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Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence

Michael L. Perlin, J.D. and Deborah A. Dorfman, J.D.

This article examines the way that "sanist" attitudes (attitudes driven by the same kind of irrational, unconscious and bias-driven stereotypes exhibited in racist and sexist decisionmaking) lead to "pretextual" decisions (in which dishonest testimony is either explicitly or implicitly accepted) in mental disability law jurisprudence. In conjunction with these sanist ends, social science data is teleologically employed by legal decisionmakers, so that it is privileged when it supports a conclusion that the fact-finder wishes to reach but subordinated when it questions such a conclusion. The article examines recent Supreme Court cases in an effort to determine the extent of domination of such sanist behavior, and concludes by offering several prescriptions to scholars and policymakers so as to best avoid sanism's pernicious power.

I. INTRODUCTION

Any investigation of the roots or sources of mental disability jurisprudence has to factor in society's irrational mechanisms that govern our dealings with mentally disabled individuals.¹ The entire legal system makes assumptions about mentally disabled people—who they are, how they got that way, what makes them different, what there is about them that lets us treat them differently, and whether their conditions are immutable.² These assumptions—that reflect our fears and apprehensions about mental disability, the mentally disabled, and the possibility that *we* may

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¹ See generally Michael L. Perlin *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599 (1989-90).

² See generally MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990); SANDER GILMAN, *DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS* (1985).

become mentally disabled³—are often non-reflective, self-referential and purportedly “common sensical”;⁴ they reflect further the pernicious effect of heuristic reasoning and thinking (implicit cognitive devices used to simplify complex information processing tasks and which frequently lead to distorted and systematically erroneous decisions).⁵ The most important question of all—why do we feel the way we do about these people?⁶—is rarely asked.⁶

These conflicts lead us to inquire about the extent to which social science data does (or should) inform the development of mental disability law jurisprudence. After all, if we agree that mentally disabled individuals can be treated differently (because of their mental disability, or because of behavioral characteristics that flow from that disability), it would appear logical that this difference in legal treatment is—or should be—founded on some sort of empirical data base that confirms both the *existence* and the *causal role* of such difference. Yet, we tend to ignore, subordinate or trivialize behavioral research in this area, especially when acknowledging that such research would be cognitively dissonant with our intuitive (albeit empirically flawed) views.⁷

One might optimistically expect, though, that this gloomy picture is now subject to change. First, scholars such as John Monahan and Laurens Walker have constructed a jurisprudence of “social science in law,” articulating coherent theories about the role of social science data and research in the trial process and outlining specific proposals for obtaining, evaluating and establishing the findings of such research.⁸ Second, a recent series of social and political developments (primarily,

³ See, e.g., Joseph Goldstein & Jay Katz, *Abolish the “Insanity Defence”—Why Not?* 72 YALE L. J. 853, 868–69 (1963); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 108 (1991) (on society’s fears of mentally disabled persons), and *id.* at 93 n.174 (“[W]hile race and sex are immutable, we all *can* become mentally ill, homeless, or both. Perhaps this illuminates the level of virulence we experience here”) (emphasis in original). On the way that public fears about the purported link between mental illness and dangerousness “drive the formal laws and policies governing mental disability jurisprudence,” see John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 AM. PSYCHOLOGIST 511, 511 (1992).

⁴ Richard Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729 (1988) (discussing “ordinary common sense” (OCS)). See also, Michael L. Perlin, *Pretexits and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. (1992), manuscript at 28 n.69 (“My criticism here is not of true ‘common sense,’ but of self-referential pronouncements made under the guise of being ‘common sensical,’ a kind of *faux* common sense”).

⁵ Michael Saks & Robert Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC’Y REV. 123 (1980–81); Michael L. Perlin, *Are Courts Competent to Decide Competency Questions? Stripping the Facade from United States v. Charters*, 38 U. KAN. L. REV. 957, 966 n.46 (1990).

⁶ But see Perlin, *supra* note 1; Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990).

⁷ See, generally J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L. J. 137 (1990).

⁸ See e.g., Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988); John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571 (1991). Similarly illuminating are Gary Melton’s and Michael Saks’ insights into “psychological jurisprudence” (the study of community and cultural norms through structures that create or sustain social behavior consistent with values that promote human welfare). See, e.g., Gary Melton, *The Law Is a Good Thing (Psychology Is, Too): Human Rights in Psychological Jurisprudence*, 16 LAW & HUM. BEHAV. 381 (1992); Gary Melton & Michael Saks, *The Law as an Instrument of Socialization and Social Structure*, in 33 NEBRASKA SYMPOSIUM ON MOTIVATION: THE LAW AS A BEHAVIORAL INSTRUMENT 235 (Gary B. Melton ed. 1985).

the public awareness of psychiatric hospital deinstitutionalization and its purported link to homelessness, and a series of sensational criminal trials in which mental status defenses have been raised) have resulted in significantly increased visibility of some mentally disabled persons in often-negative ways.⁹ One might expect that litigation and legislation in these areas would draw on social science data in attempting to answer such questions as, say, the actual impact that deinstitutionalization has had on homelessness, or whether experts can knowledgeably testify about criminal responsibility in so-called "volitional prong" insanity cases.¹⁰

And yet, when we attempt to place mental disability law jurisprudence in context, we are confronted with a discordant reality: social science is rarely a coherent influence on mental disability law doctrine.¹¹ Rather, the legal system selectively—teleologically—either accepts or rejects social science data depending on whether or not the use of that data meets the *a priori* needs of the legal system.¹² In other words, social science data is privileged when it supports the conclusion the fact finder wishes to reach, but it is subordinated when it questions such a conclusion.¹³

It is not enough to simply say, in an almost existential tone, that courts are teleological. What we must do next is to try to articulate exactly what ends fact finders (both trial and appellate judges) attempt to meet through their manipulation of social science data and social science reasoning.

We contend that these ends are sanist. By this we mean that decisionmaking in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic and religiously- and ethnically-bigoted decisionmaking.¹⁴ Sanist decisionmaking infects all branches of mental disability law, and distorts mental disability jurisprudence. Paradoxically, while sanist decisions are frequently justified as being therapeutically-based, sanism customarily results in anti-therapeutic outcomes.¹⁵

⁹ Perlin, *supra* note 3, at 106–08; Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 399–400 (1992). On the role of the media in the dissemination of information in such cases, see Thomas Grisso, *Forensic Evaluations and the Fourth Estate*, 3 FORENS. REP. 427 (1990).

¹⁰ See, e.g., Norman Finkel, *The Insanity Defense: A Comparison of Verdict Schemas*, 15 LAW & HUM. BEHAV. 533, 535 (1991); Richard Rogers, *APA's Position on the Insanity Defense: Empiricism Versus Emotionalism*, 42 AM. PSYCHOLOGIST 840 (1987).

¹¹ See e.g., Jodie English, *The Light Between Twilight and Dark: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L. J. 1, 20–52 (1988); Perlin, *supra* note 1, at 658 n.256 (federal legislators ignored empirical evidence about the insanity defense in the debate leading to the passage of the Insanity Defense Reform Act of 1984).

¹² See Perlin, *supra* note 6, at 60–61; Perlin, *supra* note 4, manuscript at 75–76; Paul Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 AM. J. L. & MED. 335, 341–42 (1987); Tanford, *supra* note 7, at 157; David Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 577 (1991).

¹³ See Tanford, *supra* note 7, at 157; Faigman, *supra* note 12, at 581.

¹⁴ Perlin, *supra* note 9, at 374–77. On the phobic base of these fears, see Deborah A. Dorfman, "Pretexts in Commitment and Medication Decisionmaking: A Psychoanalytic Perspective Through a Therapeutic Jurisprudential Filter" (unpublished manuscript, awaiting submission), manuscript at 5.

¹⁵ See, e.g., David Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship* (this issue) (hereinafter Wexler, *Changing*); David Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992) (hereinafter Wexler, *Putting*); THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David Wexler ed. 1990) (hereinafter THERAPEUTIC JURISPRUDENCE).

each aspect of the law's development. In Part V, we urge scholars to confront these systemic dissonances as a means of creating a coherent framework for the use of social science data in mental disability cases. Here we also show how this confrontation will help create a mental disability jurisprudence that is truly therapeutic. Finally, we conclude with some recommendations for all participants in the mental disability law system.

II. SANISM

A. Introduction²⁰

"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.²¹ It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based largely upon stereotype, myth, superstition and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.

Judges are not immune from sanism. "[E]mbedded in the cultural presuppositions that engulf us all,"²² they express discomfort with social science²³ (or any other system that may appear to challenge law's hegemony over society) and skepticism about new thinking; this discomfort and skepticism allows them to take deeper refuge in heuristic thinking and flawed, non-reflective OCS, both of which perpetuate the myths and stereotypes of sanism.²⁴

B. Sanism and the Court Process in Mental Disability Law Cases

Judges reflect and project the conventional morality of the community, and judicial decisions in all areas of civil and criminal mental disability law continue to reflect

²⁰ Much of the material *infra* text accompanying notes 21–29 is adapted from Perlin, *supra* note 4, manuscript at 79–83.

²¹ The phrase "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 Ayd ed. 1974); *Koe*, 573 F. 2d at 764. See Perlin, *supra* note 3, at 92–93 (discussing Birnbaum's insights).

²² Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 *WM. & MARY L. REV.* 329, 332 (1991).

²³ Perlin, *supra* note 6, at 59–61; 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, 133–37 (1991). The discomfort that judges often feel in having to decide mental disability law cases is often palpable. See, e.g., Perlin, *supra* note 5, at 991, discussing *United States v. Charters*, 863 F.2d 302, 310 (4th Cir 1988) (en banc), *cert. den.*, 494 U.S. 1016 (1990).

²⁴ Perlin, *supra* note 6, at 61–69; Perlin, *supra* note 1, at 718–30.

and perpetuate sanist stereotypes.²⁵ Their language demonstrates bias against mentally disabled individuals²⁶ and contempt for the mental health professions.²⁷ Courts often appear *impatient* with mentally disabled litigants, ascribing their problems in the legal process to weak character or poor resolve. Thus, a popular sanist myth is that “[m]entally disabled individuals simply don’t try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint.”²⁸

Rarely, if ever, is behavioral or scientific authority cited to support sanist opinions.²⁹ As we will show, it is not coincidental that this sort of sanist judicial behavior ignores available social science research. Through sanist thinking, judges allow themselves to avoid difficult choices in mental disability law cases; their refuge in alleged “ordinary common sense” contributes further to the pretextuality that underlies much of this area of the law.

III. SELECTIVE USE OF SOCIAL SCIENCE DATA

The use of social science data is often met with tremendous resistance by the courts, which are frequently skeptical and suspicious of and hostile toward such evidence.³⁰ Specifically, the skepticism toward statistical data and evidence about the behavioral sciences appears to stem directly from the belief that such data are not “empirical” in the same way that “true” sciences are and therefore are not trustworthy.³¹ Social science data is seen as overly subjective and vulnerable to researcher bias.³²

Courts are often threatened by the use of such data. Judges’ general dislike of

²⁵ See Perlin, *supra* note 9, at 400–04. Not all judicial opinions are sanist. See, e.g., *id.*, at 403–04; Perlin, *supra* note 4, manuscript at 103–04 (citing examples). For more recent examples, see *Riggins v. Nevada*, 112 S.Ct. 1810 (1992) (trial court’s failure to determine need for continued administration of antipsychotic medications to insanity-pleading defendant or to make inquiry about reasonable alternatives violated defendant’s liberty interest in freedom from such drugs; conviction reversed); *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992) (statute that permits continued hospitalization of insanity acquittee found to be no longer mentally ill violates due process).

²⁶ See, e.g., *Corn v. Zant*, 708 F.2d 549, 569 (11th Cir. 1983), *reh. den.*, 714 F.2d 159 (11th Cir. 1983), *cert. den.*, 467 U.S. 1220 (1984) (defendant referred to as a “lunatic”); *Sinclair v. Wainwright*, 814 F.2d 1516, 1522 (11th Cir., 1987), *quoting Shuler v. Wainwright*, 491 F.2d 213 (5th Cir. 1974) (using “lunatic”).

²⁷ See, e.g., *Commonwealth v. Musolino*, 467 A.2d 605 (Pa. Super. 1983) (reversible error for trial judge to refer to expert witnesses as “headshrinkers”). Compare *State v. Percy*, 507 A.2d 955, 956 (Vt. 1986), *app’l after remand*, 595 A.2d 248 (Vt. 1990), *cert. den.*, 112 S. Ct. 344 (1991) (conviction reversed where prosecutor referred to expert testimony as “psycho-babble”), to *Commonwealth v. Cosme*, 575 N.E.2d 726, 731 (Mass. 1991) (not error where prosecutor referred to defendant’s expert witnesses as “a little head specialist” and a “wizard”).

²⁸ Perlin, *supra* note 9, at 396.

²⁹ See, e.g., *People v. LaLone*, 437 N.W.2d 611, 613 (Mich. 1989), *reh.* (1989) (without citation to any authority, court found that it is less likely that medical patients will “fabricate descriptions of their complaints” than will “psychological patients”); *In re Melton*, 597 A.2d 892, 898 (D.C. 1991) (psychiatric predictivity of future dangerousness likened to predictions made by an oncologist as to consequences of an untreated and metastasized malignancy); *Brale v. State*, 741 P.2d 1061, 1064–65 (Wyo. 1987) (expert testimony on a homicide defendant’s reactions to fear and stress rejected on grounds that such emotions are “experienced by all mankind” and thus not related to any body of scientific knowledge).

³⁰ Perlin, *supra* note 23, at 136–37; J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N. C. L. REV. 741, 742–46 (1988).

³¹ See, e.g., David Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1010 (1989).

³² Faigman, *supra* note 31, at 1016, 1026.

social science is reflected in self-articulated claims that they are unable to understand the data and are thus unable to apply it properly to a particular case.³³

This dislike and distrust of social science data has led courts to be teleological in their use of this evidence. Social science that enables courts to meet predetermined ends is often privileged while data that would require judges to question such ends are frequently rejected.³⁴ Judges often select certain proffered data that adheres to their pre-existing social and political attitudes, and use both heuristic reasoning and false OCS in rationalizing such decisions.³⁵ Social science data is used pretextually in many cases to rationalize otherwise baseless judicial decisions.³⁶

Courts thus will take the literature out of context,³⁷ misconstrue the data or evidence being offered,³⁸ read such data selectively,³⁹ and/or inconsistently.⁴⁰ Other times, courts choose to flatly reject⁴¹ this data or ignore its existence.⁴² In other circumstances, courts simply "rewrite" factual records so as to avoid having to deal with social science data that is cognitively dissonant with their OCS.⁴³ Even when courts do acknowledge the existence and possible validity of studies

³³ See, e.g., Perlin, *supra* note 5, at 986-93, discussing decision in *United States v. Charters*, 863 F.2d 302 (4th Cir. 1988) (en banc, cert. den., 494 U.S. 1016 (1990) (limiting right of pretrial detainees to refuse medication). The *Charters* court rejected as incredulous the possibility that a court could make a meaningful distinction between competency to stand trial and competency to engage in medication decisionmaking:

[Such a distinction] must certainly be of such subtlety and complexity as to tax perception by the most skilled medical or psychiatric professionals . . . To suppose that it is a distinction that can be fairly discerned and applied even by the most skilled judge on the basis of an adversarial fact-finding proceedings taxes credulity.

Charters, 863 F.2d at 310.

³⁴ Perlin, *supra* note 23, at 136-37; Appelbaum, *supra* note 12, at 341; Tanford, *supra* note 7, at 144-50; Faigman, *supra* note 12, at 581.

³⁵ On the courts' heuristic use of social science data, see Perlin, *supra* note 4, manuscript at 74-77.

³⁶ See Perlin, *supra* note 4, manuscript at 75-76, discussing decisions in *Barefoot v. Estelle*, 463 U.S. 880 (1983) (testimony as to future dangerousness admissible at penalty phase in capital punishment case), *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting statistical evidence offered to show racial discrimination in death penalty prosecutions), and *Charters*, (curtailing rights of criminal defendant awaiting trial to refuse antipsychotic medication).

³⁷ Faigman, *supra* note 12, at 577.

³⁸ *Id.* at 581.

³⁹ Kathryn Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 461 (1988) (on courts' reading of impact of parents' homosexuality in custody decisions); Tanford, *supra* note 7, at 153-54. See, e.g., *Holbrook v. Flynn*, 475 U.S. 560, 571 n.4 (1986) (defendant's right to fair trial not denied where uniformed state troopers sat in front of spectator section in courtroom; court rejected contrary empirical study, and based decision on its own "experience and common sense").

⁴⁰ See, e.g., Thomas Hafemeister & Gary Melton, *The Impact of Social Science Research on the Judiciary*, in *REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH* 27 (Gary B. Melton ed. 1987).

⁴¹ See, e.g., *Barefoot*, 463 U.S. at 897-902.

⁴² Faigman, *supra* note 12, at 581. See, e.g., *Watkins v. Sanders*, 449 U.S. 341 (1981) (refusal of courts to acknowledge social science research on ways that jurors evaluate and misevaluate eyewitness testimony).

⁴³ The classic example is Chief Justice Burger's opinion for the court in *Parham v. J.R.*, 442 U.S. 584, 605-10 (1979) (approving more relaxed involuntary civil commitment procedures for juveniles than for adults). See, e.g., Gail Perry & Gary Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as an Example*, 22 J. FAM. L. 633, 645 (1984):

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

that take a contrary position from their decisions, this acknowledgement is frequently little more than mere "lip service."⁴⁴

IV. SANISM AND SOCIAL SCIENCE

Sanist attitudes toward social science permeate all aspects of the mental disability trial process. Here, we consider specifically these attitudes in the contexts of involuntary civil commitment cases, cases involving the right to refuse antipsychotic medication, and in criminal trial determinations of incompetency to stand trial and the insanity defense.

A. Involuntary Civil Commitment

In the involuntary civil commitment process, courts often selectively use social science data in order to rationalize sanist decisions to either commit patients or deny their petitions for release. Thus, while involuntary civil commitment cases ostensibly turn on the question of whether there is clear and convincing evidence that the patient is mentally ill and, as a result of that mental illness, is dangerous to herself or others (or, in some jurisdictions, gravely disabled), other factors frequently dominate the decisionmaking process. Thus, an entirely different question—whether the patient is likely to self-medicate in the community⁴⁵—is frequently the dispositive "swing" issue in contested commitment cases.

In deciding such cases, courts will privilege psychiatric testimony that implicitly suggests that forensic experts have the power to make this prediction in spite of an utter absence of any behavioral evidence to support either the premise that psychiatrists *can* accurately make this prediction, or whether there is any correlation between this conclusion and future dangerousness.⁴⁶ This privileging serves overtly sanist and pretextual ends; it allows courts to overcommit individuals who do not meet statutory commitment criteria where judges feel "it's the right thing to do."⁴⁷ This puts a false patina of testimonial respectability on decisions that are grounded neither in social science nor in coherent legal doctrine.

⁴⁴ See, e.g., *Washington v. Harper*, 494 U.S. 210, 229–30 (1990) (prisoners retain limited liberty interest in right to refuse forcible administration of antipsychotic medications), in which the majority acknowledges, and emphasizes in response to the dissent, the harmful, and perhaps fatal, side-effects of the drugs. The court also stressed the "deference that is owed to medical professionals . . . who possess . . . the requisite knowledge and expertise to determine whether the drugs should be used." *Id.* at 230 n.12. Compare *id.* at 247–49 (Stevens, J., concurring in part & dissenting in part) (suggesting that the majority's side effects acknowledgement is largely illusory). But compare *Riggins v. Nevada*, 112 U.S. 1810 (1992) discussed *infra* text accompanying notes 69–78.

Scholars who recommend a critical reevaluation of the way that that social science data is received, see, e.g., Monahan & Walker, *supra* note 8, at 582–83, are similarly frequently ignored. See *infra* Part IV.

⁴⁵ Perlin, *supra* note 4, manuscript at 83–95; Michael L. Perlin, *Reading the Supreme Court's Tea Leaves: Predicting Judicial Behavior in Civil and Criminal Right to Refuse Treatment Cases*, 12 AM. J. FORENS. PSYCHIATRY 37, 50–51 (1991).

⁴⁶ Perlin, *supra* note 4, manuscript at 88–89.

⁴⁷ Michael Saks, *Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts*, 14 LAW & HUM. BEHAV. 291, 293 (1990), discussing trial judge's explanation to mental health law students as to why he ordered commitment in individual cases notwithstanding a failure of proof:

I guess you noticed that some of these people were not fit subjects for commitment under the statute. But, after all, I am a human being. I care what is best for these people, and I have to do what I think is right.

Even where courts seek to determine whether statutorily-mandated dangerousness criteria are met, dispositions inevitably turn on future dangerousness predictions, in spite of an overwhelming data base questioning the accuracy of psychiatric predictions in this area.⁴⁸ The paradox here is a pointed one: judges continue to cite approvingly observations on the state of psychiatric knowledge more than 35 years out of date⁴⁹ notwithstanding a broad array of recent and available research suggesting impressive improvement in psychiatric diagnosis and testing.⁵⁰ Yet, they doggedly endorse—and “routinely and unquestioningly accept[.]”⁵¹—the continued use of psychiatric predictions of dangerousness, notwithstanding the empirical record demonstrating the inaccuracy of most such predictions. The teleological use of this paradox is demonstrated in *In re Melton*'s comparison of an oncologist's ability to predict the future prognosis of a cancer patient to a psychiatrist's ability to predict future dangerousness.⁵² Here, psychiatry was placed on an equal footing with general medicine where such testimonial privileging served sanist ends.

Similarly, courts frequently teleologically ignore social science so as to justify conclusions that failure to involuntarily commit a person will lead causally to that person's future homelessness,⁵³ or to sustain commitments based upon legislation that broadens the scope of committability to include individuals who are “gravely disabled” and thus deemed incapable of caring for themselves.⁵⁴

Sanist treatment of social science data is common even in cases that are generally nonpretextual. Thus, in *Zinerman v. Burch*,⁵⁵ the Supreme Court recognized that a patient's “voluntary” status is often illusory, and held that a patient could maintain a civil rights suit alleging that he had a right to a due process hearing prior to

⁴⁸ *Barefoot*, 463 U.S. at 916–19 (Blackmun, J., dissenting).

⁴⁹ See, e.g., *Foucha v. Louisiana*, 112 S.Ct. 1780, 1789 (1992) (O'Connor, J., concurring in part & concurring in judgment) (quoting *Jones v. United States*, 463 U.S. 354, 365 n.13 (1983), quoting *Greenwood v. United States*, 350 U.S. 366, 375 (1956), on the “present state of [psychiatric] knowledge and therapy regarding mental disease”); *id.* at 1801 (Thomas, J., dissenting) (quoting *Jones*' further quotation of *Greenwood* as to the “uncertainty of diagnosis . . . and tentativeness of professional judgment”). See also *Nesbitt v. Community of South Dade, Inc.*, 467 So. 2d 711, 717 (Fla. Dist. App. 1985) (Jorgenson, J., dissenting), attacking the credibility of psychiatry and contrasting it to the validity of other medical evidence:

The science of psychiatry represents the penultimate grey area . . . A substantial body of literature suggests that the psychiatric field cannot even agree on appropriate diagnosis, much less recommend a course of treatment. Unlike a physician's diagnosis, which can be verified by x-ray, surgery, etc., the psychiatrist cannot verify his diagnosis, treatment, or predicted prognosis except by long-term follow-up and reporting.

⁵⁰ See Perlin, *supra* note 1, at 658–63 (citing developments).

⁵¹ See Marilyn Hammond, *Predictions of Dangerousness in Texas: Psychotherapists' Conflicting Duties, Their Potential Liability, and Possible Solutions*, 12 ST. MARY'S L. J. 141, 150 n.71 (1980).

⁵² 597 A.2d 892, 898 (D.C. 1991) (upholding civil commitment).

⁵³ See, e.g., *In re Melton*, 565 A.2d 635, 649 (D.C. 1989) (Schwalb, J., dissenting), *superseded on rehearing*, 597 A.2d 788 (D.C. 1991), discussed in Perlin, *supra* note 4, manuscript at 107–08.

⁵⁴ This category includes those unable to find and maintain housing, unable to feed themselves, or unable to effectively self-medicate for both physical as well as mental problems. See, e.g., COLO. REV. STAT. §27–10–107 (1982); MD. HEALTH GEN. CODE ANN. §§10–617, 10–805 (f) (1982 & 1987 Supp.); see also Mary Durham & John LaFond, *The Impact of Expanding a State's Therapeutic Commitment Authority*, THERAPEUTIC JURISPRUDENCE, *supra* note 15, at 121. In deciding such cases, courts frequently link a finding of “gravely disabled” to future dangerousness in order to justify commitment. See, e.g., *People in the Interest of King*, 795 P.2d 273 (Colo. App. 1990) (even though expert testimony indicated patient was not necessarily dangerous in supervised setting, evidence sustained finding of “dangerousness” so as to sustain long-term treatment petition).

⁵⁵ 494 U.S. 113 (1990).

his "voluntary" admission to a mental health facility.⁵⁶ Yet, in support of this decision, Justice Blackmun noted that "the very nature of mental illness" makes it "foreseeable" that such a person "will be unable to understand any proffered 'explanation and disclosure of the subject matters' of the forms that such a person is asked to sign, and will be unable 'to make a knowing and willful decision' whether to consent to admission."⁵⁷

It is ironic that *Zinermon*—the first Supreme Court case to consider the multiple textures of "voluntariness"—still retains the concept of a unitary definition of the impact of mental illness on competency. Competency is not a "fixed state;" a person competent for some legal purposes may be incompetent for others at the same time; incompetency and mental illness are not identical states.⁵⁸ Although the ultimate impact of *Zinermon* on actual practice is still not clear,⁵⁹ it shows that, even in the context of a "generally sensitive" decision⁶⁰ by the member of the court with the *best* understanding of psychological concepts and constructs,⁶¹ social science data is still misused in at least a partially sanist way.

B. The Right to Refuse Medication

The teleological use of social science data is also prevalent in decisions in cases involving the right to refuse antipsychotic medication.⁶² For the past 15 years, this issue has dominated the legal-medical debate and has been seen as "the most controversial issue in forensic psychiatry today."⁶³ Advocates of the use of such

⁵⁶ *Id.* at 130-37.

⁵⁷ *Id.* at 132 (emphasis added).

⁵⁸ See, e.g., Paul Appelbaum & Loren Roth, *Clinical Issues in the Assessment of Competency*, 138 AM. J. PSYCHIATRY 1462, 1465 (1981); Loren Roth, Alan Meisel & Charles Lidz, *Tests of Competence to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279, 279 (1977). See also *In re LaBelle*, 107 Wash. 2d 196, 728 P. 2d 138, 146 (1986) ("the mere fact that an individual is mentally ill does not mean that the person so affected is incapable of making a rational choice with respect to his or her need for treatment").

⁵⁹ Compare Bruce Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zinermon v. Burch*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 83, 130 (David Wexler & Bruce Winick eds. 1991) (lower courts should be "hesitant to read *Zinermon*'s language broadly"), to 1 PERLIN, *supra* note 17, §3.69, at 60-61 (1991 pocket part) (speculating that, given the growing fear of litigation by public mental hospital staff personnel, *Zinermon* may have a "further reductive effect on state hospital admissions").

⁶⁰ 1 PERLIN, *supra* note 17, §3.69 at 60 (1991 pocket part).

⁶¹ See Gary B. Melton, *Realism in Psychology and Humanism in Law: Psycholegal Studies at Nebraska*, 69 NEB. L. REV. 251, 272-73 (1990) (Justice Blackmun is "Court's scientist" and "Court's moral authority").

⁶² As with involuntary civil commitment decisions, social factors play a significant role in institutional medication decisionmaking as well. See, e.g., Paul Benson, *Factors Associated With Antipsychotic Drug Prescribing by Southern Psychiatrists*, 21 MED. CARE 639 (1983) (patients' race, occupation and marital status found to be significant during process of prescribing antipsychotic medications); Ira Sommers & Deborah Baskin, *The Prescription of Psychiatric Medications in Prison: Psychiatric Versus Labeling Perspectives*, 7 JUST. Q. 739 (1990) (decision to medicate mildly impaired prison inmates influenced by social factors).

⁶³ Michael L. Perlin, *The Right to Refuse Treatment in a Criminal Law Setting*, in *FORENSIC PSYCHIATRY: A COMPREHENSIVE TEXTBOOK* (R. Rosner ed. 1992) (in press), manuscript at 1, quoting, in part, Jonathan Brant, Pennhurst, Romeo, and Rogers: *The Burger Court and Mental Health Law Reform Litigation*, 4 J. LEG. MED. 323 (1983). See generally 2 PERLIN, *supra* note 17, Chapter 5; Michael L. Perlin, *Decoding Right to Refuse Treatment Law*, 16 INT'L J. L. & PSYCHIATRY (1992) (in press).

medication point to its benefits while critics point out the serious neurological side effects that can result from these drugs.⁶⁴ As a result of this debate, the courts have the opportunity to "choose sides;" thus, if they so choose, they can critically assess the empirical data, or, they can demur to the evidence and refuse to engage in a scholarly discourse over such data.⁶⁵

Such was the case in *Washington v. Harper* in which the Court answered the question of whether a convicted prisoner could be forcibly medicated against his will. In providing defendant with a limited remedy, the majority in *Harper* selectively chose to privilege those aspects of the data available on the effects of antipsychotic drugs that discussed the benefits of such medication, while at the same time acknowledging but discounting⁶⁶ the potential harmful and debilitating effects of these drugs.⁶⁷

Harper thus accommodated social science evidence with an important strand of the Supreme Court's penological jurisprudence: "prison security concerns will, virtually without exception, trump individual autonomy interests."⁶⁸

The court's social science jurisprudence seemed to take a dramatic turn this term, though, in *Riggins v. Nevada*.⁶⁹ *Riggins* held that the use of antipsychotic drugs violated defendant's right to fair trial (at which he had raised the insanity defense), citing *Harper*'s side-effects language, and construing *Harper* to require "an overriding justification and a determination of medical appropriateness" prior to forcibly administering antipsychotic medications to a prisoner.⁷⁰ It focused on what might be called the "litigational side-effects" of antipsychotic drugs, and discussed the possibility that the drug use might have "compromised" the substance of the defendant's trial testimony, his interaction with counsel, and his comprehension of the trial.⁷¹

In a concurring opinion, Justice Kennedy (the author of *Harper*) took an even bolder position. He would not allow the use of antipsychotic medication to make a defendant competent to stand trial "absent an extraordinary showing" on the state's part, and noted further that he doubted this showing could be made "given our

⁶⁴ The disagreement is seen most pointedly in *United States v. Charters*, 863 F.2d 302 (4th Cir. 1988) (en banc), cert. den., 494 U.S. 1016 (1990), and *Washington v. Harper*, 494 U.S. 210 (1990).

⁶⁵ See Perlin, *supra* note 5, at 991 (criticizing *Charters*).

⁶⁶ See *Harper*, 494 U.S. at 240 n.5 (Stevens, J., concurring in part & dissenting in part):

The Court relies heavily on the brief filed by the American Psychiatric Association and the Washington State Psychiatric Association . . . to discount the severity of these drugs. However, medical findings discussed in other briefs support conclusions of the Washington Supreme Court and challenge the reliability of the Psychiatrists' Brief.

Compare, e.g., *id.* at 230 (majority relies on Psychiatrists' brief for proposition that tardive dyskinesia is found in 10-25% of hospitalized patients), to *id.* at 239 n.5 (Stevens, J., concurring in part & dissenting in part) (chances greater than one in four of patient developing tardive dyskinesia, and rate is increasing).

⁶⁷ In *Harper*, both the state and the defense submitted studies discussing drug side-effects. Although both sets of studies acknowledged the side-effects' seriousness, they disagreed on how pervasive they were in institutional populations. See *id.* at 229.

⁶⁸ 2 PERLIN, *supra* note 17, §5.64A, at 64 (1991 pocket part).

⁶⁹ 112 S. Ct. 1810 (1992). Even though *Riggins* might appear to be more appropriately discussed as a "criminal trial process" case, we have chosen to consider it here so as to illuminate its relationship to *Harper*. See generally Michael L. Perlin, *Riggins v. Nevada: Forced Medication Collides With the Right to a Fair Trial*, 16 NEWSLETTER AM. ACAD. PSYCHIATRY & L. (Dec. 1992) (in press).

⁷⁰ *Riggins*, 112 S. Ct. at 1815.

⁷¹ *Id.* at 1816.

present understanding of the properties of these drugs."⁷² Justice Thomas dissented, suggesting (1) the administration of the drug might have *increased* the defendant's cognitive ability,⁷³ (2) since Riggins had originally asked for medical assistance (while a jail inmate, he had "had trouble sleeping" and was "hearing voices"), it could not be said that the state ever "ordered" him to take medication,⁷⁴ (3) if Riggins had been aggrieved, his proper remedy was a §1983 civil rights action,⁷⁵ and (4) under the majority's language, a criminal conviction might be reversed in cases involving "penicillin or aspirin."⁷⁶

It is not clear whether *Riggins* is teleological. *Riggins* differs importantly from *Harper* in that the court treated *Harper* as a prison security case while it read *Riggins* as a fair trial case; yet, this difference in the litigants' legal status self-evidently has no effect on the physiological or neurological potential impact of the drugs in question. Nevertheless, the side effects language in *Harper* (subordinated there because of security reasons) is privileged in *Riggins* (where such issues are absent) by nature of the court's consideration of the question in the context of a fair trial issue. Thomas's opinion raises grave issues for defense counsel; had his position prevailed, would concerned and competent defense lawyers feel as if they were assuming a risk in ever seeking psychiatric help for an awaiting-trial defendant? His analogizing antipsychotic drug side effects to penicillin or aspirin may be disingenuous or it may be cynical. What is clear is that nowhere in the lengthy *corpus* of "right to refuse treatment" litigation is this position ever seriously raised.⁷⁷ Its use here appears, again, to reflect the sanist use of "social science."

C. The Criminal Trial Process

Courts tend to be even more sanist in their decisions in mental disability cases that arise in the criminal contexts than in civil cases.⁷⁸ Thus, the sanist use of social science in criminal cases involving the mentally ill is even more teleological than in civil matters. This selectivity is exemplified in cases involving issues such as incompetency to stand trial, insanity determinations, and post-insanity acquittal commitment and release hearings.

⁷² *Id.* at 1817 (Kennedy, J., concurring).

⁷³ *Id.* at 1822-23 (Thomas, J., dissenting). Trial testimony had indicated that Riggins' daily drug regimen (800 mgs. of Mellaril) was enough to "tranquilize an elephant." *Id.* at 1819 (Kennedy, J., concurring), quoting trial record.

⁷⁴ *Id.* at 1823-24 (Thomas, J., dissenting).

⁷⁵ *Id.* at 1825-26. At his trial, Riggins had been sentenced to death.

⁷⁶ *Id.* at 1826.

⁷⁷ The only case in which a similar issue is raised is *Matter of Salisbury*, 524 N.Y.S. 2d 352, 354 (N.Y. Sup. Ct. 1988), holding that prior court authorization was not necessary before a state mental hospital could administer antibiotics to a patient, citing "overwhelming public policy considerations" that made it "imperative" that hospitals could perform such "routine, accepted, non-major medical treatment which poses no significant risk, discomfort, or trauma to the patient." *Salisbury* has never been cited in any subsequent case nor has it been mentioned in the law review literature.

⁷⁸ See Perlin, *supra* note 9, at 402-03 (criminal trial process "riddled with sanist myths and stereotypes"); Perlin, *supra* note 4, manuscript at 95-103 (discussing sanism in the incompetency to stand trial process).

1. Incompetency to Stand Trial (IST) Determinations⁷⁹

Courts often discourage and are hostile to pleas of incompetency based on a fear that defendants are feigning⁸⁰ in an attempt to ultimately avoid criminal responsibility.⁸¹ This may explain why the states have been so remarkably laggard in implementing the 1972 decision in *Jackson v. Indiana*⁸² in which the Supreme Court ruled that IST defendants could not be maintained in maximum security indefinitely if it were not substantially probable that they would gain their competency to stand trial within the "foreseeable future."⁸³

Mentally disabled defendants are also often forcibly medicated so as to be "made competent" to stand trial, in spite of the possibility that the medications in question might cause severe side-effects and, in specific cases, a lack of evidence that the medication in question will actually serve to meet the expected end. Thus, in *United States v. Charters*,⁸⁴ the Fourth Circuit held that the "substantial professional judgment" standard⁸⁵ sufficiently protected defendant's liberty interests in seeking to refuse forced medication.⁸⁶ Although the court briefly acknowledged the possibility of side-effects, it quickly dismissed the magnitude of their potential harm by noting that they were simply "one element" to be weighed in a best-interests decision.⁸⁷ Here the court conceded that it did not do an "exhaustive analysis" of the conflicting scientific literature before it, demurring to the literature's importance:

It suffices to observe that, while there is universal agreement in the professional discipline that side-effects always exist as a risk, there is wide disagreement within those disciplines as to the degree of their severity.⁸⁸

In the course of its decision, the court revealed its "apprehensiveness about dealing with underlying social, psychodynamic, and political issues that form the overt and

⁷⁹ See generally Perlin, *supra* note 4, manuscript at 48-53, 68-73, 95-103; Perlin, *supra* note 5.

⁸⁰ See Stephen Golding *et al.*, *Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the Interdisciplinary Fitness Review*, 8 LAW & HUM. BEHAV. 321 (1984); Richard Rogers, J. Roy Gillis & R. Michael Bagby, *The SIRS as a Measure of Malingering: Cross Validation of a Correctional Sample*, 8 BEHAV. SCI. & L. 85 (1990). The best recent evidence suggests that feigning is statistically rare, and usually identifiable. See, e.g., David Schretlen & Hal Arkowitz, *A Psychological Test Battery to Detect Prison Inmates Who Fake Insanity or Mental Retardation*, 8 BEHAV. SCI. & L. 75 (1990) (92-95% of all subjects correctly classified as either faking or non-faking); Dewey Cornell & Gary Hawk, *Clinical Presentation of Malingerers Diagnosed by Experienced Forensic Psychologists*, 13 LAW & HUM. BEHAV. 375, 381-83 (1989) (feigning attempted in fewer than 8% of cases studied).

⁸¹ See, e.g., *State v. Evans*, 586 N.E.2d 1042 (Ohio 1992); *State v. Sharkey*, 821 S.W.2d 544, 546 (Mo. App. 1991); *Blacklock v. State*, 820 S.W. 2d 882, 884-85 (Tex. App. 1991), *petit. for discret. rev. filed* (1992); *State v. Drobek*, 815 P.2d 724, 727 (Utah App. 1991). For the most recent example in a Supreme Court opinion in a case involving an insanity acquittee, see *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992), at 1796 (Kennedy, J., dissenting), and at 1802 (Thomas, J., dissenting).

⁸² 406 U.S. 715 (1972).

⁸³ *Id.* at 738. Thirteen years after *Jackson* was decided, it remained not implemented in almost half the states. See Bruce Winick, *Restructuring Competency to Stand Trial*, 32 U.C.L.A. L. REV. 921, 940 (1985).

⁸⁴ 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. den.*, 494 U.S. 1016 (1990).

⁸⁵ See *Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982).

⁸⁶ *Charters*, 863 F.2d at 307-08.

⁸⁷ *Id.* at 310.

⁸⁸ *Id.* at 311. While this is certainly true, this does not excuse the court from refusing to critically analyze the scientific research in coming to its ultimate decision. See Perlin, *supra* note 5, at 990-92; compare Monahan & Walker, *supra* note 8, at 582-83 (setting out steps to be used by courts in analyzing social science evidence).

hidden agendas in any right-to-refuse case,⁸⁹ a problem especially pointed where the right-to-refuse question arises in a criminal context. The court's decision further incorporated a broad array of heuristic devices in a way that led to the trivialization and misuse of the social science data before it.⁹⁰

2. Not Guilty by Reason of Insanity (NGRI) Determinations⁹¹

In the past decade, the impact of the Hinckley acquittal has increasingly led to attacks on the insanity defense by legislators, prosecutors, the courts, and members of the general public.⁹² The caselaw reflects incessant judicial disparagement of the plea, of expert testimony in support of defendants asserting the plea, and of social science data that could help illuminate the "myths" that have grown up about the insanity defense.⁹³

Distrust of and selective use of social science data also surfaces in cases involving the recommitment of insanity acquittees. As a result of the use of distorted heuristic cognitive devices,⁹⁴ ego defenses,⁹⁵ and sociopolitical pressure,⁹⁶ courts are particularly sanist and teleological in their consideration of social science research in these cases.⁹⁷

More recently, Justice Thomas's recent opinion in *Foucha v. Louisiana*⁹⁸ is a textbook case of sanist behavior in a social science setting. Dissenting from a decision holding that retention of non-mentally ill insanity acquittees in a forensic mental

⁸⁹ Perlin, *supra* note 5, at 966.

⁹⁰ Perlin, *supra* note 4, manuscript at 73-74.

⁹¹ See generally Perlin, *supra* note 1; Perlin, *supra* note 6.

⁹² Perlin, *supra* note 1, at 609-23.

⁹³ *United States v. Lyons*, 731 F.2d 243, 248-49 (5th Cir. 1984):

A majority of psychiatrists now believe that they do not possess sufficient accurate scientific bases for measuring a person's capacity for self-control or for calibrating the impairment of that capacity ... In addition, the risks of fabrication and "moral mistakes" in administering the insanity defense are greatest when the experts and the jury are asked whether the defendant has the capacity to "control" himself or whether he could have "resisted" the criminal impulse.

Compare id., 739 F.2d 994 (5th Cir. 1984) (Rubin, J., dissenting).

⁹⁴ Perlin, *supra* note 6, at 12-22.

⁹⁵ D. Dorfman, *supra* note 14.

⁹⁶ See, e.g., *Final Report of the National Institute of Mental Health Ad Hoc Forensic Advisory Panel*, 12 MENT. & PHYS. DIS. L. RPT. 77, 96 (1988) (in the aftermath of the Hinckley acquittal, federal government could be counted on, "in controversial cases ... to oppose any conditional release recommendation") (emphasis added). See also *Francois v. Henderson*, 850 F.2d 231, 234 (5th Cir. 198) (testifying doctor conceded he may have "hedged" in earlier testimony as to whether or not insanity acquittee could be released, "because he did not want to be criticized should [the defendant] be released and then commit a criminal act").

⁹⁷ See, e.g., *Jones v. United States*, 463 U.S. 354 (1983), approving a post-commitment insanity acquittal recommitment scheme that placed the burden on the patient to prove he was no longer mentally ill or dangerous, and concluding that it was reasonable to presume that defendant's mental illness continued: "Someone whose mental illness was sufficient to lead him to commit a criminal act [at some point in the past] is likely to remain ill and in need of treatment." *Id.* at 366. No social science data base supports this assumption; the decision in *Jones* is utterly indeterminate, and reflects simply the court's "unwillingness to contradict public sentiment [soon after the Hinckley acquittal] in such a controversial area." See Louise Dove, Note, *Jones v. United States: Automatic Commitment of Individuals Found Not Guilty by Reason of Insanity*, 68 MINN. L. REV. 822, 840 (1984).

⁹⁸ 112 S. Ct. 1780 (1992).

hospital violated the due process clause,⁹⁹ Thomas based his conclusion that such retention was permissible on a variety of sources, including the 1962 commentary to the Model Penal Code, a 1933 text by Henry Weihofen, and a 1956 Supreme Court case that had stressed psychiatry's "uncertainty of diagnosis."¹⁰⁰ He focused at some length on the possibility of "calculated abuse of the insanity defense" by defendants who might feign the plea, and speculated as to how the public might react to the specter of a "serial killer . . . returned to the streets immediately after trial."¹⁰¹

Thomas's opinion is astounding for several reasons. First, he relies on legal scholarship that precedes (by 10–40 years) the Court's application of the due process clause to cases involving the institutionalization of mentally disabled criminal defendants.¹⁰² Second, he relies on a mid-1950's characterization of psychiatric precision in diagnosis to suggest that psychiatry is so inexact that the court should discount expert testimony saying that an individual once acquitted on grounds of insanity is not mentally ill; yet—no doubt because it fits well with his *a priori* position on the case—he finds that psychiatric predictions of dangerousness are sufficiently reliable to require the acquittee's future institutionalization (although, here, the experts hedged on even this prediction).¹⁰³

Third, Justice Thomas's twin foci on the sanist judges' worst fears about insanity acquittees—that they "faked" the insanity defense in the first place and that the improper use of the defense will allow for the speedy release of serial killers—is a profound demonstration of how sanist judges distort social science evidence. The empirical data is clear—beyond doubt—that the insanity defense is rarely feigned, that such attempts are invariably "seen through" by fact finders, and that "successful" acquittees are generally institutionalized in maximum security facilities for far longer periods of time than they would have been incarcerated in penal facilities had they been convicted of the predicate crimes.¹⁰⁴ His reference to "serial killers" is even more perplexing here, given the fact that Foucha's underlying charges were burglary and firearms offenses.

⁹⁹ Foucha had been found NGRI of burglary and weapons charges. After he spent four years in a forensic hospital, that facility's superintendent recommended that he be released since he "evidenced no signs of psychosis and neurosis" and was in "good shape mentally," notwithstanding a diagnosis of antisocial personality disorder. *Id.* at 1782. The court below had found that, because Foucha remained dangerous, he could be retained in the facility. *Id.* at 1783. The Supreme Court reversed.

¹⁰⁰ See *id.* at 1797 (Thomas, J., dissenting) (referring to "current provisions" of the American Law Institute's Model Penal Code); *id.* at 1801 (citing *Greenwood v. United States*, 350 U.S. 366, 375 (1956), for proposition that there is "uncertainty of diagnosis" in psychiatry); *id.* at 1806 (citing, *inter alia*, HENRY WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 294–332 (1933), for proposition that there is a long history of states providing for the continued institutionalization of dangerous insanity acquittees). Cf. *Foucha* at 1787 n.6 (majority opinion) (charging that sections in question "fail to incorporate or reflect substantial developments in the relevant decisional law during the intervening three decades").

¹⁰¹ *Id.* at 1801–02.

¹⁰² See *Jackson v. Indiana*, 406 U.S. 715 (1972).

¹⁰³ See Mary Durham & John Q. LaFond, "Responsibility or Therapy in Controlling the Mentally Ill: The Relationship Between the Insanity Defense and Involuntary Commitment," (paper presented at the annual Law & Society Meeting, May 1992), manuscript at 13: "Neoconservative law reform values psychiatric expertise only when it enhances the social control function of the law and denigrates it when it does not."

¹⁰⁴ See Perlin, *supra* note 1, at 646–55 (citing empirical studies and sources). A similar "fear of feigning" may also have been the motivating force behind Justice O'Connor's recent concurrence in *Medina v. California*, 112 S. Ct. 2572 (1992) (not unconstitutional to assign burden of proof to defendant in incompetency to stand trial proceeding), discussed in 3 PERLIN, *supra* note 17, §14.05A (1992 pocket part).

D. Conclusion

Jurisprudential developments in this area still predominantly reflect sanist thinking. Although the majority opinions in *Riggins* and *Foucha* are written in nonsanist tones and demonstrate a capacity to integrate social science into mental disability law decisionmaking, courts still regularly employ heuristic cognitive devices and self-referential "common sense" in their selective use (and nonuse) of social science, leading to both sanist and pretextual outcomes. It is imperative that scholars, researchers and participants in the justice system confront this reality.

V. NEED FOR CONFRONTATION

A. Introduction

Until we articulate the roots of the legal system's sanist biases and pretextual decision-making mechanisms and subsequently demonstrate how these biases infect the legal system's "read" of social science data, we will not make any significant headway in creating a coherent framework for the consideration of social science data in mental disability law cases. A review of the caselaw reflects several specific overarching incoherences and dissonances that dominate this area of jurisprudence.

In a wide variety of jurisprudential contexts—competency determinations, civil commitments hearings, trials involving mentally disabled criminal defendants—social science is used (or *not* used) teleologically.¹⁰⁵ When a court wishes to avoid confronting the empirical reality known to all behavioralists that competency is a fluid state and that one can be competent for some purposes and not for others,¹⁰⁶ it sticks its head in the legal sand and says, basically, "This is too much for us to try to figure out."¹⁰⁷ When a fact-finder "knows" (because it comports with the judge's own self-referential *faux* common sense) that a rejection of a civil commitment application will exacerbate urban homelessness, he simply says that it will, without reference to any of the extensive sociological and behavioral data base that has carefully weighed this question.¹⁰⁸

Other examples abound.¹⁰⁹ To some extent, the principle of "cognitive dissonance"—the tendency of individuals to reinterpret information or experience that conflicts with their internally accepted or publicly stated beliefs in order to avoid the inconsistent state that much inconsistencies produce¹¹⁰—may be operative here. Judges wish to avoid overt consideration of social science data that "conflicts with

¹⁰⁵ See Tanford, *supra* note 7, at 151 (discussing critiques of social science as a decisionmaking tool that masks the true political and ideological bases of judicial decisions).

¹⁰⁶ See, e.g., sources cited in Perlin, *supra* note 21, manuscript at 85–87 nn.204–47.

¹⁰⁷ See, e.g., Monahan & Walker, *supra* note 8, at 511 n.119.

¹⁰⁸ See, e.g., Perlin, *supra* note 21, manuscript at 107–08 (discussing decision in *In re Melton*, discussed *supra* text accompanying notes 53–53; compare sources cited in Perlin, *supra* note 20, at 94–108).

¹⁰⁹ See, e.g., sources cited in Perlin, *supra* note 4, manuscript at 87–91 (on the relationship between a patient's likelihood to self-medicate in the community and an involuntary civil commitment finding); David Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. J. 595, 628–32 (1983).

¹¹⁰ See Perlin, *supra* note 24, at 139; Bruce Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 46–51 & n.103 (1991). See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957); ROBERT WICKLUND & JACK BREHM, *PERSPECTIVES ON COGNITIVE DISSONANCE* (1976).

their internally accepted or publicly stated beliefs," the result is a retreat to the use of sanist myths and pretextual decisions.

In this way, courts allow themselves to avoid the confrontation of the hard value choices that underlie many of the cases in question. This contributes further to the antitherapeutic quality of mental disability jurisprudence. At a time when scholars have begun to develop and refine the concept of "therapeutic jurisprudence," it is especially important that we consider its relationship to sanist case law and pretextual decisionmaking.

B. Therapeutic Jurisprudence

"Therapeutic jurisprudence" studies the role of the law as a therapeutic agent.¹¹¹ This perspective recognizes that substantive rules, legal procedures and lawyers' roles may have either therapeutic or antitherapeutic consequences, and questions whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles.¹¹²

Although an impressive body of literature has been produced,¹¹³ there has not yet been a systematic investigation into the reasons why some courts decide cases "therapeutically" and others "anti-therapeutically."¹¹⁴ Our preliminary conclusion is that sanism is such a dominant psychological force that it (1) distorts "rational" decisionmaking, (2) encourages (albeit on at least a partially-unconscious level) pretextuality and teleology, and (3) prevents decisionmakers from intelligently and coherently focusing on questions that are meaningful to therapeutic jurisprudential inquiries.¹¹⁵

The types of sanist decisions that we have just discussed operate in an ostensibly atherapeutic world; although some decisions are, in fact, therapeutic and others are, in fact, antitherapeutic, these outcomes seem to arise almost in spite of themselves.¹¹⁶ In short, we cannot make any lasting progress in "putting mental health

¹¹¹ See THERAPEUTIC JURISPRUDENCE, *supra* note 15; ESSAYS IN THERAPEUTIC JURISPRUDENCE, *supra* note 59; Wexler, *Putting*, *supra* note 15; David Wexler & Bruce Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENT. & PHYS. DIS. L. RPTR. 225 (1992) hereinafter Wexler & Winick, *Criminal Justice*; Wexler, *Changing*, *supra* note 15; David Wexler & Bruce Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991) (hereinafter Wexler & Winick, *New Approach*).

¹¹² David Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18, 19 n.5. See generally Wexler, *Putting*, *supra* note 15.

¹¹³ See Wexler & Winick, *New Approach*, *supra* note 111, at 981 n.9.

¹¹⁴ In two earlier papers, Perlin considered the reasons for the incoherence of insanity defense decisionmaking, and concluded that any inquiry into such a question must take into account the impact of symbolism and mythology in the unconscious ways that judges and lawmakers react to such cases, as well as the simplifying cognitive devices (heuristics) that drive such decisionmaking. See Perlin, *supra* note 1; Perlin, *supra* note 6. On how the relationship between heuristics and courts' reception of social science data is frequently pretextual, see Perlin, *supra* note 4, manuscript at 73-77.

¹¹⁵ See M. Perlin, "Law as a Therapeutic and Anti-Therapeutic Agent," paper presented at the Massachusetts Department of Mental Health's Division of Forensic Mental Health's annual conference, Auburn, MA (May 1992) (suggesting that influence of sanism must be considered in therapeutic jurisprudence investigations).

¹¹⁶ See, e.g., discussions in Wexler & Winick, *New Approach*, *supra* note 111, at 990-92 (right to refuse treatment), 992-97 (treatment of incompetent death row inmates), and 997-1001 (treatment of incompetency to stand trial); Wexler & Winick, *Criminal Justice*, *supra* note 111, at 229-30 (sex offender guilty pleas). See also, Michael L. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 LAW & PSYCHOL. REV. 29, 54-62 (1992) (duty to protect in tort law); Perlin, *supra* note 5, at 54 (right to refuse treatment). See generally, 1 PERLIN, *supra* note 17, §1.05A, at 4-7, and sources cited (1991 pocket pari).

into mental health law"¹¹⁷ until we confront the system's sanist biases and the ways that these sanist biases blunt our ability to intelligently weigh and assess social science data in the creation of a mental disability law jurisprudence.

C. Some Prescriptions for Future Behavior

First, it is essential that the issues discussed in this paper be added to the research agendas of social scientists, behaviorists and legal scholars.¹¹⁸ Researchers must carefully examine case law and statutes to determine the extent to which social science is being teleologically used for sanist ends. They must also study the way that judges treat litigants who are perceived to be mentally disabled and how such litigants respond to that judicial treatment.¹¹⁹ They must also study empirical inquiries into the extent of mentally disabled persons' knowledge about either their legal rights or their medication regimens.¹²⁰ These inquiries will help illuminate the ultimate impact of sanism on this area of the law, aid lawmakers and other policymakers in understanding the ways that social science data is manipulated to serve sanist ends, and assist in the formulation of both normative and instrumental strategies that can be used to rebut sanism in the legal system.

Second, lawyers representing mentally disabled individuals must familiarize themselves with this data. The track record of lawyers representing the mentally disabled has ranged from indifferent to wretched,¹²¹ in one famous survey, lawyers were so bad that a patient had a better chance of being released at a commitment hearing if he appeared *pro se*.¹²² Further, simply educating lawyers about psychiatric technique and psychological nomenclature does not materially improve lawyers' performance where underlying attitudes are not changed.¹²³ If counsel is to become even minimally

¹¹⁷ See Wexler, *Putting*, *supra* note 15.

¹¹⁸ See also Perlin, *supra* note 9, at 375-77, 406; Perlin, *supra* note 4, manuscript at 111 (same). Compare Perlin, *supra* note 17, at 58-59 (calling for similar scholarly inquiries into effectiveness and role of counsel in the representation of mentally disabled individuals).

¹¹⁹ Recent studies thus show that judges rarely (and in some cases *never*) inform patients before them at involuntary civil commitment hearings that there is a right to counsel, a right to seek voluntary admission or a right to appeal a commitment order. Charles Parry & Eric Turkheimer, *Length of Hospitalization and Outcome of Commitment and Recommittal Hearings*, 43 HOSP. & COMMUN. PSYCHIATRY 65, 66 (1992).

¹²⁰ See, e.g., Paul Wolpe *et al.*, *Psychiatric Inpatients' Knowledge of Their Rights*, 42 HOSP. & COMMUN. PSYCHIATRY 1168 (1991) (over half of patients tested had no recollection of having heard their legal rights explained to them upon admission to hospital) (patients institutionalized in large, urban, university-affiliated hospital); Cathryn Clary *et al.*, *Psychiatric Inpatients' Knowledge of Medication at Hospital Discharge*, 43 HOSP. & COMMUN. PSYCHIATRY 140 (1992) (more than half of patients released from similar facility did not know the name or appropriate dosage of antipsychotic medications prescribed for them, or why they were being asked to take these medications).

¹²¹ See Perlin, *supra* note 17, at 43-45. See also Steven Schwartz, *Damage Actions as a Strategy for Enhancing the Quality of Care of Persons With Mental Disabilities*, 17 N.Y.U. REV. L. & SOC. CHANGE 651, 662 (1989-90) (describing "wholesale lack of legal advocacy" available to patients in public mental institutions).

¹²² Elliot Andalman & David Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L. J. 43, 72 (1974). One half of the lawyers assigned to represent individuals in civil commitment cases in Dallas were unaware of the existence of either of the two treatises written specifically about Texas's mental health law. Daniel Shuman & Richard Hawkins, *The Use of Alternatives to Institutionalization of the Mentally Ill*, 33 SW. L.J. 1181, 1193-94 (1980).

¹²³ Norman Poythress, *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony*, 2 LAW & HUM. BEHAV. 1, 15 (1978).

competent in this area, it is critical that the underlying issues here be confronted.¹²⁴ This is underscored by judges' lack of basic knowledge about mental disability law; in one astonishing case, a Louisiana civil commitment order was reversed where the trial court did not even know of the existence of a state-mandated Mental Health Advocacy service.¹²⁵

Third, system decisionmakers should study the steps recently outlined by John Monahan and Laurens Walker for courts to adhere to when addressing questions concerning human behavior.¹²⁶ They should then assess the potential impact on developments in mental disability law if these steps were to be followed, as well as the extent to which adherence to these proposals could minimize teleological decisionmaking. If courts genuinely did follow these recommendations—and, for instance, began to “evaluate . . . available research by determining whether the research has survived the critical review of the scientific community, has used valid research methods, . . . and is supported by a body of related research”¹²⁷—the “reasoning” in decisions such as *Barefoot*, *Jones*, and *Parham* is certainly less likely to be repeated in future litigation.

Finally, system decisionmakers must regularly engage in a series of “sanism checks” to insure—to the greatest extent possible—a continuing conscious and self-reflective evaluation of their decisions to best avoid sanism’s pernicious power. We need to take what we learn from therapeutic jurisprudence to strip away sanist behavior and pretextual reasoning and provide *real* lawyers at *real* hearings (at which *real* inquiries are made as to mental status, need for commitment, availability of treatment and restrictivity of institutionalization) for mentally disabled individuals. If this were to be done, the pretextual use of social science data could be confronted in an open and meaningful way.

D. Conclusion

Sanist thinking dominates legal discourse and infects legal decisionmaking. To accommodate sanist influences, judges frequently decide mental disability cases pretextually. In doing this, they read social science data teleologically so as to confirm pre-held beliefs but so as to avoid the cognitive dissonance or psychological reactance that would be caused if they were forced to confront data or evidence that conflicted with their *faux* OCS. All of this generally operates on an unconscious level.

Mental disability is no longer—if it ever was—an obscure subspecialty of legal practice and study. Each of its multiple strands forces us to make hard social policy choices about troubling social issues—psychiatry and social control, the use of institutions, informed consent, personal autonomy, the relationship between public perception and social reality, the many levels of “competency,” the role of free will in the criminal law system, the limits of confidentiality, the protection duty of mental health professionals, the role of power in forensic evaluations. These are all difficult

¹²⁴ For a rare judicial acknowledgement of the impact of lawyer incompetency in another area where inadequate counsel leads to morally intolerable results, see *Engberg v. Meyer*, 820 P.2d 70, 104 (Wyo. 1991). (Urbigkit, C. J., dissenting in part & concurring in part) (“We . . . let ‘chiropractors’ with law degrees perform the equivalent of brain surgery in capital cases, and, predictably, the ‘patient’ often dies. This is intolerable.”).

¹²⁵ *In re C.P.K.*, 516 So. 2d 1323, 1325 (La. App. 1987).

¹²⁶ See Monahan & Walker, *supra* note 8, at 582–84.

¹²⁷ *Id.* at 583.

and complex questions that are not susceptible to easy, formulaic answers. When sanist thinking distorts the judicial process, the resulting doctrinal incoherence should not be a surprise.

David Wexler, Bruce Winick and others have embarked upon an important and exciting enterprise in the study of therapeutic jurisprudence. This, though, is just one step toward the reconstruction of mental disability law. We must also—simultaneously—confront the law's sanist roots and pretextual biases in all policy arenas: the courtroom, the legislature, the practicing bar, the academy. Only then, will an understanding of mental disability law jurisprudence, truly, begin.