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"Mr. Bad Example": Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root Out Sanism in the Representation of Persons with Mental Disabilities

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"MR. BAD EXAMPLE": WHY LAWYERS NEED TO EMBRACE THERAPEUTIC JURISPRUDENCE TO ROOT OUT SANISM IN THE REPRESENTATION OF PERSONS WITH MENTAL DISABILITIES

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I. INTRODUCTION

As co-authors, our experiences practicing law across several states have informed our approach to the issue of persuasion in ways that teaching and creating scholarship on these questions alone could not. They form the bases of the thesis that we put forth in this article: The representation of persons with mental disabilities is infected—often, fatally infected—by sanism.[1] Sanism leads to paralytic rolelessness on the part of many persons who represent this population,

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[1] *See infra* notes 42–102 and accompanying text.

makes negative case outcomes nearly inevitable, and is the cause of much of the frustration that befalls those who try to provide adequate representation in these cases.[2] One solution—perhaps the *only* meaningful solution—is the consideration of and the adoption of therapeutic jurisprudence (TJ) principles by counsel representing such clients. These precepts offer a radically different perspective on the provision of counsel—whether the case is a civil commitment case, institutional reform case, criminal case, or civil case that, on its surface, appears to have nothing to do with "mental disability law." TJ is, and can be, a way to implement positive psychology through the litigation relationship and can be a critically important tool of persuasion in all aspects of the lawyer-client relationship, case negotiations, and the courtroom process. TJ provides a ready-made toolkit for lawyers representing this population, as it allows and encourages them to focus on the critical concepts of voluntariness, voice, and validation, and is buttressed by what has been referred to in other contexts as the "ethic of care."[3] A TJ approach fits perfectly within the framework of the broader concept of the "psychology of persuasion."[4]

In this article, we draw on our experiences and observations as practitioners and scholars, and consider how the TJ toolkit can enhance the representation of persons with mental disabilities in all aspects of the legal system. We hope that readers will see that TJ is the perfect means for optimizing the psychology of persuasion in such representation. First, we will discuss the lawyer's role and the conflicts that inevitably arise when lawyers represent persons with mental disabilities.[5] Second, we will discuss the meaning of sanism, and how sanism dominates the entire representational process in such cases.[6] Third, we will discuss how the conflicts and the poison of sanism taint the lawyer-client relationship.[7] We will subsequently discuss the meaning of TJ, and finally synthesize the material within the context of the psychology of persuasion, especially as it relates to the concept of *validation*.[8]

Our title comes, in part, from Warren Zevon's song, "Mr. Bad Example." The song, a totally dysphoric life story of the narrator,[9] includes this couplet: "Of course I went to law school and took a law degree/ And counseled all my clients

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[2] *See infra* notes 42–102 and accompanying text.

[3] *See infra* notes 109–10 and accompanying text.

[4] *See infra* notes 118–27 and accompanying text.

[5] *See infra* notes 16–41 and accompanying text.

[6] *See infra* notes 42–52 and accompanying text.

[7] *See infra* notes 53–102 and accompanying text.

[8] *See infra* notes 103–27 and accompanying text.

[9] *See* Warren Zevon, Mr. Bad Example (Warner Bros. Records 1991) ("I'm very well acquainted with the seven deadly sins. I keep a busy schedule trying to fit them in. I'm proud to be a glutton, and I don't have time for sloth. I'm greedy, and I'm angry, and I don't care who I cross.").

to plead insanity."[10] Although this is certainly poetic license, it has more than a grain of truth—albeit, no doubt unconsciously on Zevon's part.

An insanity plea is often a very bad option for a criminal defendant. For example, *Jones v. United States*,[11] one of the United States Supreme Court's worst decisions in mental disability law, involved an insanity plea for a defendant whose underlying charge was attempted shoplifting.[12] The plea was apparently entered without the defendant being aware of the plea or its ramifications,[13] leading to long-term incarceration served in maximum security institutional confinement.[14] *Jones* "illuminated the Court's antipathy toward insanity pleaders"[15] and resulted in large part from the abjectly ineffective assistance of counsel provided by Jones' trial lawyer. He *was*, indeed, a "bad example" for all of us, and we use Warren Zevon's lyrics as a reminder of what can happen if counsel does not take seriously clients with mental disabilities.

II. Representation of Persons with Mental Disabilities[16]

If there is one characteristic that underscores the problems that are faced by lawyers who represent persons with mental disabilities, it is "rolelessness." One of the co-authors (MLP) identified this problem over thirty years ago, and the problem still persists today. In many jurisdictions, there has been little or no improvement in the intervening years since he first stated that

> [T]raditional, sporadically-appointed counsel in mental health cases [were] unwilling to pursue necessary investigations, lack[ed] . . . expertise in dealing with mental health problems, and . . . suffered from "rolelessness," stemming from near total capitulation to experts, hazily defined concept[s] of success/

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[10] *Id.*

[11] *See* Jones v. United States, 463 U.S. 354 (1983).

[12] *See id.*; *e.g.*, Michael L. Perlin, *"Wisdom Is Thrown into Jail": Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, 17 Mich. St. U. J. Med. & L. 343, 357–58 (2013) [hereinafter *Wisdom Is Thrown Into Jail*]; Michael L. Perlin, "*There's No Success Like Failure/and Failure's No Success at All": Exposing the Pretextuality of* Kansas v. Hendricks, 92 Nw. U. L. Rev. 1247, 1276 (1998) [hereinafter *There's No Success Like Failure*] (criticizing *Jones* as a pretextual decision).

[13] *See generally Jones*, 463 U.S. 354. The insanity defense was entered into pursuant to a stipulation and at the initial retention hearing defense counsel presented no evidence. *See id.* at 360; *see also Wisdom Is Thrown Into Jail*, *supra* note 12, at 357–58.

[14] *See, e.g.*, *Wisdom Is Thrown Into Jail*, *supra* note 12, at 357–58; *There's No Success Like Failure*, *supra* note 12, at 1276.

[15] 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, 194 (2000).

[16] This section is largely adapted from Michael L. Perlin & Heather Ellis Cucolo, Mental Disability Law: Civil and Criminal §§ 6.2, 6.6.2 (3d ed. 2016).

> failure, inability to generate professional or personal interest in [the] patient's dilemma, and lack of [a] clear definition of [the] proper advocacy function. As a result, counsel . . . functioned "as no more than a clerk ratifying the events that transpire[d], rather than influencing them."[17]

Additionally, there was rarely any serious exploration of basic legal questions dealing with the factual basis of a client's dangerousness,[18] the thoroughness of the evaluating physician's medical examination, or the existence of possible available alternatives to inpatient hospitalization.[19] Expert testimony was also rarely challenged,[20] and it seemed as though virtually all counsel took the position that they had "no choice but to trust the psychiatrist."[21] As a result, commitment hearings became "an empty ritual,"[22] accomplishing no more than adding a "falsely reassuring patina of respectability to the proceedings."[23]

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[17] Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBS. 161, 164 (1982) (alterations in original) (quoting Michael L. Perlin, *Representing Individuals in the Commitment and Guardianship Process*, *in* 1 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 497, 501 (Paul Friedman ed., 1979) [hereinafter *Representing Individuals*]). *Accord* Elliott Andalman & David Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L.J. 43 (1974); George E. Dix, *Hospitalization of the Mentally Ill in Wisconsin: A Need for Reexamination*, 51 MARQ. L. REV. 1 (1967); David B. Wexler et al., *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1 (1971).

[18] In virtually all jurisdictions, the current standard for involuntary civil commitment is mental illness and, as a result of that mental illness, danger to one's self or others. *See, e.g.*, N.J. CT. R. 4:74-7(f).

[19] *See* Virginia Hiday, *The Attorney's Role in Involuntary Civil Commitment*, 60 N.C. L. REV. 1027, 1030 (1982) (citation omitted); *see also* Andalman & Chambers, *supra* note 17, at 43–44; Wexler et al., *supra* note 17, at 52, 54.

[20] *See* David R. Richardson & Robert B. Barbor, *The Louisiana Mental Health Law of 1977: An Analysis and a Critique*, 52 TUL. L. REV. 542, 566 (1978); Wexler et al., *supra* note 17, at 54–55.

[21] Fred Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 450 (1966) (citation omitted); *see also* Perlin & Sadoff, *supra* note 17, at 165. When one of the co-authors (MLP) was on the New Jersey Supreme Court Committee on Civil Commitments, he had a conversation with then Chief Justice Richard J. Hughes and one of the psychiatrists at the state hospital whom he regularly cross-examined at hearings involving defendants at New Jersey's maximum security forensic facility. The doctor told the Chief Justice, "Mr. Perlin tortures me with this unnecessary cross-examination." The Chief Justice asked, "Why is it unnecessary?" The doctor responded, "I can look in their eyes and tell if they are crazy and dangerous. That's all the trial judge needs to know."

[22] Hiday, *supra* note 19, at 1030; *see also* Cohen, *supra* note 21, at 448.

[23] Hiday, *supra* note 19, at 1030; *see also* Andalman & Chambers, *supra* note 17, at 72.

Why do lawyers experience these role conflicts in representing individuals in the civil commitment process?[24] We can think of at least eight separate explanations. First, many lawyers assume that hospitalization is inevitably beneficial for persons with mental disabilities and fail to take into account such factors as iatrogenic illness,[25] the conditions that are prevalent in many of the public psychiatric facilities to which patients are regularly committed,[26] and the severity of the side effects often caused by the administration of psychotropic medication.[27]

Second, because the hospital is a closed system, hospital administrators almost exclusively control systemic issues such as access to patients, times, locations, and communications, creating a power imbalance.[28] As a result, counsel may find it virtually impossible to develop a lawyer-client relationship, to develop proofs, or to discover witnesses.[29]

Third, although case law and statutes forbid a presumption of incompetency because of a patient's institutionalization, counsel's perception of the patient-client's credibility remains a major issue.[30] It is axiomatic that an attorney's doubt,

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[24] *See* Michael L. Perlin, *A Law of Healing*, 68 U. Cin. L. Rev. 407, 425 (2000) [hereinafter *A Law of Healing*] ("[T]he overwhelming number of cases involving mental disability law issues are 'litigated' in pitch darkness. Involuntary civil commitment cases are routinely disposed of in minutes behind closed courtroom doors.").

[25] Iatrogenic illness refers to an illness caused by a doctor or a hospital. *See* Barry R. Furrow, *The Problem of Medical Error: The Institution as Toxin*, 9 Medico-Legal Watch 67 (Jan. 2000).

[26] *See* David Kantor & Victor Gellinau, *Making Chronic Schizophrenics*, 53 Mental Hygiene 54 (1969); Stanley F. Yolles, *Mental Health's Homeostatic State: A New Territory*, 7 Int'l J. Psychiatry 327, 328 (1969). *See generally* Ivan Illich, Limits to Medicine, Medical Nemesis: The Expropriation of Health (1976).

[27] *See* Perlin & Cucolo, *supra* note 16, § 8-2, at 8-15 to 8-16 ("As a result of the prevalence of these side effects as well as a variety of other causes, patients and their counsel began to seek judicial relief as a means of either terminating or altering unwanted medical treatment." (citations omitted)).

[28] On power imbalances in this context generally, see e.g., Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 Behav. Sci. & L. 111 (1991); Janet B. Abisch, *Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Counsel Role Dilemm*a, 1 Psychol. Pub. Pol'y & L. 120, 131 (1995).

[29] There is an important analogy here that has never, to the best of our knowledge, been discussed in literature. We know that there is a positive relationship between a criminal defendant being bailed prior to trial and his subsequently being acquitted or receiving a non-custodial sentence. *See* Michael L. Perlin & Meredith R. Schriver, *"You Might Have Drugs at Your Command": Reconsidering the Forced Drugging of Incompetent Pre-Trial Detainees From the Perspectives of International Human Rights and Income Inequality*, 8 Alb. Gov't L. Rev. 381, 383 n.12 (2015) (discussing State v. Johnson, 294 A.2d 245, 251 n.6 (N.J. 1972) ("[A]n accused who has been detained in jail between his arraignment and the final adjudication of his case is more likely to receive a criminal conviction or jail sentence than an accused who has been free on bail.") and Anne Rankin, *The Effect of Pretrial Detention,* 39 N.Y.U. L. Rev. 641, 641–43, 655 (1964) (showing a connection between continuous detention and unfavorable outcomes, such as conviction)). Of course, all individuals facing civil commitment are institutionalized prior to their commitment hearing.

[30] *See* Perlin & Cucolo, *supra* note 16, §§ 6-6.2, at 6-84.

whether or not explicitly articulated, about the client's credibility may have a devastating effect at trial,[31] especially in cases such as involuntary commitments, where a finding of mental illness is an element of proof.[32]

Fourth, the very nature of total institutionalization demands a special degree of ingenuity and persistence on counsel's part if he or she is to track down and interview witnesses. Although an institutionalized patient may find it physically impossible to produce coworkers, friends, neighbors, or character witnesses to testify at a commitment hearing there may be other people available, such as hospital staff members, outside therapists, or other patients, who could provide favorable testimony on the patient's behalf. If counsel is not sufficiently persistent, these witnesses will remain unfound and representation of the client may be incomplete.

Fifth, the attorney's self-perceived "rolelessness" breeds serious confusion. Notwithstanding case law,[33] attorneys often view commitment proceedings as non-adversarial and somehow *different* from other cases.[34] Because the attorney often cannot *identify* with the client, distance is created, further imperiling the attorney-client relationship. Also, unlike a typical criminal trial, resulting in a guilty or not guilty finding, or in a civil case, where a cause of action is found either to exist or not to exist, a civil commitment hearing does not fit into a discrete paradigm. Because the attorney may be incapable of perceiving whether the case was a victory or a loss, the attorney's ambivalence may increase.[35]

Sixth, attorneys who possess scant knowledge about psychiatric decision-making, diagnoses, and evaluation tools will be seriously impeded in their cross-examination of expert witnesses and in their evaluation of expert testimony.

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[31] *See, e.g.*, Hiday, *supra* note 19, at 1039 (a study showed only 2.3% of all appointed counsel challenged a finding of mental illness).

[32] *See* Addington v. Texas, 441 U.S. 418 (1979) (establishing "clear and convincing evidence" as the minimum burden of proof at commitment hearings); *see generally* Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121 (1999). In all of the eleven years that one of the co-authors (MLP) litigated and supervised commitment/retention hearings, he never came in contact with a single state hospital doctor who paid the slightest bit of attention to the New Jersey statute that specifically forbade that presumption.

[33] *See, e.g.*, Quesnell v. State, 517 P.2d 568, 575–76 (1973); State *ex rel.* Memmel v. Mundy, 249 N.W.2d 573, 576–77 (1977).

[34] *See* Hiday, *supra* note 19, at 1036 (attorneys "agreed overwhelmingly with the statement, 'Representing respondents in civil commitment cases should be different from representing other kinds of clients since hospitalization may be in the best interest of the client.'").

[35] For an analysis of the United States Supreme Court's ambivalence in this area, see Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or Doctrinal Abyss?*, 29 ARIZ. L. REV. 1 (1987); Michael L. Perlin, *"No Direction Home": The Law and Criminal Defendants with Mental Disabilities*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 605 (1996).

Although one study shows that, with respect to sporadically appointed counsel, mere *knowledge* of psychiatric techniques may make virtually no difference in a case's outcome,[36] such knowledge is an initial building block to effective representation of counsel.[37]

Seventh, there are external constraints on counsel who represent individuals at involuntary civil commitment hearings that are not faced by other attorneys. For example, "tremendous pressures are often placed upon counsel by mental health professionals, family members, and other members of the community to allow the state to 'help' the mentally ill person by [acquiescing in the process of] institutionalization."[38] In over forty years that MLP has been a lawyer, these were the only cases in which he received communications from family members of his clients asking if he could find a way to *lose* their relatives' cases.

Finally, attorneys often deal ineffectively with what they perceive as their clients' "differentness,"[39] as they are not accustomed to developing relationships with clients who may be passive, frightened, inarticulate, and unaware of their possible options. Beyond this, because a patient's demeanor may be considered *different*, an attorney may feel foolish or awkward in representing a client's views because the attorney fears the judge might ascribe those views to the attorney.[40]

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[36] *See* Norman Poythress, *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope with Expert Testimony*, 2 Law & Hum. Behav. 1 (1978) [hereinafter *Psychiatric Expertise*]; *see also* Norman G. Poythress, *Mental Health Expert Testimony: Current Problems*, 5 J. Psychiatry & L. 201, 210–13 (1977).

[37] In discussing his experiences training lawyers about mental illness, Dr. Norman Poythress concluded that the "trained" lawyers' behavior in court was not materially different from that of "untrained" lawyers because the former group's attitudes toward their clients had not changed. He noted that mere knowledge of cross-examination methods "did not deter them from taking [the] more traditional, passive, paternal stance towards the proposed patients." *Psychiatric Expertise*, *supra* note 36, at 15. As one trainee noted: "I really enjoyed your workshop, and I've been reading over your materials and its [sic] all very interesting, but this is the real world, and we've got to do something with these people. They're sick." *Psychiatric Expertise*, *supra* note 36, at 15.

[38] Eric S. Engum & Daniel J. Cuneo, *Attorney's Role as Advocate in Civil Commitment Hearings*, 9 J. Psychiatry & L. 161, 162 (1981). The authors also note "lack of funds" and "crushing caseloads" as two other "primary determinants" that "tend to shape the role of counsel in commitment proceedings." *Id.*

[39] *See* Michael L. Perlin, *On "Sanism"*, 46 SMU L. Rev. 373, 398 (1992) [hereinafter *On "Sanism"*] ("Legislators have traditionally responded to socially-expressed fears by enacting laws that focus on the perceived differentness of people with mental disabilities in almost all aspects of social intercourse."). On the role of difference in this area in general, see Martha Minow, Making all the Difference: Inclusion, Exclusion, and American Law (1991).

[40] This conflict becomes more significant in light of the court's view of the entire process. *See* Thomas K. Zander, *Civil Commitment in Wisconsin: The Impact of* Lessard v. Schmidt, 1976 Wis. L. Rev. 503, 516 (1976) (80% of surveyed Wisconsin judges endorsed the "best interests" model and 12% adopted the adversary position).

This "differentness" may engender acute embarrassment that inevitably will diminish the scope and quality of the attorney's advocacy.[41]

It is this final piece of "rolelessness" that we must focus on more carefully. We believe this attitude by counsel—feeling foolish or awkward presenting a client's view to the court and fearing the judge might ascribe the client's characteristics to the lawyer—are pure manifestations of what we call "sanism," a factor that poisons the lawyer-client relationship and the entire legal process.

III. SANISM[42]

Sanism is an "irrational prejudice of the same quality and character as other irrational prejudices that cause, and are reflected in, prevailing social attitudes such as racism, sexism, homophobia, and ethnic bigotry . . . ."[43] Sanism reflects discrimination on the basis of one's mental state or condition.[44] Sanism—"the pervasive stigma that befalls persons with mental disabilities"[45]—permeates the legal process both in cases in which mental capacity is a central issue, and those in which such capacity is a collateral question.[46] It affects all participants in the mental disability law system, including litigants, fact finders, counsel, and expert and lay witnesses, and its corrosive effects have warped all aspects of mental disability law, involuntary civil commitment law, anti-discrimination law institutional law, tort law, and all aspects of the criminal process.[47] Sanism also reflects what civil rights lawyer Florynce Kennedy has characterized as the "pathology of oppression."[48]

Attorneys, courts, legislatures, professional psychiatric and psychological associations, and academic scholarship are all largely silent on the issue of sanism.

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[41] *See Representing Individuals*, *supra* note 17, at 505.

[42] *See generally* Michael L. Perlin, "*You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683 (2003) [hereinafter *Sanism in Clinical Teaching*].

[43] Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 259 (2014). On the way that sanism affects lawyers' representation of clients, see *Sanism in Clinical Teaching*, *supra* note 42, at 689–90.

[44] *See Sanism in Clinical Teaching*, *supra* note 42, at 718; *see also* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (2000) [hereinafter THE HIDDEN PREJUDICE].

[45] MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD (2011); *see* Michael L. Perlin, *"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*, 117 PENN ST. L. REV. 1159, 1161 (2013).

[46] *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. L. ISSUES 3 (1999) (discussing how sanism permeates all mental disability law).

[47] *See* Michael L. Perlin, *"I Might Need a Good Lawyer, Could Be Your Funeral, My Trial": Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases*, 28 WASH. U. J.L. & POL'Y 241, 259 (2008).

[48] *Id.* at 259.

A handful of practitioners, lawmakers, scholars, and judges *have* raised lonely voices, but the topic is simply "off the agenda" for most people.[49] As a result, individuals with mental disabilities—"the voiceless, those persons traditionally isolated from the majoritarian democratic political system"[50]—are frequently marginalized to an even greater extent than are others who are marginalized by the courts and society in other ways.[51] To illustrate, sanist lawyers distrust their clients with mental disabilities, trivialize their clients' complaints, fail to forge authentic lawyer-client relationships with such clients, reject their clients' potential contributions to case-strategizing, and take adverse case outcomes less seriously.[52] Each of these failures is addressed separately.

A. Distrust of the Client

One of the basic building blocks of mental disability law is the principle that incompetence cannot be presumed either because of mental illness or because of a past history of institutionalization.[53] Furthermore, there is "no necessary relationship between mental illness and incompetency which renders [mentally ill persons] unable to provide informed consent to medical treatment."[54] As stated forcefully by the New York Court of Appeals:

> We conclude however, that neither the fact that appellants are mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being.[55]

Additionally, publications by the MacArthur Foundation's Network on Mental Health and the Law dramatically conclude that mentally ill patients are not always incompetent to make rational decisions and that they are not inherently

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[49] *See* Michael L. Perlin, *"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, 236 (2002).

[50] *On "Sanism"*, *supra* note 39, at 375 (citation omitted).

[51] *On "Sanism"*, *supra* note 39, at 375 (citation omitted).

[52] *See Sanism in Clinical Teaching*, *supra* note 42, at 695.

[53] *See, e.g.*, *In re* LaBelle, 728 P.2d 138, 146 (Wash. 1986) (en banc).

[54] Davis v. Hubbard, 506 F. Supp. 915, 935 (N.D. Ohio 1980); *see also* Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 Hous. L. Rev. 15 (1991).

[55] Rivers v. Katz, 495 N.E.2d. 337, 341–42 (N.Y. 1986).

more incompetent than patients who are not mentally ill.[56] In fact, "on any given measure of decisional abilities, the majority of patients with schizophrenia did not perform more poorly than other patients and nonpatients."[57]

In short, the presumption in which courts have regularly engaged—that there is both a *de facto* and *de jure* presumption of incompetency to be applied to medical decision making—appears to be based on an empirical fallacy. Yet, lawyers distrust their clients with mental disabilities, both in cases in which mental disability is a central issue and in those in which mental disability is collateral.[58] Lawyers assume, for example, that a criminal defendant with mental disabilities is not competent to decide whether to plead insanity or to plead other fact-based defenses. In more than one-third of insanity defense cases, "the attorneys appear[ed] to have preempted their clients' participation in the decision-making process."[59] Such lawyers apply an equivalent assumption of incompetency when representing civil clients with mental disabilities,[60] and that assumption certainly rears its head if the client is institutionalized. For instance, "ward psychiatrists demonstrate a propensity to equate incompetent with makes bad decisions and to assume, in face of statutory and case law, that incompetence in decision making can be presumed from the fact of institutionalization."[61] Like mental health professionals, these lawyers treat their clients as "patients that are sick."[62]

Lawyers, of course, are not the only professionals who share these views. An article published in a police management journal included a focus on how police

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[56] *See* Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study III: Abilities of Patients to Consent to Psychiatric and Medical Treatments*, 19 LAW & HUM. BEHAV. 149 (1995); *see also* Michael L. Perlin & Deborah A. Dorfman, *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*, 2 PSYCHOL. PUB. POL'Y & L. 114, 120 (1996).

[57] Grisso & Appelbaum, *supra* note 56, at 169.

[58] For a full discussion, see *Sanism in Clinical Teaching*, *supra* note 42, at 695–00; *see also, e.g.*, Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94, 135 (2006).

[59] Richard Bonnie et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48, 57 (1996). *See, e.g.*, State v. Khan, 417 A.2d 585 (N.J. App. Div. 1980), *overruled on other grounds by* State v. Handy, 73 A.3d 421 (N.J. 2013) (when the assigned trial lawyer heard Khan discuss "crazy" ideas, he insisted that Khan plead insanity, notwithstanding Khan's fact-based claim of self-defense; MLP served as Khan's lawyer on appeal).

[60] *See* Michael L. Perlin, *"I Ain't Gonna Work on Maggie's Farm No More": Institutional Segregation, Community Treatment, the ADA, and the Promise of* Olmstead v. L.C., 17 T.M. COOLEY L. REV. 53, 64 (2000) ("A series of behavioral myths has emerged suggesting that persons with mental disabilities are deviant, worth less than 'normal' individuals, disproportionately dangerous, and presumptively incompetent.").

[61] Perlin & Dorfman, *supra* note 56, at 121.

[62] BRUCE ARRIGO, PUNISHING THE MENTALLY ILL: A CRITICAL ANALYSIS OF LAW AND PSYCHIATRY 29–30 (2002).

officers employ stereotypes in dealing with persons with mental disabilities in almost the same way as lawyers.[63] According to the article, "[o]fficers' stereotypes of mentally disturbed people included the idea that it is not possible to have a meaningful conversation with such people,"[64] and that "officers hold on to the ideas that mentally disturbed people are completely irrational and cannot be reasoned with."[65] The parallels to what we have discovered about lawyers in this context are frightening.[66]

The attitudes displayed by such lawyers are also echoed in case law. On the question of determining whether a witness is competent to testify, the influential case of *Sinclair v. Wainwright*[67] states the controlling legal standards:

> [I]f a patient in a mental institution is offered as a witness, an opposing party may challenge competency, whereupon it becomes the duty of the court to make such an examination as will satisfy the court of the competency of the proposed witness. And if the challenged testimony is crucial, critical or highly significant, failure to conduct an appropriate competency hearing implicates due process concerns of fundamental fairness.[68]

The assumption that institutionalization ought to inevitably lead to a competency challenge is seriously flawed and is demonstrated by relevant scientific research.[69] Nevertheless, it is clear that many courts will continue to follow this doctrine, *sub silentio*, especially in criminal cases.[70]

B. Trivialization of the Client's Complaints

Clients often have complaints. They may complain about the way a case is progressing, the impact the litigation is having on their lives, or a plethora of other matters, many of which are only tangentially connected to the lawyer-client

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[63] *See* Robert Panzarella & Justin O. Alecia, *Police Tactics in Incidents with Mentally Disturbed Persons*, 20 Policing: Int'l J. Police Strategies & Mgmt. 326 (1997).

[64] *Id.* at 335.

[65] *Id.* at 336.

[66] We discuss these issues and the significance of the Panzarella and Alecia article in Michael L. Perlin & Alison J. Lynch, *"Had to Be Held Down by Big Police": A Therapeutic Jurisprudence Perspective on Interactions Between Police and Persons with Mental Disabilities*, Fordham Urb. L.J. (forthcoming 2016) (manuscript at 22) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676909) [hereinafter *Big Police*]; *see also* Panzarella & Alecia, *supra* note 63.

[67] *See* Sinclair v. Wainwright, 814 F.2d 1516 (11th Cir. 1987).

[68] *Id.* at 1522–23 (citations omitted).

[69] *See, e.g.*, Grisso & Appelbaum, *supra* note 56.

[70] On the significance of *Sinclair* in this context, see Michael L. Perlin, *Beyond* Dusky *and* Godinez*: Competency Before and After Trial*, 21 Behav. Sci. & L. 297, 303–05 (2003).

relationship. Oftentimes, they may also have complaints about the conditions of their confinement in hospitals, the deprivation of their civil rights, and the dehumanizing reality of being institutionalized.[71]

If a presumably-mentally competent client complains to a lawyer, we can expect (or at least hope) that the lawyer will take the complaint relatively seriously, if for no other reason than that the failure to do so may trigger a disciplinary investigation. But if the client has a mental disability, or is perceived as having a mental disability, such complaints are often trivialized, ignored, or mocked.

How do we know this? Scholarly research supports the notion that individuals with mental illness do not receive equal representation due to sanism on the part of their attorneys and judges overseeing the case. A critical component of the lawyer-client relationship is ensuring that client input into the representation is integrated into the attorney's case strategy. In cases involving individuals with mental disabilities, sanism frequently prevents attorneys from giving client input the same weight, giving those clients less control in how their case proceeds.[72]

Not only is this phenomenon documented in sanism research, but we have also experienced it firsthand in our own practices. For the forty-plus years that MLP has been a member of the bar, devoting his practice and consultation almost exclusively to issues of mental disability law, he has witnessed such behavior and heard such comments by countless lawyers, many of whom (e.g., criminal defense lawyers and civil legal aid lawyers) should know better. In addition, in her two plus years as a practicing lawyer, AJL has had sadly identical experiences. She has found that clients with mental disabilities often have to work harder for equal, effective, and adequate representation. This is not primarily because they present such radically difficult or different legal issues for attorneys; rather, it is because, first and foremost, they must convince an attorney that they are somehow worthy of equal advocacy.[73] Clients with mental disabilities are seen as an annoyance, and their problems are viewed as simply not as *important*.[74]

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[71] *See Sanism in Clinical Teaching*, *supra* note 42, at 697.

[72] *See generally* Perlin & Sadoff, *supra* note 17; PERLIN & CUCOLO, *supra* note 16, §§ 6-6-6.4, 6-68–6-96; *see also, e.g.*, Andalman & Chambers, *supra* note 17; State *ex rel.* Memmel v. Mundy, No. 441-417 (Cir. Ct., Milwaukee Cty., Wis., Aug. 18, 1976); 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 (Louis E. Kopolow & Helene Bloom eds., 1977); Cohen, *supra* note 21, at 448; Henry Weihofen, *Mental Health Services for the Poor*, 54 CAL. L. REV. 920, 939 (1966). For a brilliant journalistic recounting, see SUSAN SHEEHAN, IS THERE NO PLACE ON EARTH FOR ME? (2d ed. 1983).

[73] *See* Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609 (1989).

[74] The parallels here to the way hospital staff refer to patients who seek to assert their rights as "pesky," see SHEEHAN, *supra* note 72.

Therefore, persuasion in these cases is not just the job of the attorney. It is first the job of the client who must convince the attorney to take on the case, to believe his or her retelling of the facts, and to be viewed as warranting the same level of representation as a client without a mental disability.[75] This need for persuasion is tied to sanism on the part of the attorney. Not just laypersons, but also attorneys, judges, and treatment professionals see clients with mental disabilities as more persuasive when they have fewer obvious symptoms—and fewer *visual* symptoms—of mental illness.[76]

Sanism overshadows persuasion in many ways, and attorneys need to be prepared, just as the clients are, to fight not only bias due to being a criminal defendant or a person subject to involuntary civil commitment or to guardian-ship, but also bias in the form of being seen as disabled or disempowered.[77] Those types of judgments made by jurors require even greater skill on the part of the attorney to overcome. In fact, in most cases involving clients with mental disabilities, attorneys need to be even more skilled in persuasive argument technique because there is often so much bias directed at their clients—biases that are rarely, if ever, questioned.[78]

This is particularly apparent when a client chooses to speak for himself or herself in the context of formal testimony to a court or even in a less formal setting where he or she is expressing an opinion about an issue related to his or her treatment or legal outcome.[79] The sanist and paternalistic attitudes of opposing counsel, judges, jury members, doctors, and administrators can almost be palpable. A shift occurs in the room, signifying that what the individual has to say is less important due to his or her status as a mentally disabled person, immediately putting him or her at a disadvantage. This shift is why, more than ever, attorneys representing this population need not only effective advocacy skills training, but also training in the realm of TJ to directly rid them of conscious or unconscious sanist biases. If a client is rarely seen as persuasive and compelling

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[75] *See* Sheehan, *supra* note 72.

[76] *See* Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability* Evidence, 8 Notre Dame J.L. Ethics & Pub. Pol'y 239, 246 (1994) ("Fact-finders demand that defendants conform to popular, common-sensical visual images of 'looking crazy.'"). *See, generally* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 Case W. Res. L. Rev. 599, 724–27 (1989-1990). On how we use such false OCS to "generalize and wrongly stereotype persons with mental disorder in order to justify prejudiced decision making against them," see Grant H. Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. Ill. L. Rev. 1199, 1201 n.13 (2000).

[77] *See* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. Cal. L. Rev. 747 (2001).

[78] *See, e.g.*, Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 Law & Hum. Behav. 39, 39 (1992).

[79] *See* James A. Holstein, *Mental Illness Assumptions in Civil Commitment Proceedings*, 16 J. Contemp. Ethnography 147 (1987).

on his own, the attorney must be prepared to pick-up the slack and overcompensate due to the sanism that is present in many hospitals[80] and courtrooms.[81]

C. Effects on the Lawyer-Client Relationship

If lawyers do not take their clients or their clients' legal problems seriously, lawyers may not forge the sort of lawyer-client relationship that is the aspirational goal of the practice of law.[82] Certainly, doubting your client's competence (and/or veracity) and trivializing your client's complaints will not advance building such a relationship. Because persons with mental disabilities are trivialized and the essence of their basic humanity is often questioned, adverse case outcomes are simply not taken as seriously.[83]

MLP has previously written about the importance of judicial recognition of the humanity of this population:

> Nearly thirty years ago, when I was the director of the New Jersey Division of Mental Health Advocacy, I litigated a case that changed my life. That case—*Falter v. Veterans Administration*[84]—was about the way veterans with mental illness (at that time, especially Vietnam veterans) were treated at the Veterans Administration ("VA") Medical Center in Lyons, New Jersey. Following the litigation in the *Falter* case, the VA promulgated the first Patients' Bill of Rights on behalf of persons

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[80] On sanism in hospitals, see Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463 (2002).

[81] On sanism in courtrooms, see Michael L. Perlin, *"Things Have Changed": Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 542 (2002-2003).

[82] *See, e.g.*, Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099, 1130 (1997).

[83] Perhaps the first case to take this issue seriously was *Lessard v. Schmidt*. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1101–02 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974) (stating the "conclusion [that due process is mandated at involuntary civil commitment hearings] is fortified by medical evidence that indicates that patients respond more favorably to treatment when they feel they are being treated fairly and are treated as intelligent, aware, human beings." Some years ago, one of the co-authors wrote that this passage "seems to qualify as one of the true judicial forerunners of therapeutic jurisprudence." Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL'Y & L. 80, 90 (1995)).

[84] Michael L. Perlin & John Douard, *"Equality, I Spoke that Word As If a Wedding Vow": Mental Disability Law and How We Treat Marginalized Persons*, 53 N.Y.L. SCH. L. REV. 9, 10 (2008-2009); *see* Falter v. Veterans Admin., 502 F. Supp. 1178 (D.N.J. 1980).

> in its facilities,[85] and attention was paid to substantive areas of patients' rights that all too often were previously ignored . . . .[86]
>
> But what has lasted with me most vividly from *Falter* was one line of Judge Harold Ackerman's initial decision: "[In this opinion], I am referring to how [plaintiffs] are treated as human beings."[87] I read that line in the slip opinion, and for a moment, my breath stopped. Prior to that time, I had been representing persons with mental disabilities for nearly a decade, and litigated other class actions that truly had a vast impact on the New Jersey mental health system. But never before had a judge written a line like this in an opinion in one of my cases.[88]

In problematic lawyer-client relationships of the sort we are discussing here, lawyers will be prone to dismiss or ignore the client's view about the course of litigation. For example, the selection of a theory of the case, pre-trial discovery, case strategizing, choice of witnesses, structuring of cross-examination, and choice of remedy may all be adversely affected. Such suggestions are rarely taken seriously.

Another voice that is typically ignored is that of "psychiatric survivor groups."[89] For at least thirty-five years, formerly hospitalized individuals and their supporters have formed an important role in the reform of the mental health system and in test case litigation.[90] Yet, there is little evidence that these groups are taken seriously either by lawyers or academics.[91]

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[85] Perlin & Douard, *supra* note 84; *see* Falter v. Veterans Admin., 632 F. Supp. 196, 203 (D.N.J. 1986) (stating that "[i]n December 1982, the V.A. Patients' Bill of Rights was promulgated.").

[86] Perlin & Douard, *supra* note 84; *see id.* at 203–08 (noting the patients' rights such as rights to privacy while using telephones, to privacy in reading mail, to visitation, and to attend religious services).

[87] Perlin & Douard, *supra* note 84; *see Falter*, 502 F. Supp. at 1185.

[88] Perlin & Douard, *supra* note 84.

[89] Peter Margulies, *The Cognitive Politics of Professional Conflict: Law Reform, Mental Health Treatment Technology, and Citizen Self-Governance*, 5 Harv. J.L. & Tech. 25, 49 n.102 (1992); *see* Jennifer Honig & Susan Fendell, *Meeting the Needs of Female Trauma Survivors: The Effectiveness of the Massachusetts Mental Health Managed Care System*, 15 Berkeley Women's L.J. 161, 185 (2000).

[90] Survivor groups generally have opposed the constitutionality or application of involuntary civil commitment statutes, see Project Release v. Prevost, 722 F.2d 960 (2d Cir. 1983), or supported the right of patients to refuse the involuntary administration of psychotropic drugs, see Rennie v. Klein, 653 F.2d 836, 838 (3d. Cir. 1981), but also have involved themselves in a far broader range of litigation. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157 (1986) (discussing the impact of severe mental disability on the *Miranda* waiver. The Committee on the Fundamental Rights and Equality of Ex-Patients [FREE] filed *amicus* brief on behalf of respondent.).

[91] *See, e.g.*, Michael L. Perlin, *An Internet-Based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economie*s, 30 Fordham Int'l L.J. 435, 444 n.39 (2007). There are, of course, important exceptions. *See, e.g.*, Shin Imai, *A Counter-Pedagogy for*

At its base, sanism is irrational.[92] Any investigation of the roots or sources of mental disability jurisprudence must factor in society's irrational mechanisms for dealing with mentally disabled individuals. The entire legal system and virtually all of society[93] makes assumptions about persons with mental disabilities—who they are, how they got that way, what makes them different, what there is about them that allows us to treat them differently, and whether their conditions are immutable. These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we ourselves may become mentally disabled.[94] The most important question of all—why do we feel the way we do about these people?—is rarely asked.[95]

D. Likely Outcomes

Sanist lawyers who distrust their clients are inevitably going to be less persuasive than lawyers who trust their clients and who authentically represent their views.[96] As a result, negative case outcomes will be taken less seriously. This should be clear to all, but probably requires us to concede that this is utterly "under the radar" for most lawyers. This summer, MLP had the opportunity to observe three problem-solving courts in New Zealand: a youth court, a homelessness court,

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Social Justice: Core Skills for Community-Based Lawyering, 9 CLINICAL L. REV. 195, 199 (2002) (discussing Osgoode Hall Law School's clinic's collaborative work with Parkdale Community Legal Services in representing one such group); Tewksbury v. Dowling, 169 F. Supp. 2d 103 (E.D.N.Y. 2001); Charles W. v. Maul, 214 F.3d 350 (2d Cir. 2000).

[92] *See* Pamela R. Champine, *A Sanist Will?*, 46 N.Y.L. SCH. L. REV. 547, 548 (2002-2003); Michael L. Perlin, *"Everybody Is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 481–82 (2008) [hereinafter *Sexual Autonomy*]; John W. Parry, *The Death Penalty and Persons with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence, and Faulty Predictions of Dangerousness*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 667 (2005); Jennifer M. Poole et al., *Sanism, Mental Health, and Social Work/Education: A Review and Call to Action*, 1 INTERSECTIONALITIES: GLOBAL J. SOC. WORK ANALYSIS, RES., POLITY, & PRAC. 20 (2012); Lynn C. Holley et al., *Reconceptualizing Stigma: Toward a Critical Anti-Oppression Paradigm*, 2 STIGMA RES. & ACTION 51 (2012); Alexandra Bacopoulos-Viau & Aude Fauvel, *The Patient's Turn: Roy Porter and Psychiatry's Tales, Thirty Years On*, 60 MED. HIST. 1 (2016).

[93] *See generally* THE HIDDEN PREJUDICE, *supra* note 44.

[94] *See, e.g.*, Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 93 n.174 (1991) (stating that "while race and sex are immutable, we all *can* become mentally ill, homeless, or both. Perhaps this illuminates the level of virulence we experience here.").

[95] *See* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 6–7 (1994) (asking this question).

[96] *See Sanism in Clinical Teaching*, *supra* note 42, at 695–97. MLP had occasion to speak to private counsel who had been assigned to represent a patient in a county in which the New Jersey Division of Mental Health Advocacy (which the co-author then directed) did not represent patients. The assigned counsel asked MLP, "Why is the State wasting money to pay me to do this bullshit?"

and a drug court. In blogging about these visits, he concluded glowingly, "Simply put, I have never, in such a short period of time, had the honor to observe such examples of therapeutic jurisprudence in action,"[97] adding that,

> In my entire career as a lawyer—spanning over [forty] years, practicing in NJ and NY—I have only seen a handful of judges that ran their courtroom with the level of dignity that I observed and that showed the defendants and all others who came before them the level of respect that I saw here.[98]

But this blog post omitted one vivid negative experience. Virtually all of the representation was provided by local public defenders, legal aid lawyers, or "duty lawyers" (a group regularly assigned to represent defendants in court). One lawyer was clearly there involuntarily, having been appointed to represent one of the defendants who had been charged with drug offenses in the homelessness court. He barely spoke to his client, his disdain was apparent, and at the bail hearing, he said, "Your honor, my client is very volatile." At first blush, this was dumbfounding, but on the briefest consideration, it was utterly reflective of the behavior of lawyers who do not care about the potential for negative outcomes for their clients. Ironically, the presiding judge subsequently emailed the author, relating that he bailed the defendant out in two days when a "safe house" became available. The judge stated, "[s]he is there at the moment and getting good support from her social worker."[99] The defendant's lawyer would not have shown this level of concern for his client.

Generally, laypeople are shocked when we tell them that an institutionalized individual has just as much a right as any other person to representation in commitment proceedings, and is able to actually have a similar amount of control over the way his or her case is presented by the attorney.[100] Attorneys are also generally surprised that we allow our clients to voice their opinions to us, and under appropriate circumstances to the judge, and use those opinions as the basis for their cases.

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[97] Michael L. Perlin, *Therapeutic Jurisprudence in Action*, Therapeutic Jurisprudence in the Mainstream Blog (Sept. 5, 2015), https://perma.cc/9H6Y-NMEX.

[98] *Id.*

[99] E-mail from Judge Anthony Fitzgerald to Michael L. Perlin (Sept. 14, 2015) (on file with author).

[100] Laypeople are also shocked when they find out that, in the context of our representation, we advocate for the sexual autonomy of our clients. When one of the co-authors (MLP) spoke about this topic to a public audience at the Florida Mental Health Institute (part of the University of South Florida in Tampa) some years ago, an audience member (from the general public) leapt to his feet, and denounced him: "Professor Perlin, you are an agent of the devil!" At a New York City hospital presentation, a nurse folded her arms across her chest, and announced, "Professor, you are the very embodiment of evil!" A nurse at a New Jersey state hospital told him, "God explicitly forbids what you are talking about," the nurse adding that she "would pray for [Michael's] soul."

Persuasion, in all its forms, is important here as well. As seen in the context of criminal law, there are multiple levels of bias and sanism that attorneys encounter in this particular form of advocacy. Additionally, the reactions given when this topic is discussed make it clear that persuasiveness will not only come from helping others understand the individual circumstances of clients, but from seeing and understanding the larger issues involved in this particular topic.

Some seven years ago, MLP stated: "Over the past fifteen years, I have frequently spoken about issues related to psychiatric patient sexuality. I have grown accustomed to the 'There he goes again!' eye-rolling I get from colleagues when I tell them that I write and think about the issues related to institutionalized patients having sex."[101] During several talks on this topic, MLP has noted how faculty colleagues reacted when he embarked on this line of advocacy and scholarship, and its connection to sanism:

> I was sitting at my faculty lunch table, and conversation turned to upcoming presentations that we would soon be doing. My colleagues mostly take left-liberal positions on a wide variety of issues, and are generically the exact mix of retro '60s generationists and early baby boomers that you'd expect. They (appropriately) are quick to criticize any behavior that is racist, sexist, ethnically bigoted or homophobic. Rush Limbaugh would probably view them as one of his worst "politically correct" horror fantasies. I'm not terribly out of place in this group.
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> [W]hen it got to be my turn, I said that I was going to be speaking about the right of institutionalized mentally disabled persons to sexual interaction. All conversation came to a screeching halt. "Michael, are you serious?" "Are you crazy (sic)?" "Michael, even for you, you've gone too far!" "What are you going to say next: that they can get married?!?" Et cetera.[102]

Keep these attitudes in mind—especially in the context of the politics of those who were expressing them—as we turn to therapeutic jurisprudence.

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[101] *Sexual Autonomy*, *supra* note 92, at 483.

[102] *Sanism in Clinical Teaching*, *supra* note 42, at 703.

IV. Therapeutic Jurisprudence (TJ)[103]

TJ "asks us to look at law as it actually impacts people's lives"[104] and focuses on the law's influence on emotional life and psychological well-being.[105] The ultimate aim of TJ is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[106] There is an inherent tension in this inquiry, but Professor David Wexler clearly identifies how it must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[107] Again, it is vital to keep in mind that "[a]n inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[108]

In its aim to use the law to empower individuals, enhance rights, and promote well-being, TJ has been described as "a sea-change in ethical thinking about the role of law[;] . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism."[109] That is, TJ supports an ethic of care.[110]

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[103] *See generally Big Police*, *supra* note 66.

[104] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 Nova L. Rev. 535, 535 (2009).

[105] *See* David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, *in* Daniel P. Stolle et al., Practicing Therapeutic Jurisprudence: Law as a Helping Profession 45 (2000).

[106] *See* Michael L. Perlin, *"And My Best Friend, My Doctor/Won't Even Say What It Is I've Got": The Rold and Significance of Counsel in Right to Refuse Treatment Cases*, 42 San Diego L. Rev. 735, 751 (2005); *Sexual Autonomy*, *supra* note 92, at 510 n.139; *see also* Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 St. Thomas L. Rev. 561, 599 n.111 (2005); Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risk of Influence*, 30 T. Jefferson L. Rev. 575, 585–86 (2008).

[107] David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 Behav. Sci. & L. 17, 21 (1993); *see also* David B. Wexler, *Applying the Law Therapeutically*, 5 Applied & Preventive Psychol. 179 (1996).

[108] *A Law of Healing*, *supra* note 24, at 412. *See also* Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, Us and Them*, 31 Loy. L. Rev. 775, 782 (1998).

[109] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & Med. 328, 329–30 (2001); *see also* Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, *in* Marjorie A. Silver, The Affective Assistance of Counsel: Practicing Law as a Healing Profession 341 (2006); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 Clinical L. Rev. 605, 605–06 (2006). The use of the phrase dates back to 1982, see Carol Gilligan, In a Different Voice (1982).

[110] *See, e.g.*, Winick & Wexler, *supra* note 109, at 605–07; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic*

We cannot lose sight of the fact that there is often an inherent bias against litigants with mental disabilities, and the greater the bias, the more essential it is for lawyers to rely on TJ in representation. MLP recently wrote an article with a colleague about representing the most hated of all clients (those alleged to be sexually violent predators) and made the following comment about TJ:

> Those very variables that make SVPA [sexually violent predator act] litigation *different*—the need for lawyers to be able to understand, contextualize and effectively cross-examine experts on specific actuarial tests; the need for lawyers to recognize when an expert witness is needed to rebut the state's position, and the need for lawyers to understand the potential extent of jury bias (making the ideal of a fair trial even more difficult to accomplish)—all demand a TJ approach to representation and to litigation.[111]

In another piece, he explored the TJ-based conversations a lawyer should have with other disfavored clients (those who raise the incompetency status or who plead insanity).[112] Some of the potential TJ-based conversations include:

- If a defendant is, in fact, incompetent to stand trial, that means that he does not have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and or a rational as well as factual understanding of the proceedings against him; how can TJ principles be invoked in such a case?

- If a defendant is initially found to be incompetent to stand trial, will the lawyer act as most lawyers and consider him to be *de facto* incompetent for the entire proceeding (as a

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Jurisprudence Criminal Defense Lawyering, 48 B.C. L. REV. 597, 599 (2007); Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006).

[111] Heather Ellis Cucolo & Michael L. Perlin, *"Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J.L. & SOC. CHANGE 125, 166–67 (2015).

[112] *See* Michael L. Perlin, "*Too Stubborn to Ever Be Governed By Enforced Insanity": Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases*, 33 INT'L J.L. & PSYCHIATRY 475, 480 n.63 (2010) [hereinafter *Too Stubborn*]. *See also* Michael L. Perlin, *"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, AM. CRIM. L. REV. (forthcoming 2016) (manuscript at 64–66) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683480). On TJ-based conversations that a lawyer should have with such a client prior to criminal sentencing, see Michael L. Perlin, *"I Expected It to Happen/I Knew He'd Lost Control": The Impact of PTSD on Criminal Sentencing After the Promulgation of DSM-5*, 4 UTAH L. REV. 881, 924–25 (2015).

significant percentage of lawyers do act for *any* client who is institutionalized)?

- If a defendant is found to be incompetent to stand trial, will the lawyer assume that he is also guilty of the underlying criminal charge?

- What are the issues that a lawyer must consider in addition to the client's mental state in assessing whether or not to invoke an incompetency determination?

- What are the TJ implications for a case in which the incompetency status is not raised by the defendant, but, rather, by the prosecutor or the judge?

- Are there times when TJ principles might mandate not raising the incompetency status (for example, in a case in which the maximum sentence to which the defendant is exposed is six months in a county workhouse but is in a jurisdiction in which IST defendants are regularly housed in maximum security forensic facilities for far longer periods of time than the maximum to which they could be sentenced)?

- What are the TJ implications of counseling a defendant to plead or not to plead the insanity defense?

- Can a defendant who pleads NGRI ever, truly, take responsibility?

- Does the fact that the insanity-pleading defendant must concede that he committed the actus reus distort the ongoing lawyer-client relationship?

- To what extent do the ample bodies of case law construing the ineffectiveness assistance of counsel standard established by the US Supreme Court in *Strickland v. Washington*[113] even consider the implications of TJ lawyering?

- To what extent does the pervasiveness of sanism make it obligatory for lawyers in such cases to educate jurors about both sanism and why sanism may be driving

[113] *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) (stating, "whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result.").

> their decisionmaking, and to what extent should lawyers in such cases embark on this educational process using TJ principles?[114]

One of the central principles of TJ is a commitment to dignity.[115] Professor Amy Ronner describes voice, validation, and voluntariness as the "three Vs" and[116] argues:

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.[117]

The question to be considered is this: To what extent can TJ be employed with the psychology of persuasion so as to eradicate sanism in the representation of persons with mental disabilities?

V. THE PSYCHOLOGY OF PERSUASION

In the call for papers emerging from the University of Wyoming College of Law Symposium on the Psychology of Persuasion, the organizers laid down their charge:

> Good advocates need to understand basic principles of cognitive psychology in order to craft the most persuasive arguments they can to support their client's cause. Scholars who are currently

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[114] *See Too Stubborn*, *supra* note 112, at 477–78.

[115] *See* BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005).

[116] Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of "voice," see Freckelton, *supra* note 106, at 588.

[117] Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence,* Miranda *and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002).

> working in this area are invited to present their work and lead discussions of how judges and juries process information and reach decisions, and how lawyers can use that knowledge to become more effective advocates.[118]

We agree 100% with the significance of this approach, and will use it as a springboard for the topic that we have chosen to address: How lawyers can use TJ as a means for eradicating sanism in their representation of persons with mental disabilities. We focus here on the principle of *validation*, which we believe is of critical importance from two perspectives. First, as we have already indicated, validation is an integral part of TJ: "If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation."[119] This is one of the *sine qua non* of TJ and can never be far from the mindset of the TJ inspired lawyer.

Over fifteen years ago, the late Professor Bruce Winick, along with Professor David Wexler, a founder of TJ, stated: "Dealing with clients about such issues is challenging work; it demands a high degree of psychological skill and judgment and the ability to listen to the client, to make the client feel comfortable, to communicate empathy, and to understand the social psychology of persuasion."[120] Remarkably, that is the only mention in the legal literature of the psychology of persuasion in this context.

Beyond this, it is necessary to consider how *validation* is at the forefront of the psychology of persuasion. Central to the psychology of persuasion is social validation.[121] Social validation means that we are significantly more likely to take action when we see others, especially those who are similar to us take the same action.[122] We need to consider this in the context of the issues we raised earlier about the conflicts lawyers often have in the representation of clients with mental disabilities. If one juror makes a disparaging, sanist remark about such an individual, how persuasive will that remark be to the other jurors? If one lawyer in a law office makes such a remark (especially if it is a senior lawyer), how persuasive will that be to the other lawyers? We must keep this phenomenon

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[118] *Call for Proposals*, University of Wyoming College of Law (2015), https://perma.cc/D7LZ-F9GM.

[119] Ronner, *supra* note 117, at 94.

[120] Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing a Therapeutic Jurisprudence/Preventative Law Model*, 5 Psychol. Pub. Pol'y & L. 1034, 1064 (1999).

[121] In Robert B. Cialdini, Influence: the Psychology of Persuasion (2006), Robert Cialdini uses the phrase "social validation" as a principle that "governs what it is that we decide constitutes correct behavior in a group setting." *Id.* at 116.

[122] *See* Cordell M. Parvin, *Unlocking the Secrets to Developing Your Future Rainmakers*, 54 Prac. L. 17, 22 (Oct. 2008), https://perma.cc/Y8A3-S42P.

of social validation in our minds, and use it in different ways to best insure that the legal process is authentically valid for the client base of which we speak. This is why TJ is immensely beneficial and necessary, especially for education of legal professionals.[123]

TJ allows for several end goals: it targets sanism, sets up a legal system where the therapeutic benefit of legal solutions is not just discussed but actually made to be a targeted outcome, and teaches attorneys and judges how to appropriately interact with individuals with mental disabilities in all stages of the trial process. By doing these things, TJ enhances the likelihood that counsel will provide authentically effective representation for clients with mental disabilities.

Further, we believe it is profitable to turn our attention to the schools of positive criminology and positive psychology, both of which are potentially excellent sources for enhancing the psychology of persuasion. Professor David B. Wexler has recently argued that TJ is "remarkably (but not at all surprisingly) consistent with the school of 'Positive Criminology,' [which is] 'oriented to human strengths, resilience, and positive encounters that can assist individuals in abstaining from crime and deviant behaviors.'"[124] As Professor Wexler and Tali Gal, an Israeli criminologist and lawyer, explained: Positive criminology "goes against the focus of much of the research which highlights 'goodness' in relation to normative people and 'badness' in relation to law-breakers, offering an alternative research agenda that focuses on goodness in the lives of offenders, victims, and those at risk of become either."[125] Similarly, "positive psychology is 'the scientific study of the strengths and virtues that enable individuals and communities to thrive'—in short, the rigorous study of human flourishing."[126] It emphasizes positive experiences and traits, and studies how people flourish, focusing on an individual's well-being and the "good life."[127]

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[123] *See* Winick & Wexler, *supra* note 109.

[124] David B. Wexler, *Getting and Giving: What Therapeutic Jurisprudence Can Get from and Give to Positive Criminology*, 6 PHOENIX L. REV. 907, 908 (2013) (citation omitted).

[125] Tali Gal & David B. Wexler, *Synergizing Therapeutic Jurisprudence and Positive Criminology*, *in* POSITIVE CRIMINOLOGY 85, 87 (Natti Ronel & Dana Segev eds., 2015). Australian forensic psychologist, Tony Ward, has created the "good lives model," see Tony Ward, *Good Lives and the Rehabilitation of Offenders: Promises and Problems*, 7 AGGRESSION & VIOLENT BEHAV. 513 (2002), based on therapeutic principles and on positive psychology, as "a strength-based approach to supporting offenders in meeting their human needs." Astrid Birgden, *Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required*, 78 REV. JUR. U.P.R. 43, 49 (2009).

[126] Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 VA. J. SOC. POL'Y & L. 385, 387 (2009).

[127] *See* Jeffrey L. McClellan, *Marrying Positive Psychology to Mediation: Using Appreciative Inquiry and Solution-Focused Counseling to Improve the Process*, 62 DISP. RESOL. J. 29, 30 (Nov. 2007-Jan. 2008).

VI. Conclusion

Lawyers should draw on the insights that TJ can provide in our efforts to be psychologically persuasive in the hopes that the end result will be a new paradigm for the representation of persons with mental disabilities. By validating clients, giving them a voice, and insuring that their actions are authentically voluntary, TJ can best strip the sanist façade from the representation of persons with mental disabilities,[128] and solve the "rolelessness" dilemma that bedevils practicing lawyers in such circumstances. The shift to TJ will be psychologically persuasive. It will allow lawyers to engage in meaningful collaborative conversations with their clients and provide lawyers with skills and strategies through which they can effectively rebut sanism in the courtroom. It will also offer a blueprint as to how the attorney-client relationship can be restructured to enhance dignity and respect, and in the words of Judge Ackerman in the *Falter* case, take seriously how we treat the population as "human beings."[129]

In "Mr. Bad Example," Warren Zevon also sings, "I don't care who gets hurt."[130] The willful blindness exhibited by most lawyers in the representation of the population that we are discussing here is the functional equivalent of the lawyer not caring "who gets hurt." We hope that the ideas we discussed in this article will lead more lawyers to realize exactly who is hurt when they allow sanism to infect their representation. If this happens, we will have accomplished what we have set out to do.

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[128] *See* Michael L. Perlin, *"Baby, Look Inside Your Mirror": The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. Pitt. L. Rev. 589, 591 (2008) (discussing how TJ "might be a redemptive tool in efforts to combat sanism, as a means of 'strip[ping] bare the law's sanist façade . . . .'" (first alteration in original)).

[129] *See* Falter v. Veterans Admin., 502 F. Supp. 1178, 1185 (D.N.J. 1980).

[130] *See* Warren Zevon, Mr. Bad Example (Warner Bros. Records 1991); *see also supra* notes 9–10 and accompanying text.