

“BABY, LOOK INSIDE YOUR MIRROR”: THE LEGAL
PROFESSION’S WILLFUL AND SANIST BLINDNESS TO LAWYERS
WITH MENTAL DISABILITIES

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INTRODUCTION

The legal profession has notoriously ignored the reality that a significant number of its members exhibit signs of serious mental illness (and become addicted or habituated to drugs or alcohol at levels that are statistically significantly elevated from levels of the public at large).¹ This is no longer news. What has not been explored is why so much of the bar has remained willfully ignorant of these realities, and why it refuses to confront the depths of this problem—one which appears to be exacerbated in the cases of lawyers in large, high-powered firms.²

Paradoxically, there has been increased attention paid to related issues: the extent to which the Americans with Disabilities Act³ (ADA) is a factor to consider in bar disciplinary proceedings brought against lawyers with a diagnosis of mental illness,⁴ and the extent to which an attorney’s mental illness might be a cognizable factor in a criminal post-conviction application alleging ineffective assistance of counsel at trial.⁵ Yet there has been no

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1. See, e.g., John M. Conley, *How Bad Is It Out There?: Teaching and Learning About the State of the Legal Profession in North Carolina*, 82 N.C. L. REV. 1943, 1973-80 (2004); John M. Conley & Scott Baker, *Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 LAW & SOC. INQUIRY 783, 784 (2005).

2. See, e.g., Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 886 (1999).

3. 42 U.S.C. §§ 12101-12213 (2000).

4. See, e.g., Stephen M. Hines, Note, *Attorneys: The Hypocrisy of the Anointed—The Refusal of the Oklahoma Supreme Court to Extend Antidiscrimination Laws to Attorneys in Bar Disciplinary Hearings*, 49 OKLA. L. REV. 731, 748-49 (1996).

5. The Supreme Court’s standard for ineffectiveness is set out in *Strickland v. Washington*, 466 U.S. 668, 686 (1984): “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” See also Michael L. Perlin, “*Life Is In Mirrors, Death Disappears*”:

consideration of the paradox that our responses in these cohorts of cases are utterly dissonant with our responses to the crisis in the profession mentioned above.

I believe that the roots of this puzzle are found in the social attitude of sanism, 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, infecting both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable, is based predominantly upon stereotype, myth, superstition, and deindividualization, and is sustained and perpetuated by our use of alleged “ordinary common sense” (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.⁶ Just as lawyers are sanist towards clients with mental disabilities, they are sanist towards their peers with mental disabilities. And this sanism manifests itself in utterly inconsistent ways (ignoring the reality of mental illness in the practicing bar, blaming attorneys for their mental illness in disciplinary matters, and, again, ignoring the impact of mental illness on representation in the criminal trial process), an inconsistency that is a common mechanism that allows us to avoid confronting both the realities of mental disability and the stereotypical ways that we seek to deal with it in legal contexts. As I have argued elsewhere, “We tend to ignore, subordinate or trivialize behavioral research in this area, especially when acknowledging that such research would

Giving Life to Atkins, 33 N. MEX. L. REV. 315, 348 (2003) [hereinafter Perlin, *Mirrors*] (characterizing adequacy of counsel standard as “pallid”); Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 53 (1992) [hereinafter Perlin, *Fatal Assumption*] (characterizing standard as “sterile and perfunctory”).

6. See Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 713-27 (2003) [hereinafter Perlin, *Lepers*] (discussing the way in which sanist behaviors influence legal education); see also, e.g., Michael L. Perlin, “*Things Have Changed*”: *Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535 (2003) [hereinafter Perlin, *Things Have Changed*]; Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as it Did*, 10 J. CONTEMP. LEGAL ISSUES 3 (1999) [hereinafter Perlin, *Half-Wracked Prejudice*]; Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J.L. & HEALTH 15 (1994) [hereinafter Perlin, *Sanist Attitudes*]; 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 (1994) [hereinafter Perlin, *Sanist Jurors*]; Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993); Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373 (1992) [hereinafter Perlin, *Sanism*]. See generally MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000) [hereinafter PERLIN, *HIDDEN PREJUDICE*].

On the relationship between sanism and pretextuality in this context see *infra* text accompanying notes 81-85.

be cognitively dissonant with our intuitive—albeit empirically flawed[—]views.”⁷

I have written frequently about the ways that therapeutic jurisprudence (TJ)—a means of studying the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers’ roles may have either therapeutic or antitherapeutic consequences⁸—might be a redemptive tool in efforts to combat sanism, as a means of “strip[ping] bare the law’s sanist façade” and as a “powerful tool that will serve as a means of attacking and uprooting the we/they distinction that has traditionally plagued and stigmatized the mentally disabled.”⁹ My friend, colleague, and co-presenter Susan Daicoff has already done a herculean job of looking at lawyer-stress issues through a TJ filter;¹⁰ I hope in this paper to add to that by considering squarely the impact of sanism on the underlying dilemmas.

This paper (1) briefly reviews the evidence as to rates of mental disability among practicing lawyers, the state of ADA law as it relates to lawyers with mental disability, and the caselaw that has emerged in the criminal procedure context with regard to ineffectiveness of counsel issues; (2) explains sanism and describes its impact upon the legal system with special attention paid to the narrow but important issue of its impact on lawyers with mental

7. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 408, 422 (2000) [hereinafter Perlin, *A Law of Healing*]; see JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 156 (1992):

Neoconservative insanity defense and civil commitment reforms value psychiatric expertise when it contributes to the social control function of law and disparage it when it does not. In the criminal justice system, psychiatrists are now viewed skeptically as accomplices of defense lawyers who get criminals “off the hook” of responsibility. In the commitment system, however, they are more confidently seen as therapeutic helpers who get patients “on the hook” of treatment and control. The result will be increased institutionalization of the mentally ill and greater use of psychiatrists and other mental health professionals as powerful agents of social control.

Id.

8. See, e.g., MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 417-19 (1994); Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993). See generally ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (Bruce J. Winick ed., 1997); THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990).

9. Perlin, *Things Have Changed*, *supra* note 6, at 544 (quoting PERLIN, HIDDEN PREJUDICE, *supra* note 6, at 301 (internal quotation marks omitted)).

10. See generally Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL’Y & L. 811 (1999) (analyzing therapeutic jurisprudence as a tool to potentially improve the quality of the practice of law).

disabilities; (3) speculates as to why lawyers are as susceptible (or more susceptible) to sanism's pernicious power as others; and then (4) considers how an application of TJ principles to this problem may eventually have a redemptive effect.

My title for this paper comes from Bob Dylan's *Mama, You Been on My Mind*, a song written in 1964 but not released officially by Dylan until 1991.¹¹ Characterized by Oliver Trager in his definitive Dylan encyclopedia as "simply a great love song" with "gorgeous melody and cascading almost incantatory lyrics of romance and inevitable separation,"¹² the song includes this verse:

When you wake up in the mornin', baby, look inside your mirror.
 You know I won't be next to you, you know I won't be near.
 I'd just be curious to know if you can see yourself as clear
 As someone who has had you on his mind.¹³

Lawyers and the legal system fail miserably at "looking inside [their own] mirror," and lawyers do not see themselves "as clear." Perhaps it is time that we have ourselves on our collective minds.

I. WHAT THE EVIDENCE TELLS US

Lawyers, as a group, are twice as likely to commit suicide as the general public.¹⁴ Practicing lawyers ranked highest in major depressive disorders among 104 occupational groups studied.¹⁵ The rate of alcoholism among

11. BOB DYLAN, *MAMA, YOU BEEN ON MY MIND* (Sony BMG Music Entertainment 1991), available at <http://bobdylan.com/moderntimes/songs/mama.html>. Dylan last performed the song on February 18, 2003, in Newcastle, Australia. See *How Long Has It Been Since Dylan Played . . .*, <http://www.adamselzer.com/boblast.html> (last visited Aug. 15, 2008). Joan Baez released her version of the song ("Daddy, You Been on My Mind") on her 1965 album, *Farewell, Angelina*. See Joan Baez Discography, *Farewell Angelina*, <http://www.joanbaez.com/Discography/FA.html> (last visited Aug. 15, 2008). Dylan and Baez frequently performed the song as a duet in live conference appearances. See *The Bob Dylan/Joan Baez Pages*, <http://www.bobdylanroots.com/baez.html#duets> (last visited Aug. 15, 2008).

12. OLIVER TRAGER, *KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA* 408 (2004).

13. DYLAN, *supra* note 11.

14. David M. Wooldridge, *Addressing the Unthinkable: How You Can Constructively Deal with the Problem of Suicide*, 68 ALA. LAW. 154, 155 (2007), available at http://www.alabar.org/publications/pastissues/0107/addressing_suicide.pdf.

15. Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 765 n.26 (2004) (quoting William Eaton et al., *Occupations and the Prevalence of Major Depressive Disorders*, 32 J. OCCUPATIONAL MED. 1079, 1085 tbl.3 (1990)).

A more recent government study suggests that the rate of major depressive disorders among lawyers has diminished somewhat in recent years. SUBSTANCE ABUSE AND MENTAL HEALTH SVCS. ADMIN., U.S.

practicing lawyers is generally estimated at being twice that of the rate of the general public,¹⁶ and even more startlingly, nearly 70% of lawyers are likely to have an alcohol problem at some time during their career.¹⁷ Estimates of substance abuse rates range from 9-20%.¹⁸ These statistics hold true for law students as well, and some evidence suggests that rates of clinical depression as well as alcohol and substance abuse rise regularly while students continue their legal education.¹⁹ These figures are appalling²⁰ and appear to be higher for lawyers than for other professionals (presumably under like levels of stress).²¹ And they are made even *more* appalling by what appears to be widespread denial that there is anything wrong; the reality that less than .1%

DEPT. HEALTH AND HUMAN SVCS., NAT'L SURVEY ON DRUG USE AND HEALTH, DEPRESSION AMONG ADULTS EMPLOYED FULL-TIME, BY OCCUPATIONAL CATEGORY (2007), available at <http://www.oas.samhsa.gov/2k7/depression/occupation.htm>. But it is, at this point, impossible to ascertain if this latter study actually contradicts the Eaton Study. The Eaton Study adjusted for social demographic factors; it is not clear that the government study did that.

16. ABA Comm. on Ethics and Prof'l Responsibility, Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment, Formal Op. 03-431 n.1 (2003) ("[L]awyers have been found to suffer from alcoholism and substance abuse at a rate at least twice as high as the general population."); Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 5-6 (1995) (comparing a study showing 9% of U.S. adults meet the criteria for alcohol abuse or dependency, while 15-18% of lawyers met the same criteria); Len Klingen, Note, *The Mentally Ill Attorney*, 27 NOVA L. REV. 157, 168 (2002) (discussing a sample statistic which found approximately 15% of the members of the Florida bar will have an alcohol problem at some time, as opposed to only 8% of the general population); see also JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS 67 (2005) ("Lawyers as a group are very heavy drinkers, even more than undergraduates, law students, or the population at large.").

17. Beck et al., *supra* note 16, at 3.

18. E.g., John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992) (discussing the rate of substance abuse among Texas lawyers in particular).

19. Schuwerk, *supra* note 15, at 764, discussed in G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 240-47 (1986).

20. See generally Schiltz, *supra* note 2, at 874-79 (discussing the high incidence of mental illness, substance abuse, and divorce amongst legal professionals).

21. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 22 (2007), available at http://law.sc.edu/faculty/stuckey/best_practices ("It is well-known that lawyers suffer higher rates of depression, anxiety and other mental illness, suicide, divorce, alcoholism and drug abuse, and poor physical health than the general population or other occupations."); Theresa M. Beiner, *Insight Into the Woes of a Profession*, 20 GEO. J. LEGAL ETHICS 101, 112 (2007) (reviewing STEFANCIC & DELGADO, *supra* note 16) ("[L]awyers also suffer from disproportionate psychological problems, including a higher incidence of depression than that experienced by people with non-legal occupations."); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1347 (1997) ("[L]awyers are currently experiencing a significantly higher level of depression . . . and substance abuse . . . than individuals in other professions." (footnote omitted)).

of practicing attorneys have reported “having a disability”²² suggests the enormity of this problem. I recognize that many states have compulsory or optional continuing legal education dealing with alcoholism and substance abuse issues among attorneys.²³ But my sense—based on a combination of research and anecdote—suggests to me that this remains an issue that is still, at best, under the radar for many or, at worst, the subject of a “don’t ask, don’t tell” attitude.

There is no doubt that these are frightening statistics, and at this point in time they should be a surprise to no one. But what is perhaps more frightening is the reality that very few of us seem to notice or care. It is not a coincidence, I think, that one of the bar journal articles—about impaired judges²⁴—is titled *The Worst Kept Secret in the Courthouse*.²⁵ There are multiple articles in state-level bar journals calling attention to our abysmal record,²⁶ but I see no evidence that this is an issue that has grabbed the attention of the practicing bar, the academy,²⁷ or the judiciary, notwithstanding the great publicity that attended the first ABA National Conference on the

22. Wendy F. Hensel, *The Disability Dilemma: A Skeptical Bench & Bar*, 69 U. PITT. L. REV. 651 (2008).

23. See, e.g., Richard Carlton, *Addressing Disability and Promoting Wellness in the Federal Courts*, 90 JUDICATURE 26 (2006).

24. For a discussion on the issues which arise when judges are faced with mental disabilities, alcoholism, or substance abuse problems, see Isaiah M. Zimmerman, *Helping Judges in Distress*, 90 JUDICATURE 10 (2006), and American Judicature Society, *The Harder They Fall: A Hand Up for Impaired Judges*, 90 JUDICATURE 16 (2006).

25. Cynthia Gray, *The Worst Kept Secret in the Courthouse*, 90 JUDICATURE 30 (2006).

26. See, e.g., Patrick J. Kelly, *Lawyers Concerned for Lawyers: Friends in Deed*, BENCH & B. MINN., Nov. 2006, at 7; Jack M. Morgan, Jr., *Mental Illness, Addiction and Attorneys*, UTAH B.J., Aug/Sep. 2004, at 14; William G. Schma, *Therapeutic Jurisprudence: Recognizing Law as One of the Healing Arts*, MICH. B.J., Jan. 2003, at 25; Stephen M. Terrell, *The Dirty Secret in the Lives of Lawyers*, 49 RES GESTAE 34 (2006); Wooldridge, *supra* note 14, at 154.

27. See Schuwerk, *supra* note 15, at 765 n.26 (quoting Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 125-26 (2002)), on how the academy actually acts to perpetuate this state of affairs:

It is almost too obvious to state that if our operant paradigms, teaching methods, or other practices exert pressures that undermine the physical health, internal values, intrinsic motivation, and/or experience of security, self-worth, authenticity, competence, and relatedness of our students, we should expect the negative results that studies of law students (and lawyers) consistently demonstrate: major deficits in well-being, life satisfaction, and enthusiasm, and flourishing depression, anxiety, and cynicism.

Id.

Employment of Lawyers with Disabilities.²⁸ To paraphrase a more famous Bob Dylan song: something's happening, but we don't care what it is.²⁹

What we *are* paying attention to, however, is the intersection between mental disability and a cluster of other issues:

- the impact of such mental disability on bar disciplinary proceedings;³⁰
- the application of the ADA to such matters, and to the bar examination process;³¹ and
- the role of a lawyer's mental disability in a defendant's appeal of a criminal conviction in which the defendant alleges he was denied effective assistance of counsel under *Strickland v. Washington*.³²

In each of these scenarios, questions of mental disability are raised and evaluated, often with apparently inconsistent results. Bar discipline cases often talk about mental illness as if it were curable in precisely the same way that a sore throat or cold is curable³³ and reject mitigation arguments unless lawyers can “*prove* that the risk of continued substance abuse causing future acts of misconduct is virtually nonexistent.”³⁴ Underlying the cases is a

28. See, e.g., *ABA Resolution and Report on Website Accessibility*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 504 (2007).

29. See BOB DYLAN, *BALLAD OF A THIN MAN* (Sony BMG Music Entertainment 1965), available at <http://bobdylan.com/moderntimes/songs/thinman.html>. The actual lyrics are:

Because something is happening here,
But you don't know what it is,
Do you, Mister Jones?

30. See *infra* text accompanying notes 33-37.

31. See *infra* text accompanying notes 38-51.

32. See *infra* text accompanying notes 52-74.

33. See, e.g., *In re Sherman*, 363 P.2d 390, 392 (Wash. 1961) (“Mental irresponsibility is a complete defense to conduct of an attorney which would otherwise warrant disciplinary action: (1) if such conduct was the result or consequence of mental incompetency; and (2) if the mental condition which was responsible for such conduct has been cured so completely that there is little or no likelihood of a recurrence of the condition.”). But cf., e.g., Theo C. Manschreck, *Delusional Disorder and Shared Psychotic Disorder*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1031, 1048 (Harold I. Kaplan & Benjamin J. Sadock eds., 6th ed. 1995) (observing that some patients are “refractory to attempts to reduce their delusory thinking”); Jennifer S. Bard, *Re-arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense*, 5 HOUS. J. HEALTH L. & POL'Y 1, 15 n.42 (2005) (“[T]here are serious . . . mental illnesses, such as . . . delusional disorder, of which it may be said that medical science has not yet found a cure.”); Breanne M. Sheetz, Note, *The Choice to Limit Choice: Using Psychiatric Advance Directives to Manage the Effects of Mental Illness and Support Self-responsibility*, 40 U. MICH. J.L. REFORM 401, 404 (2007) (“[P]sychiatric treatment does not cure chronic mental illness.”).

34. *Twohy v. State Bar*, 769 P.2d 976, 982 (Cal. 1989) (emphasis added). This places a burden on the respondent *beyond* that of the “beyond a reasonable doubt” standard employed in criminal trials.

powerful current of *blame*: claims of mitigation are rejected on the basis that the initial use of alcohol and drugs was voluntary.³⁵ Decisions in these cases eerily track decisions under the Federal Sentencing Guidelines that reject arguments seeking mitigation in the sentencing process unless the defendant's mental disability mimics that of an insanity defense (usually, that he cannot tell right from wrong).³⁶ In short, the assessment by a student author—"until recently, the profession has preferred to ignore the possibility of rehabilitation for mentally ill attorneys; instead, courts have drummed them out of the profession"³⁷—appears to be frighteningly accurate.

The phrase "until recently" used by the author in the article just cited refers to a (partial) change that has followed the passage of the ADA.³⁸ Yet, virtually without exception, ADA claims have been rejected by the courts. Notwithstanding Professor Laura Rothstein's bold and optimistic prediction that the ADA "will permit individuals with disabilities to have a level playing field in . . . the practice of law,"³⁹ nearly two decades of practice under the ADA has made it clear that, in the words of one commentator, "courts have consistently held that the ADA does not prevent courts from taking disciplinary action against attorneys with disabilities."⁴⁰ In a Florida case, the court concluded that, even if any of the respondent's "actions occurred when he could not distinguish right from wrong, the ADA would not necessarily bar

35. *In re Rentel*, 729 P.2d 615, 620-21 (Wash. 1986); cf. *Montana v. Egelhoff*, 518 U.S. 37, 49-51 (1996) (holding that there is no error for a state to exclude voluntary intoxication as an aspect for consideration in determining the existence of a mental state that is an element of a criminal offense).

36. See, e.g., Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431 (1995); see also Michael L. Perlin, "The Executioner's Face Is Always Well-Hidden": *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 229 (1996) ("Underlying many of the Guidelines cases is a powerful current of *blame*: the defendant *succumbed* to temptation by not resisting drugs or alcohol and by not overcoming childhood abuse." (emphasis added)).

37. Hines, *supra* note 4, at 748.

38. *Id.* ("This type of discrimination is exactly the type addressed by the Americans with Disabilities Act.").

39. Laura F. Rothstein, *Bar Admissions and the Americans with Disabilities Act*, HOUS. LAW., Sept.-Oct. 1994, at 34.

40. Kelly R. Becton, Comment, *Attorneys: The Americans with Disabilities Act Should Not Impair the Regulation of the Legal Profession Where Mental Health Is an Issue*, 49 OKLA. L. REV. 353, 355 (1996) (citing *State ex rel. Okla. Bar Ass'n v. Busch*, 919 P.2d 1114 (Okla. 1996)); see also *Fla. Bar v. Clement*, 662 So. 2d 690 (Fla. 1995); *In re Wolfgram*, No. 90-TT-16955, 1995 WL 506002 (Cal. Bar Ct. Aug. 22, 1995); Yuri N. Walker, *Protecting the Public: The Impact of the Americans with Disabilities Act on Licensure Considerations Involving Mentally Impaired Medical and Legal Professionals*, 25 J. LEGAL MED. 441, 465 (2004) ("[T]he courts have consistently held that the ADA does not prevent regulatory bodies from taking disciplinary actions against attorneys with disabilities.").

this [c]ourt from imposing sanctions,”⁴¹ thus establishing a more stringent standard in ADA cases than in criminal insanity defense cases!⁴² Not coincidentally, the same case raised the tiresome and shopworn specter of fakery,⁴³ a clichéd, though ubiquitous, fear that continues to resonate with many, including, notoriously, Supreme Court Justice Antonin Scalia.⁴⁴

The bar admission and testing cases are somewhat different. A significant percentage of all ADA cases involving questions of mental disability involve this cohort of cases,⁴⁵ most narrowing the scope of acceptable questions on the bar admission application form,⁴⁶ but some sustaining the use of such questions.⁴⁷ In discussing this topic, commentators have voiced concern that intensive questioning on this topic “may encourage applicants with true psychological problems to avoid seeking psychiatric treatment in fear of not obtaining a license, which will pose a greater risk to the public.”⁴⁸ In general, however, there is probably little question that ADA litigation on these bar admission and testing issues has had more of an impact

41. *Clement*, 662 So. 2d at 700.

42. Scott Lemond & David Mizgala, *Identifying and Accommodating the Learning-Disabled Lawyer*, 42 S. TEX. L. REV. 69, 92-93 (2000) (discussing *Clement*).

43. *Clement*, 662 So. 2d at 700 (“*Clement* also said he could fool his doctor into believing that he was in control some of the period in question.”).

44. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 354 (2002) (Scalia, J., dissenting) (“[Determination of a person’s incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses.” (alterations in original) (citation omitted)), *critiqued in* Perlin, *Mirrors*, *supra* note 5, at 331.

45. See 3 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 5A-2.4, at 192-94 n.223 (2d ed. 2000) (listing and discussing cases and scholarly articles); 3 MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 5A-2.4, at 55-56 (2d ed. Supp. 2006-07) (same).

46. See, e.g., *Clark v. Va. Bd. of Bar Exam’rs*, 880 F. Supp. 430, 446 (E.D. Va. 1995) (enjoining bar from inquiring as to applicant’s history of being treated for mental or emotional disorders); *Ellen S. v. Fla. Bd. of Bar Exam’rs*, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994) (same). See generally Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution*, 20 J. LEGIS. 147 (1994).

47. See, e.g., *McReady v. Ill. Bd. of Admissions to the Bar*, No. 94 C 3582, 1995 WL 29609, at *7 (N.D. Ill. Jan. 24, 1995); *Applicants v. Tex. State Bd. of Law Exam’rs*, No. A 93 CA 740 SS, 1994 WL 923404, at *9 (W.D. Tex. Nov. 11, 1994); Becton, *supra* note 40, at 354 (“[T]he ADA should not prevent narrowly tailored bar application questions concerning mental health.”).

48. John D. McKenna, Note, *Is the Mental Health History of an Applicant a Legitimate Concern of State Professional Licensing Boards? The Americans with Disabilities Act vs. State Professional Licensing Boards*, 12 HOFSTRA LAB. L.J. 335, 353 (1995); see also Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 93 (2001) (“[M]any of the questions currently in use cannot be justified under the ADA, even under the premises of ‘relaxed scrutiny.’”).

on practice than such litigation has had on bar discipline issues.⁴⁹ The question here remains: Has the ADA been successful in meeting the challenge of “eradicating stereotypes and misconceptions regarding qualified individuals with disabilities?”⁵⁰ More to the point, can we or should we continue “[t]o label lawyers with non-visible disabilities as the probable class of incompetent lawyers?”⁵¹

The application of *Strickland v. Washington* to cases involving lawyers with mental disability has been, to be charitable, bizarre. In the lead case, *Smith v. Ylst*,⁵² the court rejected a defendant’s *Strickland*-based appeal in a case where his lawyer, in opening statements, discussed a conspiracy theory that purportedly endangered the lawyer’s life.⁵³ In coming to its decision, the court analogized to cases involving *competency to stand trial*, and relying on, in part, the Supreme Court’s 1966 decision in *Pate v. Robinson*,⁵⁴ it found that a hearing would be required “when there is substantial evidence that an attorney is not competent to conduct an effective defense.”⁵⁵ Based on the evidence before it, and notwithstanding psychiatric affidavits submitted to the court that the lawyer, at that time, was undergoing a “paranoid psychotic reaction,”⁵⁶ and notwithstanding other evidence that “created a doubt as to [trial counsel]’s mental stability,”⁵⁷ the Ninth Circuit concluded that the decision to not hold such a hearing was not “erroneous.”⁵⁸

Other state and federal courts have held that abuse of alcohol, cocaine, or prescription medication does not create per se ineffectiveness.⁵⁹ Perhaps the

49. See Becton, *supra* note 40, at 354 (“In contrast to the bar application mental health question debate, attacks in the area of attorney discipline have had little effect on traditional practice.”).

50. Bruce M. Familant, Comment, *The Essential Functions of Being a Lawyer with a Non-Visible Disability: On the Wings of a Kiwi Bird*, 15 T.M. COOLEY L. REV. 517, 565-66 (1998).

51. *Id.* at 565.

52. 826 F.2d 872 (9th Cir. 1987).

53. See *id.* at 874 (“Daul’s [Daul was the trial lawyer] secretary stated that he told her he was crazy and wanted to go to an insane asylum. Daul’s associate said Daul accused him of being part of the conspiracy and of trying to take over his practice. Daul repeatedly expressed concern that people were going to try to kill him . . .”).

54. 383 U.S. 375 (1966).

55. *Smith*, 826 F.2d at 877.

56. *Id.* at 874.

57. *Id.* at 877.

58. *Id.*; see also *Dows v. Wood*, 211 F.3d 480, 485 (9th Cir. 2000). The court in *Dows*, relying on *Smith*, rejected defendant’s argument that counsel—diagnosed with Alzheimer’s some eighteen months after the trial—provided ineffective assistance of counsel, reasoning that “because of the nature of Alzheimer’s disease and its varied manifestations in different individuals, neither [defendant] nor anyone else can prove what effects, if any, the disease had on [defense counsel’s] memory and cognitive ability at the time he represented [defendant] at trial.” *Id.*

59. Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective*

most stunning example is the case of *Bellamy v. Cogdell*.⁶⁰ In *Bellamy*, a death penalty case, counsel—who was subject to a disciplinary hearing to determine whether he should still be able to practice law (because of his incapacity)—was allowed to continue representing his client.⁶¹ Due to a finding of mental impairment, trial counsel was thus initially disqualified from defending himself in his own disciplinary hearing.⁶² To be able to continue representing his client in *Bellamy*, he promised he would only serve in an advisory capacity to competent lead counsel.⁶³ However, as that lead counsel was unable to attend the trial, the same attorney who was mentally incompetent to defend himself was allowed to defend someone else charged with murder, and that representation in that trial was deemed effective assistance of counsel under the *Strickland* test.⁶⁴ These decisions are consistent with other decisions affirming convictions involving defendants whose attorneys fell asleep in court, came to court inebriated, etc.⁶⁵

Judges' refusals to consider the meaning and realities of mental illness cause them to act in what appears, at first blush, to be contradictory and inconsistent ways,⁶⁶ and teleologically, to privilege (where that privileging serves what they perceive as a socially-beneficial value) and subordinate

Assistance of Counsel and the Strickland Prejudice Requirement, 75 NEB. L. REV. 425, 457-58 (1996); see also Whitney Cawley, Note, *Raising the Bar: How Rompilla v. Beard Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases*, 34 PEPP. L. REV. 1139 (2007).

60. 974 F.2d 302, 303-04 (2d Cir. 1992).

61. *Id.* at 304; see also Kirchmeier, *supra* note 59, at 458.

62. *Bellamy*, 974 F.2d at 304.

63. *Id.*

64. *Id.* at 308-09; see also Elizabeth Gable & Tyler Green, *Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years after Strickland*, 17 GEO. J. LEGAL ETHICS 755, 770 (2004).

65. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1842-43 (1994) (listing examples); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 151-60 (1995) (same).

66. This should not be a surprise. Sanism and pretextuality often cause judges to act in inexplicably contradictory ways, often in the same case. See e.g., Michael, L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 538 (1994)

As Professor Susan Stefan has perceptively noted, courts routinely find mentally disabled women incompetent to engage in sexual intercourse (i.e., to lack sufficient competence to engage knowingly and voluntarily in such behavior), but just as routinely find such individuals competent to consent to give their children up for adoption. In one startling case, a court made both of these findings simultaneously about the same woman.

Id. (footnote omitted)

(where that subordination serves what they perceive as a similar value) evidence of mental illness.⁶⁷ Thus, it is no surprise that courts that regularly engage in gross stereotyping with regard to the impact of mental illness on behavior in the context of the sentencing of persons convicted of crime or facing involuntary civil commitment,⁶⁸ similarly minimize it in cases where recognition of that impact might lead to a socially-undesirable result, such as an insanity acquittal,⁶⁹ where this tactic allows them to engage in greater social control. In this instance, sanist behavior leads to pretextual outcomes.

When these cohorts of cases are read together, some common threads can be teased out:

- there is absolutely *no* indication that the statistics regarding the high incidence of lawyer dysfunction discussed earlier are known (or, if known, are of interest) to the judges deciding the cases;
- there is substantial *blame* of lawyers with mental disabilities, often accompanied by thinly-veiled suggestions that their disability was their fault;⁷⁰
- courts simply do not want to acknowledge that the non-discrimination principles of the ADA apply to attorney discipline matters,⁷¹ though they are grudgingly beginning to “get” that they apply to bar application questionnaire cases; and
- the desire to uphold criminal convictions against *Strickland* attacks leads to behavior that is—there is no other descriptor—utterly pretextual.⁷²

In an article about the Federal Sentencing Guidelines that I co-authored with Professor Keri Gould some twelve years ago,⁷³ this was our conclusion:

67. See e.g., LA FOND & DURHAM, *supra* note 7, at 156.

68. See e.g., PERLIN, HIDDEN PREJUDICE, *supra* note 6; Perlin & Gould, *supra* note 36.

69. See e.g., MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994); Michael L. Perlin, “*The Borderline Which Separated You From Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375 (1997).

70. See Perlin, *Sanist Attitudes*, *supra* note 6, at 31 n.90 (explaining that trial judge’s response to National Center for State Courts’ survey indicates that, “in his mind, defendants who were incompetent to stand trial *could* have communicated with and understood their attorneys ‘if they [had] only wanted.’” (citing K. Gould et al., *Criminal Defendants With Trial Disabilities: The Theory and Practice of Competency Assistance* 68) (unpublished manuscript on file with Professor Keri Gould, St. John’s University School of Law)).

71. See, e.g., Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 225 (2000) [hereinafter Perlin, *Impact of the ADA*] (discussing the non-discrimination aspect of *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999)).

72. See, e.g., Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993) [hereinafter Perlin, *The Case of Competency*]; see also Perlin, *Fatal Assumption*, *supra* note 6, at 53-54 & n.84 (explaining that, under *Strickland*, “reasonably effective assistance” is objectively measured by the “prevailing professional norms”).

73. Perlin & Gould, *supra* note 36, at 433.

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. Federal judges are remarkably inconsistent in their reading of mental disability. The caselaw[] 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.

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;

...

(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.⁷⁴

I believe that judicial (and social) attitudes in the sorts of cases that I am discussing here track these attitudes almost precisely. In that context, we concluded then that the "pernicious forces" of sanism and pretextuality drove the developments on which we reported.⁷⁵ I believe the same forces are at play here.

II. ON SANISM

Sanism permeates all aspects of mental disability law and affects all participants in the mental disability law system—litigants, fact finders, counsel, and expert and lay witnesses.⁷⁶ Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law, and all aspects of the criminal process (pretrial, trial, and sentencing).⁷⁷ It reflects what civil rights lawyer Florynce Kennedy has characterized as the "pathology of oppression."⁷⁸

74. *Id.* at 434 (footnotes omitted).

75. *Id.* at 445-46.

76. Perlin, *Lepers*, *supra* note 6, at 684; *see also* PERLIN, *HIDDEN PREJUDICE*, *supra* note 6, at 28, 55-56 (discussing the way that sanism affects lawyers' representation of clients).

77. Until very recently, the only evidence I could find of any law professor candidly discussing her disability was a personal communication from my friend, Professor Marjorie Silver, who shares with her students her experiences as a person with a diagnosed mental disability. *See* Perlin, *Lepers*, *supra* note 6, at 715 n.182. In August 2007, however, University of Southern California Law School Professor Elyn Saks published a memoir that discusses openly her experiences as a person with a mental disorder serious enough to have led her to be institutionalized in the past. *See* ELYN SAKS, *CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS* (2007).

78. Morton Birnbaum, *The Right to Treatment: Some Comments on its Development*, in *MEDICAL*,

We must consider sanism hand-in-glove with pretextuality. “Pretextuality” means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends.⁷⁹ “This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.”⁸⁰

In another article (dealing primarily with the impact of sanism on clinical education), I asserted that sanism permeates the legal representation process both in cases in which mental capacity is a central issue and those in which such capacity is a collateral question. I found that “[s]anist lawyers (1) distrust their mentally disabled clients, (2) trivialize their complaints, (3) fail to forge authentic attorney-client relationships with such clients and reject their clients’ potential contributions to case-strategizing, and (4) take less seriously case outcomes that are adverse to their clients.”⁸¹

The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders. Experts frequently testify in accordance with their own self-referential concepts of “morality” and openly subvert statutory and case-law criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional standards as prerequisites for an incompetency-to-stand-trial finding. Often this testimony is further warped by a heuristic bias. Expert witnesses—like the rest of us—succumb to the seductive allure of simplifying cognitive devices in their thinking and employ such heuristic gambits as the vividness effect or attribution theory in their testimony. This testimony is then weighed and evaluated by frequently sanist fact-finders. Judges and jurors, both consciously and unconsciously, often rely on reductionist, prejudice-driven stereotypes in their decision-making,

MORAL AND LEGAL ISSUES IN HEALTH CARE 97, 107 (Frank Ayd ed., 1974) (quoting Kennedy).

79. 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, 133-36 (1991).

80. Michael L. Perlin, “*She Breaks Just Like a Little Girl*”: *Neonaticide, The Insanity Defense, and the Irrelevance of Ordinary Common Sense*, 10 WM. & MARY J. WOMEN & L. 1, 25 (2003) [hereinafter Perlin, *Neonaticide*] (internal quotation marks omitted) (quoting Perlin, *Half-Wracked Prejudice*, *supra* note 7, at 5); *see also, e.g.*, Perlin, *Half-Wracked Prejudice*, *supra* note 6 (discussing the relationship between sanism and pretextuality).

81. Perlin, *Lepers*, *supra* note 6, at 695.

thus subordinating statutory and case law standards as well as the legitimate interests of the mentally disabled persons who are the subject of the litigation. Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.

As I have previously noted:

I believe that these two concepts have controlled—and continue to control—modern mental disability law. Just as importantly (perhaps, more importantly), they continue to exert this control invisibly. This invisibility means that the most important aspects of mental disability law—not just the law “on the books,” but, more importantly, the law in action and practice—remains hidden from the public discussions about mental disability law.⁸²

These attitudes corrupt the entire process of dealing with lawyers who have mental disabilities. Because, socially, we encourage punishment for those who demonstrate a “lack of effort” or are “responsible” for their failure,⁸³ we blind ourselves willfully to the realities of mental illness, to the “gray areas” of human behavior,⁸⁴ and to behavioral, scientific, cultural, and empirical realities.⁸⁵ As a result of this self-inflicted blindness, we blame lawyers with mental disabilities for their status, we minimize the impact of mental disabilities on their actions, and we—in criminal cases—allow this minimization to pretextually affirm convictions of defendants whose trials did not meet the minimum levels of decency that the criminal justice system demands.⁸⁶ It is no coincidence that, in the bar cases, we employ language that reflects the most sanist language employed in criminal cases.⁸⁷

There is a massive database that tells us of the extent to which the problem of stigma continues to pervade all aspects of society.⁸⁸ Our refusal

82. Perlin, *Half-Wracked Prejudice*, *supra* note 6, at 19 (footnotes omitted).

83. See Bernard Weiner, *On Sin Versus Sickness: A Theory of Perceived Responsibility and Social Motivation*, 48 AM. PSYCHOLOGIST 957 (1993).

84. See Perlin, *Neonaticide*, *supra* note 80, at 27.

85. Michael L. Perlin, “Where the Winds Hit Heavy on the Borderline”: *Mental Disability Law, Theory and Practice, Us and Them*, 31 LOY. L.A. L. REV. 775, 777 (1998).

86. See, e.g., Michael L. Perlin, “Dignity Was the First to Leave”: *Godinez v. Moran, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996) [hereinafter Perlin, *Dignity Was the First to Leave*]; see also PERLIN, *HIDDEN PREJUDICE*, *supra* note 6, at 205-58.

87. See, e.g., Michael L. Perlin, “Everything’s a Little Upside Down, As a Matter of Fact the Wheels Have Stopped”: *The Fraudulence of the Incompetency Evaluation Process*, 4 Hous. J. HEALTH L. & POL’Y 239 (2004); see also Perlin, *Mirrors*, *supra* note 5; Perlin, *Sanist Jurors*, *supra* note 6; Perlin, *Impact of the ADA*, *supra* note 74; Perlin, *The Case of Competency*, *supra* note 74; Perlin, *Neonaticide*, *supra* note 80.

88. For overviews prior to the early 1990s, see, for example, N.Y. STATE OFFICE OF MENTAL

to confront the extent to which mental disability (and alcoholism and substance abuse) affect the bar, the inevitable impact those conditions have on legal practice and the lives of practitioners continue to reflect sanist behaviors and attitudes, as do decisions that impute blame to those with such disabilities.⁸⁹ Our abject failure to acknowledge the ways that this willful blindness corrupts the criminal justice system exacerbates this shameful state of affairs.

III. LAWYERS' SUSCEPTIBILITY TO SANISM

There is, to be sure, some irony in all this. Lawyers—whose job it is to provide effective representation to all their clients—fall prey to the same sanist and pretextual contaminants that distort the actions of other players in the judicial system. Just as judges and jurors “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 who are the subject of the litigation,”⁹⁰ so do lawyers. I have argued elsewhere that lawyers who represent persons with mental disabilities reflect “sanist practices.”⁹¹ If lawyers who serve as professors and supervisors in clinical programs reflect ongoing sanist biases,⁹² it should not surprise us that other members of the bar and the judiciary are

HEALTH, FINAL REPORT: TASK FORCE ON STIGMA AND DISCRIMINATION (1990); Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination and Activism*, 44 J. SOC. ISSUES 3 (1988); Gary B. Melton & Ellen G. Garrison, *Fear, Prejudice and Neglect: Discrimination Against Mentally Disabled Persons*, 42 AM. PSYCHOL. 1007 (1987); Wayne Ramage, *The Pariah Patient: The Lack of Funding for Mental Health Care*, 45 VAND. L. REV. 951 (1992); see also Perlin, *Sanism*, *supra* note 6. By the late 1990s, stigma was still seen as “a chief enemy” of meaningful reform of the mental health system. See Norman Sartorius, *Stigma: What Can Psychiatrists Do About It?*, 352 LANCET 1058 (1998). More recent surveys have found a “modest improvement” in attitudes (especially among younger persons). See Ramin Mojtabi, *Americans' Attitudes Toward Mental Health Treatment Seeking: 1990-2003*, 58 PSYCHIATRIC SERVICES 642, 650 (2007). *But cf.* Bernice A. Pescosolido, *Stigmatizing Attitudes and Beliefs About Treatment and Psychiatric Medications for Children with Mental Illness*, 48 PSYCHIATRIC SERVICES 613, 613 (2007) (suggesting that “substantial” stigma concerns still exist).

89. On the counter-productivity of a “blame culture” in mental health policy, see Nancy Wolff, *Risk, Response, and Mental Health Policy: Learning from the Experience of the United Kingdom*, 27 J. HEALTH POL. POL'Y & L. 801, 824 (2002).

90. Perlin, *A Law of Healing*, *supra* note 7, at 423.

91. Michael L. Perlin, “*And My Best Friend, My Doctor/Won't Even Say What It is I've Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 742 (2005) [hereinafter Perlin, *Role and Significance of Counsel*]; PERLIN, *HIDDEN PREJUDICE*, *supra* note 7, at 56; Perlin, *Sanism*, *supra* note 6, at 405.

92. See generally Perlin, *Lepers*, *supra* note 6.

susceptible to the same prejudice.⁹³ It is a problem that cries out for remediation.

IV. THERAPEUTIC JURISPRUDENCE

TJ questions whether legal rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential while preserving due process principles.⁹⁴ Elsewhere, I have suggested that TJ has the capacity to “expose pretextuality and strip bare the law’s sanist façade.”⁹⁵ To what extent might TJ be a tool to serve this end in this particular context? Susan Daicoff argues that one way to counteract the “rampant” dissatisfaction on the part of lawyers with their work is an adaptation of what she calls a “TJ/PL [preventative law] practice.”⁹⁶ She argues:

Because of its emphasis on psychological well-being, interpersonal dynamics and relationships, and human behavior, TJ/PL offers [dissatisfied] lawyers a way to optimize their strengths, to use their special humanistic and caring skills, and to practice law in an ultimately satisfying way that has beneficial effects on all involved.

93. On the hostility of the judiciary, see Perlin, *Role and Significance of Counsel*, *supra* note 91, at 752. I have often recounted the most chilling sanist comment that I have ever heard from a sitting trial judge:

[No example of judicial hostility] is perhaps as chilling as the following story: Sometime after the trial court’s decision in *Rennie* [*v. Klein*], I had occasion to speak to a state court trial judge about the *Rennie* case. He asked me, “Michael, do you know what I would have done had you brought *Rennie* before me? (The *Rennie* case was litigated by counsel in the N.J. Division of Mental Health Advocacy; I was director of the Division at that time). I replied, “No,” and he then answered, “I’d’ve taken the son-of-a-bitch behind the courthouse and had him shot.”

Perlin, *Half-Wracked Prejudice*, *supra* note 6, at 16 n.70 (footnotes omitted).

94. See generally *supra* note 8. For a recent spirited and valuable debate on the application of TJ to legal representation of criminal defendants, compare David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005), with Mae C. Quinn, *An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007), and David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many Of) Professor Quinn’s Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597 (2007). On the application of TJ to other more “remote” areas of the law, see Gregory Baker, *Rediscovering Therapeutic Jurisprudence in Overlooked Areas of the Law: How Exposing its Presence in the Environmental Justice Movement Can Legitimize the Paradigm and Make the Case for its Inclusion Into All Aspects of Legal Education and the Practice of Law*, 9 FL. COASTAL L. REV. 215 (2008).

95. Perlin, *Things Have Changed*, *supra* note 6, at 544 (“We cannot make any lasting progress in ‘putting mental health into mental health law’ 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.” (citations omitted)); see also PERLIN, *HIDDEN PREJUDICE*, *supra* note 6, at 301.

96. Daicoff, *supra* note 16, at 843.

With TJ/PL, the lawyer can finally “do good,” help people, prevent harm, avoid interpersonal conflict, build and maintain relationships instead of tear them asunder, and become a positive force in people’s lives rather than a necessary and often-hated evil.

Furthermore, at least some, if not all, lawyers and clients desperately need to experience the lawyer-client interaction as a positive, healing experience. TJ/PL offers one avenue to this end because it explicitly values mental health concerns, emotional consequences, and interpersonal relationships inherent in many legal matters.⁹⁷

There is no question that the current state of affairs is abjectly anti-therapeutic to virtually all who are touched by the legal system—lawyers, clients, the general public. I believe there are several remedial steps we can take—in addition to the ones initially set out so clearly and eloquently a decade ago by Professor Daicoff⁹⁸—to ameliorate current conditions. Consider the following:

1. We must acknowledge—openly and candidly—the extent to which disability and addiction permeate the profession and affect the practice of law. Acknowledgment of this reality should not be limited to articles in local bar journals. The topic should be added to scholarly agendas of academics, and national bar leaders should take the lead in initiating a national, top-priority conversation on this question.

2. In bar disciplinary hearings, decision-makers should abandon the culture of blame⁹⁹ that they have embraced; should avoid parallels to insanity defense standards, burdens of proof in criminal trials, malingering fears, and federal sentencing guideline mitigation standards; and should rather seek to enter orders in such cases that are at once protective of the public, but also sensitive to the realities of mental illness and addiction-driven behavior.

3. These approaches should be implemented in ADA cases in this area of law and practice as well.¹⁰⁰

4. It is hard to imagine a more anti-therapeutic case than *Strickland*. Criminal defendants whose lawyers fall asleep in court or come to court inebriated, and who are then convicted, and whose appeals are rejected

97. *Id.* (footnotes omitted).

98. See SUSAN S. DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* (2004).

99. Remarkably, this phrase does not seem to have appeared in legal literature before 1997. See, e.g., Neil R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 60 & n.258 (1997).

100. See generally Familant, *supra* note 50, at 566 (“[T]he ADA, properly applied, will not result in incompetent or unfit individuals entering the profession. Rather, it will permit individuals with disabilities to have a level playing field in . . . the practice of law.”) (quoting Rothstein, *supra* note 43, at 34).

perfunctorily on the basis of *Strickland*, will not likely find the criminal trial process one that makes rehabilitation easy or acceptance of responsibility likely. Cases in which defendants with a lawyer who assumes representation while in the midst of a serious psychotic episode are, for these purposes, no different. If courts were to acknowledge the pretextual bases of such decisions as *Smith v. Ylst*¹⁰¹ or *Bellamy v. Cogdell*,¹⁰² the first step toward a more therapeutic jurisprudence would be taken.¹⁰³ Courts continually and routinely ignore the reality that defendants represented by lawyers with serious mental disabilities—even lawyers deemed incompetent to represent *themselves* in *civil* actions¹⁰⁴—may have valid *Strickland* claims. Such actions bespeak pretextuality.

I am not so naïve as to think that these changes would serve as full amelioration. But they would be a valuable series of first steps.

CONCLUSION

I shared the statistics that I discuss in this paper with a heterogeneous group (in terms of age, gender, politics, area of practice) of lawyer friends. Many assumed the statistics were skewed, biased, artificial, etc. Others questioned the methodology (“Does it include someone who graduated law school but didn’t practice law?” “Maybe they were this way before they started to practice law?”). Only a few truly “got it.” I do not think that this denial is in any way atypical of the bar as a whole, and I think it flows in large part from the extent to which sanism—even unconscious sanism—affects individuals who are otherwise thoughtful, intelligent, politically articulate, and nuanced. Like the judges in many of the cases I have discussed, though, they decline to, in Dylan’s words, “look inside [their] mirror.”¹⁰⁵ I hope that the publication of this paper inspires a few, at least, to do so.

101. 826 F.2d 872 (9th Cir. 1987).

102. 974 F.2d 302 (2d Cir. 1992).

103. I argue elsewhere that TJ “has the far-reaching potential to allow us to—finally—come to grips with the pernicious power of sanism and pretextuality, and to offer us an opportunity to make coherent what has been incoherent—and to expose what has been hidden—for far too long.” Perlin, *Things Have Changed*, *supra* note 6, at 544; *see also* Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL’Y & L. 80 (1995).

104. *Cf. Godinez v. Moran*, 509 U.S. 389 (1993) (defendant who waives right to counsel need not be more competent than a defendant who does not). I discuss the conceptual and practical problems raised by *Godinez* in Perlin, *Dignity Was the First to Leave*, *supra* note 86.

105. DYLAN, *supra* note 11.