1993

The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone

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1. INTRODUCTION

The Americans With Disabilities Act (ADA)\(^2\) is the most innovative and far-reaching federal civil rights legislation—ever—on behalf of disabled persons. Its purpose is nothing less than "a national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life."\(^3\) It provides basically the same bundle of protections for the disabled as the Civil Rights Acts of the 1960's did for citizens of color.\(^4\) Through the ADA, Congress

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An earlier version of this paper was presented at the Hofstra Law School Disability Rights Conference, November 1992. The author wishes to thank Rose DiBenedetto, Ilene Sacco and Monica Studdert for their helpful research assistance, and Debbie Dorfman, Keri Gould and Ellen Saideman for their helpful comments and suggestions.


provides clear, strong, enforceable standards, and ensures that the federal government plays a central role in the enforcement of those standards.\(^5\)

The language that Congress chose to use in its introductory fact-findings is of extraordinary importance. Its specific finding that individuals with disabilities are a "discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness"\(^6\) is not just precatory flag-and-apple-pie rhetoric.\(^7\) This language was carefully chosen. It comes from the heralded "footnote 4" of the *United States v. Carolene Products* case.\(^8\) This decision has served as the springboard, for nearly a half century, for challenges to state and municipal laws that have operated in discriminatory ways against other minorities, and reflects a Congressional commitment to provide "protected class" categorization for disabled persons.

As a result, this in turn forces courts to employ a "compelling state interest" or "strict scrutiny" test in considering statutory and regulatory challenges to allegedly discriminatory treatment.\(^9\) The law's invocation of the "full sweep of

\(^5\)See, e.g., 22 N.M. L. Rev. at 43-48, 63-64, 93-95, 101-02 (discussing enforcement provisions). Cf. Stephan Haimowitz, Americans With Disabilities Act of 1990: Its Significance for Persons With Mental Illness, 42 Hosp. & COMMUN. PSYCHIATRY 23, 23 (1991) (discussing how important provisions of the ADA were "compromised to secure enactment").


\(^8\)See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). I discuss the impact of this footnote on the development of mental disability law in Michael L. Perlin, On "Sanism" 46 SMU L. REV. 373, 380-81 n.51 (1992) [hereinafter Perlin, Sanism], and in 1 PERLIN, supra note 2, § 1.03 at 6. See also M. Greg Bloche & Francine Cournos, Mental Health Policy for the 1990's: Tinkering in the Interstices, 15 J. HEALTH POL., POLY & L. 387, 389 (1990) (limited social skills of chronically mentally ill "render them uniquely ineffective as political actors in the struggle for social resources").

\(^9\)In City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441-42 (1985), the Supreme Court ruled that mental retardation was neither a suspect class nor a quasi-suspect class for purposes of equal protection analysis. In supporting its conclusion, it noted that a contrary decision would have made it difficult to distinguish other groups such as the mentally ill "who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." Id. at 445. See also Schweiker v. Wilson, 450 U.S. 221, 231-34 (1981) (employing rational basis test in challenge to statute reducing Supplemental Security Income benefits to certain individuals in institutions for mental illness); Adoption of Kay C., 278 Cal. Rptr. 907, 914-15 (Cal. App. 1991) (reaching conclusion similar to *Cleburne* on state
congressional authority, including the power to enforce the Fourteenth Amendment, simply means that any violation of the ADA must be read in the same light as a violation of the Equal Protection clause of the Constitution. This guarantees, for the first time, that this core constitutional protection will finally be made available to disabled persons.

The ADA repudiates the notion that the disabled can be treated as second-class citizens. The concept of "separate but equal" is no more acceptable here than it is in cases involving people of color. The congressional history


The Supreme Court recently affirmed the status of *Cleburne* as a rational basis case in *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993), holding that a state statutory scheme that established a heightened standard of review for involuntary commitment based on mental illness (beyond a reasonable doubt) but a lesser standard for commitment based on mental retardation (clear and convincing evidence) did not violate the equal protection clause ("We have applied rational basis review in previous cases involving the mentally retarded and the mentally ill," citing, *inter alia*, *Cleburne*). But see *id.* at 2652 (Souter, J., dissenting) (failure of court to apply *Cleburne* so as to invalidate statute leaves *Cleburne* 's status "unclear").


11 See, e.g., Cook, supra note 9, at 434 ("[Congressional] findings indicate unambiguously that Congress considered disability classifications to be just as serious and just as impermissible as racial categorizations that are given 'strict' or 'heightened' scrutiny, sustainable by the courts only if they are tailored to serve a 'compelling' governmental interest.") But see Duc Van Le v. Ibarra, No. 91SC189, 1992 WL 77908 (Colo. April 20, 1992) (en banc), reh'g denied, 843 P.2d 15 (Colo. 1992), cert. denied, 114 S. Ct. 918 (1994) (declining to apply ADA to claim that mental illness is suspect class, where Act not in effect at time of trial).

Intermediate scrutiny was applied to mental illness two years prior to the *Cleburne* decision in *J.W. v. City of Tacoma*, 720 F. 2d 1126, 1128 (9th Cir. 1983); see also, Thomas Simon, *Suspect Class Democracy: A Social Theory*, 45 U. Miami L. Rev. 107, 112 (1990) (arguing that mental illness and mental retardation should both be treated as suspect classes); but see Michael Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 Geo. L.J. 1435, 1486 (1986) (classic equal protection analysis methodology unsuitable for cases involving disabled persons). For a recent critical consideration of traditional equal protection analysis in race cases, see Donald Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 Am. U. L. Rev. 1307 (1991).

reveals a specific intent to end segregation of disabled individuals in a wide variety of community and institutional settings.\textsuperscript{13}

The ADA has been hailed by advocates for the disabled as a "breathtaking promise for people with ... disabilities,"\textsuperscript{14} as "the most important civil rights act passed since 1964,"\textsuperscript{15} and as the "Emancipation Proclamation for those with disabilities."\textsuperscript{16} Contrarily, it has been criticized by business and industry spokespeople as "a nightmare for employers."\textsuperscript{17} Other analyses focus on its impact on traditional labor relationships between union and management\textsuperscript{18} and on its potential to become a "full employment act for lawyers."\textsuperscript{19} Early case law, although sparse, suggests that some courts are taking the ADA seriously and are applying it in ways Congress apparently intended it to be applied.\textsuperscript{20}


\textsuperscript{16}Americans With Disabilities Act of 1990: Summary and Analysis, Special Supplement (BNA), at S-5, as cited in Ackourey, supra note 15, at 1183 n.2 (statement by bill's sponsors), and Tucker, supra note 4, at 16 n.4 (same); 2 PERLIN, supra note 2, § 6.44A at 111 (Supp. 1994) (ADA stands as Congress's "most innovative attempt to address the pervasive problem of discrimination against mentally and physically handicapped citizens"); Sandra Law, The Americans With Disabilities Act of 1990: Burden on Business or Dignity for the Disabled? 30 DUQ. L. REV. 99 (1991) (ADA a "solid and positive step toward making this country a better nation").

\textsuperscript{17}Thomas Barnard, The Americans With Disabilities Act: Nightmare for Employers and Dreams for Lawyers, 64 ST. JOHN'S L. REV. 229, 231 (1990). See also Lawrence Postol & David Kadue, An Employer's Guide to the Americans With Disabilities Act: From Job Qualifications to Reasonable Accommodations, 24 J. MARSHALL L. REV. 693, 726 (1991) ("many managers would laugh at the suggestion [that the ADA requires them to provide certain reasonable accommodations to disabled workers]").

\textsuperscript{18}See, e.g., G. William Davenport, The Americans With Disabilities Act: An Appraisal of the Major Employment-Related Compliance and Litigation Issues, 43 ALA. L. REV. 307, 335 (1992) (union attorneys now fear that employers will use the ADA as an offensive weapon to weaken labor organizations by attacking traditional job structures defined in typical labor contracts).

\textsuperscript{19}John Parry, The Americans With Disabilities Act (ADA), 14 MENT. & PHYS. DIS. L. Rptr. 292, 298 (1990). Six Major Areas of Litigation Predicted for the 1990's, 6 INSIDE LITIG. 32, No. 3, at *7 (WESTLAW pagination) (March 1992) (the ADA may give "biggest boost to disabled plaintiffs ... [L]awsuits brought on behalf of handicapped plaintiffs are already very difficult for defendants to win on summary judgment.").

\textsuperscript{20}E.g., Ellen S. v. Florid Bd. of Bar Examiners, 859 F. Supp. 1489 (S.D. Fla. 1994) (inquiries of bar applicants as to prior mental health treatment violates ADA) (\textit{but see}}
And yet, some storm clouds darken the sky. At least three separate (but overlapping) concerns temper my ultimate enthusiasm about the ADA as a significant civil rights enforcement tool for mentally ill individuals (those currently institutionalized, those formerly institutionalized, and those who have never had any contact with institutional systems). First, a reading of the legislative history, the early commentaries and even the practice manuals barely acknowledge the application of the ADA to persons with a mental disability. Of the scant attention paid to the mentally ill in the ADA legislative debate, most focused on an ultimately unsuccessful attempt led by Senator Helms to jettison most mentally ill persons from the Act's protections. While this attempt was ultimately unsuccessful (and its failure may actually prove to be a weapon in the arsenal of advocates litigating on behalf of the mentally ill), the tenor of the debate serves as a paradigm for my ultimate concern about the Act's prophylactic value.

21 The Act specifically defines disability as:

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such impairment; or
(C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (Supp. IV 1992) (emphasis added). While mental disability is the focus of several commentaries on the ADA, see Cook, supra note 9; Milstein, Rubenstein & Cyr, supra note 14; Haimowitz, supra note 5; Parry, supra note 19; Laura Mancuso, Reasonable Accommodations for Workers With Psychiatric Disabilities, 14 PSYCHOSOCIAL REHAB. J. 3 (1990), it is barely mentioned in much of the law review scholarship. See, e.g., James Zappa, The Americans With Disabilities Act of 1990: Improving Judicial Determination of Whether an Individual is "Substantially Limited" 75 MINN. L. REV. 1303 (1991); Philip L. Gordon, The Job Application Process After the Americans With Disabilities Act, 18 EMPLOYEE REL. L.J. 185 (Autumn 1992); D. Todd Arney, Note, Survey of the Americans With Disabilities Act, Title I: With the Final Regulations In, Are the Criticisms Out? 31 WASHBURN L.J. 522 (1992); Davenport, supra note 18; Barnard, supra note 17; Postel & Kadue, supra note 17; Ackourey, supra note 15. For additional recent references, see 2 PERLIN, supra note 2, § 6.44A, at 118-19 n. 473.34b (Supp. 1994).


23 The defeat of this effort should be a persuasive counter response to an anticipated argument that Congress failed to understand the implications of its actions when it
Second, when commentators have considered the application of the ADA to persons with a mental disability, they have generally limited their analysis to the status of mentally retarded persons, not to persons with mental illness. For example, consumer groups—a vital force in the community of persons formerly institutionalized because of mental illness (or perceived mental illness)—are virtually unmentioned in the ADA literature. Even within the disability community, persons with mental illness are often the poor stepchild, and remain the last hidden minority.

Third, and most important, no matter how strongly a civil rights act is written nor how clearly its mandate is articulated, the aims of such a law cannot be met unless there is a concomitant change in public attitudes.

expanded the bill's coverage to mentally ill persons. See, e.g., H.R. Rep. No. 485 (IV), 101st Cong., 2d Sess. 1990, reprinted in 1990 U.S.C.C.A.N. 445, 512, dissenting views of Reps. Dannemeyer, Barton & Ritter ("It is our sincere hope that the ADA does not become a shield for mentally unstable individuals such as the Louisville mass murderer").

See, e.g., Cook, supra note 9; but see Peter Cubra, Discrimination of People With Disabilities and Their Federal Rights—Still Waiting After All These Years, 22 N.M. L. REV. 277 (1992) (discussing institutional litigation on behalf of mentally ill persons); cf. Richard B. Simring, Note, The Impact of Federal Antidiscrimination Laws on Housing for People With Mental Disabilities, 59 GEO. WASH. L. REV. 413 (January 1991) (discussing stereotypic perceptions of mentally ill persons).


The significance of attitudinal barriers in this context are explicitly recognized in Thornburgh, supra note 26, at 377, and in Arney, supra note 21, at 529. On the question
"wild card" that will inevitably help determine the ultimate "real life" impact of the ADA.

This leads to my thesis. What I call "sanist" attitudes and "pretextual" judicial and legislative reactions dominate social and legal discourse about mentally ill persons (and those so perceived). These attitudes affect and infect interpersonal relationships, social, cultural and political actions, judicial decisions, legislative enactments, scholarly writings, administrative rulings, and litigation strategies. They largely operate on an unconscious (and often invisible) level, and are frequently found in the writings and public pronouncements of otherwise "liberal" or "progressive" individuals. They are also rationalized through the non-reflective use of a false kind of "ordinary common sense" (OCS) and through the use of distortive cognitive simplifying devices (heuristics). Courts and legislatures often respond to these sanist attitudes by condoning (or encouraging) pretextuality in both civil and

of attitudinal barriers in other civil rights areas, see generally Rebell, supra note 11; see also Haimowitz, supra note 5, at 23:

While the [ADA] is no more likely to completely eliminate the myths, fears, and discrimination faced by person with disabilities than earlier civil rights law eliminated discrimination based on race, the new legislation will nonetheless contribute to the enormous educational effort needed to combat widespread misinformation and stereotypes about disabilities.

On the "strongly negative perceptions of workers with psychiatric disabilities," see Mancuso, supra note 21, at 4 (citing sources).

See, e.g., Perlin, Sanism, supra note 8; Perlin & Dorfman, supra note 26; Michael L. Perlin, Competency, Deinstitutionalization and Homelessness: A Story of Marginalization, 28 Hous. L. Rev. 63, 91-93 (1991) [hereinafter Perlin, Competency].

See Perlin, Sanism, supra note 8, at 398-406.


See Michael L. Perlin, Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning, 69 Neb. L. Rev. 3 (1990) [hereinafter Perlin, Psychodynamics]. This concept is considered most carefully in Richard K. Sherwin, Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions, 136 U. Pa. L. Rev. 729 (1988), and see id. at 737 (OCS exemplified by the attitude of "What I know is 'self evident'; it is 'what everybody knows'").

criminal cases involving litigants with mental disabilities. Frequently the misuse (and teleological application) of social science data is the vehicle through which pretextual decisions serve to reify sanist attitudes.

If the ADA is to make any true headway in restructuring the way that citizens with mental disabilities are dealt with by society (by employers, public agencies, and proprietors of places of public accommodations) it must provide a means by which to deal frontally with these sanist attitudes. Importantly, and not coincidentally, most of the attention that has been paid so far to the ADA considers questions of physicality: e.g., retrofitting busses, installing ramps, restructuring buildings. Little attention has been paid to questions of attitude towards all disabled persons, less to questions of attitude regarding the mentally disabled, and even less to questions of attitude regarding persons with mental illness.

The simple official repudiation of discriminatory practices is not enough to significantly alter the distorted cognitive processes that still frequently dominate our thinking and decision-making. There have been no attempts, so far, to answer the question that has bedeviled civil rights activists since the 1950's: how to capture "the hearts and minds" of the American public so as to best insure that statutorily and judicially articulated rights are incorporated—freely and willingly—into the day-to-day fabric and psyche of society. Unless advocates turn their attention to these attitudinal questions, the


34 See generally Perlin & Dorfman, supra note 26. On the way that conservative Senators attempted to distinguish the physically from the mentally disabled in their efforts to narrow the Act's scope, see infra text accompanying notes 75-77.


36 But see sources cited supra note 27. On the value of sensitivity awareness training in this context, see Marie Watts, Overcoming Biases: Disability Awareness Training, 55 TEX. B.J. 840 (1992).

ADA may—in "real life"—turn out to be little more than the last in a long (and depressing) series of "paper victories" for mentally ill individuals.

This paper is organized in the following way. First, I discuss those sections of the ADA that have a potential impact on mentally ill individuals and look briefly at the way mental illness issues have been dealt with in the legislative debate. Next, I discuss the meaning of "sanism" and its role in the development of mental disability law policy, and explain how much of our jurisprudence in this area is pretextual. Then, I look at how the ADA "fits" into the pattern of sanist behavior and pretextual judicial and legislative decision-making, and argue that the ADA's ultimate impact on the lives of mentally ill persons will be meager unless sanism and pretextuality are confronted directly. I conclude with some modest recommendations to policy makers in this area and also look briefly at some of the additional implications for scholars and academics writing in this area.39

II. THE ADA AND MENTAL ILLNESS

The Americans With Disabilities Act bars discrimination against those who are mentally or physically disabled in a wide variety of public and private settings.40 Discrimination in hiring, promotion and discharge is proscribed,41 subject to limitations on "undue hardship,"42 and the application of qualifica-


39 On the importance of academic scholarship in the process of rebutting sanist myths, see Perlin, Sanism, supra note 8, at 406.


42 Id. § 12111(10); 45 C.F.R. § 84.12(b) (1993). At least one commentator has urged that this exception should be allowed in cases where accommodation "jeopardizes employer-sponsored health care benefits." See Sondra Lopez-Aguado, The Americans With Disabilities Act: The Undue Hardship Defense and Insurance Costs, 12 REV. LITIG. 249, 253 (1992). See also, 2 PERLIN, supra note 2, § 6.44A, at 126-27 n.473.28 (citing sources) (Supp. 1994).
tion standards "consistent with business necessity" require that a disabled person be able to perform a job's "essential functions" with "reasonable accommodations," and without creating an "undue burden" on the employer. Among the qualification standards is the requirement that the individual not pose "a direct threat to the health or safety of other individuals in the workplace." Public entities are prohibited from discriminating against disabled persons in matters involving participation, in, or the receipt of benefits from, their programs or activities. Discrimination in a wide array of public accommodations, including hotels, restaurants, parks, zoos and theaters, is similarly prohibited. By its terms, the entire ADA applies to persons with mental disability, including mentally ill persons. Yet, very little of the final statute, the legislative history, or floor debate focused on the "grotesque" history of discrimination and mistreatment suffered by such individuals; the crushing economic, social and psychological burdens borne by such persons in their day-to-day lives; the conditions faced by such persons when institutionalized in public facilities or when discharged from such facilities to lives of misery on our cities' streets without adequate transitional mental health, medical or social services; or the pernicious legal effects that flow from the badge of mental disability.

The phrase "mental impairment" or "mental disability" is mentioned only a handful of times in the final Act. In the initial findings section, Congress noted that 43 million Americans "have one or more physical or mental disabilities"; disability is defined to include a "physical or mental impairment;" discrimination includes failure to make "reasonable accommodation" to an otherwise qualified person's "known physical or mental limitations," and a section on paratransit and special transportation services requires that public entities provide such services to any individual who is unable, "as a result of a physical or mental impairment" to use other public transportation vehicles. The only other section of the ADA that looks specifically to mental disability is

43 42 U.S.C. § 12113(a).
44 Id. § 12111(8)-(10).
45 Id. § 12113(b). On the significance of this language in this context, see infra text accompanying and following note 143.
47 Id. § 12182(a), 12181(7).
48 City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 454 (1985) (Stevens, J., concurring); id. at 461 (Marshall, J., concurring in part and dissenting in part); see generally, Cook, supra note 9, at 399-407.
50 Id. § 12102(2)(A) (emphasis added).
51 Id. § 12112(b)(5)(A) (emphasis added).
52 Id. § 12143(C)(l)(A)(i) (emphasis added).
an exclusion section which states that the Act is inapplicable to, inter alia, certain sexual disorders and to compulsive gambling.

The legislative history is similarly inadequate, and speaks to only two relevant considerations. First, it reflects Congressional awareness of the pernicious danger of stereotyping behavior. Congress makes this clear through its heavy reliance on the Supreme Court's language in School Board of Nassau County v. Arline that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Congress stressed that its inclusion in the definition of disability of an individual who is regarded as being impaired acknowledges this teaching about the power of myths.

Thus, employment decisions cannot be based on "paternalistic views" of what is best for a person with a disability. The employment title of the ADA was thus designed, in significant part, to prevent employers from relying on presumptions, stereotypes, misconceptions and unfounded fears in making employment decisions, and as a means of breaking the chain of misperception that disabled individuals are a "permanently helpless and separate class, unable to work or otherwise contribute to society.

Second, the history of the "direct threat" section—again relying on the Arline case—specifies that, for persons with mental disabilities, the employer must identify the specific behavior on the part of the individual that would pose the

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54 Id. § 12211(b)(2).
56 Id. at 284.
59 Id. at 356.
60 Id. at 311 (discrimination against disabled persons "often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies").
anticipated direct threat," and that the determination must be based on such behavior, "not merely on generalizations about the disability."62 The determination must be based on "objective evidence ... that the person has a recent history of committing overt acts or making threats which caused harm or which directly threatened harm."63 While these two excerpts are praiseworthy and important, that is all that is provided. Nowhere else in any of the lengthy Congressional reports are the specific biases and prejudices faced by mentally ill persons—that I call "sanism"—discussed. Although there is recognition that much of the discrimination faced by disabled persons flows from "unfounded, outmoded stereotypes and perceptions and deeply imbedded prejudices,"64 the legislative history in no way illuminates the specific prejudices and biases faced by persons with mental disabilities. This is especially so as to the formerly institutionalized mentally ill.65

Persons with mental disabilities have been the object of this discrimination for years. Surveys show that mental disabilities are the most negatively perceived of all disabilities.66 Individuals with mental disabilities have been denied jobs, refused access to apartments in public housing or entry to places in public accommodation, and turned down for participation in publicly-


63 H.R. REP. NO. 485 (III), 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 468-69. This language closely parallels that of the Fair Housing Act Amendments of 1988, under which an otherwise qualified disabled person can be excluded from the definition of handicap only where a landlord can establish that the individual’s tenancy would be a "direct threat" to others based upon a history of overt acts or current conduct. See 24 C.F.R. § 100.202(d) (1993). To trigger this section, the legislative history stressed that "there must be objective evidence from the person’s prior behavior that the person has committed overt acts which caused harm or which directly threatened harm." H.R. REP. NO. 711, 100th Cong., 2d Sess. 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2190, as discussed in Simring, supra note 24, at 441.


65 On the way that these negative stereotypes affect our homelessness policies, see Perlin, supra Competency, note 8; Pedro J. Greer, Jr., Medical Problems of the Homeless: Consequences of Lack of Social Policy—A Local Approach 45 U. MIAMI L. REV. 407 (1990-91).

66 West, supra note 26, at 9, citing A.J. ARANGIO, BEHIND THE STIGMA OF EPILEPSY: AN INQUIRY INTO THE CENTURIES-OLD DISCRIMINATION AGAINST PERSONS WITH EPILEPSY (1975). See also infra text accompanying note 75 (comments of Senator Helms in floor debate on ADA).
funded programs because they appear "strange" or "different." A series of behavioral myths has emerged suggesting that persons with mental disabilities are deviant, worth less than "normal" individuals, disproportionately dangerous, and presumptively incompetent. Yet, putting aside the two exceptions just discussed, nothing in the ADA speaks directly to these myths or to the special problems faced by persons with mental disabilities in attempting to combat them.

Ironically, the only time that mental disability issues were clearly the focal point of an ADA debate came when a group of Senators led by Jesse Helms sought to exclude specified mental disabilities, including schizophrenia and manic-depression, from the ADA's coverage. Professor Robert Burgdorf described a portion of the debate this way:

At one point, Senator Armstrong stood on the Senate floor and pointed to a long list of conditions in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association as an example of all the conditions included. His remarks raised the specter of a potential roll call on individual amendments to remove each of these conditions.

Attacks upon certain conditions provoked a strong response from other Senators... Senator Domenici gave a spirited speech on behalf of individuals with manic-depression and schizophrenia, suggesting

67 Simring, supra note 24, at 422. See also, Cook, supra note 9, at 399-414, 424. Particularly cruel examples are listed in Tucker, supra note 4, at 16-17.


70 According to the National Institutes of Mental Health, 2% of the population suffers from schizophrenia, and .4% from manic depression. It has been estimated that 60 million American adults will experience some sort of mental disorder prior to their 65th birthday and that 15 million of these will experience one of three types of severe mental illness (schizophrenia, manic-depression, or major depression). See Blanck, Work Force, supra note 61, n.48; Milt Freudenheim, New Law to Bring Wider Job Rights for Mentally Ill, N.Y. TIMES (Sept. 23, 1991), at IA.
that Winston Churchill and Abraham Lincoln suffered from such disturbances. Other conditions did not have the advantage of such Senatorial advocacy.\textsuperscript{71}

These amendments were ultimately defeated.\textsuperscript{72} However, other amendments that excluded from the Act's coverage a wide range of gender identity disorders (including transvestism, transsexualism, pedophilia, exhibitionism and voyeurism), compulsive gambling, kleptomania and pyromania, and psychoactive drug use disorders were successfully passed.\textsuperscript{73}

The debate is illuminating. As Professor Burgdorf notes, several Senators spoke eloquently about the role of the ADA in "breaking down those barriers of [unfounded] fear and prejudices" and in "eliminating the automatic stigma" attached to mental illness.\textsuperscript{74} Others, though, reflected the depth and malignity of their bias. In his colloquy with Senator Harkin about hiring practices, Senator Helms asked, "How is an employer ... supposed to find out whether a man is a pedophile or a schizophrenic?"\textsuperscript{75} He also asked whether an "employer's own moral standards" enabled him to make hiring judgments about transvestites, kleptomaniacs, or manic depressives.\textsuperscript{76} Interestingly and revealingly, he made it clear that his attack was not meant to cover persons with physical disabilities: "If this were a bill involving people in a wheelchair or those who had been injured in the war, that is one thing."\textsuperscript{77}

This debate and its ultimate \textit{denouement} may turn out to be a double-edged sword. On one hand, the exclusions appear to reflect little more than members of Congress' "own negative reactions, fears and prejudices"\textsuperscript{78} in a spirit completely inconsistent with the ADA's overall spirit that encourages "individualized determinations of actual ability and not preconceived assumptions and stereotypes."\textsuperscript{79} On the other, the specific repudiation of

\textsuperscript{71}Burgdorf, \textit{supra} note 22, at 451-52 (citations omitted).


\textsuperscript{73}See 42 U.S.C. §§ 12208, 12211(b).

\textsuperscript{74}See 135 CONG. REC. S10,767-86 (daily ed. Sept. 7, 1989), (statement of Sen. Harkin); \textit{Id.} at S10,779 (statements of Sen. Domenici).

\textsuperscript{75}\textit{Id.} at S10,766 (statements of Sen. Helms) (emphasis added).

\textsuperscript{76}\textit{Id.} at S10,765 (emphasis added).

\textsuperscript{77}135 CONG. REC. S10,768. See also \textit{id.} at S10,783 (statements of Sen. Humphrey): "[W]e are not simply talking about the blind, the deaf, or persons confined to wheelchairs."

\textsuperscript{78}Burgdorf, \textit{supra} note 22, at 519.

\textsuperscript{79}\textit{Id.} at 452. Professor Burgdorf, nevertheless, has substantial concern about the total impact of the Act.

For while the ADA represents a huge advance for people with disabilities, those of us who have worked on the bill will continue to cringe when a focus on provisions of the Act that exclude from protection those individuals having real and difficult psychological and psychiatric disorders such as compulsive gambling, kleptomania
Helms' attempt to gut the bill's coverage of individuals with some of the most serious mental disabilities—persons who are schizophrenic and/or manic-depressive—should put to rest any lingering question as to whether Congress actually knew what it was doing when it drafted this law.

III. SANISM \(^{80}\) AND PRETEXTUALITY \(^{81}\)

A. On "Sanism"

"Sanism" \(^{82}\) is an irrational prejudice of the same quality and character as other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry. \(^{83}\) It infects both and pyromania. It detracts from the principle underlying the Act that such people were denied protection because of stereotypes, ignorance and prejudice toward them and that their exclusion was permitted primarily because they had no organized representation present during the negotiations and no congressional champion arose to their defense.

\(\text{Id. at 521.}\)

\(^{80}\) Much of the material \text{infra} text accompanying notes 82-94 is adapted from Perlin, \textit{Sanism, supra} note 8, at 386-88, and Perlin and Dorfman, \textit{supra} note 26, at 51-52. \textit{See also} Perlin, \textit{Sexual Interaction, supra} note 30, at 534-39.


\(^{82}\) The phrase "sanism" was, to the best of my knowledge, coined by Dr. Morton Birnbaum. \textit{See} Morton Birnbaum, \textit{The Right to Treatment: Some Comments on its Development, in MEDICAL, MORAL AND LEGAL ISSUES IN MENTAL HEALTH CARE 97, 106-07} (Frank J. Ayd ed., 1974); \textit{see} Perlin, \textit{Competency, supra} note 28, at 92-93 (discussing Birnbaum's insights). Dr. Birnbaum is universally regarded as having first developed and articulated the constitutional basis of the right to treatment doctrine for institutionalized mental patients. \textit{See} \textit{PERLIN, supra} note 2, § 4.03 at 8-13 (discussing Morton Birnbaum, \textit{The Right to Treatment, 46 A.B.A.J. 499 (1960)}). \textit{See also} Koe v. Califano, 573 F.2d 761, 764 (2d. Cir. 1978) wherein the court recognized counsel's assertion that there could be a "discriminatory attitude, perhaps unconscious, against the mentally ill." The court further acknowledged that this attitude was characterized as "sanism." \textit{Id. at n. 12.}

Laura Mancuso, a staff member of the National Association of State Mental Health Program Directors, has used the phrase "mentalism" to describe the same phenomenon. L. Mancuso, "Psychiatric Disabilities: ADA Legal and Policy Options" (paper presented at University of Pennsylvania Medical School Legal and Ethical Issues Conference, October 1992, Philadelphia, PA) (notes on presentation on file with author).

our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in 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," they express discomfort with social science (or any other system that may appear to challenge law's hegemony over society) and skepticism about new thinking. This discomfort and skepticism allows judges to take deeper refuge in heuristic thinking and flawed, non-reflective OCS, both of which perpetuate the myths and stereotypes of sanism.

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

Judges reflect and project the conventional morality of the community and their judicial decisions, in all areas of civil and criminal mental disability law, continue to reflect and perpetuate sanist stereotypes. Their language demonstrates bias against individuals with mental disabilities and contempt.

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85 Perlin, Psychodynamics, supra note 31, at 59-61; Perlin, Morality, supra note 33, at 133-37.

The discomfort that judges often feel in having to decide mental disability law cases is often palpable. See, e.g., Michael L. Perlin, Are Courts Competent To Decide Competency Questions? Stripping the Facade From United States v. Charters, 38 U. KAN. L. REV. 957, 991 (1990) (court's characterization in Charters, 863 F.2d 302, 310 (4th Cir. 1988) (en banc), cert. denied, 494 U.S. 1016 (1990), of judicial involvement in right to refuse antipsychotic medication cases as "'already perilous' ... reflects the court's almost palpable discomfort in having to confront the questions before it.").


87 See Perlin, Sanism, supra note 8, at 400-04. For recent examples of nonsanist opinions, 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); see generally infra text accompanying notes 155-63.

88 See, e.g., Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987) (quoting Shuler v. Wainwright, 491 F.2d 1213 (5th Cir. 1974) (using "lunatic"); Corn v. Zant, 708 F.2d 549, 569 (11th Cir. 1983), cert. denied, 467 U.S. 1220 (1984) (court's charge to the jury stated that "a person shall be considered of sound mind who is [not] a lunatic"); Pyle v. Boles, 250 F. Supp. 285, 288 n.3 (N.D. W. Va. 1966) (defendant's contention in writ of error was that "trial judge showed his prejudice when he accused the petitioner of 'being crazy'. . . ."); Brown v. People, 134 N.E.2d 760, 762 (Ill. 1956) (judge asked defendant, "You are not crazy at this time, are you?") but cf. State v. Penner, 772 P.2d 819 (unpublished
for the mental health professions. Courts often appear impatient with litigants who are mentally disabled, ascribing their problems in the legal process to weak character or poor resolve. Thus, a popular sanist myth is that "mentally disabled individuals simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint."

Rarely, if ever, is behavioral or scientific authority cited to support sanist opinions. At least one court, without citation to any authority, has found that it is less likely that medical patients will "fabricate descriptions of their complaints" than will "psychological patients." Another court has likened the accuracy inherent in psychiatric predictivity of future dangerousness to predictions made by an oncologist as to consequences of an untreated and metastasized malignancy. This unsubstantiated analysis made in spite of the

opinion) reported at 1989 Kan. Lexis 66 (Kan. 1989), at *1, 6, 8 (witnesses admonished not to refer to defendant as "crazy" or "nuts").

Judges also regularly and readily ignore evidence that jurors may share these same biases. Compare, e.g., Moore v. State, 525 So.2d 870, 871 (Fla. 1988) (juror who rejected insanity defense as potential basis for exculpatory criminal defense not excused for cause) and Noe v. State, 586 So.2d 371, 375-78 (Fla. Dist. Ct. App. 1991), with Boblett v. Commonwealth, 396 S.E.2d 131, 135-36 (Va. Ct. App. 1990) (no abuse of discretion where trial court refused to excuse for cause juror who indicated he might have difficulty voting for an insanity acquittal).


On the other hand, the most minimalist lay testimony as to sanity is frequently privileged. See, e.g., Exparte Milteer, 571 So.2d 998, 999 (Ala. 1990), (trial judge permitted warehouse supervisor witness who spoke on one occasion to defendant for two minutes to testify that defendant "was sane"); State v. Van Horn, 528 So.2d 529, 530 (Fla. Dist. Ct. App. 1988) (lay witnesses's testimony could provide "probative perceptions of [defendant's] normalcy") (reversing trial court order entering judgment of not guilty by reason of insanity).

90Perlin, Sanism, supra note 8, at 396; see also e.g., J.M. Balkin, The Rhetoric of Responsibility, 76 VA. L. REV. 197, 238 (1990) (Hinckley prosecutor suggested to jurors, "if Hinckley had emotional problems, they were largely his own fault"); State v. Duckworth, 496 So.2d 624, 635 (La. Ct. App. 1986) (juror who felt defendant would be responsible for actions as long as he "wanted to do them" not excused for cause); K. Gould, I. Keilitz & J. Martin, Criminal Defendants With Trial Disabilities: The Theory and Practice of Competency Assistance, at 68 (unpublished manuscript on file with Professor Keri Gould, University of Utah School of Law) (trial judge responding to National Center for State Courts' survey indicated that, in his mind, defendants who were incompetent to stand trial could have communicated with and understood their attorneys "if they [had] only wanted").

91People v. LaLone, 437 N.W.2d 611, 613 (Mich. 1989).

overwhelming weight of clinical and behavioral literature which concludes that psychiatrists are far more often incorrect in predicting dangerousness than they are accurate.\textsuperscript{93} Yet another court has rejected expert testimony on a homicide defendant's reactions to fear and stress on the grounds that such emotions are "experienced by all mankind" and were thus not related to any body of scientific knowledge.\textsuperscript{94}

Sanist thinking allows judges to avoid difficult choices in mental disability law cases. Their reliance on non-reflective, self-referential alleged "ordinary common sense" contributes further to the pretextuality that underlies much of this area of the law. Until and unless we confront the existence and extent of this sort of judicial behavior, it is doubtful that the ADA's lofty promises will ever become a reality.

B. Pretextuality

The entire relationship between the legal process and litigants with mental disabilities is often pretextual. By this I mean simply that courts accept (either implicitly or explicitly) testimonial dishonesty, and engage similarly in dishonest (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."\textsuperscript{95} This pretextuality is poisonous. Its toxin infects all participants in the judicial system, breeds cynicism and disrespect for the law, deems participants, and reinforces shoddy lawyering, blase judging, and, at times, perjurious and/or corrupt testifying. The reality is well known to frequent consumers of judicial services in this area: to mental health advocates and other public defender/legal aid/legal service lawyers assigned to represent patients and criminal defendants who are mentally disabled, to prosecutors and state attorneys assigned to represent hospitals, to judges who regularly hear such cases, to expert and lay witnesses, and, most importantly, to the person with a mental disability involved in the litigation in question.

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.96 Experts frequently testify in accordance with their own self-referential concepts of "morality"97 and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment98 or that articulate functional standards as prerequisites for an "incompetent to stand trial" finding.99 Often this testimony is further warped by a heuristic bias. Expert witnesses, like the rest of us, succumb to the meretricious allure of simplifying cognitive devices in their thinking. As a result they employ such heuristic gambits as the vividness effect or attribution theory in their testimony.100 This testimony is then weighed and evaluated by frequently sanist fact-finders.101 Judges and jurors, both consciously and unconsciously, often rely on reductionist, prejudice-driven stereotypes in their decision making thus subordinating statutory and case law standards as well as the legitimate interests of persons with mental disabilities who are the subject of the litigation. Judges' predispositions to employ the same sorts of heuristic bias as exhibited by expert witnesses further contaminate the process.102

This combination of sanist experts and courts helps define a system in which (1) dishonest testimony is often regularly (and unthinkingly) accepted; (2) statutory and case law standards are frequently subverted; and (3) insurmountable barriers are raised to insure that the allegedly "therapeutically correct" social end is met and that the worst-case-disaster-fantasy, the false

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97See, e.g., Cassia Spohn & Julia Homey, "The Law's the Law, But Fair Is Fair:" Rape Shield Laws and Officials' Assessments of Sexual History Evidence, 29 CRIMINOLOGY 137, 139 (1991) ("a [legal] reform that contradicts deeply held beliefs may result either in open defiance of the law or in a surreptitious attempt to modify the law"); accord H. RICHARD UVILLER, TEMPERED ZEAL 116-18 (1988) (police sanction perjury in cases where Supreme Court has imposed constitutional rules that do not comport with officers' "own idea of fair play"); see also Tracey Maclin, Seeing the Constitution from the Backseat of a Police Squad Car 70 B.U. L. Rev. 543, 580-82 (1990) (reviewing UVILLER, supra) (criticizing view).

98See, e.g., Perlin, Pretexts, supra note 33, at 664-46.

99See, e.g., People v. Doan, 366 N.W.2d 593, 598 (Mich. App. 1985) (expert testified that defendant was "out in left field" and went "bananas").

100See generally Perlin, Psychodynamics, supra note 31; Saks & Kidd, supra note 32.

101See generally 2 PERLIN, supra note 2, § 7.13 at 617-23; Perlin & Dorfman, supra note 26.

102See generally Perlin, Pretexts, supra note 33.
negative, is avoided.\textsuperscript{103} In short, the mental disability law system often deprives individuals of liberty disingenuously and upon bases that have no relationship to case law or to statutes.

Pretextual devices such as condonation of perjured testimony, distorted readings of trial testimony, subordination of statistically significant social science data, and enactment of prophylactic civil rights laws that have absolutely no "real world" impact similarly dominate the mental disability law landscape. Utilization of these devices usually flows from the same motives that inspire similar behavior by courts and legislatures in other cases. Again, we must consider the impact of this pretextual decision making on the ultimate value and utility of the ADA.

IV. SANISM, PRETEXTUALITY AND THE ADA

A. Introduction

My discussion so far has dealt with the ADA's treatment (or non-treatment) of persons with mental disability and the negative ways that sanism and pretextuality generally affect such persons. The legislative history creates a strong record about both the debilitating impact of stigma and the harm done by stereotyped perceptions of mental disability, and makes it fairly clear that these issues were in the minds of the Act's drafters.\textsuperscript{104} Yet, there is little in the ADA that speaks directly to discriminatory acts against persons with mental disabilities.\textsuperscript{105}

Nonetheless, as to matters of employment and as to accommodations, the ADA has the potential capacity be an extraordinarily important enforcement tool. If the Act is construed as Congress apparently intended, employers will no longer be able to ask questions about prior mental health treatment on job application forms;\textsuperscript{106} no longer will towns be able to exclude formerly

\textsuperscript{103}I.e., when a person predicted to be non-dangerous subsequently commits a violent act. On predictions of dangerousness in this context generally, see 1 PERLIN, supra note 2, §§ 2.14-2.16 at 116-39.


\textsuperscript{105}Interestingly, following the passage of the ADA, the Rehabilitation Act of 1973 was amended in part to, at least, better complement the ADA. See 29 U.S.C. § 701(b)(1)(A),(C),(F) (Supp. 1994). In discussing the scope of required "on-going support services," the committee report on that Act notes specifically that an individual with severe mental illness may not want his or her job coach to come to the job site because of the present stigma in our society towards individuals with disabilities "because of fear [of] the reactions of co-workers to the knowledge of his or her mental illness." H.R. REP. No. 822, 102d Cong., 2d Sess., 1992, 1992 WL 202382, WESTLAW pagination at 278.

\textsuperscript{106}See, e.g. Renee Ravid, Disclosure of Mental Illness to Employers: Legal Recourses and Ramifications, 20 J. PSYCHIATRY & L. 85 (1992) (employers can only inquire into job-related
institutionalized persons from access to local services; no longer will we be faced with the grotesque story of the zookeeper who denied access to a group of mentally handicapped schoolchildren "because they upset the chimpanzees."

Having a job and a place to live are the two key variables that serve to separate those ex-patients who can permanently stay out of hospitals and live a decent life from those who face the revolving door or life in back alleys.

The ADA's focus on employment issues can be read hand-in-glove with the 1988 amendments to the Fair Housing Act (FHAA) which underscore Congress' understanding of the importance of work and housing to disabled persons. As the first generation of ADA litigation emerges, the general public may finally begin to see deinstitutionalization as a success story rather than as a social disaster. These potentially ameliorative changes strike me as the sorts of changes that the drafters of the ADA hoped for (at least on an unconscious level).

There is little evidence, however, that the drafters paid serious attention to many of the unique dilemmas faced by persons with mental disabilities, especially as they relate to questions of institutionalization. The visually graphic negative images of persons with mental disabilities—the deranged criminal who "beats the rap" through a meretricious insanity defense; the

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107 See, e.g., Cook, supra note 9, at 415; Tucker, supra note 4 at 16-17.

108 Tucker, supra note 4, at 17.


110 See generally 2 PERLIN, supra note 2, § 6.44B at 131-36 (Supp. 1994).

111 The goals of the FHAA were to secure to people with disabilities the right to establish a home free of discrimination in any community they choose, and to integrate persons of disability into the mainstream of American life. See Simring, supra note 24, at 420; PHILIP ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS 181-86 (1989) (clearly and explicitly discussing the relationship of housing issues to homelessness); James Hogan, Community Housing Rights for the Mentally Retarded, 1987 DET. C. L. REV. 869, 897-909 (discussing the relationship between community-based housing and the future of deinstitutionalization). See also Michael L. Perlin, The Right to Voluntary, Compensated Therapeutic Work As Part of the Right to Treatment: A New Theory in the Aftermath of Souder, 7 SETON HALL L. REV. 298, 314-19 (1976) (citing sources on the meaning of work and the way it motivates, empowers and enhances self-esteem); 2 PERLIN, supra note 2, § 6.17 at 481-88.

112 See generally Perlin, Competency, supra note 28 (discussing strategies to ensure successful implementation of deinstitutionalization policies). On the gap between deinstitutionalization perceptions and realities, see id. at 94-108.

113 See Perlin, Unpacking, supra note 68, at 713-21. To some, it may not matter whether the insanity plea is real or is feigned. See Gilbert Geis & Robert F. Meier, Abolition of the Insanity Defense in Idaho: A Case Study, 477 ANNALS 72, 73 (1985) (Idaho residents concluded that criminal defendants who have a mental disability should not be able to
deinstitutionalized homeless person released from hospitals because of the legal legerdemain of naive civil libertarian lawyers\textsuperscript{114}—create additional burdens and social handicaps for all persons with mental disabilities. Indeed, the Supreme Court’s decision in \textit{Vitek v. Jones}, holding that convicted felons had a liberty interest entitling them to a due process hearing prior to involuntary civil commitment to a mental hospital,\textsuperscript{115} was premised in large part on its finding that the adverse social consequences of commitment, including social stigma, that flow from such commitment can have a "very significant impact on the individual."\textsuperscript{116} The existence of a link between institutionalization and stigma in this context is not unknown to the Supreme Court.\textsuperscript{117}

Further, with one prominent exception,\textsuperscript{118} there has been virtually no scholarly consideration of the ADA’s ultimate impact on the status of institutionalized persons with mental disabilities. The legislative history speaks eloquently and movingly about the debilitating and permanently crippling impact caused by segregation of minorities\textsuperscript{119} and notes appropriately that separate can never be equal.\textsuperscript{120} However, the inevitable question begs to be asked: What impact does this history—when taken together with the antidiscrimination language of Title II\textsuperscript{121} and the \textit{Carolene Products/equal protection language of the initial findings}\textsuperscript{122}—have on the future legitimacy of involuntary institutionalization?

\begin{itemize}
\item[\textsuperscript{115}]445 U.S. 480, 495-96 (1980).
\item[\textsuperscript{117}]See Addington, 441 U.S. at 429 ("One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma.").
\item[\textsuperscript{118}]See infra text accompanying notes 123-40.
\item[\textsuperscript{119}]See, e.g., H.R. REP. No. 485 (III), supra note 63, WESTLAW pagination at *80: "Integration is fundamental to the purposes of the ADA. Provision of segregated accommodations and services relegate persons with disabilities to second-class citizen status."
\item[\textsuperscript{120}]See, e.g., Cook, supra note 9, at 423-25 (quoting statements by members of Congress).
\item[\textsuperscript{121}]See 42 U.S.C. § 12132 (1990) which states "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."
\item[\textsuperscript{122}]See 42 U.S.C. § 12101(a)(7), (b)(4) (1990), discussed supra text accompanying notes 6-11; see also, Allan Macurdy, The Americans With Disabilities Act: Time for Celebration, or Time for Caution? 1 B. U. PUB. INT. L.J. 21, 29 (1991) ("It must be said with great clarity and fervor that the ADA is a vehicle for the enforcement of disability-based violations
\end{itemize}
In the first major analytic piece discussing the specific impact of the ADA on persons with mental disabilities, the late Timothy Cook was explicit: he saw the title as ending the segregation of institutions for the mentally disabled. He read Congressional intent, as expressed in the Act's legislative history, to abolish the "monoliths of isolated care in institutions and in segregated educational settings...[as] separate is not equal. It was not for blacks; it is not for the disabled." He found the House Judiciary Report to be equally explicit: "Integration is fundamental to the purposes of the ADA. Provisions of segregated accommodations and services relegate persons with disabilities to second-class citizen status." The Act, according to Cook, barred both intentional and unintentional discrimination. A consensus of social science research supported this bar, he argued, finding that "institutions and other segregated settings are simply unacceptable." Further, according to Cook, the Act's invocation of the Fourteenth Amendment effectively overrules the "substantial professional judgment" standard set down in *Youngberg v. Romeo*.

Cook's arguments raise difficult questions. Most of his supporting sources deal with research done in cases involving persons who were mentally retarded or developmentally disabled. Can the same arguments be made about individuals who are mentally ill? Do police power considerations inherent in the involuntary civil commitment process create a meaningful distinction? Does the invocation of the Fourteenth Amendment and the use of "discrete and insular minority" language elsewhere in the Act's introduction significantly alter the *Youngberg* standard? Has the Supreme Court subsequently opened up a slight fissure in the *Youngberg* standard in an entirely different context in...
Riggins v. Nevada\textsuperscript{132} when it seemed to suggest that "least restrictive alternative" concepts—banished from the Court's methodology after Youngberg—were pertinent in the context of drugging inquiries at a criminal trial? What application would Cook's theory have to the institutionalization of criminal defendants with mental disabilities following, say, a finding of permanent incompetency to stand trial\textsuperscript{133} or the successful proffering of an insanity defense?\textsuperscript{134}

These are difficult questions for which there are no ready or apparent easy answers. Taken to its next step, Cook's thesis would also call into question the constitutionality of each state's involuntary civil commitment statutes.\textsuperscript{135} The time has long passed since the day when commitment abolitionists appeared to be amassing support for their efforts.\textsuperscript{136} A pendulum swing\textsuperscript{137} has resulted in a call for \textit{expanded} commitment powers in many jurisdictions.\textsuperscript{138} It now appears that the perceived linkages between involuntary civil commitment requirements and homelessness make it likely that the time of the abolition movement has come and gone.\textsuperscript{139} Can, or should, the ADA be used to support

\textsuperscript{132}112 S. Ct. 1810 (1992); see Perlin & Dorfman, \textit{supra} note 26, at 57-58 (discussing Riggins).

\textsuperscript{133}Jackson v. Indiana, 406 U.S. 715 (1972). The Supreme Court held that it violated due process to commit an individual awaiting trial for more than the "reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity \[to stand trial\] in the foreseeable future." \textit{Id.} at 738. If there was no such substantial chance, then the state would be forced to initiate civil commitment proceedings against the individual or release him from custody. \textit{Id.}


\textsuperscript{135}See \textit{generally} 1 PERLIN, \textit{supra} note 2, at §§ 2.01-2.28.

\textsuperscript{136}\textit{Id.} § 2.24. In 1978, President Carter's Commission on Mental Health's Task Force Panel on Legal and Ethical Issues recommended a "modified abolition" position. \textit{Id.} § 2.26 at 172-75.


\textsuperscript{138}See, \textit{e.g.}, 1 PERLIN, \textit{supra} note 2, § 2.27A at 47-49 (Supp. 1994).

Cook's arguments? If it could, would we expect to see the efforts to *repeal* the ADA intensified?140

A recent review of a book of essays analyzing the ADA characterized the statute as "the Rip Van Winkle of civil rights legislation."141 If Cook's arguments are taken up by litigators and successfully urged on courts in impact and law reform contexts, we can expect that statutory based disability rights litigation will necessarily emerge from dormancy.

**B. The Relationship Between the ADA, Stigma and Pretextuality**

Any analysis of Cook's arguments must be undertaken contextually in light of my prior discussion of sanism and pretextuality. Mental disability law has traditionally been premised on sanist grounds. Bias and stereotype have led to sanist decision making which is reflected in many ways. For example, vivid individual cases—no matter how idiosyncratic—regularly "trump" volumes of empirical study, and social science data is used and misused for teleological ends, that is, in accordance with and in adherence to previously determined ultimate conclusions. When faced with non-sanist statutes or judicial decisions, courts frequently resort to pretextual decision making, often abetted by pretextual testimony that is often consciously and openly rationalized by a sense of a "higher morality."142

The "direct threat" language in the ADA143 is a potential laboratory for sanist and pretextual experimentation. What sort of "behavior" will allegedly pose such a threat? If an employee starts to discuss obscure political conspiracies, is that a threat? If an individual taking psychotropic medication develops side effects that create an agitated or a "zombie-like" condition, is that a threat? If an employee appears to be fixated with, say, frogs or turtles, and talks to customers about their importance to the world, is that a threat? To what extent can we expect that employers will tolerate144 "aberrant" behavior on the part of workers? Let one local news station pick up a story that a group of school children stopped going to a downtown luncheonette because an employee was "acting odd," and that anecdote will become the centerpiece of the next debate on amending the ADA.

If the plain language of the ADA conflicts with what trial judges think is "best" for persons with mental disabilities, will judges enter pretextual decisions (and encourage pretextual testimony)? Michael Saks has reported on

140See infra note 167.
141Parmet, *supra* note 26, at 583.
143See *supra* text accompanying note 45.
a trial judge's explanation as to why he has ordered civil commitment of individuals notwithstanding his overt acknowledgement that the state failed to meet its burden of proof. The judge did so because he felt compelled "to do what . . . [he thought was] right." 145 Should we expect judges to be less pretextual in ADA decision making?

Interestingly, in at least one section, the ADA drafters seem to acknowledge the dangers of pretexts. While the Act explicitly does not restrict the ability of insurance companies to limit mental illness disability benefits, 146 it specifies that this non-restriction section may not be used as a "subterfuge" to evade the purposes of either the employment or public accommodations titles. 147 This expectation of pretextual behavior on the part of an industry subject to regulation under this Act is both realistic and troubling for it reflects the extent to which pretexts can color the way we treat persons with mental disability.

The potential superimposition of "morality" has already been raised explicitly in the floor debate by Senator Helms. His revealing comment—questioning the potential consequences if an employer's "moral standards" prevent him from hiring a manic-depressive 148—reflects the reality that sanist behavior may be seen as moral behavior. Will this lead to a spate of literature suggesting that the ADA be subverted in the same way that psychiatrists have written articles suggesting that strict involuntary civil commitment laws be subverted? 149

I have suggested in prior papers that one of the many reasons why society reacts differently toward mentally disabled persons than when it discriminates against other minorities is because the distinguishing characteristics of the latter groups, such as race, are frequently immutable. 150 With rare exceptions, people do not change gender. These people, however, do so knowingly. When individuals change religion, it is generally a voluntary act undertaken with some knowledge of the dimensions and consequences of the decision. On the other hand, each one of us can become mentally ill (and none of us chooses it

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147Id. § 12201(c); see generally Ramage, supra note 69.

148See supra text accompanying note 76.


volitionally). This phenomenon may help explain the level of virulence we often show toward persons with mental disabilities.\textsuperscript{151}

The ADA floor debate on this question of what I will call the "non-immutability of mental illness" was illuminating. Senator Armstrong made this point graphically in his arguments on behalf of a narrowed law:

A person is or is not a man or a woman; A person is or is not a Catholic, a Jew, a Mormon, whatever . . . . That is something we can readily determine. A person either is or is not Irish, Italian and so on.

This bill proceeds from an entirely different point of view. . . .\textsuperscript{152}

On the other hand, Senator Domenici, a co-sponsor and ardent supporter, used the same information in an entirely different context. Said Domenici:

It is very simple to say that it is only a matter of sex discrimination and perhaps race and perhaps religion, as some have suggested. Those are easy ones.

But they just scratch the surface in terms of the suffering that goes on in the lives of people who are assumed to be disabled because of some of the niches that they are put in, especially when it comes to serious mental illness. . . .\textsuperscript{153}

Our discomfort and lack of clarity as to who, exactly, is disabled, and who is not is, at best, sanist. Just as we wish to be able to categorize individuals in the criminal law as sane or insane, competent or incompetent,\textsuperscript{154} we wish for a "real world" without tinges and shades of gray, especially on the question of who is "mentally disabled" for purposes of an act such as the ADA.

This analysis is not entirely informed by pessimism. The enormity of the badge of stigma is finally becoming clear to at least a handful of judges.

\textsuperscript{151}See Perlin, Competency, supra note 28, at 93 n.174; Perlin & Dorfman, supra note 26, at 48 n.3. 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). On the ways that stereotypes pervade our views of disabled persons, see Macurdy, supra note 122, at 32-34.


\textsuperscript{153}Id. at 112 (remarks of Sen. Domenici).

Concurring in a recent holding that an appeal from an involuntary civil commitment order was not mooted solely by the individual's release from hospitalization, Florida Supreme Court Judge Gerald Kogan revealed his understanding of the role of sanism in mental disability law: "The law itself is beginning a process of rooting out acts of irrational prejudice based on mental disability, just as the law in the 1960's began eliminating the irrational bigotry posed by racism."155

Other, more well-known opinions have been written in the same voice. Judge Frank Johnson's *Wyatt v. Stickney* decisions156 are firmly rooted in a rights/empowerment model.157 Opinions such as Justice Blackmun's dissent in *Barefoot v. Estelle*158 or the New Jersey Supreme Court's majority opinion in *State v. Krol*159 rebut sanist myths. Other jurists, such as Justice Stevens' dissenting in *Pennhurst*160 and Justices Stevens' and Marshall's separate opinions in *City of Cleburne v. Cleburne Living Center*,161 express eloquent outrage at institutional conditions that flow from sanist social attitudes. Still others, most notably Judge Stanley Brotman's second trial court opinion in *Rennie v. Klein*,162 express true empathy and understanding about the plight of

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157 See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 131-45 (1990) (discussing a rights based theory to acquire needed services for persons who have a mental impairment).


162 476 F. Supp. 1294 (D.N.J. 1979) (establishing broad constitutionally based right to refuse antipsychotic drug treatment). The court stated that:

Medicine has not yet found a cure for the terrible pain of mental illness.

The law cannot assist in this endeavor. But the constitution can and does prevent those who have suffered so much at the hands of nature from being subjected to further suffering at the hands of man.

Id. at 1309.
individuals institutionalized because of mental disability. Yet, these views represent only a clear minority. Judicial decisions in all areas of mental disability law continue to reflect and perpetuate sanist stereotypes. These myths are "cherished by trial judges, appellate judges, and Supreme Court justices, especially by the Chief Justice of the United States." C

V. CONCLUSION

The question must be recast. To what extent might our sanist practices and pretextual judicial system potentially eviscerate the plain language of the ADA? Let me offer a few interrelated answers. First, if social attitudes are not changed, I am pessimistic about the ADA's ultimate impact on the fabric of our society. If individual employers, restaurant owners, transit system managers, shopkeepers, and bureaucrats adhere to sanist's beliefs, they will inevitably resist the implementation of the ADA. If there is such resistance, the enormous transactional and social costs of the inevitable implementing litigation will drain money, time, and resources from the disability rights community at an alarming rate. Even in a best case model (where clean facts are presented with a litigationally attractive plaintiff and a fairly clear statutory violation), the danger of pretextual decision making can never be minimized. If fact-finders insist on adhering to sanist myths (as part of their reliance on faux OCS), then much of the ADA's potential value will be blunted. Second, if Cook's analysis of Title II is correct, then the ADA calls for the most important transformation—ever—of public mental health care. If litigators attempt to implement his theory, how will judges respond? Perhaps, more importantly, how will Congress respond? Legislation has already been introduced in Congress to repeal the ADA. Will other members join this effort?

Third, on whom can we rely to bring litigation to implement and enforce the ADA? Globally, the quality of representation afforded to persons with mental disabilities has traditionally been substandard. Notwithstanding the fears expressed by the business community—about the ADA generating "full

163Interestingly, the trial testimony of defendants' employees and witnesses in Rennie revealed that antipsychotic medications were often administered in state hospitals for pretextual reasons. See id. at 1299 (medical director of defendant institution acknowledged that medication was used "as a form of control and as a substitute for treatment").
164Perlin, Sanism, supra note 8, at 400-04 (listing examples).
165Id. at 401, citing, inter alia, Perlin, Unpacking, supra note 68, at 711-31; Perlin, Psychodynamics, supra note 31, at 61-69 (discussing cases).
168See generally Perlin, Fatal Assumption, supra note 32, at 49-54.
employment... for lawyers"—I am pessimistic about the opportunities that
disabled persons will have to gain access to competent, committed counsel in
this area. Without such access the words of the ADA may prove hollow.

Fourth, how will the public react if there is a single incident of violence
committed by an individual with a mental disability toward a stranger with
whom he came into contact as a result of enforcement of an ADA provision?
The way that a single vivid case can shape (or misshape) legislative policies in
the mental disability area is well known, especially when it involves a
stranger-stranger crime. It does not take a Hollywood scriptwriter to conjure
up Senator Helms' subsequent salvos on the Senate floor.

Fifth, what sort of meaningful public education effort will be undertaken?
For behavior to change, attitudes must change. Education is clearly a first step,
but abstract knowledge is not enough. Public service announcements on
radio and television will not and cannot, by themselves alone, eradicate
centuries of sanist behavior. In another paper about sanism, I made a
suggestion which is equally applicable here: "[We all must] bear witness to
sanist acts by colleagues, other professionals, the legal system, and the public
at large. . . . [We should] speak up—at the faculty lunch table, on the train, at
the bait and tackle shop—wherever and whenever sanist stereotypes are
employed."

Next, what is the role of the academy? In recent years, mental disability
scholars have been exceptionally creative and energetic in conceiving new
approaches to the study of this area of the law. The effort embarked upon by
David Wexler and Bruce Winick to study the therapeutic jurisprudential
implications of mental disability law is a monumental enterprise. This effort
should be extended to the ADA. While it seems obvious to say that, at first
blush, the ADA is as therapeutic a law as one can imagine (as it focuses on

169 See supra note 19.

170 See generally Perlin, Psychodynamics, supra note 31; Donald Bersoff, Judicial Defe
rence to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive

171 See, e.g., William Fisher, et al., How Flexible Are Our Civil Commitment Statutes? 39
HOSP. & COMMUNITY PSYCHIATRY 711 (1988).

172 For the classic example, see Norman G. Poythress, Jr., Psychiatric Expertise in Civil
Commitment: Training Attorneys to Cope With Expert Testimony, 2 LAW & HUM. BEHAV. 1,
15 (1978), discussed in Perlin, Fatal Assumption, supra note 32, at 52 n.74 (training lawyers
in substantive mental health topics did not materially affect their court performance
because their attitudes did not change).

173 Perlin, Sanism, supra note 8, at 407.

174 See, e.g., THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David
B. Wexler ed., 1990); ESSAYS, supra note 154; David Wexler, Putting Mental Health Into
generally, Perlin, Understanding, supra note 81; Michael L. Perlin, What Is Therapeutic
Jurisprudence?, 10 N.Y. L. SCH. J. HUM. RTS. 623 (1993); PERLIN, supra note 2, § 1.05A, at
6-13 (Supp. 1994); PERLIN, supra note 4, § 5.01, at 661-63.
ability, not disability, and sets out a blueprint for social, political and cultural change), more thoughtful and complete analyses are needed. Other scholars who write about "psychological jurisprudence," such as Gary Melton, begin with the fundamental assumption that the purpose of law is to "promote human welfare." Studies from a psychological perspective of the ways in which the ADA accomplishes this would be beneficial to persons with mental disabilities, the businesses and public entities regulated by the ADA, legislators, and members of the judiciary.

Finally, once "Rip Van Winkle" is awakened, how will Congress respond? In speaking against the ADA, Senator Humphrey referred to it as "one of the most radical pieces of legislation" he had encountered in his eleven years in the U.S. Senate. I believe that he was right, but with entirely the wrong spin. If the ADA does force a change in our social attitudes, then it will work a fundamental change in our social fabric. It will force us to reevaluate centuries of discrimination, bigotry and prejudice. Such a change will also force us to acknowledge that persons with disabilities, whether persons with mental disabilities, persons with mental illnesses, or persons who were previously institutionalized for mental illnesses, are full citizens of this country. Only then will it be recognized that they, like all other citizens, deserve to be treated "as human beings." That thought would be radical, indeed.

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176 See supra text accompanying note 140.

177 135 CONG. REC. S10,765 (daily ed. Sept. 6, 1989), WESTLAW pagination at 135. Cf. Macurdy, supra note 122, at 24 ("For us, the potential change in our legal position is no less revolutionary than for ... people of color after President Johnson signed the 1964 [Civil Rights] Act.")
