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Preface to Bruce Arrigo's Punishing the Mentally Ill: A Critical Analysis of Law and Psychiatry

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Preface

One of the few memories from my introductory philosophy course in college—over 35 years ago—is the parable of the blind men and the elephant.

> Four blind men come across an elephant. They decide to feel the elephant to determine what sort of creature it is. One blind man feels the back leg of the elephant. He says, "An elephant is like a tree." The second blind man feels the trunk. He says, "An elephant is like a snake." The third blind man feels the tail. He says, "An elephant is like a rope." The fourth blind man is afraid. He doesn't feel the elephant at all.
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> The three blind men argue a long time about what an elephant is and based on their own personal experience each is right.[1]

This affected me greatly, when I first heard it at age 18, and it has stayed with me to this day. It seems to explain so much of our social, intrapsychic, political, and cultural behavior, especially the "disconnects" we all frequently experience in everyday work and professional life. When I started writing about the meretricious allure of "ordinary common sense" in legal theory,[2] I realized that that parable helped explain our distorted thinking processes that have led to such incoherence in, for example, our insanity defense policies.[3]

When I read the manuscript of Bruce Arrigo's brilliant new book, *Punishing the Mentally Ill: A Critical Analysis of Law and Psychiatry*, the parable came back to me in a very different way. For what Professor Arrigo has done is to expose the failures and shortcomings of those methodologies that insist on looking at the "mental health system" through one perspective only—be that the clinical, the legal, the behavioral, the empirical, the political, or the theoretical. Professor Arrigo—who demonstrates in this book a prodigious knowledge of *all* of these approaches—aims to do more, and he sets out that aim clearly.

In the first pages of his Introduction he says this:

> I am interested in exploring the depths of punishment enacted first unconsciously in symbolic form and subsequently legitimized, knowingly or not, in social effect. In other words, this project seeks to link clinicolgeal practices (e.g., predicting dangerousness, executing the mentally ill) with unspoken desires (e.g., the metaphysics of presence, the social control thesis), revealing how ideology and circumscribed knowledge inform the behavior of law and psychiatry.[4]

His thesis is that we cannot possibly understand the mental health system without confronting ideology, desires, and unconscious imagery. He also argues that this perception controls whether we are looking at civil or criminal mental disability law, at institutional or community mental disability law policy, or questions of mental health advocacy. And I agree. By framing his arguments as he does, he recognizes that what is really going on in mental disability policy decision-making is complex, and is informed by a discourse that is highly dependent on our understanding of the depths of our punitive urges, and the roots of our need to control those perceived to be deviant.[5]

Professor Arrigo shows how these attitudes inform our clinical policies and out legal policies, whether we are looking at involuntary civil commitment, the provision of community treatment, the right to refuse treatment, an insanity defense trial, or the decision making involved in determining whether a person with mental disability can be executed. By doing this, he forces us to leave the comfortably narrow cocoons of our own substantive specialties (and professional calling), and makes us understand how a set of unconsciously integrated attitudes explains why we do what we do—especially in the name of the state—in the way we deal with persons with mental disability.

I am interested in all of the topics that Professor Arrigo has brought to the scholarly table, and have written about many of them.[6] I was most interested, however, in his chapter on "the ethics of advocacy for the mentally ill." This is a topic that has been severely underconsidered over the years,[7] and about which there has truly been little that is original or controversial. Professor Arrigo's thesis here is clear: "Each time the mentally ill (or their representatives) engage the law, they strengthen and bolster their dependence on it, and, further, *become somewhat disempowered because of it.*"[8] This, he concludes, establishes the "profound paradox" faced by persons with mental disability: "to endure without rights (as the law has taken them away), or seek rights from the law, which, in turn, fortifies the power of the law."[9] And this leads him to his ultimate question on this topic:

> If advocacy in mental health law is anchored by clinicolegal interpretations of rights, illness, competency, and the like, and if

> confinement decisions hinge, fundamentally, on an appeal to established structures of civil and criminal institutional authority, what room, if any, is legitimately left for the disparate voices of the psychiatrically disordered? Indeed, given these constructed realities, on whose behalf is the advocacy truly initiated?[10]

This is, of course, very unsettling, perhaps more so to someone like me who spent 11 years representing persons with mental disabilities (3 as a Public Defender, specializing in cases involving incompetency status determinations and insanity trials, and 8 as director of the NJ Division of Mental Health Advocacy, a state-funded, subcabinet office vested with the power to provide legal representation in both individual and class action matters for persons with mental disability), who, for the past 17 years, has taught students, in both classroom and clinical settings, to do the same,[11] and who employs different modes of legal analysis as a means of expanding the rights of persons with mental disabilities through mental health advocacy.[12] Professor Arrigo's arguments here "push the envelope" in directions new to interdisciplinary scholarship, and will, I hope, inaugurate a new and important dialogue in the mental health "rights community."

For the past decade or so, I have focused my own writing on what I term *sanism* as well as what I term *pretextuality*. Simply put, 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. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly on stereotype, myth, superstition, and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.

And, "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." This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.[13]

I turned to these concepts as a way of explaining why and how mental disability law has developed as it has. And I believe that the perniciousness and malignance of these concepts *do* so explain that law, whether we are looking at assisted outpatient commitment law, sexually violent predator laws, assessing defendants' competence to plead guilty, the right of institutionalized patients to

sexual interaction, or any of the other "standard" topics of mental disability law about which courts decide cases and scholars write articles.

I have sought—especially in my earlier writings of the topic—to explain the historical, religious, and political sources of sanism, and how, to a great extent, these sources still animate current attitudes and behaviors.[14] But, having said that, I always have wondered if there were still "something else" to be added to help solve this most difficult of social policy puzzles. Professor Arrigo provides that "something else" in this book, and he does so clearly, provocatively, and persuasively. It is one that we will be thinking about for a long, long time.

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