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Everything's a Little Upside down, as a Matter of Fact the Wheels Have Stopped: The Fraudulence of the Incompetency Evaluation Process

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“EVERYTHING’S A LITTLE UPSIDE DOWN, AS A MATTER OF FACT THE WHEELS HAVE STOPPED”:

THE FRAUDULENCE OF THE INCOMPETENCY EVALUATION PROCESS

Michael L. Perlin, J.D.

INTRODUCTION

I frequently lecture on questions of criminal incompetencies,¹ and, when I do, I am often asked to recommend what I think are the most “important” articles in the field. I invariably tell the audiences that there are two articles that stand head and shoulders above all others: Bruce Winick’s 1985 piece in the *UCLA Law Review*,² and the 1993 article by Grant Morris and J. Reid Meloy in the *U.C. Davis Law Review*.³ I tell my audiences that I say this *not* because they are first-rate analytical and doctrinal pieces of scholarship (which they are), but because, empirically, they force us to confront the glaring

¹ For a sampling of my writings on this topic, see, e.g., Michael L. Perlin, *Beyond Dusky and Godinez: Competency Before and After Trial*, 21 *BEHAV. SCI. & L.* 297 (2003); Michael L. Perlin, “For the Misdemeanor Outlaw”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 *ALA. L. REV.* 193 (2000) [hereinafter Perlin, *Outlaw*]; Michael L. Perlin, “Dignity Was the First to Leave”: *Godinez v. Moran, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 *BEHAV. SCI. & L.* 61 (1996) [hereinafter Perlin, *Dignity*]; Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 *U. MIAMI L. REV.* 625 (1993) [hereinafter Perlin, *Pretexts*]; Michael L. Perlin, *Are Courts Competent to Decide Questions of Competency? Stripping the Facade From United States v. Charters*, 38 *U. KAN. L. REV.* 957 (1990) [hereinafter Perlin, *Charters*]; Michael L. Perlin & Joel 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). See generally 4 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL*, ch. 8 (2d ed. 2002) [hereinafter 4 PERLIN, *MENTAL DISABILITY LAW*].

² Bruce Winick, *Restructuring Competency to Stand Trial*, 32 *UCLA L. REV.* 921 (1985).

³ Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 *U.C. DAVIS L. REV.* 1 (1993).

pretextuality⁴ that is at the heart of incompetency-to-stand-trial (IST) law: the fact that decades after the United States Supreme Court's decision in *Jackson v. Indiana*—holding that an incompetent-to-stand-trial criminal defendant cannot be housed indefinitely in a maximum security forensic facility because of incompetent status unless it appears likely that he or she will regain competence to stand trial within the “foreseeable future”⁵—nearly half of the states still have not implemented, enforced or operationalized *Jackson*.⁶ And I further tell my audiences that that failure—a failure unthinkable in other areas of constitutional law⁷—better than any other example, demonstrates the fraud and charade of mental disability law.⁸

In the decade since Morris and Meloy published their U.C. Davis article, nothing has been written that has led me to reconsider my position.⁹ Until now. Flatly stated, the article published in this Symposium by Grant Morris and his co-authors (sometimes “the Morris article”) is the most important piece about incompetency-to-stand-trial law ever published, and it may very well be the most important empirical piece ever published about any aspect of foren-

⁴ See Michael L. Perlin, “*Life Is In Mirrors, Death Disappears*”: *Giving Life to Atkins*, 33 N.M. L. REV. 315, 343–44 (2003) [hereinafter Perlin, *Mirrors*]. “Pretextuality” means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends.” *Id.*; see also Perlin, *Outlaw*, *supra* note 1, at 227; Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 422–23 (2000) [hereinafter Perlin, *Healing*]. I first developed these thoughts in 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, 133–35 (1991) [hereinafter Perlin, *Morality and Pretextuality*].

⁵ 406 U.S. 715, 738 (1972).

⁶ Winick, *supra* note 2, at 940–41; Morris & Meloy, *supra* note 3, at 9; see Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 23–24 (1999) [hereinafter Perlin, *Half-Wracked*]; Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 48 (1992).

⁷ Imagine if half the states simply chose to ignore the Supreme Court's decisions in areas such as reproductive rights law, school desegregation, or environmental protection; what sort of public outcry would follow such failures of implementation.

⁸ See generally MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000) [hereinafter PERLIN, *HIDDEN PREJUDICE*].

⁹ This is certainly not to say that there has been no superb scholarship in this area of the law. See, e.g., 4 PERLIN, *MENTAL DISABILITY LAW*, *supra* note 1, § 8A-2.2, at 11–12 n.57 (citing recent “significant” literature). However, I believe that none of this scholarship—no matter its intellectual rigor, empirical grounding, or theoretical brilliance—can match for importance the articles by Winick or by Morris and Meloy, of which I speak here.

sic mental disability law. If there is any rationality in the world, its publication will restructure for all time the debate and the dialogue about expert testimony by forensic mental health professionals in criminal law cases.

Morris and his colleagues show us that *all* our assumptions about forensic testimony—in what had always appeared to be a relatively “easy” area of mental disability law (competency-to-stand-trial determinations)—have been dead wrong. These authors force us to do what scholars, advocates, polemicists and politicians have failed at miserably for the past thirty years—they force us to reconceptualize the role of the expert in the decision making process in what is probably the most important law/mental health professional interaction in the criminal law field: the adjudication of incompetency-to-stand-trial (IST) cases. This is not just “news”; this is *big* news. And it is news that no one could have possibly expected. It is groundbreaking, it is revolutionary, and it is profound. Mental disability law will never (or, at least, *should* never) be the same.

The reader of this essay at this point is logically entitled to ask: Why? What’s the big deal? What is it about this seemingly straightforward and direct article, reporting on paper responses to a multiple-vignette test, that can cause such effusive hyperbole?¹⁰ And this is a fair question. I say what I have said for multiple reasons (as I will explore below), but primarily for an overarching one.

This article forces us to acknowledge that the disagreement among experts—and the most “expert” experts, at that¹¹—is profound and pervasive, so much so that it is perhaps time to dust off the phrase made famous nearly thirty years ago by Bruce Ennis and Tom Litwack, discussing clinical predictions of future dangerousness in the context of civil commitment; that this exercise is no more than “flipping coins in the courtroom.”¹²

¹⁰ Although Professors Morris and Haroun are friends of mine, I never met the third collaborator until after I submitted this paper. Be assured that these connections have no impact on what I am writing here.

¹¹ The authors sent their questionnaire solely to individuals who were either Board Certified in Forensic Psychiatry or Diplomates in Forensic Psychology. See Grant Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL’Y 193, 212 (2004).

¹² Bruce Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974).

There is some irony here, to be sure, in that researchers and clinicians have finally broken the 50% barrier (as reflected in the Ennis and Litwack article). For the most comprehensive research on predictions of violence, see John Monahan, *Clinical and Actuarial Predictions of Violence*, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §§ 7-2.0 to 7-2.4, at 300 (David Faigman et al. eds., 1997).

The implications of this insight reverberate throughout the entire criminal trial process, and will, eventually, force us to rethink the role of expertise in sexually violent predator determinations,¹³ in insanity defense cases,¹⁴ in sentencing matters,¹⁵ and in death penalty inquiries.¹⁶ These, though, are inquiries for a future day. At this point in time, we must focus on the matter at hand. If the odds of obtaining these results were less than one in a billion,¹⁷ what does that say about the role of this evaluation in the criminal law system (and, most importantly, what does it say about the ultimate disposition of tens of thousands of felony cases a year in which there is an inquiry as to the defendant's competency)?¹⁸ The genie, to use a shopworn cliché, is out of the bottle. It cannot be put back.

This article will proceed in the following manner. First, I will look at the Morris article's main findings, and explain why it is so precedent-shaking for all of forensic criminal law, and why it demonstrates, beyond any doubt, the pretextuality of this entire area of the law (something I have been seeking to do for a decade).¹⁹ Second, I will focus on a cluster of points made in the article, and demonstrate how these points reflect the pretextuality to which I have just referred, and how they require us to rethink so many of the basic assumptions generally held about this area of the law. Third, I will focus on another cluster of points made in the article, and demonstrate how those points reflect the *sanism* that is pervasive in all of mental disability law.²⁰ Finally, I will offer some mod-

¹³ On the (unproven) assumption that evaluators have this expertise, see David Shapiro, *Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions*, 34 CAL. W. L. REV. 177, 199-200 (1997).

¹⁴ See, e.g., Michael L. Perlin, "The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment, 82 IOWA L. REV. 1375, 1408 (1997) [hereinafter Perlin, *Borderline*] (one myth associated with the insanity defense is "[a] fear that the soft, exculpatory sciences of psychiatry and psychology, claiming expertise in almost all areas of behavior, will somehow overwhelm the criminal justice system by thwarting the system's crime control component").

¹⁵ See, e.g., Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353 (2001).

¹⁶ See, e.g., Kenneth B. Dekleva, *Psychiatric Expertise in the Sentencing Phase of Capital Murder Cases*, 29 J. AM. ACAD. PSYCHIATRY & L. 58, 58 (2001).

¹⁷ Morris & Meloy, *supra* note 3, at 52.

¹⁸ See 4 PERLIN, MENTAL DISABILITY LAW, *supra* note 1, § 8A-2.1, at 3 n. 5 (citing HENRY J. STEADMAN, BEATING A RAP? DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL 4 (1979) and noting that 36,000 potentially incompetent defendants are evaluated yearly).

¹⁹ See generally Perlin, *Pretexts*, *supra* note 1.

²⁰ See, e.g., Perlin, *Mirrors*, *supra* note 4, at 317 n.28. "Sanism" is an irrational prejudice towards mentally ill persons, which is of the same quality and character as other irrational

est conclusions that we can draw from the publication of this new data.

My title comes from Bob Dylan's towering masterpiece, *Idiot Wind*,²¹ a song whose "searing metaphors and savage language"²² create—to my mind—a perfect milieu for mental disability law analyses. The line in question is part of this angry verse:

It was gravity which pulled us down and destiny which broke us apart[.]
You tamed the lion in my cage but it just wasn't enough to change my heart.
Now everything's a little upside down, as a matter of fact the wheels have stopped[.]
What's good is bad, what's bad is good, you'll find out when you reach the top[.]
You're on the bottom.²³

As I hope to demonstrate in this article, the world of incompetency-to-stand-trial law is truly "upside down," and, in many important ways, the "wheels [of justice] have stopped." I hope that the publication and dissemination of this symposium issue will be the first step in the taming of this "idiot wind."

I. THE SIGNIFICANCE OF THE FINDINGS

Morris and his colleagues report that, in assessing Vignette 1, the 264 forensic psychiatrists and psychologists were evenly divided,²⁴ and characterize that division as "not merely surprising, [but] shocking."²⁵ This is an understatement: It is stupefying. It is

prejudices, and is based largely upon stereotype, myth, superstition and deindividualization. *Id.*

²¹ Bob Dylan, *Idiot Wind*, on BLOOD ON THE TRACKS (Ram's Horn Music 1975) available at <http://www.bobdylan.com/songs/idiot.html> (last visited July 28, 2004) [*hereinafter* *Idiot Wind*].

This is the fourth time that I have turned to that song as inspiration for the title of an article on mental disability law. See Perlin, *Borderline*, *supra* note 14, at 1379–80; Michael L. Perlin, *The Americans with Disabilities Act: "What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top, You're on the Bottom": Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More than "Idiot Wind"?*, 35 U. MICH. J.L. REFORM 235, 241 (2001–02) [*hereinafter* Perlin, *Olmstead*]; Michael L. Perlin, "Big Ideas, Images and Distorted Facts": *The Insanity Defense, Genetics, and the "Political World,"* in GENETICS AND CRIMINALITY: THE POTENTIAL MISUSE OF SCIENTIFIC INFORMATION IN COURT 37, 39 (Jeffrey Botkin, et al., eds. 1999).

²² Perlin, *Olmstead*, *supra* note 21, at 241.

²³ *Idiot Wind*, *supra* note 21.

²⁴ Morris et al., *supra* note 11, at 215.

²⁵ *Id.*

also not random. The authors calculate the chances of this split as being less than one in one billion.²⁶ This is equally stupefying.²⁷

The authors logically conclude from the data that “the defendant’s fate depends only on who performed the evaluation.”²⁸ And, indeed, no other conclusion can reasonably be drawn from these facts, facts which lead the authors to ask—somewhat ruefully, I think—“are forensic psychiatrists and forensic psychologists competent to assess competence?”²⁹ What is the significance of these astounding findings? Let me suggest a few possibilities:

1. We have always accepted as conventional wisdom the fact there is high inter-rater concordance in the assessment of what should be a much more *difficult* evaluation: whether a defendant is insane (meaning, is he not responsible for his acts because of mental illness which led him to, variously, not know right from wrong, or be able to appreciate the nature or quality of his act).³⁰ It would be reasonable to expect greater ambiguity on insanity questions because of several factors: (a) the ambiguity of the tests, (b) the political context of insanity defense evaluations, (c) the greater publicity attached to these cases, and (d) the ultimate implications of the ultimate finding.³¹ Yet most studies have demonstrated unflinchingly that the rate of agreement in these cases is remarkably high—often approaching 90%.³² The contrast is startling.

2. The competency-to-stand-trial test is often seen as an “easy” or “minimalist” one.³³ Only, it is commonly argued, the most “out of it” criminal defendants will be found IST, in large part because the

²⁶ *Id.* at 216.

²⁷ Only one of 273 respondents adequately explained why the Vignette #1 defendant might be competent under the “rational manner” language but *incompetent* under the “rational understanding” standard. *Id.* at 225.

²⁸ *Id.* at 216.

²⁹ *Id.* Cf. Perlin, *Charters*, *supra* note 1 (asking the same question about judges).

³⁰ For a discussion of all insanity tests, see 4 PERLIN, *MENTAL DISABILITY LAW*, *supra* note 1, §§ 9A-3 to 9A-3.7, at 145-79.

³¹ See generally MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1994) [*hereinafter* PERLIN, *INSANITY DEFENSE*].

³² Perlin, *Half-Wracked*, *supra* note 6, at 21 n.96 (citing, *inter alia*, Jeffrey L. Rogers et al., *Insanity Defense: Contested or Conceded?*, 141 AM. J. PSYCHIATRY 885 (1984); Kenneth K. Fukunaga et al., *Insanity Plea: Interexaminer Agreement and Concordance of Psychiatric Opinion and Court Verdict*, 5 LAW & HUM. BEHAV. 325, 326 (1981)).

³³ See Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument For Fairness And Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 171 (2000).

competency test demands so little. What then to do with the utterly contrary findings in this survey?

3. In the years since Bernard Diamond exposed the fallacy of the "impartial expert," scholars, for the most part have avoided the "dirty little question" that was at the core of Diamond's writings in this area: Is there such a thing as a "neutral" or "objective" expert witness? I have always thought that this was a vastly under-discussed question, and perhaps, this article will reinvigorate that debate.³⁴

We ignore the results reported here at our own peril. They tell us that all of our common wisdom about these evaluations is, to be blunt, dead wrong. We can no longer keep our heads conveniently and blissfully buried in the legal, moral and behavioral sands.

II. PRETEXTUALITY AND CRIMINAL INCOMPETENCY LAW

Morris and his colleagues' findings also demonstrate the depths of the pretextuality of the criminal incompetency system. Over a decade ago, I wrote this about the pretexts of that system, under the guise of "morality," as expert witnesses seek to achieve the "right" ends:

"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

³⁴ Perlin, *Pretexts*, *supra* note 1, at 641 (discussing, *inter alia*, Bernard L. Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES CRIM. PSYCHODYNAMICS 221, 223 (1959)). I wrote this a decade ago:

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

Id. Diamond's article has been virtually ignored since that time. *But see* Daniel W. Shuman, et al., *Assessing the Believability of Expert Witnesses: Science in the Jurybox*, 37 JURIMETRICS J. 23, 25 n.10 (1996); Daniel W. Shuman, et al., *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three City Study*, 34 JURIMETRICS J. 194, 195 n.7 (1994) (both citing Diamond's article).

or scholarly attention suggests that specific social ends animate the entire incompetency to stand trial system.³⁵

What light does the Morris study shed on these issues?

The Morris article reveals the extent to which pretextuality dominates the incompetency-to-stand-trial system. First, the entire system—implicitly and explicitly—*assumes* that the defendant committed the predicate criminal act with which he is charged.³⁶ Although there is nothing in the invocation of the incompetency status that at all concedes factual guilt (as opposed to the entry of a not-guilty-by-reason-of-insanity plea that concedes the commission of the underlying criminal act),³⁷ it is assumed by all that the defendant did, in fact, commit the crime.

When I was a public defender, I represented in individual cases well over 200 criminal defendants who had been found—at some point—incompetent to stand trial. In not a single case did the prosecutor, the judge, or the forensic evaluator even acknowledge the possibility that the defendant might have been “factually innocent” of the underlying charge. This is a topic that is rarely, if ever, addressed in the case law or the legal or behavioral literature, but I am convinced that it is one that must be taken seriously if we are going to carefully and comprehensively examine this question.³⁸

In fact, the research shows that “expert” evaluations frequently rely not on the examiners’ experience or knowledge but on the facts of the criminal act charged.³⁹ In one study, 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.”⁴⁰

³⁵ Perlin, *Pretexts*, *supra* note 1, at 653; see Perlin, *Morality and Pretextuality*, *supra* note 4.

³⁶ See Morris et al., *supra* note 11, at 194–96.

³⁷ See *Jones v. United States*, 463 U.S. 354, 363 (1983) (“A verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness.”).

³⁸ See Perlin, *Outlaw*, *supra* note 1, at 206–07.

Consider this easy hypothetical. A defendant is charged with crime and is, in fact, factually innocent. Walking to the courthouse for the initial bail hearing, he is hit on the head by a cinder block from ongoing courthouse construction, causing severe organic brain damage. He will be found—most likely—incompetent to stand trial, but such finding in no way should allow us to assume that he is factually “guilty” of the underlying charge.

³⁹ Perlin, *Pretexts*, *supra* note 1, at 663.

⁴⁰ *Id.* (quoting Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1096 (1976)).

Second, the paper notes the Supreme Court's fact-not-in-evidence assumption that, in competency-to-stand-trial determinations, defense counsel "will often have the best-informed view of the defendant's ability to participate in his defense,"⁴¹ and then observes that counsel "typically does not testify in the incompetency hearing."⁴² The empirical data is even more dramatic than that. In a recent paper, Professor Randy Otto and his colleagues reported on data that revealed that, in a study of 674 juvenile incompetency cases (the subset where one might reasonably expect counsel would be *more* involved than in other cases), not a *single* defense counsel testified at the juvenile's competency hearing.⁴³ This pretext is just as glaring.

Third, the analysis of Vignette # 1 demonstrates that many forensic witnesses insist on "playing lawyer," making decisions as to incompetency based on their perceptions of whether a defendant's tactical decision (e.g., to refuse to raise an insanity defense) is a rational one.⁴⁴ There are many valid reasons why a defendant would want to reject an insanity defense (not the least of which is the likelihood that he would be incarcerated in a maximum security facility for a far greater time period following a successful insanity plea than had he been sentenced to the maximum term allowable under the criminal law).⁴⁵ For the forensic expert to make these conclusions reflects both inappropriate and pretextual behavior.

⁴¹ Morris et al., *supra* note 11, at 199 (quoting *Medina v. California*, 505 U.S. 437, 450 (1992)).

⁴² *Id.*

⁴³ Randy Otto, "Evaluations of Juveniles' Competence to Proceed," paper presented to the American Academy of Psychiatry and Law, Newport Beach, Cal., October 24, 2002; see also Annette Christy et al., *Juveniles Evaluated Incompetent to Proceed: Characteristics and Quality of Mental Health Professionals' Evaluation*, 35 PROF. PSYCHOL.: RES. & PRAC. 380 (2004) (of the 1357 evaluations generated in the 674 cases, only thirty-three reported on an interview by the examining psychologist of the juvenile's lawyer).

⁴⁴ Morris et al., *supra* note 11, at 220.

⁴⁵ See *Jones*, 463 U.S. at 369 ("There simply is no necessary correlation between severity of the offense and length of time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment."). This is especially significant in a case such as the one in the vignette where the maximum sentence the defendant would face would be a year in the county jail. See Morris et al., *supra* note 11, at 213, 219.

The research demonstrates that, in the case of misdemeanors and lesser felonies, defendants who "successfully" plead insanity generally serve *nine* times as long in a maximum security facility than they would have served had they been convicted. See Perlin, *Outlaw*, *supra* note 1, at 210; PERLIN, *INSANITY DEFENSE*, *supra* note 31, at 110-11; HENRY J. STEADMAN ET AL., *BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM* 58-61 (1993).

Fourth, the responses reveal an inappropriate fusing on the part of some of the experts between their evaluative role and their (non-existent) treating role.⁴⁶ One respondent thus answered: "She [the subject of the vignette] appears to need medication. I would lean toward unfit with greater period of observation as an inpatient."⁴⁷ The inappropriateness of this sort of response was first noted over thirty years ago,⁴⁸ and remarkably, it still appears to be flourishing. Again, it is the rankest sort of pretext to invoke or adapt the competency evaluation process to serve as a vehicle for treatment needs.

Fifth, some of the responders simply rejected the significance of the difference between the two incompetency tests used in the study; "I'm not impressed with the standards . . . really being different," wrote one.⁴⁹ Again, there is nothing new here:

[A]fter 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."⁵⁰

What is depressing is that this behavior continues, unabated, after more than twenty years.

Sixth, the article reveals that, in spite of the impressive array of new competency assessment instruments now available to evaluators, "the overwhelming majority of psychiatrists and psychologists do not use psychological tests in assessing a defendant's competency."⁵¹ This refusal to use such tools (e.g., the MacArthur

On the right of a defendant to refuse to plead the insanity defense, see 4 PERLIN, MENTAL DISABILITY LAW, *supra* note 1, § 9A-8, at 241-45.

⁴⁶ Morris et al., *supra* note 11, at 222-23.

⁴⁷ *Id.* at 222.

⁴⁸ See ARTHUR MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 134 (1970) (noting the competency process is frequently invoked to effect hospitalization that might not otherwise be possible under the state's civil commitment statute); see also Winick, *supra* note 2, at 933.

⁴⁹ Morris et al., *supra* note 11, at 224.

⁵⁰ Perlin, *Pretexts*, *supra* note 1, at 645 (quoting William O. McCormick, *Involuntary Commitment in Ontario: Some Barriers to the Provision of Proper Care*, 124 CAN. MED. ASS'N J. 715, 717 (1981)).

⁵¹ Morris et al., *supra* note 11, at 234 (relying, *inter alia*, upon Randy Borum & Thomas Grisso, *Psychological Test Use in Criminal Forensic Evaluations*, 26 PROF. PSYCHOLOGY: RES. & PRAC. 465, 468 (1995) (11% of psychiatrists and 36% of psychologists regularly used such tests)). For some perspective, consider that this test has only been referred to in two unpublished cases. See *Anderson v. State*, No. 04-00-00751-CR, 2002 WL 31556954 (Tex. App. 2002); *Commonwealth v. Morasse*, No. 1999-01420, 2001 WL 1566407 (Mass. Super. 2001).

Competence Assessment Tool—Criminal Adjudication (MacCAT—CA))⁵² reflects, again, a pretextual turn on the part of experts who presumably feel that their expertise enables them to make such determinations without the assistance of “standardized and nationally norm-referenced clinical measure[s].”⁵³

Finally, the respondents consistently failed to differentiate between forensic and clinical issues,⁵⁴ and it is this error that in many ways best demonstrates the pretextuality that is at play here. The answers of “numerous” respondents “clearly suggested” that clinical questions concerning the presence of mental illness, psychosis and amenability to treatment were determinative of their final (putatively) *forensic* conclusion.⁵⁵ The overt—perhaps defiant—call on the part of the respondents to willfully ignore the legal standard and to superimpose their own moralistic sense of how the case should be resolved tells us that this pretextual system is far more corrupt than any of us had known.

Writing some 14 years ago, Michael Saks charged that expert witnesses often act like “imperial experts” who install themselves as “temporary monarch[s]” by replacing a “social preference expressed through the law and legal process with [their] own preferences.”⁵⁶ Saks based his conclusion on court hearings that he watched in one courthouse.⁵⁷ The cohort of responders to the Morris survey—from across the nation⁵⁸—clarifies that this is not, had anyone so thought it to be, simply an idiosyncratic or local problem.

One evaluator, in responding to the vignettes, answered in this manner: “Irrespective of the specific legal definition of incompetency, in this case the defendant is incompetent based on active psychosis that impairs his reasoning ability and judgment.”⁵⁹ Over thirty years ago, Professors Robert A. Burt and Norval Morris set

⁵² See, e.g., THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESMENTS AND INSTRUMENTS* 97 (2d ed. 2003).

⁵³ Morris et al., *supra* note 11, at 233 (quoting Patricia Zapf & Jodi Viljoen, *Issues and Considerations Regarding the Use of Assessment Instruments in the Evaluation of Competency to Stand Trial*, 21 *BEHAV. SCI. & L.* 351, 359 (2003)).

⁵⁴ *Id.* at 237.

⁵⁵ *Id.*; see also Christy et al., *supra* note 43 (calling on examiners to understand the difference between forensic and therapeutic assessments).

⁵⁶ Michael J. Saks, *Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts*, 14 *LAW & HUM. BEHAV.* 291, 294 (1990).

⁵⁷ *Id.* at 293.

⁵⁸ See Morris et al., *supra* note 11, at 212.

⁵⁹ *Id.* at 237–38.

out the paradigmatic incompetency-to-stand-trial testimonial dialogue:

Judge: Doctor, is he incompetent?

Psychiatrist: Your Honor, he is psychotic!⁶⁰

When I first wrote about this dialogue, I said this:

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.⁶¹

Apparently, nothing has changed in thirty-plus years.

III. SANISM AND CRIMINAL INCOMPETENCY LAW

In a 2000 law review article, I had this to say about sanism and criminal incompetency law:

Sanism similarly infects incompetency-to-stand-trial jurisprudence in at least four critical ways: (1) courts resolutely adhere to the conviction that defendants regularly malingering 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.⁶²

If there is any better evidence than the Morris article to support the fourth of these assertions, I frankly cannot imagine what that might be. The Morris article—in its reportage on the responses and elsewhere—highlights other evidence of rampant sanism in the entire incompetency determination process. Initially, the authors note,

⁶⁰ Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Insanity Plea*, 40 U. CHI. L. REV. 66, 92 n.109 (1972).

⁶¹ Perlin, *Pretexts*, *supra* note 1, at 657.

⁶² Perlin, *Outlaw*, *supra* note 1, at 235–36; *see also* Perlin, *Pretexts*, *supra* note 1, at 678 (discussing, *inter alia*, *Hensley v. State* (575 N.E.2d 1053, 1055 (Ind. App. Ct. 1991) (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"; *State v. Pruitt*, 480 N.E.2d 499, 504 (Ohio Ct. App. 1984) (sole expert witness testified in conclusory terms that the defendant "suffered no mental disease or defect [and] 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").

“trial judges appear to have little interest in carefully weighing all the evidence, and in making their own independent assessment of the defendant’s competence.”⁶³ Why? Why do judges agree with the forensic evaluator in 90% or 96.3% or 99.7%(!) of the cases studied?⁶⁴ This failure to make independent assessments in this area of law reflects the bleakest sort of sanism. Judge Bazelon’s words of years ago still ring true:

Very few judges are psychiatrists. But equally few are economists, aeronautical engineers, atomic scientists, or marine biologists. For some reason, however, many people seem to accept judicial scrutiny of, say, the effect of a proposed dam on fish life, while they reject similar scrutiny of the effect of psychiatric treatment on human lives. [I]t can hardly be that we are more concerned for the salmon than the schizophrenic.⁶⁵

This unprecedented-in-any-other-area-of-the-law abdication of judicial responsibility helps to define sanism.⁶⁶

The finding of competence is not trivial, nor is it a “legal technicality” (if that beleaguered word has any place at all in discussions of constitutional law and policy).⁶⁷ It is, rather, the bedrock of a legal system purportedly, at least in part, premised upon the dignity of the individual,⁶⁸ and one which allows the punishment of only individuals who can comprehend the significance of that punishment.⁶⁹ For judges to say, as Professor Zapf has reported, that it would make their job “much easier” if experts would “simply state whether

⁶³ Morris et al., *supra* note 11, at 199.

⁶⁴ See *id.* at 199–200 nn.28, 30 (citing RONALD ROESCH & STEPHEN GOLDING, *COMPETENCY TO STAND TRIAL* (1980) (90%); Steven Hart & Robert Hare, *Predicting Fitness to Stand Trial: The Relative Power of Demographic, Criminal and Clinical Variables*, 4 *FORENSIC REP.* 53 (1992) (96.3%); and Patricia A. Zapf et al., *Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?*, 4 *J. FORENSIC PSYCHOL. PRAC.* 27, 39 (2004) (99.7%).

⁶⁵ David L. Bazelon, *Implementing the Right to Treatment*, 36 *U. CHI. L. REV.* 742, 743 (1969), quoted in Henry Dlugacz, *Riggins v. Nevada: Towards a Unified Standard for a Prisoner’s Right to Refuse Medication?*, 17 *LAW & PSYCHOL. REV.* 41, 79 (1993).

⁶⁶ On sanist judges in general, see PERLIN, *HIDDEN PREJUDICE*, *supra* note 8, at 51–55; see also *id.* at 47 (“Judges ‘are embedded in the cultural presuppositions that engulf us all’”) (quoting Anthony D’Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 *WM. & MARY L. REV.* 329, 332 (1991)).

⁶⁷ See Robert J. Boeckmann & Tom Tyler, *Commonsense Justice and Inclusion Within the Moral Community: When Do People Receive Procedural Protections from Others?*, 3 *PSYCHOL. PUB. POL’Y & L.* 362, 363 (1997) (discussing public perceptions of insanity defense as such a “technicality”).

⁶⁸ See generally Perlin, *Dignity*, *supra* note 1.

⁶⁹ See Perlin, *Mirrors*, *supra* note 4, at 326–47 (discussing the Supreme Court’s decision in *Atkins v. Virginia*, 122 *S. Ct.* 2242 (2002) (barring execution of persons with mental retardation)).

the defendant is competent or not⁷⁰ is, to repeat a word I have already used here, stupefying.

As Morris and his colleagues underscore: “[T]he competency adjudication process has not been taken seriously, either by prosecutors or defense counsel who raise the issue of competence and introduce evidence on this issue, or by judges who supposedly consider that evidence and make their decisions.”⁷¹ This trivialization—premised implicitly on the assumption that the people about whom these decisions are made are somehow not “worthy” of true constitutional protection (and are, perhaps, less than human)⁷²—is the rotten core of sanism.⁷³

The abdication on the part of lawyers (leaving it to mental health professionals to develop their own competence assessment standards with little assistance)⁷⁴ and on the part of judges (refusing to independently assess clinical testimony),⁷⁵ the failure of most clinicians to use standardized and validated tests,⁷⁶ the lack of meaningful dialogue between the lawyer and the evaluator,⁷⁷ are all symptoms of the same malignancy: the corrosive impact of sanism on the legal process.

IV. CONCLUSION

It is rare for a law review article to force us to significantly change the way that we construct an area of the law. The lead article in this symposium does that by exposing the fraudulence of the in-

⁷⁰ Zapf, *supra* note 64, at 35.

⁷¹ Morris et al., *supra* note 11, at 227.

⁷² Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 394 (1992) (discussing sanist myth that “mentally ill individuals are ‘different,’ and, perhaps, less than human”); Michael L. Perlin, *Where The Winds Hit Heavy on The Borderline: Mental Disability Law, Theory And Practice, “Us” And “Them,”* 31 LOY. L.A. L. REV. 775, 785 (1998).

⁷³ On sanism’s “malignant,” “corrosive,” “pernicious,” and “pervasive” impact on mental disability law, see Michael L. Perlin, “*She Breaks Just like a Little Girl: Neonaticide, the Insanity Defense, and the Irrelevance of “Ordinary Common Sense,”*” 10 WM. & MARY J. WOMEN & L. 1, 6, 24 n.188 (2003) [*hereinafter* Perlin, *Neonaticide*]; Michael L. Perlin, “*You Have Discussed Lepers and Crooks: Sanism in Clinical Teaching,*” 9 CLINICAL L. REV. 683, 685, 687 n.15 (2003); Perlin, *Healing*, *supra* note 4, at 419; Perlin, *Mirrors*, *supra* note 4, at 348.

⁷⁴ Morris et al., *supra* note 11, at 235–36.

⁷⁵ *Id.* at 235.

⁷⁶ *See id.* at 234, 237–38.

⁷⁷ *Id.* at 235–36.

competency evaluation process, and by demonstrating that our “ordinary common sense”⁷⁸ is gravely distorted and deeply flawed.

These astonishing revelations underscore the conclusion that the mental disability law system is a pretextual and sanist one, and force us to consider the implications of this teaching. If we now know that clinical decision-making is as random and incoherent as it appears to be, and that the courts wish to abdicate their role even more completely, what does that say about the way we continue to carry on business-as-usual in this area? At what point will we finally acknowledge that this system is completely damaged and in need of a complete rebuilding and reconceptualization?

Everything here, to return to the lyric used in my title, is more than “a little upside down.” And although the “wheels” (of justice) have not “stopped,” the authentic administration of justice has. In the next verse of *Idiot Wind*, the song from which the lyric comes, Dylan sings, “I noticed at the ceremony, your corrupt ways had finally made you blind.”⁷⁹ Perhaps the publication of this remarkable article will finally open our eyes.

⁷⁸ “Ordinary common sense” refers to a self-referential and non-reflective way of constructing the world (“I see it that way, therefore everyone sees it that way; I see it that way, therefore that’s the way it is”). See, e.g., Perlin, *Neonaticide*, *supra* note 73, at 8; PERLIN, HIDDEN PREJUDICE, *supra* note 8, at 16–20; see also Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990); PERLIN, INSANITY DEFENSE, *supra* note 31, at 287–310.

⁷⁹ *Idiot Wind*, *supra* note 21.

