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# Sanism and the Law

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"Sanism," an irrational prejudice against people with mental illness, is of the same quality and character as other irrational prejudices such as racism, sexism, homophobia, and ethnic bigotry that cause (and are reflected in) prevailing social attitudes [1, 2]. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in irrational responses to events in both everyday life and the legal process [3, 4].

I have written extensively about the roots of the assumptions that are made by the legal system about persons with mental disabilities. These mistaken assumptions include: that people with mental illness are erratic, deviant, sexually uncontrollable, emotionally unstable, superstitious, lazy, and ignorant; that they demonstrate a primitive morality; they are invariably more dangerous than persons without mental illness, and such dangerousness is easily and accurately identified by experts; that for a person in treatment for mental illness to decline to take prescribed antipsychotic medication is an excellent predictor of (1) future dangerousness and (2) need for involuntary institutionalization; that people with mental illness should be segregated in large, distant institutions because their presence threatens the economic and social stability of residential communities; that they give in too easily to their basest instincts and do not exercise appropriate self-restraint [5].

These assumptions—which reflect societal fears and apprehensions about mental disability, persons with mental disabilities, and the possibility that any individual may become mentally disabled—ignore the most important question of all—why do we feel the way we do about people with mental disabilities [6, 7]? One explanation may lay in history. Thousands of years ago, it was commonly believed that sickness was "a punishment sent by God" [8]. Historian Judith Neaman has concluded that "demonic possession remains the simplest, the most dramatic, and secretly, the most attractive of all explanations of insanity in the Middle Ages" [9, 10]. Society saw madness as a condition "in which a person was 'possessed, controlled, or affected by some supernatural power or being,' and this connection has remained 'extremely resilient in western culture'" [11].

Any attempt to place mental disability jurisprudence in context results in confrontation with a discordant reality: social science data that refutes these

assumptions is rarely a coherent influence on mental disability law doctrine [12-14]. Rather, the legal system selectively—teleologically—accepts or rejects social science data depending on whether or not the use of that data meets the *a priori* needs of the legal system [15, 16]. In other words, social science data is privileged when it supports the conclusion the fact finder wishes to reach, but it is subordinated when it questions that conclusion [17].
By way of example, as Susan Stefan has perceptively noted, courts routinely find mentally disabled women to lack sufficient competence to engage knowingly and voluntarily in sexual intercourse but just as routinely find them competent to consent to give their children up for adoption. In one startling case, a court made both of these findings simultaneously about the same woman [18].

Thus, it is no surprise that courts selectively accept stereotypes to exert social control—engaging in gross stereotyping about the impact of mental illness on behavior when sentencing persons convicted of crime or deciding on involuntary civil commitment and rejecting the stereotypes when acknowledging them might lead to a socially undesirable result, such as an insanity acquittal [19].

This stereotyping of the effects of mental illness also flows from the meretricious impact of a false "ordinary common sense" ("OCS") and the pernicious impact of heuristic thinking on judicial decision making. OCS is self-referential and non-reflective ("I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is"). Not surprisingly, many of the greatest areas of OCS-caused dissonance emerge in cases involving family relationships ("If Joe was that bad...why didn't the defendant divorce him? Why didn't she just leave him?"), sexual assault ("Look at the way she was dressed; she was asking for it"), and mental illness ("If he had just tried harder, he really could have gotten better"). Areas such as these are treasure troves of self-righteousness, narrow thinking, and "atrophied moral development" [20].

Heuristics are "simplifying cognitive devices that frequently lead to...systematically erroneous decisions through ignoring or misusing rationally useful information" [21-23]. The vividness heuristic, for example, is a cognitive simplifying device through which a "single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made" [24]. So, because most high-profile cases involving the insanity defense are the focus of exaggerated media attention, the illusion is created that they are reflective of the entire universe of insanity cases, or even the entire universe of all cases [25].

The law's use and misuse of social science and OCS nurture sanism. Decision making in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decision making. Sanist decision making infects all branches of mental disability law and distorts mental disability jurisprudence by, for instance, relying vividly on the heuristic of

the statistically exceptional but graphically compelling case of the person with a major mental disorder who is randomly violent [26].

Paradoxically, while sanist decisions are frequently justified as being therapeutically based, sanism customarily results in antitherapeutic outcomes [27-29]. This happens in a wide array of decisions, ranging from those that commit insanity acquittees charged with misdemeanors to maximum-security facilities for many years longer than the maximum sentence they would have received if found guilty [30] to those that ignore a Supreme Court decision limiting the indefinite commitment of persons found permanently incompetent to stand trial [31] to those that mandate medication over objection even where there is a strong likelihood that neurological side effects may result [32].

Judges are not immune to sanism. “Embedded in the cultural presuppositions that engulf us all,” judges also take deeper refuge in heuristic thinking and flawed, non-reflective “ordinary common sense” [33]. They reflect and project the conventional morality of the community, and judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes [34]. Thus, a trial judge responding to a National Center for State Courts’ survey indicated that, in his mind, defendants who were incompetent to stand trial *could have* communicated with and understood their attorneys “if they [had] only wanted” [35]. Judges are not the only sanist actors. Lawyers, legislators, jurors, and witnesses (both lay and expert) all exhibit sanist traits and characteristics [36].

Sanist attitudes also lead to pretextual decisions. “Pretextuality” refers to the fact that courts regularly accept (either implicitly or explicitly) testimonial dishonesty, countenance liberty deprivations in disingenuous ways that bear little or no relationship to case law or to statutes, and engage in dishonest (and frequently meretricious) decision making, specifically when witnesses, especially expert witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends” [37]. The failure of more than half the states to implement the Supreme Court’s 1972 decision in *Jackson v. Indiana* [38] (limiting the length of time one can be kept in a maximum security forensic psychiatric facility solely because of incompetence to stand trial) is a textbook example of pretextuality [39]. As I have written elsewhere, “the political decision making in insanity acquittal cases—best exemplified by a National Institute of Mental Health Report conceding that individual release decisions are made in accordance with political dictates in ‘controversial cases’—demonstrates that pretextuality drives this area of jurisprudence” [39]. 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 or corrupt testifying.

Pretextual devices such as condoning perjured testimony, distorting appellate readings of trial testimony, subordinating statistically significant social science data, and enacting purportedly prophylactic civil rights laws that have little or no “real-

world" impact dominate the mental disability law landscape [40]. A few examples are illustrative. 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 this right to statutory review [41]. While former attorney general William French Smith told Congress that the insanity 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" [42]. 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 [43, 44].

In other circumstances, courts simply "rewrite" factual records to avoid having to deal with social science data that controverts their view of how the world "ought to be" [45]. The classic example is Chief Justice Burger's opinion for the court in *Parham v. J.R.* (1979) [46], approving more relaxed involuntary civil commitment procedures for juveniles than for adults. Gail Perry and Gary Melton accurately characterized the *Parham* case in this way:

> The *Parham* case is an example of the Supreme Court's taking advantage of the free rein on social facts to promulgate a dozen or so of its own by employing one tentacle of the judicial notice doctrine. The Court's opinion is filled with social facts of questionable veracity, accompanied by the authority to propel these facts into subsequent case law and, therefore, a spiral of less than rational legal policy making [47].

Even when courts do acknowledge the existence and possible validity of studies that take a position contrary to their decisions, this acknowledgement is frequently little more than mere "lip service." Involuntary civil commitment and periodic review hearings, for example, rarely make vigorous and authentic inquiries into the restrictivity of confinement and the availability of community treatment, both of which they are mandated to do by an array of court decisions [48], and refusal-of-treatment hearings rarely take seriously the autonomy-privileging language of cases such as *Rivers v. Katz* [49, 50].

Until system "players" confront the ways that sanist biases inspire the selective incorporation or misuse of social science data and such pretextual decision making, mental disability jurisprudence will remain incoherent. Behaviorists, medical researchers, social scientists, and legal scholars must begin to develop research agendas to (1) determine and assess the ultimate impact of sanism, (2) better understand how social science data is manipulated to serve sanist ends, and (3) formulate normative and instrumental strategies that can be used to rebut sanist pretextuality in the legal system. Practicing lawyers need to articulate the existence and dominance of sanism and of pretextual legal behavior in their briefs and oral arguments so as to sensitize judges to the underlying issues.

A rare example of judicial understanding of the ravages of sanism and pretextual thinking is *In re the mental health of K.G.F.* [51], a decision by the Montana Supreme Court that focused specifically on sanism as a factor in assessing effectiveness of counsel in involuntary civil commitment hearings. Underscored the court:

> The use of such stereotypical labels [to describe people with mental illness, e.g., "idiots" and "lunatics"]—which, as numerous commentators point out, helps create and reinforce an inferior second-class of citizens—is emblematic of the benign prejudice individuals with mental illnesses face, and which are, we conclude, repugnant to our state constitution. *See generally* Michael L. Perlin, *On "Sanism,"* 46 Smu L. Rev. 373, 374 (1992) (identifying prejudice toward the mentally ill among "well-meaning citizens" as the same "quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry," which in turn is reflected in our legal system) [and Bruce Winick's 1999 article "Therapeutic Jurisprudence and the Civil Commitment Hearing" in the *Journal of Contemporary Legal Issues*] (stating that because people with a mental illness "already have been marginalized and stigmatized by a variety of social mechanisms, self-respect and their sense of their value as members of society are of special importance to them" throughout legal proceedings) [52].

"Sanism" is well known in the legal community. A recent search of the WESTLAW database reveals that it has been referred to in 272 law review articles between 1992 and 2013. It is, sadly, much less well-known in the medical community. It is vital that physicians begin to confront its scope and its significance.

**References**


1. The classic treatment is Allport GW. *The Nature of Prejudice*. New York: Addison-Wesley; 1954.
2. For an important alternative perspective, see Young-Bruehl E. *The Anatomy of Prejudices.* Cambridge, MA: Harvard University Press; 1998.
3. The phrase was first used by Birnbaum. See Birnbaum M. The right to treatment: some comments on its development. In: Ayd F, ed. *Medical, Moral and Legal Issues in Mental Health Care.* Baltimore: Williams & Wilkins; 1974:97-141.
4. See generally, Perlin ML. On "sanism." *SMU Law Rev.* 1992;46:373-407.
5. Perlin, "On 'sanism,'" 394-397.
6. Perlin ML. *The Hidden Prejudice: Mental Disability on Trial.* Washington, DC: American Psychological Association; 2000. Discusses roots of sanism and the relationship between sanism and other "ismic" behavior, such as racism, sexism, and homophobia.
7. Perlin, *The Hidden Prejudice,* note 2.

8. Biggs J. *The Guilty Mind: Psychiatry and the Law of Homicide.* San Diego, CA: Harcourt Brace; 1955:26.
9. Neaman JS. *Suggestion of the Devil: The Origins of Madness.* New York: Anchor Press; 1975:31.
10. On how mental illness was "God's punishment for sin," see Neaman, 50.
11. Perlin ML. "There are no trials inside the gates of Eden": mental health courts, the Convention on the Rights of Persons with Disabilities, and the promise of therapeutic jurisprudence. In: Mcsherry B, Freckelton I. *Coercive Care: Rights, Law, and Policy*. New York: Routledge; 2013.
12. English J. The light between twilight and dark: Federal criminal law and the volitional insanity defense. *Hastings Law J.* 1988;40(1):20-52.
13. "The prevailing opinions in the Court's recent major capital punishment decisions have increasingly displayed an unwillingness to incorporate the results of relevant social science findings." Acker J. A different agenda: the Supreme Court, empirical research evidence, and capital punishment decisions, 1986-1989. *Law Society Rev.* 1993;27(1):81.
14. "The parsimonious explanation for the failure of social science data to influence the Court in death penalty cases seems to be that the outcome of these cases is frequently a foregone conclusion." Ellsworth P. Unpleasant facts: the Supreme Court's response to empirical research on capital punishment. In: Haas KC, Inciardi JA, eds. *Challenging Capital Punishment: Legal and Social Science Approaches.* Thousand Oaks, CA: Sage Publications; 1988:208.
15. Perlin ML. Morality and pretextuality, psychiatry and law: of "ordinary common sense," heuristic reasoning, and cognitive dissonance. *Bull Am Acad Psychiatry Law*. 1991;19(2):131-150.
16. Perlin ML. Pretexts and mental disability law: the case of competency. *U Miami Law Rev.* 1993;47:625-688.
17. "Judges' refusals to consider the meaning and realities of mental illness cause them to act in what appears, at first blush, to be contradictory and inconsistent ways and, teleologically, to privilege (where that privileging serves what they perceive as a socially-beneficial value) and subordinate (where that subordination serves what they perceive as a similar value) evidence of mental illness." La Fond JQ, Durham ML. *Back To The Asylum: The Future Of Mental Health Law And Policy in the United States.* New York: Oxford University Press; 1992:156.
18. Stefan S. Silencing the different voice: feminist theory and competence. *U Miami L Rev.* 1993;47:805.
19. Perlin ML. "Baby, look inside your mirror": the legal profession's willful and sanist blindness to lawyers with mental disabilities. *U Pitt Law Rev.* 2008;69:600.
20. Perlin ML. "She breaks just like a little girl": neonaticide, the insanity defense, and the irrelevance of "ordinary common sense." *William and Mary J Women Law*. 2003;10:8-9.
21. Perlin, "She breaks," 8.

22. Perlin ML. Unpacking the myths: the symbolism mythology of insanity defense jurisprudence. *Case W Res L Rev*. 1989;40:644.
23. Cucolo HE, Perlin ML. Preventing sex-offender recidivism through therapeutic jurisprudence approaches and specialized community integration. *Temple Pol Civ Rights Law Rev.* 2012;22:38.
24. Perlin ML. "The borderline which separated you from me": the insanity defense, the authoritarian spirit, the fear of faking, and the culture of punishment. *Iowa Law Rev.* 1997;82:1375-1426.
25. Perlin ML. "His brain has been mismanaged with great skill": how will jurors respond to neuroimaging testimony in insanity defense cases? *Akron Law Rev.* 2009;42(3):885-916.
26. Perlin ML. "Half-wracked prejudice leaped forth": sanism, pretextuality, and why and how mental disability law developed as it did. *J Contemp Legal Issues.* 1999;10:28-29.
27. Wexler DB, ed. *Therapeutic Jurisprudence: The Law as a Therapeutic Agent.* Durham, NC: Carolina Academic Press; 1990.
28. Perlin ML. "Striking for the guardians and protectors of the mind": The Convention on the Rights of Persons with Mental Disabilities and the future of guardianship law. *Penn St L Rev.* 2013;117:1159-1190.
29. Perlin ML. Promoting social change in Asia and the Pacific: the need for a disability rights tribunal to give life to the UN Convention on the Rights of Persons with Disabilities. *George Washington Int Law Rev.* 2012;44:1-37.
30. Perlin ML, Half-wracked prejudice, 30, note 158, discussing *Jones v. United States,* 463 US 354 (1983).
31. Perlin ML. "For the misdemeanor outlaw": the impact of the ADA on the institutionalization of criminal defendants with mental disabilities. *Alabama Law Rev*. 2000;52:206-207, discussing *Jackson v Indiana,* 406 US 715 (1972).
32. Perlin ML, Dorfman DA. Is it more than "dodging lions and wastin' time"? Adequacy of counsel, questions of competence, and the judicial process in individual right to refuse treatment cases. *Psychol Pub Pol Law.* 1996;2(1):127-128.
33. D'Amato A.. Harmful speech and the culture of indeterminacy. *William and Mary Law Rev.* 1991;32:332.
34. Perlin, On sanism, 400-404.
35. Perlin ML. The ADA and persons with mental disabilities: can sanist attitudes be undone*? J Law Health,* 1993-1994;(8):31, note 90.
36. Perlin ML. Fatal assumption: a critical evaluation of the role of counsel in mental disability cases. *Law Human Behav.* 1996;16(1):39-59.
37. Perlin, "Morality, and pretextuality, psychiatry and the law," 133.
38. *Jackson v Indiana*, 406 US 715 (1972).
39. Perlin, "For the misdemeanor outlaw," 212.
40. Perlin, "The hidden prejudice: mental disability on trial," 67.
41. *Streicher v Prescott,* 663 F Supp 335, 343 (DDC 1987).

42. Perlin, "Morality and pretextuality, psychiatry and the law," 134 (quoting *Proceedings of the Forty-Sixth Judicial Conference of the District of Columbia Circuit,* 111 FRD 91, 225 (1985)).
43. Bodine BG. Washington's new violent sexual predator commitment system: an unconstitutional law and an unwise policy choice. *U Puget Sound Law Rev.* 1990;14:105-141.
44. See, e.g., *Watkins v Sowders,* 449 US 341 (1981). Discusses the refusal of courts to acknowledge social science research on ways that jurors evaluate and misevaluate eyewitness testimony.
45. On the Supreme Court's special propensity in mental health cases to base opinions on "simply unsupportable" factual assumptions, see Morse SJ. Treating crazy people less specially. *West Va Law Rev*. 1987;90:353-382.
46. *Parham v JR,* 442 US 584, 605-610 (1979).
47. Perry GS, Melton GB. Precedential value of judicial notice of social facts: *Parham* as an example. *J Fam Law.* 1984;22:645.
48. Perlin ML. "Their promises of paradise": will *Olmstead v. L.C.* resuscitate the constitutional least restrictive alternative principle in mental disability law? *Houst Law Rev.* 2000;37(4):1049.
49. Perlin ML, "Half-wracked prejudice leaped forth," 20.
50. *Rivers v Katz,* 495 NE2d 337, 344 (NY 1986).
51. *In re the mental health of KGF,* 29 P3d 485 (Montana 2001).
52. *In re the mental health of KGF,* 495-496.

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