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Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines

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Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines[†]

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I. Introduction

The Federal Sentencing Guidelines (Guidelines) were written to eliminate, or at least to lessen, arbitrariness and caprice and to establish

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objective, normative standards against which convicted defendants' behavior could be assessed.¹ The Guidelines—promulgated in response to criticisms of indeterminate sentences and seemingly inexplicable disparities in sentences for like crimes—were meant to guide judges and to educate the public about factors that could either increase or decrease sentences.²

One such factor is mental disability. A federal judge can depart from the prescribed ranges when “the defendant committed a nonviolent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants.”³ In such cases, a lower sentence “may be warranted” to reflect the extent to which the reduced mental capacity contributed to the commission of the offense as long as the defendant’s criminal history “does not indicate a need for incarceration to protect the public.”⁴ It should be noted, however, that a Sentencing Commission policy statement declares that mental and emotional conditions

1. See 18 U.S.C. §§ 3551-742 (1988) (stating general rules for sentencing, probation, and appeals); 28 U.S.C. §§ 991-98 (1988) (establishing the United States Sentencing Commission). The constitutionality of these Guidelines was upheld in *Mistretta v. United States*, 488 U.S. 361, 412 (1989). See generally Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?* 10 N.Y.L. SCH. J. HUM. RTS. 835 (1993) (describing the sentencing process under the Guidelines).

2. See generally Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990) (stating that empirical studies revealed disparities in sentences for similar offenses); Julia L. Black, Note, *The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984 After Mistretta v. United States*, 75 IOWA L. REV. 767, 771, 773-74 (1990) (describing the goals of increased public understanding and more defined sentencing); Kirk Houser, *Downward Departures: The Lower Envelope of the Federal Sentencing Guidelines*, 31 DUQ. L. REV. 361 (1993) (discussing the specific issue of downward departures).

3. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 5K2.13 (1994) [hereinafter MANUAL].

4. *Id.* Deviation from the putative sentence due to factors bearing on mental capacity appear three times in the Guidelines. An example is 28 U.S.C. § 994(d) (1988), which provides:

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance . . .

. . . .

(4) mental and emotional condition to the extent that such condition mitigates the defendant’s culpability or to the extent that such condition is otherwise plainly relevant

are not "ordinarily relevant" in determining whether a sentence should be outside the Guidelines' ranges.⁵

Great discretion is vested in the trial courts in determining when a sentence reduction is appropriate under the Guidelines, and decisions not to depart from the Guidelines are generally not appealable.⁶ Only when it appears that the district court misunderstood its authority to reduce the defendant's sentence will appellate courts be willing to disturb sentencing determinations.⁷

The cases reported so far reflect no coherent reading of the Guidelines and no real understanding of the role of mental disability, short of an exculpating insanity defense, in criminal behavior.⁸ Federal judges are remarkably inconsistent in their reading of mental disability.⁹ The caselaw

5. See MANUAL, *supra* note 3, § 5H1.3 ("Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines, except as provided in [the general provisions of Chapter 5]."). In *Williams v. United States*, the Court held that policy statements are an authoritative guide in determining the meaning of the applicable guideline. 112 S. Ct. 1112, 1115 (1992). However, the legislative history of the Commission's policy statement on the influence of mental disability is spotty at best. The brevity of the policy statement seems to be due to Congress's failure to provide any coherent explanation of the weight due individual offender characteristics and a failure of the Commission to conduct or refer to any empirical studies or evidence regarding the effect of mental disability on sentencing patterns. Although this omission was initially recognized by the Commission, it was later deleted without any additional explanation. Marc Miller & Daniel J. Freed, *Offender Characteristics & Victim Vulnerability: The Differences Between Policy Statements and Guidelines*, 3 FED. SENT. R. 3, 4 (1990).

6. Compare *United States v. Follett*, 905 F.2d 195, 197 (8th Cir. 1990) (holding that a refusal to grant a downward departure on the basis of psychological problems and diminished mental capacity was not appealable), *cert. denied*, 111 S. Ct. 2796 (1991) and *United States v. Ghannam*, 899 F.2d 327, 328 (4th Cir. 1990) (holding that a refusal to grant downward departure for diminished capacity was not appealable) with *Follett*, 905 F.2d at 199 (Heaney, S.C.J., dissenting) (advocating remand to the district court for a reconsideration of defendant's mental disorders and a resentencing) and *United States v. Patterson*, 15 F.3d 169, 171 (11th Cir. 1994) (stating that when the district court refused to grant a downward departure on the grounds that it lacked authority, the refusal was appealable) and *United States v. Schechter*, 13 F.3d 1117, 1120 (7th Cir. 1994) (holding that a court of appeals will review a ruling only when decision not to depart results from the district court's mistaken conclusion that it lacked authority).

7. See *United States v. Ruklick*, 919 F.2d 95, 98 (8th Cir. 1990) (reversing trial court's refusal to depart from Guidelines when defendant had the mental capacity of a 12-year-old). On the need for specific findings in Guideline decisionmaking, see *United States v. Zackson*, 6 F.3d 911, 912 (2d Cir. 1993) (remanding case for an adequate statement of the reason for the 151 month sentence); *United States v. Perkins*, 963 F.2d 1523, 1528 (D.C. Cir. 1992) (stating that a court is required to make specific findings of whether cocaine found in codefendant's house was reasonably foreseeable in order to satisfy the sentencing guidelines).

8. See generally 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 16.18A (1989 & Supp. 1994) (discussing how the courts have invoked the Guidelines in violent and nonviolent crimes).

9. See generally Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal*

suggests that federal judges have not seriously considered the way mental disability should be assessed in sentencing decisions, and that random decisions generally reflect a judge's "ordinary common sensical read" of whether an individual defendant "really" could have overcome his disability.¹⁰

We contend that this is caused by several factors:

- (1) a lack of understanding on the part of federal judges and defense counsel as to the meaning of mental disability and its potential interrelationship with criminal behavior;¹¹
- (2) an attitude by federal prosecutors that such mitigating evidence is a mere play for sympathy and an inappropriate factor for consideration at the sentencing phase, an attitude given strong support by Justice Scalia's dissent in *Penry v. Lynaugh*, when he argued that the presentation of testimony to a death penalty jury about a defendant's mental retardation and childhood sexual and physical abuse led to an inappropriate "outpouring . . . [of] unfocused sympathy;"¹²
- (3) the structure of the insanity defense as an all-or-nothing alternative, causing many to believe that lesser evidence of mental disorder is simply an insufficient factor to consider in sentencing decisions;¹³

Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss"? 29 ARIZ. L. REV. 1, 4 (1987) (noting that there is no common thread or cohesiveness among decisions using mental disability defenses).

10. On the way that similar behavior drives insanity defense jurisprudence, see MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 423-29 (1994) (arguing that the therapeutic potential of different policies must be considered in order to make the insanity defense system more coherent) [hereinafter PERLIN, *INSANITY DEFENSE*]; see also Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373 (1992) [hereinafter Perlin, *Sanism*].

11. See generally Keri A. Gould, *A Therapeutic Jurisprudence Analysis of Competency Evaluation Requests: The Defense Attorney's Dilemma* 18 INT'L J. L. & PSYCHIATRY 83 (1995) (describing the therapeutic jurisprudence approach and applying it to the arraignment process); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 627-30 (1993) (arguing that the relationship between legal process and litigants is pretextual).

12. *Penry v. Lynaugh*, 492 U.S. 302, 359-60 (1989) (Scalia, J., concurring in part & dissenting in part); see 3 PERLIN, *supra* note 8, § 17.09 (Supp. 1994) (discussing Justice Scalia's concurrence); 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, 244 (1994) (discussing Justice Scalia's concurrence).

13. *United States v. Ruklick*, 919 F.2d 95, 97-98 (8th Cir. 1990) (concluding that the sentencing court is not required to find that reduced mental capacity is the sole cause of the offense before downward departure from the Guidelines is justified); cf. *United States v. Gentry*, 925 F.2d 186, 188-89 (7th Cir. 1991) (stating that the sentencing court cannot merely point to a mental condition, but must assess whether the defendant possesses "significantly reduced mental incapacity" in justifying downward departure from Guidelines) (emphasis in original).

(4) and ambivalence about mental disability as exculpatory evidence, which frequently results in putatively-mitigating testimony serving an aggravating function, most notably in death penalty cases.¹⁴

This set of misassumptions leads to what we call the Rashomon effect, the way that multiple perspectives will lead to multiple interpretations of the same “facts,”¹⁵ an effect that inevitably distorts the intent of *any* set of guidelines. At the roots of these misassumptions is another set of unconscious factors that compel judicial behavior. Most important among these factors are: (1) punitive urges that drive the criminal justice system in spite of statutory or caselaw to the contrary;¹⁶ (2) “sanist” behavior in the criminal justice system;¹⁷ and (3) “pretextual” behavior of courts and other factfinders in that system.¹⁸

Although there is a robust developing literature about almost all other aspects of the Guidelines,¹⁹ virtually nothing has been written on the

14. This happens notwithstanding the Supreme Court mandate that sentencing authorities consider any relevant mitigating evidence a defendant offers as basis for a sentence less than death. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering any mitigating factors of the defendant’s character or record as a basis for a sentence less than death); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (reasoning that mitigating evidence cannot, *as a matter of law*, be kept from the sentencer); 3 PERLIN, *supra* note 8, § 17.09 (discussing *Eddings*). Consequently, mental disability is viewed as a mitigating factor at the penalty phase of death penalty cases only when the crime is seen as not “planful” and the defendant previously “sought help” for his condition. See Perlin, *supra* note 12, at 245-49 (commenting that empirical evidence shows that factfinders are more receptive to a mental status defense not involving “planful” behavior and discussing, inter alia, Lawrence White, *The Mental Illness Defense in the Capital Penalty Hearing*, 5 BEHAV. SCI. & L. 411, 414-19 (1987)).

15. See David S. Sokolow, *From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon for Current Legal Education*, 1991 WIS. L. REV. 969, 975 (suggesting that perception, point of view, and capacity to remember all influence interpretation of facts).

16. PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 49-59.

17. PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 392; Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science Evidence, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47, 51-52 (1993); see *infra* Part IV.B.

18. Perlin, *supra* note 11, at 627; see *infra* Part IV.C.

19. An August 14, 1994 simple search (“federal sentencing guidelines”) of the WESTLAW/JLR database revealed 190 documents. For recent representative articles, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (detailing the legislative history of the Guidelines); Eric Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187 (criticizing the Guidelines as violating congressional goals and public policy because sentences handed down under the Guidelines often do not adequately relate to the defendant’s actual culpability); Emmett H. Miller, III, *Federal Sentencing Guidelines for Organizational Defendants*, 46 VAND. L. REV. 197 (1993) (describing the Guidelines and proposing a number of amendments to improve them); Houser, *supra* note 2 (proposing broader discretion for judges to consider factors not included in the Guidelines).

application of the Guidelines to mentally disabled persons.²⁰ This Article seeks to explore that subject by illuminating the ways in which prejudice, misunderstanding, and distrust have infected the federal sentencing process. We begin in Part II with a brief history of the Guidelines, and then, in Part III, we show how the mental disability language in the Guidelines was chosen. Part IV then defines “sanism” and “pretextuality,” and Part V shows how those concepts have affected the jurisprudence of the courts on this issue. Then in Part VI, we more closely demonstrate how the courts’ decisions in this area reflect unconscious feelings about mentally disabled defendants, feelings that stem from our urge to punish and that are reflected in the sanist and pretextual court system. We conclude by looking first at these questions through a therapeutic jurisprudence lens²¹ and then by offering some modest policy recommendations for the future.

II. The Sentencing Guidelines²²

In response to criticisms of indeterminate sentencing,²³ Congress passed the 1984 Sentencing Reform Act²⁴ in an attempt to bring about a

20. *But see* Robert Weinstock et al., *Psychiatry and the Federal Sentencing Guidelines*, 15 AM. J. FORENSIC PSYCHIATRY 67 (1994) (arguing that psychiatry can potentially play a significant role in the outcome of the sentencing process but that this potential has often been overlooked). One of us has looked at another important, and heretofore ignored, mental health related aspect of the Guidelines: the therapeutic jurisprudential implications of the Guidelines that encourage defendants to testify against, or in more common parlance, “turn rat on,” their codefendants. *See* Gould, *supra* note 1 (questioning the practice of coercing defendants to turn state’s evidence on each other in return for lesser sentences and using evidence of uncharged or acquitted crimes to boost sentences).

21. *See* THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990); ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991); David B. Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992) (advocating the creation of an interdisciplinary field combining law and behavioral science to supplant the traditional analytical approach to mental health law); David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517 (1992) (detailing how an appreciation of the mental health disciplines can contribute to a more just legal system); 1 PERLIN, *supra* note 8, § 1.05A (Supp. 1994) (describing recent works on therapeutic jurisprudence); Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993) (exploring the role of the law as a therapeutic agent); Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Basis of Mental Disability Law*, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 369 (1994) (describing the problems of “sanism” and “pretextuality” in modern criminal law).

22. The Guidelines are discussed in more depth in PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 165-70.

23. *See* *Mistretta v. United States*, 488 U.S. 361, 363-67 (1989) (discussing the problems associated with indeterminate sentencing and the resulting unfairness).

24. 18 U.S.C. §§ 3551-742 & 28 U.S.C. §§ 991-98 (1988 & Supp. V 1994). *See*

measure of regularity and uniformity in federal sentencing procedures and provide for a more efficient and just sentencing system.²⁵ Under this law, a Sentencing Commission (Commission) was created²⁶ and was mandated to promulgate Guidelines in accordance with the Act.²⁷ The constitutionality of these Guidelines—a binding set of rules that courts *must* use in imposing sentences²⁸—was subsequently upheld by the Supreme Court in *Mistretta v. United States*.²⁹

The sentencing structure set up under the Guidelines uses a mathematical calculation to arrive at the presumptive sentence.³⁰ Within the permissible sentencing range, the judge must determine an appropriate sentence, consistent with the concerns and purposes of the Act, including: the nature and circumstances of the offense, the history and characteristics of the defendant, the need to achieve the recognized purposes of sentencing, the kinds of sentences available, pertinent policy statements, the need to

generally Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (discussing the Guidelines, the problem of disparity in sentencing, and proposed remedies).

25. Some states also adopted determinate sentencing laws. See, e.g., *State v. Allert*, 815 P.2d 752, 759 (Wash. 1991) (discussing the sentencing guidelines and holding that a combination of depression, personality disorder, and alcoholism did not justify exceptional sentence). For a careful opinion considering the appropriate scope of discretion in unusual cases, see *People v. Watters*, 595 N.E.2d 1369, 1377-78 (Ill. App. Ct. 1992) (discussing the history of criminal punishment and whether mandatory sentencing should apply to a sexual offender who is mentally ill).

The state caselaw on mandatory sentencing and mental disability is scant. *But see Barret v. State*, 772 P.2d 559, 571 (Alaska Ct. App. 1989) (finding that although mental illness was the cause of the defendant's criminal escape, such a finding did not automatically require a reduction of the presumptive sentence); *Lorenzo v. State*, 483 So. 2d 790, 791 (Fla. Dist. Ct. App. 1986) (holding that the trial court erred in increasing the defendant's sentence under the state's mentally disordered sex offenders program); *State v. Alexander*, 591 So. 2d 1029, 1030 (Fla. Dist. Ct. App. 1991) (determining that a lower sentence was not justified absent a finding that sexual offenders had strong motivation to be rehabilitated); *Commonwealth v. Larkin*, 542 A.2d 1324 (Pa. 1988) (finding that the defendant, who was found guilty but mentally ill, was not entitled to a reduction in the mandatory minimum sentence).

26. 28 U.S.C. § 991 (Supp. V 1994).

27. *Id.* § 994(a)(1).

28. See *id.* § 994(b)(2) (setting guidelines for the Commission to use when determining maximum sentences).

29. 488 U.S. 361, 412 (1989). See generally Nagel, *supra* note 2, at 906-13 (explaining the bases for *Mistretta* decision); Black, *supra* note 2, at 787 (noting that the decision was highly controversial); Myrna Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEP. L. REV. 905, 925-26 (1993) (discussing *Mistretta* and the subsequent implementation of the Guidelines); Christina C. Montgomery, *Social and Schematic Injustice: The Treatment of Offender Personal Characteristics Under the Federal Sentencing Guidelines*, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 27, 31 (1993) (discussing *Mistretta*).

30. Gould, *supra* note 1, at 850.

avoid unwarranted disparities among similarly situated defendants, and the need to provide restitution to any victims of the offense.³¹ The enabling statute specifically mandates that the sentencing judge consider the history and characteristics of the defendant and the nature and circumstances of the offense.³² In practice, the phrase “relevant information,” as used within the Guidelines, has a “particular, rigid meaning and application,”³³ and judges are generally not free to use such information to fashion a sentence outside the boundaries set by the mathematical sentencing equation.³⁴

It is generally accepted that there are four major purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation.³⁵ Throughout history, one or the other of these purposes has dominated sentencing theory and practice.³⁶ At the heart of each new sentencing philosophy is a series of goals that embrace the current favored purpose. At different times, the legislature,³⁷ the sentencing judge,³⁸ or various other administrative groups³⁹ have been entrusted with the primary responsibility of fulfilling sentencing goals.

31. 18 U.S.C. § 3553(a)(1)-(7) (1988).

32. *Id.* § 3553(a)(1); see *United States v. Duarte*, 901 F.2d 1498, 1500-01 (9th Cir. 1990) (holding that under 18 U.S.C. § 3553(a) a court must consider correspondence describing the defendant’s history); *Miller & Freed*, *supra* note 5, at 4 (searching for a framework to guide courts in the consideration of a defendant’s characteristics under 28 U.S.C. § 3553(a)).

33. Gould, *supra* note 1, at 853; see 18 U.S.C. app. 4, § 1B1.3(2) (Supp. V 1994) (outlining the use of information specified by the applicable guideline to determine a sentence).

34. Gould, *supra* note 1, at 853.

35. See Nagel, *supra* note 2, at 887 (compiling an excellent review of sentencing theory).

36. *Id.*

37. Congress has met this responsibility by creating the Commission and by passing legislation that delineates mandatory minimum sentences for certain crimes.

38. Federal district judges were the prime arbiters of divining sentences under the indeterminate sentencing system in effect prior to the implementation of the Guidelines. As long as sentences were within the broad ranges set down by statute, they were essentially unreviewable by the appellate courts. See *United States v. Bright*, 710 F.2d 1404, 1409 (9th Cir. 1982) (indicating that sentencing courts have broad discretion in imposing sentences, but the power of a appellate courts is limited to determining whether discretion was actually exercised); *United States v. Barbara*, 683 F.2d 164, 166 (6th Cir. 1982) (stating that the imposition of the maximum sentence allowed by a plea agreement, when the sentencing judge’s articulated rationale for the punishment was to exact retribution for the attorney-defendant’s abuse of professional trust, did not fit any of the “few exceptions to the rule that a sentencing decision by a district judge is unreviewable if it is within the statutory limits”); *United States v. Dace*, 502 F.2d 897, 899 (8th Cir. 1974) (upholding consecutive sentences for mail fraud because these “heavy” sentences did not constitute a manifest or gross abuse of discretion).

39. Under the present sentencing system, the Commission and perhaps the United States Attorney fulfill this role. Under an indeterminate sentencing system, the parole boards function in this way, by determining when an inmate is rehabilitated enough to be released from the correctional institution.

The Commission began its work at a time when enthusiasm for rehabilitation theory was waning.⁴⁰ Several studies had been conducted indicating that criminal rehabilitation was a dead-end goal.⁴¹ Public outcry over increased violence and crime increased the pressure on lawmakers to move away from indeterminate sentencing,⁴² which was believed to produce disparate sentences, and toward a “just desserts” sentencing rationale.⁴³ The just desserts sentencing theory imputes a ranking of

40. See Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 395 (1991) (contending that reform was stimulated by empirical studies that demonstrated the ineffectiveness of rehabilitation efforts); Karin Bornstein, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor Out of the Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135, 138-140 (1992-93) (stating that contemporary scholarship and public opinion concerning the system’s “softness” on crime combined to undermine support for the rehabilitative theory); Nagel, *supra* note 2, at 884, 895-97 (citing empirical studies which suggest that rehabilitation theory undermines “equal justice under the law”).

41. See Douglas S. Lipton et al., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975)* (promoting the “Nothing Works” theory). Later, a coauthor of the book, Professor Robert Martinson, renounced his views by affirming the virtues of probation as a rehabilitative method. Robert Martinson & Judith Wilks, *Save Parole Supervision*, 41 FED. PROBATION 23 (1977). Two years later, he published a study in which he found “startling results” of rehabilitative treatment programs. See Robert Martinson, *New Findings, New Views: A Note Of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 254-255 (1979) (evaluating statistics that suggest the effectiveness of a treatment program depends on the conditions under which the program is conducted, rather than the substance of the program).

Although the dominant congressional and public perception was that all social scientists had condemned rehabilitation as an idea that could not work, more sophisticated correctional rehabilitative research continued with some positive results. See generally Paul Gendreau & Robert R. Ross, *Revivification of Rehabilitation: Evidence From the 1980s*, 4 JUST. Q. 349 (1987) (conducting an extensive review of offender rehabilitation programs and theories and concluding that offender rehabilitation is an attainable goal).

42. With indeterminate sentencing, an offender is sentenced to a “flexible sentence,” in which the length of actual incarceration is handed down by the sentencing judge in terms of a minimum-maximum range. The actual amount of time served is determined by both conditional “good time” early releases (approved by the correctional facility administration) and periodic evaluations of the prisoner’s overall rehabilitation (as determined by the parole board). Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 435 n.94 (1992). In other words, for an indeterminate sentence of two to four years, the inmate must serve at least two years, but depending upon his or her behavior within the facility and upon parole hearing determinations, he may serve anywhere from two to four years in the facility. Parole boards also determine if a prisoner may be transferred to a less restrictive correctional program. Under this model, it is believed that wardens and the parole boards are in the best position to determine when the prisoner is rehabilitated enough to resume living outside of the correctional facility. *Id.*

43. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15 (1988) (contending that the “just desserts” approach forced drafters of the Guidelines to reach a compromise).

criminal behaviors by severity and applies a similarly ranked order of punishments. Thus, in theory, the just desserts system of sentencing advocates punishing those who violate the rights of others in accordance with their individual level of blameworthiness⁴⁴ and in this way satisfies the public hunger for the expression of communal blame upon the culpable.⁴⁵ Thus, the criminal conduct is punished without regard to individual characteristics or circumstances.

III. The Choice of Mental Disability Language⁴⁶

The Guidelines state that a downward departure is appropriate when the defendant suffers "from significantly reduced mental capacity."⁴⁷ The use of the modifier "significantly" suggests that the drafters sought to limit application of this provision to only the most mentally impaired defendants. This view tracks public sentiment, which continues to endorse the eighteenth century "wild beast" test⁴⁸ as the appropriate means of assessing criminal responsibility; this view is also consistent with Congress's decision in 1984 to enact a more restrictive version of the discredited 1843 *M'Naghten* rules following public outrage over the Hinckley acquittal.⁴⁹

44. Nagel, *supra* note 2, at 898.

45. See Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 748 (1992) (arguing that the notion of culpability is essential to a "just desserts" approach to criminal punishment).

46. Offender characteristics are split between the Guidelines and policy statements. The criminal history provisions are contained within the Guidelines and the noncriminal personal history provisions, including consideration of 5K21.3 (mental and emotional history), are relegated to policy statements. According to the Department of Justice's *Prosecutorial Handbook on Sentencing Guidelines*, this means that they are only "advisory and non-binding." See Miller & Freed, *supra* note 5, at 3. But see *Williams v. United States*, 503 U.S. 193, 201 (1992) (holding policy statement to be an authoritative guide to the meaning of the applicable guideline).

The Commission published no evidence to document or substantiate the "not ordinarily relevant" language added to the policy statement. The Commission also did not conduct a study of federal or state judicial practice on the influence of mental condition on sentencing. The Commission offered no reasons pursuant to 28 USC § 994(p) to support its offender characteristics policy statement when the initial guidelines were submitted in May 1987. *Id.* at 4. In its Supplemental Report to Initial Federal Sentencing Guidelines and Policy Statements of June 18, 1987, the Commission described many aspects of research and philosophy concerning the Guidelines Manual, but said virtually nothing about offender characteristics policies. *Id.*

47. MANUAL, *supra* note 3, § 5K2.13.

48. See Caton F. Roberts et al., *Implicit Theories of Criminal Responsibility Decision Making and the Insanity Defense*, 11 LAW & HUM. BEHAV. 207, 223-24 (1987) (concluding that the public continues to use the early English concept of "total insanity").

49. PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 138-43 (discussing the public's

Courts regularly find that, to qualify for a downward departure, a defendant's condition must be "extraordinary" or "atypical." Thus, in *United States v. Vela*⁵⁰ the Fifth Circuit reversed a downward departure in the case of a defendant subjected to incestuous childhood sexual abuse that was admittedly "shocking and repulsive" because that factor, while egregious, was insufficiently extraordinary to support such a departure.⁵¹ And in *United States v. Lara*,⁵² Judge Metzner dissented from the Second Circuit's affirmance of a downward departure in the case of a "delicate looking" bisexual young man, arguing that susceptibility to physical and sexual attack in prison is not sufficiently unusual as to rise to the level of atypicality required by the Guidelines.⁵³

The Guidelines also require that the defendant's "reduced mental capacity" not be caused by the "voluntary use of drugs or other intoxicants."⁵⁴ This exclusion suggests that the drafters specifically sought to limit application of the provision to those who could not be deemed "responsible" for their mental state.⁵⁵ Indeed, appellate courts have regularly ruled that downward departures are precluded even in cases in which the defendants successfully completed postarrest drug rehabilitation.⁵⁶

These limitations on the use of the mental disability defense parallel both the attitude of legislators⁵⁷ and the attitude of jurors, who consistently

frustrations with the insanity defense and the passage of the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. § 4241 (1985)).

50. 927 F.2d 197 (5th Cir. 1991).

51. *Id.* at 198-99. See generally Jean H. Shuttleworth, Recent Developments, *Childhood Abuse as a Mitigating Factor in Federal Sentencing: The Ninth Circuit Versus the United States Sentencing Commission*, 46 VAND. L. REV. 1333, 1334 (citing *Vela* as a case that holds that childhood abuse is relevant in certain circumstances). On atypicality, see *United States v. Studley*, 907 F.2d 254, 258 (1st Cir. 1990) (holding that a downward departure based on the mental or emotional condition of a defendant is only appropriate when the particular condition is "atypical").

52. 905 F.2d 599 (2d Cir. 1990).

53. *Id.* at 608 (Metzner, J., dissenting).

54. MANUAL, *supra* note 3, § 5K2.13.

55. See *United States v. Tolliver*, No. 91-4130, 1993 WL 100067, at *8-9 (6th Cir. Apr. 5, 1993) (rejecting downward departure because of defendant's "voluntary" decision to use drugs).

56. *United States v. Harrington*, 947 F.2d 956, 963 (D.C. Cir. 1991) (vacating defendant's downward departure sentence and remanding for resentencing because drug rehabilitation is not a mitigating circumstance according to the Commission); *United States v. Martin*, 938 F.2d 162, 163 (9th Cir. 1991) (holding that a defendant's postarrest drug rehabilitation efforts provided no basis for downward departure because the court lacked the power to deviate from sentencing guidelines).

57. PERLIN, INSANITY DEFENSE, *supra* note 10, at 73-142, 417-45; see *State v. Duckworth*, 496 So. 2d 624, 635 (La. Ct. App. 1986) (ruling that trial judge was proper in rehabilitating juror by explaining the law on insanity and culpability after juror had stated that defendant was

refuse to treat mental illness as a mitigating factor in death penalty cases.⁵⁸ In short, the Guidelines present an extraordinarily cramped reading of “mental disability” as a mitigator, a reading that is totally consonant with public and legislative attitudes toward an exculpatory nonresponsibility defense and toward mental disability as a mitigator in death penalty sentencing.

IV. Sanism and Pretextuality

A. Introduction

We contend that it is impossible to truly understand the developments discussed in this Article without an understanding of what we refer to as “sanism” and “pretextuality.” These constructs, we believe, best illuminate the underlying issues.

B. Sanism⁵⁹

“Sanism” is an irrational prejudice of the same quality and character of other irrational prejudices that cause and are reflected in prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.⁶⁰ It infects both our jurisprudence and our lawyering practices.⁶¹ Sanism is largely invisible and socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividuation, and is sustained and perpetuated by our use of alleged “ordinary common sense” and by

responsible for actions if he “wanted to do them,” instead of excusing for cause); J.R. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 238 (1990) (discussing suggestion by Hinckley prosecutor to jurors that “if Hinckley had emotional problems, they were largely his own fault”).

58. See Perlin, *supra* note 12, at 259 (discussing belief that jurors treat mental illness as an aggravating factor, not a mitigating factor, in many death penalty cases).

59. The text accompanying notes 60-64 *infra* is generally adapted from Perlin & Dorfman, *supra* note 17, at 51-52.

60. The classic study is GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1955). On the way that sanism incorporates a multistep “prejudice assimilation model,” see Keri A. Gould, “*Madness in the Streets*” *Rides the Waves of Sanism*, 9 N.Y.L. SCH. J. HUM. RTS. 567, 574-81 (1992) (reviewing RAELE ISAAC & VIRGINIA ARMAT, *MADNESS IN THE STREETS: HOW PSYCHIATRY AND THE LAW ABANDONED THE MENTALLY ILL* (1990), and describing its treatment of sanism).

61. The term “sanism” was, to the best of our knowledge, coined by Dr. Morton Birnbaum. See Morton Birnbaum, *The Right to Treatment: Some Comments on its Development*, in *MEDICAL, MORAL AND LEGAL ISSUES IN HEALTH CARE* 97, 106-07 (Frank J. Ayd, Jr. ed., 1974) (developing the concept of sanism by drawing an analogy to racism); *Koe v. Califano*, 573 F.2d 761, 764 & n.12 (2d Cir. 1978) (defining sanism).

heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.

Judges, legislators, attorneys, and lay persons all exhibit sanist traits and profess sanist attitudes.⁶² It is no surprise that jurors reflect and project the conventional morality of the community and that judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes. For example, one important stereotype is that mental illness can easily be identified by lay persons; this belief matches up closely to popular media depictions and comports with our “common sense” notion of “crazy behavior.”⁶³ Another sanist belief is that it is—and should be—socially acceptable to use pejorative labels to describe and single out the mentally ill; this singling out is not problematic in the way that the use of other pejorative labels to describe women, blacks, Jews, or homosexuals might be.⁶⁴

Most of the caselaw is similarly riddled with other sanist stereotypes and myths. Examples include the omnipresent, obsessive fear of feigned mental illness⁶⁵ and the presumption of an absolute linkage between

62. PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 201, 440; Perlin & Dorfman, *supra* note 17 at 51-52.

63. PERLIN, *supra* note 8, at 395. *See generally* State v. Van Horn, 528 So. 2d 529, 530 (Fla. Dist. Ct. App. 1988) (discussing the probative value of lay witnesses’ “perceptions of [the defendant’s] normalcy”); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 727 & n.608 (1989-90) (discussing the “wild beast” standard in connection with *Battalino v. People*, 199 P.2d 897, 901 (Colo. 1948)); Walter Bromberg & Hervey M. Cleckley, *The Medico-Legal Dilemma*, 42 J. CRIM. L. & CRIMINOLOGY 729, 738 (1952) (contrasting lay perceptions of “insanity” with actual attributes of schizophrenia).

64. Perlin, *Sanism*, *supra* note 10, at 395. On the ways that negative characterization of mental illness and the mentally ill are used by prosecutors in criminal trial summations, see Thomas M. Fleming, Annotation, *Negative Characterization or Description of Defendant, by Prosecutor During Summation of Criminal Trial, as Ground for Reversal, New Trial, or Mistrial—Modern Cases*, 88 A.L.R. 4th 8, 91-95 (1991) (reviewing cases in which the prosecutor’s characterization of the defendant as mentally deranged did not require reversal on appeal); Randy V. Cargill, “Hard Blows” Versus “Foul Ones”: *Restrictions on Trial Counsel’s Closing Argument*, ARMY L., Jan. 1991, at 20, 26 (giving examples of permissible and impermissible characterizations of defendants). On the descriptions used by members of Congress to describe mentally disabled individuals (“the demented,” “the deranged,” “lunatics,” “madmen,” “idiots and morons,” and “psychopaths and nincompoops”), see Motion for Leave to File and Brief for the New Jersey Dep’t of the Public Advocate, Division of Mental Health Advocacy and American Civil Liberties Union of New Jersey as Amici Curiae at 17, *United States Dep’t of Treasury v. Galioto*, 477 U.S. 556 (1986) (No. 84-1904) (quoting various passages from the legislative debate on the 1968 gun control legislation).

65. *See* PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 236-47, 402-03 (discussing public’s constant fear of defendants’ faking an insanity defense); *see also* Lynch v. Overholser, 369 U.S. 705, 715 (1962) (holding that a criminal defendant accused of passing bad checks is not compelled to be confined to a mental hospital unless he relies on the insanity defense and is

mental illness and dangerousness.⁶⁶ Underlying these myths is one constant: the extraordinary fear of mentally disabled criminal defendants.⁶⁷

In this environment, it is easy to understand how evidence of mental illness—ostensibly introduced for mitigating purposes—can instead be construed by judges as an aggravating factor.⁶⁸ In one notorious Florida case, for example, a trial judge concluded that due to the defendant's mental disability (paranoid schizophrenia manifested by hallucinations in which he "saw" others in a "yellow haze"), "the only assurance society can receive that [the defendant] never again commits to another human being what he did to [the brutally murdered decedent] is that the ultimate sentence of death be imposed."⁶⁹

acquitted on that ground); *United States v. Brown*, 478 F.2d 606, 611 (D.C. Cir. 1973) (noting that the standard for committing an acquitted criminal defendant to a mental hospital is preponderance of the evidence); Peter Margulies, *The "Pandemonium Between the Mad and the Bad: Procedures for the Commitment and Release of Insanity Acquittees After Jones v. United States*, 36 RUTGERS L. REV. 793, 806-07 n.85 (1984) (contrasting an attempt to fake insanity with an act of collusion to defraud an insurance company).

66. Perlin, *Sanism*, *supra* note 10, at 402; see *Jones v. United States*, 463 U.S. 354, 365 (1983) (finding that the government may confine a criminal defendant to a mental hospital even if the defendant establishes that he is not guilty by reason of insanity); *Overholser v. O'Beirne*, 302 F.2d 852, 861 (D.C. Cir. 1961) (reasoning that the petitioner's release would be premature and put the public at risk); PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 161-71 (discussing the public's lack of faith in psychiatric defenses to criminal behavior).

67. Successful insanity defendants are perceived as perhaps the "most despised" and most "morally repugnant" group of individuals in society. See Deborah C. Scott et al., *Monitoring Insanity Acquittees: Connecticut's Psychiatric Security Review Board*, 41 HOSP. & COMMUN. PSYCHIATRY 980, 982 (1990) (describing the difficulties psychiatric review boards face when contemplating release of inmates); see also James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961 (1986) (noting that legislators are searching for alternatives to the insanity defense in the wake of the Hinckley acquittal); Tony Rogers, *Juries' Reluctance to Accept Insanity Pleas Linked to Fear, Experts Say*, L.A. TIMES, April 18, 1993, at A18 (describing the reluctance of jurors to acquit a defendant on the basis of insanity).

68. Ellen F. Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 299-300 (1989).

69. *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979). The Florida Supreme Court reversed this sentence, however, finding that it was reversible error for the trial court to consider the possibility that the defendant would commit similar acts in the future when imposing the death penalty. *Id.*

C. *Pretextuality*⁷⁰

Sanist attitudes often lead to pretextual decisions. By this we mean simply that factfinders accept—either implicitly or explicitly—testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decisionmaking, specifically when witnesses, especially *expert* witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends.”⁷¹ This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blase judging, and at times, perjurious or corrupt testifying. The reality is well known to frequent consumers of judicial services in this area: to mental health advocates and other public defender, legal aid, and legal service lawyers assigned to represent patients and mentally disabled criminal defendants; to prosecutors and state attorneys assigned to represent hospitals; to judges that regularly hear such cases; to expert and lay witnesses; and most importantly, to the mentally disabled person involved in the litigation itself.

The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and factfinders.⁷² Experts frequently testify in accordance with their own self-referential concepts of “morality”⁷³ and openly subvert statutory and caselaw criteria that impose rigorous behavioral standards as predicates for

70. This section is largely adapted from Michael L. Perlin, *The ADA and Persons With Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 J.L. & HEALTH 15, 29-34 (1993-94).

71. Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of “Ordinary Common Sense,” Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 133 (1991); see Charles Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 839 (1974) (suggesting that for the most part police perjury is ignored by the judiciary).

72. See *Streicher v. Prescott*, 663 F. Supp. 335, 343 (D.D.C. 1987) (noting that although the District of Columbia Code contained a provision that allowed patients to seek periodic review of commitment or independent psychiatric evaluation, not a single patient had ever exercised that right). The significance of *Streicher* is discussed carefully in Arlene Kanter, *Abandoned but Not Forgotten: The Illegal Confinement of Elderly People in State Psychiatric Institutions*, 19 N.Y.U. REV. L. & SOC’L CHANGE 273, 304-06 (1991).

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

commitment⁷⁴ or that articulate functional standards as prerequisites for an incompetency to stand trial finding.⁷⁵ Often this testimony is further warped by a heuristic bias. Expert witnesses—like the rest of us—succumb to the meretricious allure of simplifying cognitive devices in their thinking and employ such heuristic gambits as the vividness effect or attribution theory in their testimony.⁷⁶

Testimony is then weighed and evaluated by frequently sanist fact-finders.⁷⁷ Judges and jurors, both consciously and unconsciously, frequently rely on reductionist, prejudice-driven stereotypes in their decision-making, thus subordinating statutory and caselaw standards as well as the legitimate interests of the mentally disabled persons that are the subject of the litigation. The process is further contaminated by judges' predispositions to employ the same sorts of heuristics as the expert witnesses employ.⁷⁸ Even when confronted with a clear body of contrary empirical evidence, judges pretextually decide cases based on their vision of the socially appropriate result.⁷⁹

In a series of other articles, we have attempted to demonstrate how sanism and pretextuality drive other aspects of the mental disability law system.⁸⁰ As we discuss below, we believe these same pernicious forces are equally at play here.

74. Perlin, *supra* note 11, at 641-59.

75. *See* People v. Doan, 366 N.W.2d 593, 598 (Mich. Ct. App. 1985) (stating that at trial expert testified that defendant was "out in left field" and went "bananas").

76. Perlin, *supra* note 70, at 21; Perlin *supra* note 11, at 629, 661, 667; *see* Michael Saks & Robert Kidd, *Human Information Processing and Adjudication: Trial By Heuristics*, 15 LAW & SOC'Y REV. 123, 130-31 (1980) (recognizing human cognitive abilities are limited and that not all information can be processed successfully and that, therefore, experts in a variety of fields simplify the process by employing heuristics).

77. Perlin, *Sanism*, *supra* note 10, at 397; Perlin & Dorfman, *supra* note 17, at 51-52.

78. *See* Perlin, *supra* note 11, at 664-67 (noting that judges are willing to rely primarily on their own personal observation of the defendant's demeanor at trial when assessing the defendant's mental state).

79. *See* Gacy v. Welborn, 994 F.2d 305, 317 (7th Cir.) (affirming the defendant's conviction in a notorious multiple homicide case notwithstanding body of evidence concluding jurors do not understand capital punishment instructions), *cert. denied*, 114 S. Ct. 269 (1993).

80. Perlin, *Sanism*, *supra* note 10, at 391-406; Perlin, *supra* note 11, at 636-39; Perlin, *supra* note 70, at 29-43; Perlin & Dorfman, *supra* note 17, at 51-53; Gould, *supra* note 60, at 570, 576.

V. The Caselaw

As Professor Stephen Schulhofer, a consultant to the Commission, has noted:

[I]n many courts, at the Department of Justice and at the Commission itself there has been a pervasive assumption that departures represent a threat to the Guidelines system or that they should be used sparingly and only as a last resort.

. . . .

[Appellate decisions have thus] sent a message to lower courts and contributed to an atmosphere in which departure is considered out of the question under virtually any circumstances."⁸¹

This message is even more pronounced in cases involving mentally disabled criminal defendants.

Departures from the Guidelines based on mental disability have been few, and more often than not, have come in cases in which a defendant's mental state more closely approximates that of a potentially successful insanity plea.⁸² In *United States v. Speight*,⁸³ for instance, the court found that a defendant (convicted of drug and firearm offenses) who suffered from schizophrenia and other emotional disturbances met all the criteria of the Guidelines and that a sentence reduction was thus warranted.⁸⁴ In *United States v. Ruklick*⁸⁵ the court emphasized that, under the Guidelines, it was not necessary to find the defendant's reduced mental capacity amounted to "but-for causation" in order to reduce a sentence, as long as his diminished mental capacity "comprised a contributing factor in the commission of the offense."⁸⁶

81. Schulhofer, *supra* note 24, at 863-64.

82. *See* *United States v. Lara*, 905 F.2d 599, 603 (2d Cir. 1990) (upholding departure from Guidelines based on defendant's likely "extreme vulnerability" in a correctional facility); *United States v. Cotto*, 793 F. Supp. 64, 67 (E.D.N.Y. 1992) (finding that the defendant's near retardation, vulnerability, efforts at rehabilitation, and incompetence warranted downward departure). There are limits to the use of mental disability as a reductive element. *See* MANUAL, *supra* note 3, § 5H1.3 ("Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines, except as provided in [the general provisions of Chapter 5].").

83. 726 F. Supp. 861 (D.D.C. 1989).

84. *Id.* at 867-68; *see also* *United States v. Glick*, 946 F.2d 335, 339 (4th Cir. 1991) (affirming the trial court's grant of a downward departure under the clearly erroneous standard); *United States v. Adonis*, 744 F. Supp. 336, 341-42 (D.D.C. 1990) (allowing downward departure because of the defendant's abnormally low intelligence); *cf.* *United States v. Doering*, 909 F.2d 392, 394-95 (9th Cir. 1990) (prohibiting *upward* departure when evidence reflected need for psychiatric care).

85. 919 F.2d 95 (8th Cir. 1990).

86. *Id.* at 97-98; *cf.* *United States v. Gentry*, 925 F.2d 186, 188-89 (7th Cir. 1991)

Not all of the remaining cases exhibit sanist characteristics, however. Several reflect the work product of thoughtful judges who have carefully weighed mental disability testimony and applied this evidence sensitively to the cases before them. Most recently, in *United States v. Cantu*⁸⁷ the Ninth Circuit reversed a trial court's refusal to grant a downward departure to a defendant suffering from post-traumatic stress disorder. The court carefully construed the Guidelines to include emotional disorders and organic syndromes. In the court's view, the purpose of the Guidelines is to enable federal judges to show "lenity toward defendants whose ability to make reasoned decisions is impaired."⁸⁸ Because the defendant's post-traumatic stress disorder had the capacity to "distort or suppress the formation of reasoned decisions," or "impair the formation of reasoned judgments," the defendant had thus qualified for a downward departure.⁸⁹

These cases are the exception. Generally, applications for downward departures are summarily rejected. In some cases uncontroverted evidence of major depression,⁹⁰ manic depression,⁹¹ severe emotional stress,⁹² or a history of psychosis⁹³ is rejected as a grounds for departure. In others,

(holding that the sentencing court must assess whether the defendant possesses "significantly reduced mental incapacity" in justifying downward departure from Guidelines) (emphasis in original).

87. 12 F.3d 1506 (9th Cir. 1993).

88. *Id.* at 1512.

89. *Id.* at 1512-13. Other courts have also carefully considered defendants' clinical conditions in assessing the propriety of a downward departure. See *United States v. Garza-Juarez*, 992 F.2d 896, 913-14 (9th Cir. 1993) (affirming downward departure because the defendant suffered from panic disorder and agoraphobia); *United States v. Lewinson*, 988 F.2d 1005, 1007-08 (9th Cir. 1993) (affirming downward departure despite the defendant's drug use because such use had ended before the crime was completed); *United States v. Chatman*, 986 F.2d 1446, 1454 (D.C. Cir. 1993) (vacating the defendant's sentence because the trial court failed to adequately consider the defendant's mental disability); *United States v. McCarthy*, 840 F. Supp. 1404, 1412-13 (D. Colo. 1993) (granting a downward departure to a defendant who had been in a "confused mental state" after being expelled from school and then learning of his friend's death); *United States v. McMurray*, 833 F. Supp. 1454, 1484 (D. Neb. 1993) (granting downward departure to a defendant suffering from a bipolar disorder and recognizing that the defendant's drug use was an effect of his disease and not the cause); *United States v. Cotto*, 793 F. Supp. 64, 67-68 (E.D.N.Y. 1992) (granting a downward departure to a defendant who was "vulnerable" and near retardation); see also *Commonwealth v. Sheridan*, 502 A.2d 694, 696-97 (Pa. Super. Ct. 1985) (affirming downward departure in part because of the defendant's "weak ego structure").

90. *E.g.* *United States v. Kimball*, No. 92-30133, 1993 WL 186624, at *2 (9th Cir. June 1, 1993); *United States v. Frazier*, 979 F.2d 1227, 1230 (7th Cir. 1992); *United States v. Eagan*, 965 F.2d 887, 893 (10th Cir. 1992); *United States v. Gudal*, No. 92-30014, 1992 WL 354551, at *4 (9th Cir. Nov. 27, 1992).

91. *E.g.*, *State v. Walker*, 393 N.W.2d 204, 207 (Minn. Ct. App. 1986).

92. *E.g.*, *State v. Rogers*, 770 P.2d 180, 182 (Wash. 1989).

93. *E.g.*, *United States v. Regan*, 989 F.2d 44, 48 (1st Cir. 1993).

evidence of a failed insanity defense is used as a justification for a refusal to enter a downward departure.⁹⁴ The entry of the insanity plea has been seen as evidence of a failure to demonstrate contrition (presumably because the plea entry denied legal responsibility for the offense), and that lack of contrition has been seen as a failure to accept responsibility, thus bringing the defendant out of the ambit of *another* Guideline (3E1.1), which provides for a downward departure if the defendant “clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct.”⁹⁵ As one court put it, the defendant’s entry of an insanity plea—containing in it the admission that he committed the underlying act (an armed robbery)—did not rise to the level of “contrition necessary . . . for acceptance of responsibility.”⁹⁶ In yet another case, the Seventh Circuit affirmed a denial of a sentence reduction in a failed insanity case when the defendant stated he was “very ashamed because [he] could not control [his] illness and [was] sorry [he could] not continue the [psychiatric] treatment that was necessary to bring him back to reality.”⁹⁷

In other cases, evidence of past insanity acquittals has been seen as an *aggravating* circumstance worthy of an upward departure.⁹⁸ And even when conviction is followed by commitment to a federal medical center for psychiatric care and treatment,⁹⁹ that level of mental illness has not been seen as sufficient to warrant a downward departure.¹⁰⁰

Generally, decisions by trial courts to reject downward departures are merely summarily affirmed, especially when the underlying crime is violent and the defendant’s violent criminal record raised the possibility that he would be a threat to public safety,¹⁰¹ or when the court simply found the defendant’s disability too insignificant as to warrant such a reduction,¹⁰²

94. *E.g.*, *United States v. Spedalieri*, 910 F.2d 707, 711-12 (10th Cir. 1990).

95. *Id.* at 712.

96. *Id.*

97. *United States v. Reno*, 992 F.2d 739, 744 (7th Cir. 1993).

98. *E.g.*, *United States v. Medved*, 905 F.2d 935, 942 (6th Cir. 1990); *United States v. McKenley*, 895 F.2d 184, 186 (4th Cir. 1990).

99. *See* 18 U.S.C. § 4244 (1985) (detailing the procedures for hospitalization of a convicted defendant).

100. *United States v. Hunter*, 985 F.2d 1003, 1007 (9th Cir. 1993), *vacated as moot*, 1 F.3d 843 (9th Cir. 1993).

101. *E.g.*, *United States v. Braxton*, 19 F.3d 1385, 1386 (11th Cir. 1994); *United States v. Fairman*, 947 F.2d 1479, 1480 (11th Cir. 1991); *United States v. Poff*, 926 F.2d 588, 592 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1503 (1992); *United States v. Wilson*, No. 89-3360, 1989 WL 149948, at *1 (6th Cir. Dec. 12, 1989), *cert. denied*, 494 U.S. 1038 (1990).

102. *E.g.*, *United States v. Regan*, 989 F.2d 44, 47-48 (1st Cir. 1993); *United States v. Tucker*, 986 F.2d 278, 280 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 76 (1993); *United States v. Hamilton*, 949 F.2d 190, 193-94 (6th Cir. 1991).

A recent case has also explored the relationship between the Guidelines and other federal

or when the court did not find defendant's "extraordinary postarrest efforts" at drug rehabilitation sufficient to warrant such a reduction,¹⁰³ or when the court felt that the defendant did not take sufficient responsibility for his role in the criminal offenses in question.¹⁰⁴ And in at least one case, it has been held that a defendant's "dangerous mental state" could make an upward departure appropriate.¹⁰⁵

Several cases deal with the application of the Guidelines to defendants suffering from compulsive gambling disorder. In *United States v. Harris*,¹⁰⁶ for instance, a downward departure was denied because the defendant failed to prove that he suffered from a pathological gambling disorder.¹⁰⁷ The decision was based in part upon the defendant's "highly sophisticated" scheme for defrauding banks.¹⁰⁸ In *United States v. Libutti*¹⁰⁹ a downward departure was granted for the defendant's claustrophobia disorder (under a 5H1.3 departure for medical and emotional conditions)¹¹⁰ and was denied for his compulsive gambling disorder (a 5K2.13 departure).¹¹¹ Taking it another step, in *United States v. Katzenstein*¹¹² the court concluded that a departure would not be warranted unless the defendant could either demonstrate that total rehabilitation had been achieved or that there was a lack of correlation between compulsive gambling disorder and increased propensity for criminal activity.¹¹³

statutes governing the provision of mental health care to prisoners during their period of sentence and the care of competent persons suffering from mental disease prior to sentencing. See *United States v. Roberts*, 915 F.2d 889, 891-92 (4th Cir. 1990), cert. denied, 498 U.S. 1122 (1991) (finding no error in trial judge sentencing defendant provisionally pursuant to 18 U.S.C. § 4244(c) rather than in accordance with sentencing guidelines). Another case has explored the relationship between diminished mental capacity and subsequent revocation of probation. See *United States v. Sylvester*, No. CR-90-177-2-FR, 1994 WL 92035, at *1 (D. Or. Mar. 11, 1994) (reconsidering revocation in case of defendant originally given downward departure because of "mental/emotional dysfunctions").

103. *United States v. Zeigler*, 1 F.3d 1044, 1048-49 (10th Cir. 1993).

104. *United States v. Haddad*, 10 F.3d 1252, 1261 (7th Cir. 1993).

105. *United States v. Hines*, 26 F.3d 1469, 1477-78 (9th Cir. 1994).

106. No. S192 Cr. 455 (CSH), 1994 WL 683429 (S.D.N.Y. Dec. 6, 1994).

107. *Id.* at *16.

108. *Id.*

109. No. CRIM. 92-611 (JBS), 1994 WL 774647 (D.N.J. Dec. 23, 1994).

110. *Id.* at *10.

111. *Id.* at 15.

112. No. 90-CR-272, 1991 WL 24386 (S.D.N.Y. Feb. 20, 1991).

113. *Id.* at *2; see also *United States v. Rosen*, 896 F.2d 789, 791 (3d Cir. 1990) (holding that defendant's compulsive gambling did not warrant downward departure). See generally Lawrence Lustberg, *Sentencing the Sick: Compulsive Gambling as the Basis for a Downward Departure Under the Federal Sentencing Guidelines*, 2 SETON HALL J. SPORT L. 51 (1992) (providing a thorough overview of compulsive gambling and mental disability departures under the Guidelines).

Similarly, in *State v. O'Brien*¹¹⁴ the court rejected the defendant's application for a downward departure in large part because of the "sophistication and planning" of his criminal activity: theft by swindle, through which the defendant defrauded others into forming car leasing joint ventures with him.¹¹⁵ And in *United States v. Rosen*,¹¹⁶ the trial court found that because the crime was committed to pay off a home equity loan—a loan that was needed to pay the defendant's gambling debts—rather than to support gambling directly, the crime consequently resulted from personal financial and economic difficulties, grounds determined by the Commission to be irrelevant to the sentencing process.¹¹⁷

Another important theme runs through each of the reported cases. In each one, without exception, the U.S. Attorney's Office opposed the use of mental disability as a mitigating factor.¹¹⁸ In at least one case, the Office argued that a defendant's need for psychiatric treatment justified an *upward* departure.¹¹⁹ This is especially important because the role of prosecutors has been "greatly enhanced" in the entire federal sentencing process.¹²⁰ This decision by the Justice Department mocks the spirit of the Guidelines and exposes federal prosecutors as inflexible gatekeepers, interested solely in insuring maximum prison time for all defendants convicted on federal charges no matter how serious their mental disability.¹²¹

114. 429 N.W.2d 293 (Minn. 1988).

115. *Id.* at 296.

116. 896 F.2d 789 (3d Cir. 1990).

117. *Id.* at 790 n.2. *But see* *United States v. Harris*, No. S192 Cr. 455 (CSH), 1994 WL 683429, at *3 (S.D.N.Y. Dec. 6, 1994) (citing two unreported cases, *United States v. Berube* and *United States v. Heizman*, in which the district courts granted the defendants' downward departure requests on the basis of diminished capacity caused by pathological gambling).

118. We recognize that there may be some methodological problems here. It is certainly possible that prosecutors have agreed to downward departures in unpublished cases. It is also possible that prosecutors have agreed to plea bargains in cases in which they thought the defendant's mental condition justified a more lenient sentence. The universe of *published* cases, however, reveals these findings.

119. *United States v. Doering*, 909 F.2d 392, 395 (9th Cir.1990).

120. Jack McCall, *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467, 496 (1993).

121. For a particularly troubling account, see Eva Rodriguez, *Blind Spot in U.S. Sentencing System: No Allowance Made for Mentally Retarded Defendants*, 132 N.J.L.J., Nov. 2, 1992, at 11. Press accounts of such behavior are legion. See Deborah Pines, *Heroism Wins Defendant Reduction in Sentencing*, N.Y.L.J., Mar. 1, 1994, at 1, 7 (reporting on *United States v. Acosta*, 846 F. Supp. 278 (S.D.N.Y. 1994), and stating that "Judge Lasker rejected arguments by federal prosecutors that [the defendant's mental] handicap [was a] permissible grounds for a sentencing reduction").

VI. Mental Disability and the Guidelines

Cases decided under the Guidelines reflect a lack of understanding by federal judges of the meaning of mental disability and its role as a potential sentencing mitigator. In attitudes that strikingly mirror attitudes of *jurors* in assessing mental disability in death penalty cases,¹²² judges conceptualize mental disability as an “all or nothing” absolute construct,¹²³ demand a showing of mental disability that approximates the amount needed for an exculpatory insanity defense,¹²⁴ continue to not “get” distinctions between mental illness, insanity, and incompetency, repeat sanist myths about mentally disabled criminal defendants, and engage in pretextual decision-making.

The ominous spirit of Justice Scalia’s partial dissent in *Penry v. Lynaugh*—castigating the majority for allowing an “outpouring . . . [of] unfocused sympathy”¹²⁵—looms over many of these cases. Most of the few cases in which mental disability is seen as a mitigator eerily track the fact pattern of the few situations in which jurors grudgingly sanction the use of the insanity defense: when a defendant—especially one who has previously sought counseling—commits a nonplanful crime.¹²⁶

The attitudes expressed in these cases are frequently sanist. For example, in a recent Sixth Circuit case the court rejected the defendant’s “suicidal tendencies” as a possible basis for a downward departure in an embezzlement case.¹²⁷ The court held that departure would *never* be permissible on this basis, because *any* consideration of such an argument would lead to “boilerplate” claims and force courts to “separate the wheat of valid claims from the chaff of disingenuous ones,” a “path before which we give serious pause.”¹²⁸ This argument tracks, nearly verbatim, the reasoning of the Fourth Circuit, which refused to grant a downward departure in the case of a defendant who had suffered severe childhood sexual abuse, referring to the “innumerable defendants” that could plead

122. Perlin, *supra* note 12, at 254-74.

123. PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 77.

124. An analogy may be drawn here to the way that GBMI (Guilty But Mentally Ill) statutes in some jurisdiction basically track the language of the more “liberal” Model Penal Code insanity test, while the more rigid M’Naghten standard is used for insanity evaluations. PERLIN, *supra* note 8, § 15.09; PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 91-95; MICHAEL L. PERLIN, *LAW AND MENTAL DISABILITY* § 4.41 (1994).

125. 492 U.S. 302, 359-60 (1989) (Scalia, J., concurring in part & dissenting in part).

126. Perlin, *supra* note 12, at 245-49 (discussing research reported in White, *supra* note 14).

127. *United States v. Harpst*, 949 F.2d 860, 871 (6th Cir. 1991); *see also* Schulhofer, *supra* note 24, at 866 (discussing *Harpst*).

128. *Harpst*, 949 F.2d at 871.

“unstable upbringing” as a potential departure grounds.¹²⁹

Just as evidence of organic disorder appears more “real” to judges in insanity cases (than does evidence of psychological disability),¹³⁰ so does such evidence appear more “real” in Guidelines cases. In *United States v. Hamilton*,¹³¹ the Sixth Circuit affirmed a trial court’s refusal to enter a downward departure in the case of a defendant suffering a “major depressive episode,” on the theory that the Commission was “talking about things such as a borderline mental *intelligence* capacity.”¹³² The court concluded that because the defendant was “able to absorb information in the usual way and to exercise the power of reason,” he did not suffer from a “significantly reduced mental capacity.”¹³³

The District of Columbia Circuit has explicitly rejected the admission of expert testimony on an individual defendant’s potential for successful rehabilitation on two grounds: Another defendant without access to such expert testimony might be able to make a similar case for leniency, and reliance on “scientific” predictions could transform sentencing hearings into an inappropriate “battle of experts.”¹³⁴ But as Professor Schulhofer notes in his critique of this case, a district court always has the capacity to appoint expert witnesses to aid a defendant at sentencing, an option made explicitly constitutional in a different context in *Ake v. Oklahoma*.¹³⁵

Beyond this, the court’s professed concern over sorting out potentially conflicting expert testimony reveals pretextuality at its worst: Federal judges are certainly capable of this type of judicial decisionmaking. Indeed, they must regularly weigh conflicting expert testimony on a variety of scientific and technical subjects. This approach mirrors perfectly the behavior of courts in *other* mental disability law cases, such as the en banc Fourth Circuit in *United States v. Charters*,¹³⁶ a case involving the right of incompetent-to-stand trial detainees to refuse antipsychotic medication, where the court “abdicated its responsibility to read, harmonize, distinguish and analyze social science data on the issues before it.”¹³⁷ This trivialization of social science simultaneously allows courts to more comfortably seek refuge in allegedly common sense “morality,”¹³⁸ employ heuristic

129. *United States v. Daly*, 883 F. 313, 319 (4th Cir. 1989).

130. PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 252-58.

131. 949 F.2d 190 (6th Cir. 1991).

132. *Id.* at 193 (emphasis added).

133. *Id.*

134. *United States v. Harrington*, 947 F.2d 956, 960 (D.C. Cir. 1991).

135. 470 U.S. 68 (1985); *see also* Schulhofer, *supra* note 24, at 869 (discussing *Ake*).

136. 863 F.2d 302, 312-13 (4th Cir. 1988), *cert. denied*, 494 U.S. 1016 (1990).

137. Michael L. Perlin, *Are Courts Competent to Decide Competency Questions? Stripping the Facade From United States v. Charters*, 38 U. KAN. L. REV. 957, 999 (1990).

138. Perlin, *supra* note 71, at 136-38.

devices in a wide variety of cases in “uncomfortable” areas of the law, and use sanist behavior in deciding such cases.¹³⁹

Underlying many of the Guidelines cases is a powerful current of blame: The defendant *succumbed* to temptation by not resisting drugs or alcohol, by not overcoming childhood abuse, and so forth. This sense of blame mirrors courts’ sanist impatience with mentally disabled criminal defendants in general, attributing their problems in the legal process to “weak character or poor resolve.”¹⁴⁰ Thus, we should not be surprised to learn that a trial judge, responding to a National Center for State Courts survey, indicated that incompetent-to-stand-trial defendants *could have* understood and communicated with their counsel and the court “if they [had] only wanted.”¹⁴¹ Again, one of the leading texts on white collar crimes sentencing stresses:

Judges consider[] two major concepts pertinent to individual attributes of the offender: blameworthiness and consequence Certain characteristics of offenders relate to the culpability of or degree of blameworthiness of the particular defendant. Illustrations include mental competency¹⁴²

In addition to the use of sanism, sentencing decisions are also often pretextual. In the case of a chronically depressed, compulsive gambler under threats of violence to pay off his debts (apparently from organized crime figures), the Sixth Circuit justified its rejection of a downward departure on the grounds that the defendant could have “just said no.” The court moralized: “He had the option of reporting the threats he received to the authorities, of course, but he chose instead to engage in serious violations of the law.”¹⁴³

Just as judges do not “get” the differences between the differing legal standards in insanity and incompetency to stand trial cases,¹⁴⁴ they similarly do not “get” the difference between either of these statuses and the

139. Perlin, *supra* note 11, at 669.

140. *Id.* at 670-71. See generally Bernard Weiner, *On Sin Versus Sickness: A Theory of Perceived Responsibility and Social Motivation*, 48 AM. PSYCHOLOGIST 957 (1993) (proposing conceptual system of social motivation to balance societal tendencies that tend to encourage punishment for those who demonstrate a “lack of effort” or are “responsible” for their failure).

141. Perlin, *supra* note 11, at 671 (quoting Keri A. Gould et al., *Criminal Defendants With Trial Disabilities: The Theory and Practice of Competency Assistance* 90 (1993) (unpublished manuscript)); see also Perlin, *supra* note 11, at 671 nn. 230-31 (citing sources).

142. STANTON WHEELER ET AL, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS* 20-21 (1988).

143. *United States v. Hamilton*, 949 F.2d 190, 193 (6th Cir. 1991).

144. Perlin, *supra* note 11, at 679; see also 3 PERLIN, *supra* note 8, § 14.02 n.7 (citing sources).

degree of mental capacity needed to justify a downward departure under the Guidelines. For example, one trial court concluded (in reliance on the prosecutor's argument) that because the defendant, who was learning disabled, physically disabled, and of borderline intelligence, was competent to stand trial and responsible for his act (the distribution of LSD), he was therefore ineligible for a downward departure under the Guidelines.¹⁴⁵ This decision was affirmed by the First Circuit in an opinion "agree[ing] with] and applaud[ing]" the trial judge's "thoughtful consideration" of the underlying issues.¹⁴⁶

Misunderstandings such as these are likely to be further exacerbated by the Supreme Court's decision in *Godinez v. Moran*,¹⁴⁷ which held that the standard for competency to plead guilty or to waive counsel is no greater than the standard for competency to stand trial. At least one trial court decision implicitly suggests that *Godinez* may be a source of greater future confusion in the area of mental disability and sentencing under the Guidelines.¹⁴⁸ Our reading is that *Godinez* makes far more likely the possibility of pretextual decisionmaking under the Guidelines.

VII. A Therapeutic Jurisprudence Perspective

What are the therapeutic jurisprudence implications? Therapeutic jurisprudence studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures, and lawyers' roles may have either therapeutic or antitherapeutic consequences, and questioning whether such rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential without subordinating due process principles.¹⁴⁹ What is the "fit" between the Guidelines and therapeutic jurisprudence? The rationale of this aspect of the Guidelines is clear: To *some* extent, *some* level of mental disability can serve as a mitigator of sentence in *some* cases. But on what theoretical basis is this rationale premised? That a

145. *United States v. Lauzon*, 938 F.2d 326, 332 (1st Cir. 1991). *Lauzon* is one of almost two dozen reported Guidelines cases involving defendants that were so-called "Deadheads," followers of the Grateful Dead rock group.

146. *Id.*

147. 112 S. Ct. 2680 (1993); see Perlin, *supra* note 12, at 275 (arguing that the decision will lead to confusion and misunderstanding in the lower courts). See generally 3 PERLIN, *supra* note 8, §§ 14.20A, 14.21 (Supp. 1994) (discussing *Godinez*); PERLIN, *supra* note 124, § 4.13 (discussing *Godinez*).

148. See *United States v. Stevens*, No. CRIM.92-184-1, 1993 WL 539125, at *1 (E.D. Pa. Dec. 20, 1993) (approving a downward departure in the case of a defendant with "serious mental health problems").

149. PERLIN, *supra* note 124, § 5.01; see also sources cited, *supra* note 21.

mentally disabled person is less worthy of being punished? That the retributive basis of punishment is less applicable to such a person? That it offends proportionality theory to punish a mentally disabled person as severely as a nonmentally disabled person? That a more severe punishment might be counterproductive in the case of a mentally disabled criminal defendant?

Congress's failure to provide any coherent explanation or clarification as to the relative weight that the Commission was to give to individual offender characteristics, and its failure to prioritize the philosophical purposes of sentencing, combined to provide the Commission with very little structure in the creation of its policy statements.¹⁵⁰ The Commission compounded this error by failing to include in its policy statements any reference to empirical studies or evidence regarding the effect of mental disability on sentencing patterns. We can tentatively conclude from these failures that neither the Commission nor Congress was terribly interested in therapeutic issues or in the therapeutic effect of sentences, a disinterest certainly consistent with the Guidelines' focus on retribution as the primary philosophical rationale of federal sentencing policies.¹⁵¹

We do know, however, the way in which mentally disabled prisoners are treated.¹⁵² Mentally ill prisoners have always been relegated to low status in prison settings;¹⁵³ they are often institutionalized in facilities bereft of even minimal mental health services; and they are often treated more harshly than other inmates.¹⁵⁴ Any change in the law—be it restrictions on the use of the insanity defense,¹⁵⁵ diminution of inquiries into defendant's capacity to plead guilty or waive counsel,¹⁵⁶ or restrictive interpretations of the Guidelines—that results in more mentally disabled

150. Stith & Koh, *supra* note 19, at 300.

151. Bornstein, *supra* note 40, at 142.

152. See generally Fred Cohen & Joel A. Dvoskin, *Therapeutic Jurisprudence and Corrections: A Glimpse*, 10 N.Y.L. SCH. J. HUM. RTS. 777 (1993) (setting out a broad understanding of therapeutic jurisprudence and describing the impact that some characteristics of correctional policy have on therapeutic jurisprudence analysis); Fred Cohen & Joel A. Dvoskin, *Inmates with Mental Disorders: A Guide to Law and Practice*, 16 MENT. & PHYS. DIS. L. RPTR. 339 (1992) (discussing the right of inmates and detainees with mental disorders to obtain treatment).

153. Seymour Halleck, *The Criminal's Problem With Psychiatry*, in READINGS IN LAW AND PSYCHIATRY 51 (R. Allen et al. eds., 1975).

154. PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 428 n.55; see Deborah Baskin et al., *Assessing the Impact of Psychiatric Impairment on Prison Violence*, 19 J. CRIM. JUST. 271, 272 (1991) (noting the mentally ill have a higher rate of disciplinary infractions than other inmates).

155. PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 427-29.

156. Michael L. Perlin, *A Major Step Backward: Deciphering Godinez v. Moran*, 2 CRIM. PRAC. L. REP. 89 (1994); PERLIN, *supra* note 124, § 4.13.

people being incarcerated in prisons or in longer prison sentences for the mentally disabled will be antitherapeutic.¹⁵⁷

What impact will this subordination of mental disability as a reductive factor have on the lives of mentally disabled criminal offenders (and on their keepers and their cellmates)? It is likely that only the most disabled—perhaps the group *least* likely to show substantial improvement in a penal setting—will qualify for downward departures. Many seriously disabled defendants will be subject to lengthy terms of imprisonment. These terms will likely often have detrimental effects: Symptomatology will be exacerbated and prison facilities will become even more dangerous. Also, it is likely that some defense counsel will discourage clients from making showings of mental disability for fear of *upward* departures, thus diminishing the likelihood that such a defendant will receive any meaningful treatment once incarcerated. When such untreated inmates are eventually released into community settings, we can expect that recidivism rates will increase, having the effect of restarting this vicious cycle. Again, these impacts are profoundly antitherapeutic.

VIII. Conclusion

In a recent article, Dr. Robert Weinstock and his colleagues argue that psychiatric evidence should be more extensively and creatively developed in federal sentencing cases so as to “temper judicial rigidity” under the Guidelines.¹⁵⁸ To the best of our knowledge, this is the only example in the legal or behavioral literature calling for such expanded use of mental disability evidence at the sentencing stage in Guidelines cases. Given this level of academic apathy, it should not be a surprise that the relevant cases sadly and predictably track the sanist and pretextual ways that factfinders generally “process” mental disability evidence in the criminal trial process, leading to the now familiar “doctrinal abyss.”¹⁵⁹ Judges continue to narrowly construe such evidence, to attribute blame to mentally disabled offenders, to demand near total incapacitation prior to invocation of the downward departure policy, and to misunderstand the relationship between mental disability and criminal behavior.

We chose to title this Article *Rashomon and the Criminal Law . . .* to

157. PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 428.

158. Weinstock et al., *supra* note 20, at 72.

159. See PERLIN, *INSANITY DEFENSE*, *supra* note 10, at 406-15 (discussing how sanism and pretextuality on the part of judges and lawyers have created an incoherent jurisprudence); Perlin, *supra* note 9, at 4 (discussing lack of doctrinal cohesiveness in the jurisprudence regarding mental illness).

stress the importance of perspective. The Guidelines *appear* to countenance downward departures in cases of mentally disabled offenders. Indeed, from Congress's vantage point that is exactly what the Guidelines say. Perspectives of judges, lawyers, and mental disability professionals, not to mention the defendants themselves, suggest very different approaches.

The Guidelines have come under significant criticism in recent years, mostly on the part of federal judges protesting the Guidelines' Draconian effect on low-level drug offenders. In April 1993, Judge Jack Weinstein of the Eastern District of New York announced that he was taking his "name out of the wheel for drug cases" because "[he] can simply not sentence another impoverished person whose destruction has no discernable effect on the drug trade."¹⁶⁰ Disproportionately severe sentences for low-level drug offenders continue to sustain widespread judicial criticism.¹⁶¹ More recently, federal judge John S. Martin stated, "Sending street level dealers . . . to jail for ten years will have no impact on the drug problem in this country. It does, however, reflect poorly on our system of justice."¹⁶²

State court judges have also joined in voicing dissatisfaction with excessive drug sentences, which disproportionately affect low-level drug users. In *People v. Perez*,¹⁶³ Justice Caro declared:

In considering this sentencing issue I cannot help but question whether the hemorrhage of taxpayer funds used to warehouse thousands of low-level drug users and sellers for long periods of time in our dangerously overcrowded prisons, at a cost of \$35,000 per year per inmate in addition to the capital expenditure of \$180,000 per prison cell, could not be more productively and humanely directed toward prevention, through education, and treatment of drug addiction. The increasingly unavoidable conclusion that with the passage of time is becoming more widely recognized and articulated by respected representatives of our criminal justice system, is that the primary method currently utilized to deal with the drug epidemic, essentially an effort to eliminate the availability of drugs on our streets, while increasing inordinately the length of prison terms for low-level drug offenders, has failed.¹⁶⁴

Yet, with the exception of a couple student notes mentioning in passing some of the cases discussed here,¹⁶⁵ there has not been a word in

160. Henry J. Reske, *Senior Judge Declines Drug Cases; Says He Has Been A Party To Cruelty By Imposing Required, Harsh Sentences*, 79 A.B.A. J. 22, 22 (July 1993).

161. Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENT. R. 63, 63 (Sept.-Oct. 1990).

162. *United States v. Genao*, 831 F. Supp. 246, 254 (S.D.N.Y. 1993).

163. 599 N.Y.S.2d 269, 270 (N.Y. App. Div. 1993) (Caro, J., concurring) (footnotes omitted).

164. *Id.* at 270-71 (citations omitted).

165. Montgomery, *supra* note 29; Shuttleworth, *supra* note 51.

a legal journal criticizing the pattern of mental disability case decision-making. On one hand, this is not surprising. Mental disability issues are trivialized, misunderstood, and distorted at all levels of the trial system. The current political climate is one in which *any* potentially mitigating circumstance will be viewed suspiciously, *especially* one as “loaded” as mental disability.

On the other hand, however, the issue is an important one that demands further reflective consideration by scholars, judges, prosecutors, social theorists, and legislators. If this Article helps illuminate the ways that sanism and pretextuality have infected the federal sentencing process, then we hope that such consideration will be forthcoming.

