. 91, 225 (1985)).

51. *See* John Q. La Fond, The New "Sexually Violent Predator" Law—America's Unique Sexual Offender Commitment Law 8, Paper presented at the American College of Forensic Psychiatry's Tenth Annual Symposium, San Francisco, CA (April 1992) (discussing WASH. REV. CODE § 71.09 *et seq.* (1970)); *see also* Brian G. Bodine, Comment, *Washington's New Sexual Predator Commitment System: An Unconstitutional Law and An Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105 (1990).

52. United States v. Still, 857 F.2d 671, 672 (9th Cir. 1988), *cert. denied*, 489 U.S. 1060 (1989).

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 *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" dissatisfaction[58] with decisions such as *O'Connor v. Donaldson,*[59] *Jackson v. Indiana*[60] and *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]

485, 540 (only two of 1700 contested cases resulted in patient's release). *See generally* 2 PERLIN, CIVIL & CRIMINAL, *supra* note 5, § 8.11, at 783-86; Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process,* 45 LAW & CONTEMP. PROBS. 161 (1982).

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).

57. *See* William O. McCormick, *Involuntary Commitment in Ontario: Some Barriers to the Provision of Proper Care,* 124 CAN. MED. ASS'N J. 715, 717 (1981).

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).

62. Bush v. United States, 375 F.2d 602, 604 (D.C. Cir. 1967) ("[I]t would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion."). *But see* People v. McMurty, 314 N.Y.S.2d 194, 197 (N.Y. Crim. Ct. 1970) (Younger, J.) (disagreeing with Justice Burger's point of view); Orfield, *supra* note 2. *McMurty* is discussed in Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap,* 60 GEO. L.J. 507 (1971).

63. Opinion testimony by psychiatrists is "routinely and unquestioningly accepted" at involuntary civil 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.[64] 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.[65] 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.[66] 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).

CIVIL & CRIMINAL, *supra* note 5, § 3.31, at 291-96; *see also* United States v. Charters, 863 F.2d 302, 310 (4th Cir. 1988) (en banc), *cert. denied*, 494 U.S. 1016 (1990).

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.

65. *See* State v. Willard, 234 S.E.2d 587, 591-93 (N.C. 1977).

66. Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 648-55, 713-21 (1989-90) [hereinafter Perlin, *Unpacking*].

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),[67] two critical questions turn, definitively, on the opinon 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.[68] 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[69]—then 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.[70]

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),[71] 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),[72] 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).

68. *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078, 1093 n.24 (E.D. Wis. 1972) (involuntary civil commitment); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 455 (1985) (incompetency to stand trial).

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.[73] 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."[74] 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.[75]

In a whole range of forensic mental health fact settings, social bias "infects and hides behind scientific judgments."[76] Ben Bursten

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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).

73. *See* Jeffrey J. Parker, Note, *Contingent Expert Witness Fees: Access and Legitimacy*, 64 S. CAL. L. REV. 1363, 1385-86 (1991); *see also* R.J. Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3, 11 (1987); John M. Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 S. CAL. L. REV. 195, 197 (1956).

74. Bernard L. Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES CRIM. PSYCHODYNAMICS 221, 223 (1959). *See generally* Seymour L. Halleck, *The Ethical Dilemmas of Forensic Psychiatry: A Utilitarian Approach*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 279 (1984); Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111, 116-17 (1991) [hereinafter Perlin, *Power*].

75. *See* Robert J. Homant et al., *Ideology as a Determinant of View on the Insanity Defense*, 14 J. CRIM. JUST. 3, 7 (1986); Robert J. Homant & Daniel B. Kennedy, *Definitions of Mental Illness as a Factor in Expert Witnesses' Judgments of Insanity*, 31 CORRECTIVE & SOC. PSYCHIATRY J. BEHAV. TECH. METHODS & THERAPY 125 (1985); Robert J. Homant & Daniel B. Kennedy, *Judgment of Legal Insanity as a Function of Attitude Toward the Insanity Defense*, 8 INT'L J.L. & PSYCHIATRY 67 (1986); Robert J. Homant & Daniel B. Kennedy, *Subjective Factors in the Judgment of Insanity*, 14 CRIM. JUST. & BEHAV. 38 (1987) [hereinafter Homant & Kennedy, *Subjective Factors*]. *But see* Richard Rogers & Charles P. Ewing, *Ultimate Opinion Proscriptions: A Cosmetic Fix and a Plea for Empiricism*, 13 LAW & HUM. BEHAV. 357, 369 (1989) (questioning the universal applicability of Homant and Kennedy's conclusions).

76. Peggy C. Davis, *Law, Science, and History: Reflections Upon* In The Best Interests of the Child, 86 MICH. L. REV. 1096, 1107 (1988) (reviewing JOSEPH GOLDSTEIN ET AT., IN THE

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."[77] 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.[78] 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.[79]

Other evidence suggests that variables such as race, sex, culture,

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BEST INTERESTS OF THE CHILD (1986)); *see also* Homant & Kennedy, *Subjective Factors*, *supra* note 75, at 42 (as noted by Benjamin M. and Dorthea D. Braginsky, varying a patient's political philosophy and his degree of deference toward interviewers significantly affects clinicians' judgment of severity of patient's mental illness).

77. BEN BURSTEN, BEYOND PSYCHIATRIC EXPERTISE 167 (1984); *see also* Mary A. Deitchman et al., *Self-Selection Factors in the Participation of Mental Health Professionals in Competency for Execution Evaluations*, 15 LAW & HUM. BEHAV. 287, 299 (1991) (personal combination of attitude toward capital punishment and attribution for criminal responsibility affects forensic examiners' decisions as to whether or not to participate in competency for execution evaluations).

A National Institute of Mental Health advisory committee report submitted in the aftermath of the Hinckley acquittal conceded Bursten's argument by acknowledging that, "in controversial cases," the federal government could "be counted upon to oppose *any* conditional release recommendation." *Final Report of the National Institute of Mental Health Ad Hoc Forensic Advisory Panel*, 12 MENTAL & PHYSICAL DISABILITY L. REP. 77, 96 (1988) (emphasis added).

78. Richard Rogers et al., *Forensic Psychiatrists' and Psychologists' Understanding of Insanity: Misguided Expertise?*, 33 CAN. J. PSYCHIATRY 691 (1988). *See generally* Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of* Zinermon v. Burch, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 83, 125 n.180 (David B. Wexler & Bruce J. Winick eds., 1991). For a discussion concerning clinician confusion about applicable competency standards, see THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 8-9 (1980); Norman G. Poythress, *Mental Health Expert Testimony: Current Problems*, 5 J. PSYCHIATRY & L. 201, 207 (1977). For a discussion of the ways that clinical evaluators mistakenly conflate incompetency and insanity standards, see GRISSO, *supra*, at 8-9; RONALD ROESCH & STEPHEN L. GOLDING, COMPETENCY TO STAND TRIAL 16-17, 50, 83-91 (1980). For the most recent research, see William G. Johnson et al., *The Relationship of Competency to Stand Trial and Criminal Responsibility*, 17 CRIM. JUST. & BEHAV. 169 (1990). For the ways that *courts* continue to confuse the underlying concepts, see Kirk v. State, 308 S.E.2d 592, 598 (Ga. Ct. App. 1983), *aff'd*, 311 S.E.2d 821 (Ga. 1984). *See generally infra* part IV.B.2.

79. *See* People v. Anderson, 421 N.W.2d 200, 205-06 (Mich. Ct. App. 1988) (diminished capacity); People v. Doan, 366 N.W.2d 593 (Mich. Ct. App. 1985) (incompetency to stand trial); People v. Matulonis, 320 N.W.2d 238, 240 (Mich. Ct. App. 1982) (same); People v. Drossart, 297 N.W.2d 863, 869 (Mich. Ct. App. 1980) (insanity defense) (defining standard); State v. Bennett, 345 So. 2d 1129, 1138 (La. 1977) (Dennis, J., on rehearing) (competency to plead guilty) (legal conclusion). *But cf.* State v. Widenhouse, 582 So. 2d 1374, 1385-86 (La. Ct. App. 1991) (not error to allow state's witness to inform jury of legal insanity standard), *cert. denied*, 112 S. Ct. 1274 (1992).

gender preference, physical attractiveness and economic status significantly affect expert testimony.[80] Some other research suggests that less secure mental health professionals are preoccupied with eliciting pathology as a demonstration of their own expertise. *Their* competence as examiners may rest on their ability to demonstrate incompetency on the part of the defendant.[81] Finally, professionals with different education and training rely on different sets of data in doing forensic evaluations.[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-

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80. *See, e.g.*, Martha L. Bruce et al., *Poverty and Psychiatric Status*, 48 ARCHIVES GEN. PSYCHIATRY 470 (1991) (on the relationship between psychiatric disorder and social class); Gerald Cooke et al., *A Comparison of Blacks and Whites Committed for Evaluation of Competency to Stand Trial on Criminal Charges*, 2 J. PSYCHIATRY & L. 319, 319 (1974) (psychopathology overestimated in black defendants); Kirk Heilbrun et al., *Comparing Females Acquitted by Reason of Insanity, Convicted, and Civilly Committed in Florida, 1977-1984*, 12 LAW & HUM. BEHAV. 295 (1988) (on relationship between gender, age and race and insanity defense success); Sarah Rosenfeld, *Race Differences in Involuntary Hospitalization: Psychiatric vs. Labeling Perspectives*, 25 J. HEALTH & SOC. BEHAV. 14 (1984) (more coercive conditions under which nonwhites enter treatment accounts for greater involuntary hospitalization rate); Sarah Rosenfeld, *Sex Roles and Societal Reactions to Mental Illness: The Labeling of "Deviant" Deviance*, 23 J. HEALTH & SOC. BEHAV. 18 (1982) [hereinafter Rosenfeld, *Sex Roles*] (in commitment context, both men and women treated more harshly when their deviant behavior is inconsistent with traditional sex role norms); *see also* Ellen C. Wertlieb, *Individuals With Disabilities in the Criminal Justice System: A Review of the Literature*, 18 CRIM. JUST. & BEHAV. 332, 333 (1991); Leslie A. Zebrowitz & Susan M. McDonald, *The Impact of Litigants' Baby-Facedness and Attractiveness on Adjudications in Small Claims Court*, 15 LAW & HUM. BEHAV. 603 (1991) (on harsh societal treatment of the physically unattractive); Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035 (1987).

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

81. A. Louis McGarry, *Demonstration and Research in Competency for Trial and Mental Illness: Review and Preview*, 49 B.U. L. REV. 46, 52-53 (1969); *see also* Saleem A. Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCHOLOGIST 224 (1978) (standard rule of medical decisions is, "When in doubt, suspect illness").

82. Jean C. Beckham et al., *Decision Making and Examiner Bias in Forensic Expert Recommendations for Not Guilty by Reason of Insanity*, 13 LAW & HUM. BEHAV. 79 (1989).

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

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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).

84. *See* Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 550-51 (discussing Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987) (no violation of discrimination law for Girls Club to fire unmarried pregnant employee under club's "negative role model" policy)); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 818 (1990) (critiquing pretextual nature of case law that incorporates double standard of sexual morality in dealing with "the tortious consequences of adultery"); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L. J. 1177, 1209 (1990) (critiquing the pretextual nature of sexual harassment decisions for reinforcing a "boys will be boys" ideology); Lawrence M. Friedman, *Two Faces of Law*, 1984 WIS. L. REV. 13, 21-23 (critiquing pretextual nature of prostitution control law); Thomas B. Griffen, Note, *Zoning Away the Evil of Alcohol*, 61 S. CAL. L. REV. 1373, 1405 (1988) (criticizing zoning laws as "pretext[s]" for suppressing adult entertainment); David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 217 (1988) ("Laws regulating morality are manifestly designed to subjugate women."); Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 364 (1987) (criticizing Justice Marshall's death penalty jurisprudence as "pretextual" and as a "disguise for his own substantive morality"); Laura E. Santilli & Michael C. Roberts, *Custody Decisions in Alabama Before and After the Abolition of the Tender Years Doctrine*, 14 LAW & HUM. BEHAV. 123 (1990) (critiquing pretextual nature of child custody laws); *see also* Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148 (1st Cir. 1990) (finding stated reasons for discharging bank employee for violating company rule requiring "public morality" a pretextual "cover" for discriminatory treatment of female employee).

85. *See* 1 PERLIN, CIVIL & CRIMINAL, *supra* note 5, §§ 2.09-.11. *See generally* David B. Wexler, *The Structure of Civil Commitment: Patterns, Pressures, and Interactions in Mental Health Legislation*, 7 LAW & HUM. BEHAV. 1 (1983).

and legislatures.[86] 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."[87] 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.[88] 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."[89] The subsequent empirical data partially suggests that this prediction came true.[90] Other studies

86. Walter Reich, *Psychiatric Diagnosis as an Ethical Problem*, *in* PSYCHIATRIC ETHICS 72 (Sidney Bloch & Paul Chodoff eds., 1981). *See also* PERLIN, CIVIL & CRIMINAL, *supra* note 5, § 2.23A, at 32-36 (Supp. 1992). This is not the only area of legal regulation inspiring charges of "turf invasion" by organized psychiatry. *Compare* Lawson R. Wulsin et al., *Unexpected Clinical Features of the* Tarasoff *Decision: The Therapeutic Alliance and the "Duty to Warn"*, 140 AM. J. PSYCHIATRY 601, 601 (1983) ("[T]he clinician . . . is understandably disturbed by the concept of therapeutic approaches being disruptively influenced from remote judicial benches.") *with* Richard J. Bonnie, *Professional Liability and the Quality of Mental Health Care*, 16 LAW MED. & HEALTH CARE 229, 236 (1988) (*Tarasoff* litigation "has made a beneficial contribution to [patients'] quality of care."). *Compare* Arnold S. Relman, *The* Saikewicz *Decision: A Medical Viewpoint*, 4 AM. J.L. & MED. 233 (1978) (courts incapable of handling "right to die" cases; judicial involvement impedes medical decisionmaking) *with* Charles H. Baron, *Medical Paternalism and the Rule of Law: A Reply to Dr. Relman*, 4 AM. J.L. & MED. 337, 340 (1979) (court determination of such questions not a " 'gratuitous encroachment' on the domain of medical expertise").

87. Paul Chodoff, *The Case for Involuntary Hospitalization of the Mentally Ill*, 133 AM. J. PSYCHIATRY 494, 501 (1976).

88. *Id.*; *see* Louis McGarry & Paul Chodoff, *The Ethics of Involuntary Hospitalization*, *in* PSYCHIATRIC ETHICS 203, 211-12 (Sidney Bloch & Paul Chodoff eds., 1984); Paul Chodoff, *Involuntary Hospitalization of the Mentally Ill as a Moral Issue*, 141 AM. J. PSYCHIATRY 384, 388 (1984). *See generally* Loretta M. Kopelman, *On the Evaluative Nature of Competency and Capacity Judgments*, 13 INT'L J.L. & PSYCHIATRY 309, 320-22 (1990) (discussing moral paternalism on part of such psychiatrists). On the parallel question of judicial involvement in patients' decisions to seek voluntary hospitalization, see Zinermon v. Burch, 494 U.S. 113, 127-28 (1990) (procedural due process requires some judicial inquiry into patient's competency to consent to voluntary hospitalization prior to admission of patient on voluntary basis). For criticism on therapeutic jurisprudential grounds, see generally Winick, *supra* note 78.

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?").

90. Studies of the impact of Ontario's reform laws concluded that mental health legislation had "little effect" on commitment practices. B.A. Martin & K.D. Cheung, *Civil Commitment Trends in Ontario: The Effect of Legislation on Clinical Practice*, 30 CAN. J. PSYCHIATRY 259 (1985); *see also* R. Michael Bagby, *The Effects of Legislative Reform on Admission Rates to Psychiatric Units of General Hospitals*, 10 INT'L J.L. & PSYCHIATRY 383 (1987). For a

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

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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).

92. Norman G. Poythress, *Mental Health Expert Testimony: Current Problems*, 5 J. PSYCHIATRY & L. 201, 207 (1977) (quoting Itamar Salamon, *Evaluation of Suicidal Patients*, 24 N.Y. ST. J. MED. 65 (1974)).

93. Rise B. Goldstein et al., *The Prediction of Suicide: Sensitivity, Specificity, and Predictive Value of a Multivariate Model Applied to Suicide Among 1906 Patients With Affective Disorders*, 48 ARCHIVES GEN. PSYCHIATRY 418 (1991). *See generally* 3 PERLIN, CIVIL &

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-

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CRIMINAL, *supra* note 5, §§ 12.19-.23, at 57-66; ROBERT I. SIMON & ROBERT L. SADOFF, PSYCHIATRIC MALPRACTICE: CASES AND COMMENTS FOR CLINICIANS 121-56 (1992).

94. Hiday, *Six-Month*, *supra* note 91, at 564 (citing findings reported in V.A. Hiday & T.L. Scheid-Cook, *The North Carolina Experience With Outpatient Commitment: A Critical Appraisal*, 10 INT'L J.L. & PSYCHIATRY 215-32 (1987)); *see* R. Jay Turner, *Social Support as a Contingency in Psychological Well-Being*, 22 J. HEALTH & SOC. BEHAV. 357, 357 (1981).

95. *See, e.g.*, Julie M. Zito et al., *One Year Under* Rivers: *Drug Refusal in a New York State Psychiatric Facility*, 12 INT'L J.L. & PSYCHIATRY 295 (1989); Phillip Leaf, Wyatt v. Stickney*: Assessing the Impact in Alabama*, 28 HOSP. & COMMUNITY PSYCHIATRY 351, 354 (1977).

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))).

cific patients in question are "worth it."[98]

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.[99] We can only speculate as to the extent to which this sort of attitude "spills over" to evaluations of patient worth.[100]

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.[101] 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.[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").[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"[104]—the promise of counsel becomes little more than a hoax.

This alleged, presumptuous and oppressive "morality" of non-professional gatekeepers thus contributes to, and, in some cases, controls involuntary civil commitment decisionmaking.[105] Expert

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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 Petrila, *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).

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).

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.

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)[106] and either exaggerating[107] or downplaying[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 *parens patriae* standard?—appear even less academically significant in this context.[109]

Dr. H. Richard Lamb's attack on courts for interpreting involuntary civil commitment laws too "literally"[110] suggests further that there is nothing transparent or *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.[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"[112]—is no more accurate than the United States Supreme Court's OCS in *United States v. Leon* that there is "no

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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* Petrila, *supra* note 102.

109. *See, e.g.*, Perlin, *Psychodynamics*, *supra* note 12; Perlin, *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).

110. H. Richard Lamb, *Involuntary Treatment for the Homeless Mentally Ill*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 269, 277 (1989).

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.*, MICHAEL AVERY & DAVID RUDOVSKY, POLICE MISCONDUCT, LAW AND LITIGATION 8-5 (2d ed. 1987); J. Martin Kaplan, *Children Don't Always Tell the Truth*, 35 J. FORENSIC SCI. 661 (1990).

112. Stitt v. State Dep't of Mental Health & Mental Retardation, 562 So. 2d 259, 262 (Ala. Civ. App. 1990) (quoting Williams v. Wallis, 734 F.2d 1434, 1438 (11th Cir. 1984)).

Another field of inquiry involves *economically*-oriented "bias" in the way that the commitment process may be abused by for-profit hospitals. *See, e.g.*, Perlin, *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 Amendment or to suggest that they have any stake in the outcomes of criminal 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 zealously protecting patients' procedural rights, and by regularly dismissing, 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] counsel 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 hospitalization 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 Massachusetts 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 commitment 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))).

113. 468 U.S. 897, 916-17 (1984).

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").

116. Perlin, *Fatal Assumption*, *supra* note 15, at 43.

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 Commitment and Recommitment Hearings*, 43 HOSP. & COMMUNITY PSYCHIATRY 65 (1992).

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.[121]

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,"[122] a "pageant which dramatizes the differences between 'we' and 'they' by portraying a symbolic encounter between the two"[123] that allows us to "keep peace with the public morality."[124] The criminal process symbolizes the existence and enforcement of social norms, and manipulates criminal defendants as part of society's struggle for just punishment.[125] Because the incompetency plea frequently is incorrectly viewed as a means to "undercut the [death] penalty,"[126] and thus purportedly rob society of its right to retributive vengeance,[127] it is not surprising that "morality" questions infuse the

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admit privately that he would not want the patient walking around in the neighborhood he lives in.").

121. *Cf.* Uri Aviram, *Care or Convenience? On the Medical-Bureaucratic Model of the Commitment of the Mentally Ill*, 13 INT'L J.L. & PSYCHIATRY 163 (1990) (discussing collusive behavior between courts and doctors in Israel's commitment system).

122. Samuel J. Brakel, *Presumption, Bias, and Incompetency in the Criminal Process*, 1974 WIS. L. REV. 1105, 1116.

123. Stanley Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 911 (1975).

124. Sidney J. Kaplan, *Barriers to the Establishment of a Deterministic Criminal Law*, 46 KY. L.J. 103, 104 (1957). *See generally* Perlin, *Unpacking*, *supra* note 66, at 628-29.

125. Ingber, *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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> we express community condemnation of wrongdoers, especially the wrongdoers we fear the most. In this way, punishment takes on an important symbolic significance: more than mere disapproval, it represents "a kind of vindictive resentment" as a "way of getting back at the criminal."

(citations omitted). *See generally* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (forthcoming 1993) (manuscript at chapter II.B., on file with the author) [hereinafter PERLIN, INSANITY DEFENSE].

For a recent important inquiry into the roots of these attitudes, see Harold G. Grasmick et al., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, 30 CRIMINOLOGY 21 (1992).

128. Dusky v. United States, 362 U.S. 402 (1960).

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)).

130. *See, e.g.*, ROESCH & GOLDING, *supra* note 78, at 13-15; Silten & Tullis, *supra* note 129, at 1058-65. *See generally* Ronald Roesch & Stephen Golding, *Legal and Judicial Interpretation of Competency to Stand Trial Statutes and Procedures*, 16 CRIMINOLOGY 420 (1978).

incompetent to stand trial.[131] Critics disagree with these approaches on grounds of political bias[132] and because they attempt to "quantify the essentially unquantifiable."[133] 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,[134] one of the most important tests in use.[135]

Further, traditionally, judges rarely have based their ultimate decisions on "anything but the concluding statement in the psychiatric report to the court."[136] The ultimate legal decision as to competence often has thus fallen, perhaps by default, to the examiner.[137] Given the way that bias can and does infect the forensic evaluation,[138] 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.[139] 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.

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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 agentry" 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

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140. *See* Halleck, *supra* note 74, at 279; Perlin, *Power*, *supra* note 74, at 116; Jerome J. Shestack, *Psychiatry and the Dilemma of Dual Loyalties*, 60 ABA J. 1521, 1521 (1984).

Cases involving defendants evaluated at public psychiatric hospitals raise additional questions as to witnesses' neutrality or objectivity. Where the witness is also the patient's treating doctor, he frequently has an additional stake in wanting the judge to believe that his diagnosis and treatment plan are the right ones. Where the witness is called as an independent court witness, he has a stake in maintaining the proper relationship with the court so as to insure further appointments. Interview with Professor Keri Gould, *supra* note 104; *see also* Wexler, *supra* note 96, at 23 (disposition of cases involving incompetent-to-stand-trial defendants driven by financial considerations, not clinical needs).

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.

143. *See, e.g.*, Paul S. Appelbaum, *The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm*, 13 INT'L J.L. & PSYCHIATRY 249 (1990); Stephen L. Golding, *Mental Health Professionals and the Courts: The Ethics of Expertise*, 13 INT'L J.L. & PSYCHIATRY 281 (1990); Thomas Grisso & Paul S. Appelbaum, *Is It Unethical to Offer Predictions of Future Violence?*, 16 LAW & HUM. BEHAV. 621 (1993); Douglas Mossman, Is Forensic Testimony Inevitably Unethical? (Jan. 1993) (unpublished manuscript, on file with author). *See generally* Perlin, *Power*, *supra* note 74, at 120 n.74 (citing sources).

144. *See, e.g.*, 3 PERLIN, CIVIL & CRIMINAL, *supra* note 5, §§ 16.03-.04A, 17.13-.14, at 413-35, 529-40; *id.* § 16.04A, at 123-24 (Supp. 1992) (discussing Powell v. Texas, 109 S. Ct. 3146 (1989), Satterwhite v. Texas, 486 U.S. 249 (1988); Barefoot v. Estelle, 463 U.S. 880 (1983); and Estelle v. Smith, 451 U.S. 454 (1981); Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden*

itself.[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.' "[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:[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.[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.[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.[150] Over twenty years ago, Professors Robert A. Burt and Norval Morris set out the paradigmatic incompetency to stand trial testimonial dialogue:

Rationales, or "Doctrinal Abyss"?, 29 ARIZ. L. REV. 1 (1987) [hereinafter Perlin, *Symbolic Values*].

145. George E. Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 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 AM. J.L. & MED. 407 (1983); Perlin, Crime & Culture, *supra* note 127, at 52 n.162.

146. Golding, *supra* note 143, at 287.

147. *See infra* part IV.B.2.

148. MENTAL HEALTH STANDARDS, *supra* note 135, at 163.

149. *Id.* at 163-64.

150. Christopher Slobogin, Estelle v. Smith: *The Constitutional Contours of the Forensic Evaluation*, 31 EMORY L.J. 71, 123 n.220 (1982).

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

151. Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Insanity Plea*, 40 U. CHI. L. REV. 66, 92 n.109 (1972).

152. Thomas Grisso, *The Economic and Scientific Future of Forensic Psychological Assessment*, 42 AM. PSYCHOLOGIST 831, 836 (1987) (attorneys' influence and attitudes similar to those of judges).

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.[157] 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.[158] 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.[159]

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 trail 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.[160] 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."[161] 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-

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was not implemented in nearly half the states. Winick, *supra*, at 940. I discuss the implications of the fact that such rights are not self-executing in this context in Perlin, *Fatal Assumption*, *supra* note 15, at 47-49; *see also* Wertlieb, *supra* note 80, at 336 (as of 1988, Attorneys General of Hawaii and Virginia indicated that incompetent to stand trial mentally retarded defendants will be institutionalized until found "fit to proceed" (citing James K. McAfee & Michele Gural, *Individuals With Mental Retardation and the Criminal Justice System: The View From States' Attorneys General*, 26 MENTAL RETARDATION 5, 9 (1988))).

157. Paul S. Appelbaum & Loren H. Roth, *Clinical Issues in the Assessment of Competency*, 138 AM. J. PSYCHIATRY 1462, 1465 (1981); Winick, *supra* note 156, at 966.

158. Winick, *supra* note 156, at 973-74.

159. *See* Gerald T. Bennett & Arthur F. Sullwood, *Competence to Proceed: A Functional and Context-Determinative Decision*, 29 J. FORENSIC SCI. 1119, 1123 (1984); *see also* Stephen L. Golding et al., *Assessment and Conceptualization of Competency to Stand Trial*, 8 LAW & HUM. BEHAV. 321, 322-23 (1984).

160. Henry J. Steadman et al., *Maintenance of an Insanity Defense Under Montana's "Abolition" of the Insanity Defense*, 146 AM. J. PSYCHIATRY 357 (1989). I discuss this in the context of the ritualistic role of punishment in Perlin, *Unpacking*, *supra* note 66, at 628-29 n.126.

161. *See generally* Perlin, *Unpacking*, *supra* note 66.

ness."[162] 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 . . . ."[163] 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.[164] 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,[165] doctrinal developments and individual decisions are still informed largely by the cognitive distortions reflected in heuristics use.

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162. The classic policy debate is found in United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc), *cert. denied*, 426 U.S. 951 (1976).

163. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 57 (2d ed. 1961).

164. *See generally* JACK W. BREHM & ARTHUR R. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962); LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); GUY R. LEFRANCOIS, PSYCHOLOGY 518 (2d ed. 1983); Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203 (1959). I discuss cognitive dissonance in a mental disability law context in Perlin, *Morality*, *supra* note 3, at 139; *see also* Winick, *supra* note 78, at 70-71; *cf.* Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1203-04 (1989) (we deny the bases of legal fictions because of "legal dissonance").

165. *See, e.g.*, Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978) (trial court opinions), *supplemented*, 476 F. Supp. 1294 (D.N.J. 1979), *modified*, 653 F.2d 836 (3d Cir. 1981), *vacated*, 458 U.S. 1119 (1982); United States v. Charters, 829 F.2d 479 (4th Cir. 1987) (panel opinion), *on reh'g*, 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. denied*, 494 U.S. 1016 (1990).

"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."[166] The "vividness" heuristic teaches that one single, vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.[167] President Reagan's famous "welfare queen" anecdote is a textbook example of heuristic behavior.[168] 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.[169]

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

166. Perlin, *Psychodynamics*, *supra* note 12, at 14-15; *see also id.* at 12-14, 15-17; Perlin, *Questions*, *supra* note 14, at 966 n.46 (quoting John S. Carroll & John W. Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology*, *in* COGNITION AND SOCIAL BEHAVIOR 13, 21 (John S. Carroll & John W. Payne eds., 1976)).

167. *See* David L. Rosenhan, *Psychological Realities and Judicial Policy*, 19 STAN. LAW. 10, 13 (1984).

168. I consider Reagan's heuristic style in Perlin, *Psychodynamics*, *supra* note 12, at 16, 20.

169. *See, e.g.*, CHRISTOPHER D. WEBSTER ET AL., CLINICAL ASSESSMENTS BEFORE TRIAL 121 (1982); Bagby, *Community Values*, *supra* note 90, at 172; Margaret A. Jackson, *The Clinical Assessment and Prediction of Violent Behavior: Toward a Scientific Analysis*, 16 CRIM. JUST. & BEHAV. 114 (1989); Margaret Windsor Jackson, *Psychiatric Decision-Making for the Courts: Judges, Psychiatrists, Lay People?*, 9 INT'L J.L. & PSYCHIATRY 507 (1986). On juror use of heuristic reasoning, see Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 264-65 (1990); Perlin, *Psychodynamics*, *supra* note 12, at 39-53; Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1050 (1991); *see also* Caton F. Roberts & Stephen L. Golding, *The Social Construction of Criminal Responsibility and Insanity*, 15 LAW & HUM. BEHAV. 349, 372 (1991) (jurors' pre-existing attitudes toward insanity defense strongest predictor of individual verdicts). On legislative use of heuristic reasoning, see Perlin, *Morality*, *supra* note 3, at 138-39; Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 128 (1991) [hereinafter Perlin, *Homelessness*].

of a decision on our evaluation of an outcome.[170]

2. HEURISTICS AND INVOLUNTARY CIVIL COMMITMENT

Research confirms that heuristic thinking dominates the mental disability law process.[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.[172] In these instances, "[t]he drama of a

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170. *See generally* Perlin, *Psychodynamics*, *supra* note 12, at 13-18, 29-30 (citing JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) [hereinafter JUDGMENT]); *see also* SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL (1981); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); REASONING, INFERENCE, AND JUDGMENT IN CLINICAL PSYCHOLOGY (Dennis C. Turk & Peter Salovey eds., 1988) (discussing heuristics in general); Hal R. Arkes, *Principles in Judgment/Decision Making Research Pertinent to Legal Proceedings*, 7 BEHAV. SCI. & L. 429 (1989) (hindsight and outcome biases); Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569 (1988); Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329 (1992) (discussing heuristics); Neal V. Dawson et al., *Hindsight Bias: An Impediment to Accurate Probability Estimation in Clinicopathologic Conferences*, 8 MED. DECISION MAKING 259 (1988); Shari S. Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 BEHAVIORAL SCI. & L. 73 (1989) (vividness effect); Anthony N. Doob & Julian N. Roberts, *Social Psychology, Social Attitudes and Attitudes Toward Sentencing*, 16 CAN. J. BEHAVIORAL SCI. 269 (1984) (vividness effect); Baruch Fischhoff, *HindsightForesight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975) (hindsight and outcome biases); Harold H. Kelley, *The Process of Causal Attribution*, 28 AM. PSYCHOLOGIST 107 (1973) (attribution); Dan Russell, *The Causal Dimension Scale: A Measure of How Individuals Perceive Causes*, 42 J. PERSONALITY & SOC. PSYCHOL. 1137 (1982) (attribution); Saks & Kidd, *supra* note 12, at 137 (availability); *id.* at 151 (particularistic proofs); David E. Van Zandt, *Commonsense Reasoning, Social Change, and the Law*, 81 NW. U. L. REV. 894 (1987) (typification). In mental health contexts, see, e.g., Harold Bursztajn et al., *"Magical Thinking," Suicide, and Malpractice Litigation*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 369 (1988); David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations*, 7 BEHAVIORAL SCI. & L. 485 (1989). In the criminal law context, see, e.g., R.D. Mackay & Andrew M. Colman, *Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience*, 1991 CRIM. L. REV. 800 (1991).

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."[173] 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 discharges the patient as "cured" or declines to admit him. Furthermore, such a single instance's empirical effect is independent of any legislative change that might follow such an event.[174]

Experts often use the typification heuristic in cases that involve the improper prescription of medication.[175] Here, the treating doctor " 'slots' his patient into certain categories and prescribes a similar regimen for all."[176] Also, clinicians significantly overestimate their diagnostic and predictive accuracy, and ignore supplemental means of interpretation that might enhance their accuracy.[177] Through use of the attribution heuristic, this data is ignored in the mental disability law process.[178] 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

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overstate percentage of involuntary civil commitment cases that begin as police referrals and that jeopardized staff safety); *see also* Henry J. Steadman et al., *Psychiatric Evaluations of Police Referrals in a General Hospital Emergency Room*, 8 INT'L J.L. & PSYCHIATRY 39 (1986).

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).

175. *See* Hale v. Portsmouth Receiving Hosp., 338 N.E.2d 371 (Ohio Ct. Cl. 1975) (doctor 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-

179. Saks, *supra* note 83, at 294; *see also* James Wyda & Bert Black, *Psychiatric Predictions and the Death Penalty: An Unconstitutional Sword For the Prosecution But a Constitutional Shield for the Defense*, 7 BEHAVIORAL SCI. & L. 505, 513 (1989) (clinicians overvalue evidence that supports their conclusions and deny counterevidence).

180. Richard Rogers & Christopher D. Webster, *Assessing Treatability in Mentally Disordered Offenders*, 13 LAW & HUM. BEHAV. 19 (1989).

181. Bersoff, *supra* note 170, at 354-55. On the development of a new computerized assessment instrument, see George W. Barnard et al., *Competency to Stand Trial: Description and Initial Evaluation of a New Computer-Assisted Tool (CADCOMP)*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 367 (1991).

182. *See* Jackson v. Indiana, 406 U.S. 715 (1972). Additional problems are raised in jurisdictions where post-incompetency finding commitments are governed by statutes that do not require a predicate dangerousness finding. See 3 PERLIN, CIVIL & CRIMINAL, *supra* note 5, § 14.16B, at 108-09 n.265.45 (Supp. 1992) and Michael L. Perlin & Joel A. Dvoskin, *AIDS-Related Dementia and Competency to Stand Trial: A Potential Abuse of the Forensic Mental Health System?*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 349 (1990) for discussion of N.Y. CRIM. PROC. LAW §§ 730.10-.70 (McKinney 1988).

183. Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1096 (1976); *see also* Vernon L. Quinsey & Rudolf Ambtman, *Variables Affecting Psychiatrists' and Teachers' Assessments of the Dangerousness of Mentally Ill Offenders*, 47 J. CONSULTING & CLINICAL PSYCHOL. 353 (1979).

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.[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.[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.[186]

4. HEURISTICS AND THE COURTS

Courts also regularly fall prey to heuristic behavior in mental disability law cases.[187] *Bouchillon v. Collins*,[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 *United States v. Charters*,[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. *Bouchillon v. Collins*

In *Bouchillon v. Collins*,[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.[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.[192]

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184. Cocozza & Steadman, *supra* note 183, at 1096.

185. Bagby, *Community Values*, *supra* note 90, at 170-71; R. Michael Bagby, *The Deprofessionalization of Civil Commitment*, 29 CAN. PSYCHOL. 234, 234 (1988).

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. *See* Winick, *supra* note 78, at 125 n.180 (sources cited). *See generally* Winick, *supra* note 156.

187. *See generally* Bersoff, *supra* note 170. I discuss courts' use of heuristics in insanity defense decisionmaking in Perlin, *Psychodynamics*, *supra* note 12.

188. 907 F.2d 589 (5th Cir. 1990).

189. 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. denied*, 494 U.S. 1016 (1990).

190. 907 F.2d at 589.

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. *Id.* at 590.

192. *Id.* at 591.

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.[193] This occurred despite counsel's awareness that his client had "mental problems," had been institutionalized, and was taking antipsychotic medication.[194] On appeal, the Fifth Circuit found the defendant's mental condition to be "undisputed"[195] 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.[196] The court stressed that demeanor is not dispositive. "[T]he existence of even a severe psychiatric defect is not always apparent to laymen."[197] A defendant "need not be catatonic, raving or frothing" to be legally incompetent.[198]

Interestingly, the defendant's trial counsel conceded that although his client told him his entire medical history, he nonetheless dissuaded Bouchillon from pleading insanity becauses of his own prior unsuccessful experience with another insanity defense case in the same judicial district.[199] 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."[200]

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.[201] 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. [H]e 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.

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-

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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).

203. 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. denied*, 494 U.S. 1016 (1990). *See generally* Perlin, *Questions*, *supra* note 14.

204. 457 U.S. 307, 321 (1982).

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

206. United States v. Charters, 829 F.2d 479, 490 (4th Cir. 1987), *on reh'g*, 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. denied*, 494 U.S. 1016 (1990).

207. Perlin, *Questions*, *supra* note 14, at 966.

ticularistic proofs, and the vividness effect.[208] Its attempts to "simplify 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."[209]

Taken together, *Bouchillon* and *Charters* demonstrate the different 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[210] and the outrageous, memorable case dominates the judicial process.[211]

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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, 71 (Martin F. Kaplan ed., 1986).

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 Sexual Deviance in Adolescent Males?*, 14 INT'L J.L. & PSYCHIATRY 85 (1991). He responded, "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;

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,[212] most courts remain profoundly disinterested.[213] Paul Appelbaum's analysis of the Supreme Court's decisions in *Barefoot v. Estelle*[214] and *McCleskey v. Kemp*[215] 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.[216] 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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see also Richard Rogers, *APA's Position on the Insanity Defense: Empiricism Versus Emotionalism*, 42 AM. PSYCHOLOGIST 840 (1987).

212. *See, e.g.*, Monahan & Walker, *supra* note 25; John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571 (1991); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); *see also* Suggs, *supra* note 210. For a thoughtful judicial inquiry, see Abner J. Mikva, *Bringing the Behavioral Sciences to the Law: Tell it to the Judge or Talk to Your Legislator?*, 8 BEHAVIORAL SCI. & L. 285 (1990).

213. *See, e.g.*, Phoebe C. Ellsworth, *Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment*, *in* CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 177 (Kenneth C. Haas & James A. Inciardi eds., 1988).

214. 463 U.S. 880 (1983) (testimony as to future dangerousness admissible at penalty phase in death penalty case).

215. 481 U.S. 279 (1987) (rejecting statistical evidence offered to show racial discrimination in death penalty prosecutions).

216. 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. *Introduction*[218]

"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]mbedded 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

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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.

219. The classic study is GORDON ALLPORT, THE NATURE OF PREJUDICE (1954).

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).

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

222. Perlin, *Morality*, *supra* note 3, at 133-37; Perlin, *Psychodynamics*, *supra* note 12, at 59-61; *see also* Randolph N. Jonakait, *Forensic Science: The Need for Regulation*, 4 HARV. J.L. & TECH. 109, 167-68 (1991).

sanism.[223]

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.[224] Their language demonstrates bias against mentally disabled individuals[225] and contempt for the mental health professions.[226] 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."[227] Another court has likened psychiatric ability to predict future dangerousness to predictions made by an oncologist regarding consequences of an untreated and metastasized malignancy.[228] 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.[229]

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

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223. Perlin, *Psychodynamics*, *supra* note 12, at 61-69; Perlin, *Unpacking*, *supra* note 66, at 718-30.

224. *See* Perlin, *Sanism*, *supra* note 13, at 400-04.

225. *See, e.g.*, Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987) (quoting Shuler v. Wainwright, 491 F.2d 1213, 1222 (5th Cir. 1974) (using "lunatic")); Corn v. Zant, 708 F.2d 549, 569 (11th Cir. 1983) (defendant referred to as a "lunatic"), *cert. denied*, 467 U.S. 1220 (1984); Pyles v. Boles, 250 F. Supp. 285, 288 (N.D. W. Va. 1966) (trial judge accused habeas petitioner of "being crazy"); Brown v. People, 134 N.E.2d 760, 762 (Ill. 1956) (judge asked defendant, "You are not crazy at this time, are you?"); *cf.* State v. Penner, 1989 KAN. LEXIS 66, at *3 (Kan. 1989) (witnesses admonished *not* to refer to defendant as "crazy" or "nuts").

Lawyers for mentally disabled clients are not immune. For example, in oral argument in Foucha v. Louisiana, 112 S. Ct. 1780 (1992), on the question of whether his non-mentally ill, but dangerous insanity acquittee client should be retained in a forensic mental hospital, defense counsel "drew nods from several of the justices when he said Foucha's conduct might be the normal reaction of a sane man surrounded by 'lots of insane people. . . . A little paranoia is probably justified.' " Foucha v. Louisiana, 9 Mental Health L. Rep. 111, 112 (1991).

226. *See, e.g.*, Commonwealth v. Musolino, 467 A.2d 605, 614 (Pa. Super. Ct. 1983) (reversible error for trial judge to refer to expert witnesses as "headshrinkers"); *cf.* State v. Percy, 507 A.2d 955, 956-57 n.1 (Vt. 1986), *cert. denied*, 112 S. Ct. 344 (1991) (conviction reversed where prosecutor, in closing argument, referred to expert testimony as "psychobabble").

227. People v. LaLone, 437 N.W.2d 611, 613 (Mich. 1989).

228. *In re* Melton, 597 A.2d 892, 898 (D.C. 1991).

229. *See* Perlin, *Unpacking*, *supra* note 66, at 693-96 (sources cited); *see also, e.g.*, JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981); John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 AM. PSYCHOLOGIST 511 (1992); John Monahan, *Risk Assessment of Violence Among the Mentally Disordered: Generating Useful Knowledge*, 11 INT'L J.L. & PSYCHIATRY 249 (1988); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984).

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."[230] 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."[231] 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.[232]

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.[233] A Texas study revealed that a significant number of judges were not even aware of state statutes recognizing a patient-psychotherapist privilege.[234] With little public attention, other courts have regularly entered commitment orders without any explicit statutory authority.[235] 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.[236]

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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 Stano 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).

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

234. Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 924 (1982).

235. David B. Wexler, *Inappropriate Patient Confinement and Appropriate State Advocacy*, *in* THERAPEUTIC JURISPRUDENCE, *supra* note 96, at 347-48.

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.[237] By failing to insist on adequate representation by assigned counsel,[238] and by refusing to find error in cases that reflect the starkest denial of adequate representation,[239] 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.[240]

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.[241] 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:[242] whether a patient is "competent" to make the "right choice" and self-medicate in the community if commitment is not ordered.[243]

I start with three basic principles. First, individuals are presumed to be competent, and this presumption generally may not be

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told patients of their right to counsel, fewer than one-fourth of the right to voluntary status, and about two-fifths of the right to appeal. Parry & Turkheimer, *supra* note 118, at 66. By a patient's second review hearing after six to twelve months in the hospital, less than five percent mentioned the right to counsel and less than eight percent mentioned voluntary admissions, while fifteen percent referred to the right to appeal. *Id.*

237. *See generally* Perlin, *Fatal Assumption*, *supra* note 15.

238. *See generally* 2 PERLIN, CIVIL & CRIMINAL, *supra* note 5, §§ 8.11, 8.17-.23.

239. *See, e.g.*, *In re* McMahon, 581 N.E.2d 1208, 1210 (Ill. App. Ct. 1991) (no error where counsel was appointed on date of involuntary civil commitment hearing).

240. On judges' passive-aggressive behavior in mental disability law cases, see Wexler, *supra* note 216, at 40. On some mental health professionals' passive-aggressive behavior, see *supra* note 95.

241. *See* John Petrila, *Redefining Mental Health Law: Thoughts on a New Agenda*, 16 LAW & HUM. BEHAV. 89, 100-01 (1992) ("discussions of the commitment process that ignore . . . political realities run the risk of being largely academic").

242. On the important collateral question of what happens in involuntary civil commitment cases that do not go to a hearing, see, e.g., Dan A. Lewis et al., *The Negotiation of Involuntary Civil Commitment*, 18 LAW & SOC'Y REV. 629 (1984); Robert D. Miller et al., *The Use of Plea Bargaining in Civil Commitment*, 7 INT'L J.L. & PSYCHIATRY 395 (1984).

243. *See generally* cases discussed in 1 PERLIN, CIVIL & CRIMINAL, *supra* note 5, § 3.45, at 71-73 nn.726.1-741 (Supp. 1992); Perlin, *Homelessness*, *supra* note 169, at 116-17 nn.306-08; Perlin, *Tea Leaves*, *supra* note 6, at 50-51.

This issue is discussed in Donald A. Treffert, *The Obviously Ill Patient in Need of Treatment: A Fourth Standard for Civil Commitment*, 36 HOSP. & COMMUNITY PSYCHIATRY 259, 260 (1985) (arguing that the result of stricter legislative commitment criteria was clinicians waiting for a patient "with an obvious and severe mental illness that was formerly well controlled on antipsychotic medication [to] become unable to make an informed decision about treatment and slowly deteriorate until he or she would 'qualify' for detention or commitment under harsh, realistic commitment criteria").

overcome except by a judicial determination.[244] 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.[245] However, the medical profession's record of complying with this mandate of presumed competency has been significantly spotty.[246]

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.[247] 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."[248] Even if a person is found incompetent to stand trial, it does not mean that she is incompetent to function in society.[249]

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"[250] still resonates today.

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244. *See, e.g.*, Rogers v. Comm'r of Dep't of Mental Health, 458 N.E.2d 308, 314-15 (Mass. 1983); William M. Brooks, *A Comparison of a Mentally Ill Individual's Right to Refuse Medication Under the United States and New York State Constitutions*, 8 TOURO L. REV. 1, 36 (1991); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 538; Note, *The Mentally Ill's Right to Refuse Drug Treatment: A Panacea or a Bitter Pill to Swallow?*, 29 WASHBURN L.J. 62, 81 (1989); *cf.* A.E. v. Mitchell, 724 F.2d 864, 867 (10th Cir. 1983) (incompetency determination is prerequisite for involuntary civil commitment under Utah statute).

245. Lessard v. Schmidt, 349 F. Supp. 1078, 1088 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974).

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.

248. *In re* LaBelle, 728 P.2d 138, 146 (Wash. 1986); *see also, e.g.*, Rivers v. Katz, 495 N.E.2d 337, 342 (N.Y. 1986).

249. Linda C. Fentiman, *Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109, 1166 (1986); Perlin, *Questions*, *supra*, note 14, at 988; Note, *State Mental Health Patients' Right to Refuse Forcible Administration of Medication Narrowly Construed*, 11 SETON HALL L. REV. 796, 807 (1981).

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.[251] Despite this work, the response of the *en banc* court in *United States v. Charters* is typical.[252] 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.[253] Other appellate courts share this futile response.[254]

Examination of the relationship between competency, treatment refusal, and the involuntary civil commitment process reveals a paradox.[255] Fewer than a handful of reported involuntary civil commitment cases have frontally considered right to refuse treatment claims.[256] Most courts simply dismiss such claims as not justiciable in the involuntary civil commitment context.[257] 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.[258] Professor David Wexler presciently noted this link almost a decade ago;[259] yet, the academic journals have been

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251. Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635, 1635-36 (1988).

252. 829 F.2d 479 (4th Cir. 1987), *on reh'g*, 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. denied*, 494 U.S. 1016 (1990).

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").

254. *Cf.* United States v. Hoskie, 950 F.2d 1388, 1390 n.2 (9th Cir. 1991) (differentiating between incompetency to stand trial and competency to plead guilty). For other jurisdictions in accord, see 3 PERLIN, CIVIL & CRIMINAL, *supra* note 5, § 14.20, at 266-68 (cases cited).

255. Perlin, *Tea Leaves*, *supra* note 6, at 49.

256. *See, e.g.*, *In re* J.L.J., 509 A.2d 184, 186 (N.J. Super. Ct. App. Div. 1985) (behavior modification program).

257. *See, e.g.*, *In re* Harhut, 367 N.W.2d 628, 632 (Minn. Ct. App. 1985); *In re* Wicks, 364 N.W.2d 844, 847 (Minn. Ct. App. 1985); *cf. In re* D.J.M., 386 A.2d 870, 872 (N.J. Super. Ct. App. Div. 1978) (patient wishing to raise adequacy of treatment issue claim at involuntary civil commitment hearing must give prior notice to court and adverse parties).

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.[260] Although there is widespread belief that refusal to take such medication will make some patients more dangerous,[261] there is absolutely no evidence that psychiatrists have any special ability to predict community medication compliance.[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.[263]

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

260. For an example of a court rejecting this line of thinking, see *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).

261. Teresa L. Scheid-Cook, *Commitment of the Mentally Ill to Outpatient Treatment*, 23 COMMUNITY MENTAL HEALTH J. 173, 180 (1987).

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., *On the Predictability of Violent Behavior: Considerations and Guidelines*, 36 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.").

263. Scheid-Cook, *supra* note 261, at 181-82 (citing Robert Stern & Kenneth Minkoff, *Paradoxes in Programming for Chronic Patients in a Community Clinic*, 30 HOSP. & COMMUNITY PSYCHIATRY 613 (1979)); *see also* ANN B. JOHNSON, OUT OF BEDLAM: THE TRUTH ABOUT DEINSTITUTIONALIZATION 78 (1990); Steven J. Schwartz & Cathy E. Costanzo, *Compelling Treatment in the Community: Distorted Doctrines and Violated Values*, 20 LOY. L.A. L. REV. 1329, 1386-89 (1987).

264. *See, e.g.*, *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.

265. N.D. CENT. CODE § 25-03.1-19 (1989); *see also In re* Kupperion, 331 N.W.2d 22, 26 (N.D. 1983) (interpreting statute).

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. CENT. CODE § 25-03.1-02(10)(d) (1989).

"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 . . . ."[267] 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,"[268] 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.[269]

Similarly, other courts rely upon like testimony in recommitment hearings following insanity acquittals.[270] 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,"[271] or if there were a "high likelihood that without adequate supervision [the patient] would stop taking [his] medication."[272]

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."[273] 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.[274] If medication noncompliance in the community leads to deterioration and decompensation,

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267. *In re* R.N., 453 N.W.2d 819, 822 (N.D. 1990).

268. MINN. STAT. § 253B.12, subd. 4 (1982).

269. *In re* Thornblad, No. C9-91-1501, 1991 WL 271491, at *2 (Minn. Ct. App. Dec. 24, 1991).

270. This is also frequently the dispositive issue in post-insanity acquittee/NGRI release hearings. *See, e.g.*, State v. Jacob, 669 P.2d 865, 869 (Utah 1983) (citing Warren v. Harvey, 632 F.2d 925 (2d Cir.), *cert. denied*, 449 U.S. 902 (1980)); Clark v. State, 261 S.E.2d 764 (Ga. Ct. App. 1979), *aff'd*, 266 S.E.2d 466 (Ga. 1980); Bethany v. Stubbs, 393 So. 2d 1351 (Miss. 1981) (incompetency to stand trial)).

In at least one case, a court has considered the role of the jury in determining whether such an insanity acquittee would self-medicate in the future. *See* People v. Williams, 244 Cal. Rptr. 429, 430-31 (Cal. Ct. App. 1988).

271. Lawrence v. State, 410 S.E.2d 136, 137 (Ga. Ct. App. 1991).

272. People v. Bolden, 266 Cal. Rptr. 724, 727 (Cal. Ct. App. 1990).

273. *See* Perlin, *Forensic System*, *supra* note 153, at 2; *see also supra* note 153.

274. *See* Perlin, *Homelessness*, *supra* note 169, at 86-97 (discussing Lamb's critique). I respond directly to this critique in Douglas Mossman & Michael L. Perlin, *Psychiatry and the Homeless Mentally Ill: A Reply to Dr. Lamb*, 149 AM. J. PSYCHIATRY 951, 952 (1992).

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.[275] Although such patients generally have an absolute right to refuse medication,[276] invocation of that right frequently leads to a transfer to involuntary status.[277] 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.[278]

Outpatient commitment ("OPC") cases reflect similar decisionmaking.[279] Individuals unable to make informed decisions "to seek voluntary treatment or *comply with recommended treatment*" are thus subject to OPC.[280] 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.[281] 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,[282] then, again, it is necessary to consider the extent of the power that sanist judicial thinking may exert on the mental disability system.[283]

This entire inquiry takes on new meaning when we consider

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275. *See* Perlin, *Tea Leaves*, *supra* note 6, at 50.

276. *See, e.g.*, N.J. STAT. ANN. § 30:4-24.2d(1) (West 1981); Paul S. Appelbaum, *The Right to Refuse Treatment With Antipsychotic Medications: Retrospect and Prospect*, 145 AM. J. PSYCHIATRY 413, 413 (1988).

277. *See, e.g.*, ARK. CODE ANN. § 20-47-104 (Michie 1991).

278. *See, e.g.*, Wessel v. Pryor, 461 F. Supp. 1144, 1148 (E.D. Ark. 1978); *In re* Melas, 371 N.W.2d 653, 655 (Minn. Ct. App. 1985); *In re* J.B., 705 P.2d 598, 602 (Mont. 1985).

279. *See* Perlin, *Tea Leaves*, *supra* note 6, at 50-51. *See generally* Gerry McCafferty & Jeanne Dooley, *Involuntary Outpatient Commitment: An Update*, 14 MENTAL & PHYSICAL DISABILITY L. REP. 277 (1990).

280. N.C. GEN. STAT. § 122C-263(d)(1) (1991) (emphasis added).

281. *See, e.g.*, TENN. CODE ANN. § 33-6-201(b)(2) (1984 & Supp. 1992) (allowing OPC where patient is subject to the "obligation to participate in any medically appropriate outpatient treatment, including . . . medication. . . ."); WIS. STAT. ANN. § 51.20(dm) (West 1987 & Supp. 1992) (OPC permissible if court finds that patient's dangerousness "is likely to be controlled with appropriate medication administered on an outpatient basis"); *In re* Anderson, 140 Cal. Rptr. 546, 550 (Cal. Ct. App. 1977).

282. Schwartz & Costanzo, *supra* note 263, at 1384; Susan Stefan, *Preventive Commitment: The Concept and Its Pitfalls*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 288, 294 (1987).

283. *See generally* Jillane T. Hinds, *Involuntary Outpatient Commitment for the Chronically Mentally Ill*, 69 NEB. L. REV. 346, 367-76 (1990).

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.[284] 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 malinger 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.[285] Research reveals that defendants attempt feigning in less than eight percent of all competency to stand trial inquiries.[286]

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284. Cathryn Clary et al., *Psychiatric Inpatients' Knowledge of Medication at Hospital Discharge*, 43 HOSP. & COMMUNITY PSYCHIATRY 140, 142 (1992); *see also* Jeffrey L. Geller, *State Hospital Patients and Their Medication: Do They Know What They Take?*, 139 AM. J. PSYCHIATRY 611, 612 (1982) (only 22% of patients tested could name their medications; 41% gave correct frequency of administration); David A. Soskis, *Schizophrenic and Medical Inpatients as Informed Drug Consumers*, 35 ARCHIVES GEN. PSYCHIATRY 645, 646 (1978) (36% of patients tested knew correct medication dosages).

285. Perlin, *Unpacking*, *supra* note 66, at 715-16 nn.556-58 (sources cited); *see also, e.g.*, David Schretlen & Hal Arkowitz, *A Psychological Test Battery to Detect Prison Inmates who Fake Insanity or Mental Retardation*, 8 BEHAVIORAL SCI. & L. 75, 75 (1990) ("92-95% of subjects were correctly classified as either faking or not faking").

286. Dewey G. Cornell & Gary L. Hawk, *Clinical Presentation of Malingerers Diagnosed by Experienced Forensic Psychologists*, 13 LAW & HUM. BEHAV. 375, 380-83 (1989). On the potential role of racial bias in such determinations, see *id.* at 382 (clinicians may overdiagnose malingering in black defendants).

For other recent research, see, e.g., R. Michael Bagby et al., *Detection of Dissimulation*

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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with the New Generation of Objective Personality Measures, 8 BEHAVIORAL SCI. & L. 93 (1990); Richard Rogers et al., *The SIRS as a Measure of Malingering: A Validation Study with a Correctional Sample*, 8 BEHAVIORAL SCI. & L. 85 (1990); Orest E. Wasyliw et al., *The Detection of Malingering in Criminal Forensic Groups: MMPI Validity Scales*, 52 J. PERSONALITY ASSESSMENT 321 (1988).

287. *See, e.g.*, Cowan v. State, 579 So. 2d 13, 15 (Ala. Crim. App. 1990); Farinas v. State, 569 So. 2d 425, 432 (Fla. 1990) (Grimes, J., dissenting); State v. Sharkey, 821 S.W.2d 544, 546 (Mo. Ct. App. 1991); People v. Perkins, 562 N.Y.S.2d 244, 245 (N.Y. App. Div. 1990); State v. Evans, 586 N.E.2d 1042, 1054 (Ohio 1992), *cert. denied*, 113 S. Ct. 246 (1992); Blacklock v. State, 820 S.W.2d 882, 884-85 (Tex. Ct. App. 1991); State v. Drobel, 815 P.2d 724, 727-28 (Utah Ct. App. 1991).

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).

291. *See, e.g.*, United States v. McEachern, 465 F.2d 833, 836 (5th Cir. 1972) ("we note the possible confusion caused by [the trial court's] use of the term 'insane' when the relevant inquiry is competence to stand trial"), *cert. denied*, 409 U.S. 1043 (1972); State v. Spivey, 319 A.2d 461, 470 (N.J. 1974) ("[t]he Court must be careful to distinguish between insanity and incapacity to stand trial"); Aponte v. State, 153 A.2d 665, 669-70 (N.J. 1959). The error is often deemed harmless. *See, e.g.*, Buttrum v. Black, 721 F. Supp. 1268, 1295 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990).

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

294. *See* DEBRA WHITCOMB & RONALD L. BRANDT, COMPETENCY TO STAND TRIAL 2 (1985); George E. Dix & Norman G. Poythress, *Propriety of Medical Dominance of Forensic Mental Health Practice: The Empirical Evidence*, 23 ARIZ. L. REV. 961, 972-74 (1981); David B. Wexler et al., *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 64-65 (1971); Carl R. Vann & Fred Morganroth, *Psychiatrists and the Competence to Stand Trial*, 42 U. DET. L. REV. 75, 84 (1964); Helene R. Banks, *Immediate Appeal of Pretrial Commitment Orders: "It's Now or Never,"* 55 FORDHAM L. REV. 785, 786 n.8 (1987).

295. William H. Erickson et al., *Competence to Stand Trial, in* MENTAL HEALTH STANDARDS, *supra* note 135, at 157, 159. For an example of counsel's misunderstanding, see Kirk v. State, 308 S.E.2d 592, 598 (Ga. Ct. App. 1983) (counsel mistakenly asked for incompetency to stand trial charge in insanity case), *aff'd*, 311 S.E.2d 821 (Ga. 1984).

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. Keilitz & Martin, *supra* note 231, at 84.

300. Ann L. Hester, State v. Gravette: *Is There Justice for Incompetent Defendants in North Carolina?*, 69 N.C. L. REV. 1484, 1497 (1991).

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.[301] 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,[302] 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.*' "[303]

Although the Supreme Court held in favor of Jackson, striking down such commitments as tantamount to life sentences without trial,[304] 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]."[305]

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),[306] temporarily stabilized, returned to court, found competent, and jailed to await trial. At this point, many "destabilize" and become incompetent once again.[307] This endless cycle has been well documented,[308] 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-

301. *Jackson*, 406 U.S. at 717.

302. *Id.* at 718-19.

303. *Id.* at 719 (emphasis added).

304. *Id.* at 731-38.

305. 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).

306. *See* 3 PERLIN, CIVIL & CRIMINAL, *supra* note 5, § 14.09 (cases cited).

307. 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.

308. *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)).

petency to stand trial cases.[309] 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."[310] 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.[311] 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."[312] 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.[313] These and other similar cases[314] suggest that the most minimal testimony will satisfy courts in such incompetency to stand trial inquiries.

C. *Nonsanist Courts*[315]

Certainly, not all judges write in a sanist voice. Some nonsanist

309. WHITCOMB & BRANDT, *supra* note 294, at 2 (experts' reports are often "empty and meaningless"). For a review of such deficiencies, see *id.* at 1 (reporting on findings in Ingo Keilitz, Mental Health Examination in Criminal Justice Settings: Organization, Administration, and Program Evaluation (Sept. 1981) (unpublished manuscript, on file with the National Center for State Courts) (courts often fail to provide reasons for evaluation requests and fail to screen out unwarranted evaluation requests; no agreement exists between the justice and mental health systems as to the purpose of evaluation; and the evaluation report is frequently delayed at great length)).

310. 480 N.E.2d 499, 504 (Ohio Ct. App. 1984). The witness also admitted that while he had been aware that the defendant was evaluated by mental health professionals at a V.A. hospital, he did not have copies of those records and that, depending on the content of those records, his opinion might have been different. *Id.*

311. *Id.* at 509 (Markus, J., concurring); *id.* (Nahra, J., concurring).

312. 575 N.E.2d 1053, 1055 (Ind. App. Ct. 1991).

313. People v. Lopez, 576 N.E.2d 246, 248-49 (Ill. App. Ct. 1991).

314. *See, e.g.*, United States v. Prince, 938 F.2d 1092, 1093-95 (10th Cir.), *cert. denied*, 112 S. Ct. 427 (1991) (finding no abuse of discretion in trial court's refusal to hold a second competency hearing where defendant exposed himself and urinated in courtroom); Rollins v. Leonardo, 938 F.2d 380, 382 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 944 (1992) (defendant was an escapee from a psychiatric hospital at the time that he was tried for the offense); United States v. Caicedo, 937 F.2d 1227, 1232 (7th Cir. 1991) (although trial counsel stated that he did not know if the defendant "could cooperate with him in the preparation of his defense, he [stated that defendant] was *'perfectly competent'* ").

315. This section is largely adapted from Perlin, *Sanism*, *supra* note 13, at 400-04.

opinions, such as Judge Johnson's *Wyatt v. Stickney*[316] decisions, are firmly rooted in a rights/empowerment model.[317] Others, like Justice Blackmun's dissent in *Barefoot v. Estelle*,[318] Justice Stevens's partial dissent in *Washington v. Harper*,[319] and the New Jersey Supreme Court's opinion in *State v. Krol*,[320] specifically rebut sanist myths. Still others, such as Justice Stevens's dissent in *Pennhurst State School & Hospital v. Halderman*,[321] Justices Stevens's and Marshall's separate opinions in *City of Cleburne v. Cleburne Living Center*,[322] and Judge Kaufman's use of a "Gulag archipelago" metaphor in a Second Circuit case involving a mentally disabled prisoner,[323] 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.[324] 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.[325] Other judges, in less known cases, have also shown real sensitivity to the underlying issues.[326] These examples, however, clearly constitute the minority of

316. 325 F. Supp. 781 (M.D. Ala. 1971), *supplemented*, 334 F. Supp. 1341 (M.D. Ala. 1971), *supplemented*, 344 F. Supp. 373 (M.D. Ala. 1972), *supplemented*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1305 (5th Cir. 1974).

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).

318. 463 U.S. 880, 916-38 (1983) (Blackmun, J., dissenting).

319. 494 U.S. 210, 237-40 (1990) (Stevens, J., concurring in part and dissenting in part).

320. 344 A.2d 289 (N.J. 1975).

321. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 126-28 (1984) (Stevens, J., dissenting).

322. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 454-55 (1985) (Stevens, J., concurring); *id.* at 455, 461-67 (Marshall, J., concurring in part and dissenting in part).

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

324. My favorite is Judge Brotman's opinion in the class action Rennie v. Klein, 476 F. Supp. 1294, 1309 (D.N.J. 1979), *modified*, 653 F.2d 836 (3d Cir. 1981), *vacated*, 458 U.S. 1119 (1982):

> 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.

325. Judge David L. Bazelon is the finest example. *See* Heathcole W. Wales, *The Rise, the Fall, and the Resurrection of the Medical Model*, 63 GEO. L.J. 87, 104 (1974) (Judge Bazelon "invited the world of mental health professionals and criminologists into his courtroom" and "extended his courtroom back into the world"). *See generally, e.g.*, David L. Bazelon, *Veils, Values, and Social Responsibility*, 37 AM. PSYCHOLOGIST 115 (1982).

326. *See, e.g.*, Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1942 (1992); United States v. Hemsi, 901 F.2d 293 (2d Cir. 1990); S.H. v. Edwards, 860 F.2d 1045, 1053 (11th Cir. 1988) (Clark, J., dissenting), *cert. denied*, 491 U.S. 905 (1989), *vacated*, 880 F.2d 1203 (11th Cir. 1989); Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984); *In re*

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] Competency

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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.

330. *See supra* part II; *cf.* United States v. Lyons, 739 F.2d 994, 999-1000 (5th Cir. 1984) (Rubin, J., dissenting) (quoting WILLIAM J. WINSLADE & JUDITH W. ROSS, THE INSANITY PLEA 2-3 (1983)):

> 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.[331] Experts employ an outcome-determinative test: if they agree with the patient's decision, then she's competent; if not, then she's not.[332]

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.[333]

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,[334] the opinion cites neither empirical evidence nor social science data in support of the speculations. It is a textbook heuristic

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the bottom line of all these complaints is that *guilty people go free*—guilty people who do not have to accept judgment or responsibility for what they have done and are not held accountable. . . . These are not cases in which the defendant is *alleged* to have committed a crime. *Everyone knows he did it.*"

331. For the classic example, see United States v. Charters, 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. denied*, 494 U.S. 1016 (1990). *See generally* Perlin, *Questions*, *supra* note 14.

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.

333. *In re* Melton, 565 A.2d 635, 649 (D.C. 1989) (Schwelb, J., dissenting), *reh'g granted*, 581 A.2d 788 (D.C. 1990), *aff'd*, 597 A.2d 892 (D.C. 1991).

334. *See* Perlin, *Homelessness*, *supra* note 169, at 94-108.

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,

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335. *See supra* part III.B.2.

336. 420 U.S. 162 (1975); *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").

340. *See, e.g.*, ROBERT L. SADOFF, FORENSIC PSYCHIATRY: A PRACTICAL GUIDE FOR LAWYERS AND PSYCHIATRISTS 58-59 (2d ed. 1988) (emphasizing expert witness's teaching function).

and roles can or should be reshaped in order to enhance their therapeutic potential while not subordinating principles of due process.[341]

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?[342] 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?[343]

John Ensminger and Thomas Liguori originally published their ground breaking essay on the therapeutic potential of the involuntary civil commitment hearing in 1978.[344] 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.[345] Notwithstanding the general lackluster performance of counsel in this area,[346] there are enough institutionally structured and individual exceptions[347] to inspire a measure of hope.

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

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341. *See generally* THERAPEUTIC JURISPRUDENCE, *supra* note 96; ESSAYS IN THEREPEUTIC JURISPRUDENCE, *supra* note 78; David B. Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992). I consider the therapeutic jurisprudential potential of the tort "duty to protect" doctrine in Perlin, *Tarasoff*, *supra* note 171, at 54-62.

342. Social science literature confirms that the expectation that a process is "fair" generally mollifies even the losing parties. *See, e.g.*, E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 66-67 (1988); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992); Tom R. Tyler, *What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

343. *See* Deborah A. Dorfman, *Pretexts in Commitment and Medication Decisionmaking Through a Therapeutic Jurisprudential Filter*, — N.Y.L. SCH. J. HUM RTS. — (forthcoming 1993).

344. *See* Ensminger & Liguori, *supra* note 96.

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.[348] 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.[349]

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.

348. *See* Ingo Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 289 (1987); Perlin, *Fatal Assumption*, *supra* note 15, at 58-59; Henry J. Steadman, *Mental Health Law and the Criminal Offender: Research Directions for the 1990's*, 39 RUTGERS L. REV. 323 (1987).

349. The November 1990 conference run by the National Center for State Courts' Institute on Mental Disability and Law on "Justice and Mental Health Systems Interactions" would serve as an excellent model. *See* Pamela Casey et al., *Toward an Agenda for Reform of Justice and Mental Health Systems Interactions*, 16 LAW & HUM. BEHAV. 107 (1992); Ingo Keilitz, *Justice and Mental Health Systems Interactions: An Overview and Introduction to the Special Issue*, 16 LAW & HUM. BEHAV. 1 (1992).