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"SIMPLIFY YOU, CLASSIFY YOU": STIGMA, STEREOTYPES AND CIVIL RIGHTS IN DISABILITY CLASSIFICATION SYSTEMS

Michael L. Perlin*

INTRODUCTION

Before becoming a professor, I spent thirteen years as a practitioner, mostly representing criminal defendants with mental disabilities and persons subjected to involuntary civil commitment or committed to psychiatric hospitals. I have taught mental disability law for twenty-five years, and in the past eighteen of those years, my research and scholarship has focused mostly on what I call "sanism"[1] and on what I call "pretextuality,"[2] shorthand for the ways that prejudice towards persons with mental disabilities leads to stigma and stereotyping, and the ways that these factors malignantly distort both the legislative and judicial processes.[3] I believe that these factors are constant whether the topic is commitment, the right to refuse treatment, sexual autonomy, deinstitutionalization, any aspect of the criminal trial process, from the determination of competency to stand trial to the ultimate death penalty decision, or the relationship between international human rights law and mental disability law.[4] In

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1. *See*, *e.g.*, Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373 (1992).

2. *See*, *e.g.*, Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993).

3. *See generally* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (2000); 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 ISS. 3 (1999).

4. *See*, *e.g.*, MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994); Michael L. Perlin, Keri K. Gould, & Deborah A. Dorfman, *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); Michael L. Perlin & Deborah A. Dorfman, *Is It More Than "Dodging Lions and Wastin' Time"? Adequacy of Counsel, Questions of Competence, and the Judicial Process in*

this paper I consider the question of the extent to which these factors and these principles do or do not equally contaminate the special education process, and the decision to label certain children as learning disabled.[5] I begin with my ultimate thesis: The process of labeling children with intellectual disabilities is not merely a double-edged sword; it is at least a triple-edged and perhaps a quadruple-edged (or quintuple-edged) one. It is essential that policy makers acknowledge this in any recalibration of statutory standards or educational policy "reforms" that are undertaken. If we ignore these conflicting issues, barriers, and dilemmas, we run the risk of re-creating a system that unnecessarily stigmatizes and fails to provide adequate services to those who need them.

In coming to these conclusions, I have identified five conflicts and clusters of policy issues that we must consider:

Individual Right to Refuse Treatment Cases, 2 PSYCHOL. PUB. POL'Y & L. 114 (1996); Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517 (1993–1994); Michael L. Perlin, *"What's Good Is Bad, What's Bad Is Good, You'll Find out When You Reach the Top, You're on the Bottom": Are the Americans with Disabilities Act (and* Olmstead v. L.C.*) Anything More than "Idiot Wind?"*, 35 U. MICH. J.L. REFORM 235 (2001–2002); Michael L. Perlin, *"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683 (2002-2003); 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 (2005)*;* Perlin, *supra* note 2; 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); 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 (1996); Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent*, 39 ISR. L. REV. 69 (2006); Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT'L L. & COM. 333 (2006–2007).

5. I am no stranger to this area of the law. During my years as a mental health advocacy lawyer, I also spent two years as Acting Director of the Advocacy for the Developmentally Disabled Project Office of the New Jersey Department of the Public Advocate, and special education cases were among the core caseload of that office. When I was Special Counsel to the Commissioner of the Public Advocate Department, I filed a brief with the United States Supreme Court in *Irving Independent School District v. Tatro*, which held that the provision of clean intermittent catheterization was a "related service" to which the plaintiff was entitled under the Education of All Handicapped Children Act (EHA). 468 U.S. 883, 895 (1984). Finally, in my first years of full-time teaching, I directed New York Law School's Federal Litigation Clinic. In that position, I supervised students who represented children with disabilities at special education hearings before New York State administrative law judges.

- The need to ensure that all children receive adequate education;
- The need to ensure that the "cure" is not worse than the "illness"; that is, that the labeling of a child as being in need of special education services does not ensure that the child will forever be seen as a second-class citizen;
- The need to consider the ultimate impact this decision may have if the child eventually winds up in the criminal justice system;
- The need to consider the relationship between the decision-making in this system and issues of gender, social class, and race; and
- The need to consider the public's attitude that a learning disability label is an *advantage* to a child competing for admission to a prestigious university or graduate school.

I believe that it is essential to consider each of these—both separately and in context with each other—if we are to make some sense of the underlying problems and issues.

My paper will proceed in the following manner. In Part I, I will briefly trace the history of American federal legislation and special education law reform in the American courts. In Part II, I will consider some of the "real life" problems that create pitfalls in the implementation and enforcement of those laws. In Part III, I will look at the meanings of "sanism" and "pretextuality" in an effort to illuminate the insidious ways that stereotyping drives decision-making. In Part IV, I will consider issues of race and social class, looking specifically at the connection between these issues, sanism and pretextuality, and the implications of that connection for the purposes of this inquiry. In Part V, I will consider the unique relationship between special education labeling and the criminal justice system, paying particular attention to the important implications of the United States Supreme Court's 2002 decision in

Atkins v. Virginia,[6] which bars the execution of persons with mental retardation. In Part VI, I will look at the way that special education labeling is seen as somehow *different* from other types of labeling, noting that some upper-middle class and upper class families sometimes view the label as a strategic or tactical *advantage*. Finally, I will conclude with some modest recommendations.

My title comes from Bob Dylan's classic (though never heard today) masterpiece, *All I Really Want to Do*.[7] In it, Dylan pours out a litany of what he does *not* want to do to the object of his affections, opening with this verse:

> I ain't lookin' to compete with you,
> Beat or cheat or mistreat you,
> Simplify you, classify you,
> Deny, defy or crucify you.
> All I really want to do
> Is, baby, be friends with you.[8]

I expect that what we have done, and what we continue to do to learning disabled children, is precisely what Dylan promised not to do: "Simplify you, classify you."[9] Writing about this topic, Professor Peter David Blanck has said: "Over the course of the twenty-first century, our challenge is to strive toward national policies that promote inclusion of all persons, with and without disabilities, based on values of individual worth, fairness, and justice."[10] I write this paper to make us think a bit about the past errors of our ways and seek to bring us incrementally closer to Professor Blanck's vision and aspirations.

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6. 536 U.S. 304 (2002).

7. BOB DYLAN, *All I Really Want to Do*, *on* ANOTHER SIDE OF BOB DYLAN (Columbia Records 1964). Dylan last sang the song live on December 3, 1978. Adam Selzer, *How Long Has It Been Since Dylan Played?*, http://bobdylan.com/links/ (last visited Feb. 12, 2009).

8. DYLAN, *supra* note 7.

9. On the necessity of classification so that schools can fulfill federal mandates, *see* Patrick Linehan, *Guarding the Dumping Ground: Equal Protection, Title VII and Justifying the Use of Race in the Hiring of Special Educators*, 2001 BYU EDUC. & L.J. 179, 188 (2001).

10. Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 217 (2001).

I. LEGISLATIVE AND JUDICIAL HISTORY[11]

Two federal cases set the stage for the first important federal education legislation on behalf of children with disabilities: *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, a consent decree stating that the denial of educational services to children with mental retardation violated the Equal Protection Clause,[12] and *Mills v. Board of Education*, holding that the exclusion of children with disabilities from public school programs violated the Due Process Clause.[13] These two cases were frequently cited by Congress as sources of inspiration for subsequent ameliorative legislation.[14]

The United States Supreme Court has made it clear that there is no general federal constitutional right to education.[15] In so declaring, the Court, per Justice Powell, concluded that while a proper education is a laudable policy *goal*, it does not rise to constitutional dimensions.[16] This decision further led advocates to turn to legislation as the appropriate remedy for inadequate education.

The Education for All Handicapped Children Act of 1975 (EAHCA)[17] — the predecessor to the Individuals with Disabilities Education Act (IDEA)[18] — was an "ambitious congressional

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11. This section is partially adapted from 5 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 13C-1, at 26-27 (2d ed. 2002).

12. 334 F.Supp. 1257, 1259 (E.D. Pa. 1971).

13. 348 F.Supp. 866, 875 (D.D.C. 1972).

14. Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 299 (1993).

15. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

16. *Id.* at 36. *But see id.* at 37 ("[N]o charge fairly could be made that the system fails to provide each child with an opportunity to acquire the *basic minimal skills* necessary for the enjoyment of the rights of speech and of full participation in the political process.") (emphasis added).

17. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482).

18. *Id.* For a helpful review, see Stanley S. Herr, *Reauthorization of the Individuals with Disabilities Education Act*, 35 MENTAL RETARDATION 131 (April 1997). Despite EHA's name change to the Individuals with Disabilities Education Act (IDEA) in 1990, the basic principles of EHA are embodied in IDEA. *See, e.g.*, Rebecca Weber Goldman, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 243 (1994–1995).

attempt"[19] designed to ensure that all handicapped children have available a free public education appropriately designed to meet their unique and individual needs.[20] As a remedial statute, it was written to be applied broadly and construed liberally in favor of the provision of such education to handicapped students.[21] To be eligible for funds under the Act, each state was required to establish procedures to ensure that, "To the maximum extent appropriate, handicapped children, *including children in public or private institutions or other care facilities*, are educated with children who are not handicapped."[22]

To ensure the provision of such education, the implementing regulations specified that each state educational agency "shall make arrangements with public or private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that [this section] is effectively implemented."[23] The comment to this regulation underscored the point: "Regardless for other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting."[24]

IDEA, the successor act, was designed to assure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services

19. Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481, 485 (D.N.J. 1982).

20. *See*, *e.g.*, Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328, 1335 (W.D.N.Y. 1979).

21. Espino v. Besteiro, 520 F. Supp. 905, 911 (S.D. Tex. 1981); *see also* S-1 v. Turlington, 635 F.2d 342, 347 (5th Cir. 1981).

22. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 612, 89 Stat. 773, 781 (codified as amended 20 U.S.C. § 1412(a)(5)(A) (2006)) (emphasis added); *see also id.* § 614, 89 Stat. 784 (providing that an educational agency's funding application must include goal of enabling, to the maximum extent practicable, handicapped children residing in institutions to participate in regular education programs). For a helpful overview, see Judith Welch Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence, Part I: The Statutory Maze*, 17 J.L. & EDUC. 387 (1988)*; see also id.* at 387 n.2 (listing then-recent pertinent scholarship); Glennon, *supra* note 14; Omyra M. Ramsingh, *Disciplining Children Under the Individuals with Disabilities Education Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 155 (1995–1996); Daniel H. Melvin, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599 (1994-1995); Stephanie L. Gill, *Punitive Damages: Flying in the Face of the Individuals with Disabilities Education Act?*, 100 DICK. L. REV. 383 (1995–1996).

23. 34 C.F.R. § 300.554 (1984).

24. Comment to 34 C.F.R. § 300.554 (1984).

designed to meet their unique needs.[25] It defines "special education" as "specially designed instruction . . . to meet the unique needs of a child with a disability."[26] To create a free and appropriate public education program for each disabled child, the IDEA requires a multidisciplinary team, which includes the child's parents, to develop an Individualized Education Program (IEP).[27] It states a clear preference for educating children in the "least restrictive environment,"[28] and in a setting with their peers who do not have disabilities whenever possible.[29] Such children should be removed from the regular classroom environment only when education in the classroom cannot be achieved satisfactorily with the use of supplementary aides and services.[30] The least restrictive environment principle also requires that children be kept in the same public school they would attend if not disabled, and as close as possible to their homes, rather than in separate schools for disabled children.[31]

The Supreme Court subsequently explained why Congress enacted prophylactic legislation:

> When the law was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed: 21 years after this Court declared education to be "perhaps the most

25. 20 U.S.C. § 1400(d)(1)(A) (2006); *see generally* Ronald Wenkart, *The Individuals with Disabilities Education Act and the Establishment Clause of The United States Constitution*, 23 WHITTIER L. REV. 411 (2001-2002). Under the IDEA, a "child with a disability" is eligible for assistance. 20 U.S.C. § 1401(3)(A), (B) (2000). The disability can be "mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." *Id.* In additional to the disability and because of it, the child must require special education and related services. *Id.* For children between the ages of three and nine "disability" can include developmental delays. *Id.*

26. 20 U.S.C. § 1401(a)(16) (1988 & Supp. 1991).

27. 34 C.F.R. § 300.340-.349 (1992). The IEP should set forth the child's present educational performance, detail annual goals and short term objectives for improvement in that performance, and describe the special instruction and related services that will enable the child to meet those objectives. 20 U.S.C. § 1401(a)(2005); 34 C.F.R. § 300.346 (1992).

28. 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv) (2005). On the mental disability law sources of the "least restrictive alternative" doctrine, see 1 PERLIN, *supra* note 11, § 2C-5.3 to 5.3e, at 417–34.

29. 20 U.S.C. § 1412(5)(B) (2005).

30. 34 C.F.R. § 300.550 (1992).

31. 34 C.F.R. § 300.552 (1992).

> important function of state and local governments," *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954), congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. § 1400(b)(3). Indeed, one out of every eight of these children was excluded from the public school system altogether, § 1400(b)(4); many others were simply "warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out. See H.R.Rep. No. 94-332, p. 2 (1975). Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet.[32]

The IDEA—born in an effort to combat stigma[33]—focused on individualized treatment and mainstreaming as its core characteristics.[34] The question that must be next considered is what pitfalls have stood in the way of full enforcement of the Act, and the implications of these pitfalls for policy in this area of the law.

II. PITFALLS AND PROBLEMS

I have identified five pitfalls that we must consider in our attempts to understand the underlying issues:

32. Honig v. Doe, 484 U.S. 305, 309 (1988).

33. Peter Blanck, *The Unintended Consequences of the Americans with Disabilities Act*, 85 IOWA L. REV. 1811, 1814 (1999–2000).

34. The Ninth Circuit, by way of example, has held that an administrative law judge properly found that the mainstreaming requirement under the IDEA, 20 U.S.C. § 1400–1482, contains a legal presumption in favor of placing students with disabilities in regular classes with students who are similar in age. *See* Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., 14 F.3d 1398, 1403 (9th Cir. 1994). That presumption can be rebutted, however, by a showing that the student's educational needs require removal from the regular classroom. *Id.*

- The problem of insufficient funding;
- The reality that local programs often prove disastrous where children with intellectual disabilities are mingled with children with serious behavioral problems;
- The reality that children may still be isolated *within* mainstreamed classes;
- The fact that mainstreaming may help parents deny the reality that their child does have a disability and is need of special services; and
- The possibility that mainstreaming may lead to the creation of new stereotypes.

I will address each of these briefly.

First, there is no question that special education has been woefully under-funded, and that there are no signs that this situation is improving.[35] One Congressman put it succinctly and accurately: "[I]nsufficient funding for special education compromises the education of every student."[36] Although courts have sought to remedy these problems in individual cases,[37] the problem is clearly systemic, and shows no signs of diminishing.

What is so sadly ironic here is this: the issue of lack of funding pre-dates the creation of special education law and continues to dominate much policy discussion after more than three decades of congressional action. In *Mills v. Board of Education*, the court found that "the school system regularly excluded certain handicapped children, using the justification that the school lacked funds to

35. *See generally* Perry A. Zirkel, *NCLB: What Does it Mean for Students with Disabilities?*, 185 ED. LAW REP. 805 (2004); Andriy Krahmal, Perry A. Zirkel & Emily J. Kirk, *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 TEX. F. ON C.L. & C.R. 201, 221 (2003–2004).

36. Terry Jean Seligmann, *An Idea Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 783 n.128 (2001–2002) (quoting Congressman Michael Ferguson).

37. *See*, *e.g.*, Unified Sch. Dist. No. 1 v. Dep't. of Educ. of Connecticut, No. CV 980492696, 1999 WL 74531 (Conn. Super. Ct. Feb. 4, 1999) (affirming one year of compensatory education services to a juvenile with mild mental retardation where school district had insufficient staff, funding, and resources to provide adequate special education services).

provide proper evaluation, personnel, and service,"[38] and ruled that because inadequacies of school funding could not "be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child,"[39] each child of school age was thus entitled to "a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment."[40] And today, budget problems continue to plague school districts. As one commentator has noted, "Because of the increasing number of special education children served in mainstream settings, experts find that it is no longer possible for the states to accurately divide expenditures between general and special education."[41]

Second, the problems faced in special education classes by students with emotional disabilities are enormous. According to Professor Theresa Glennon:

> There can be little doubt that schools are failing their mission to serve this nation's emotionally disturbed children. Only a tiny percentage of students identified as seriously emotionally disturbed perform at or above grade level, and the evidence shows that they fall farther behind each year they attend school. These students also drop out of school at an alarming rate, much higher than for any other exceptionality. Very few students who are identified under the definition of seriously emotionally disturbed improve enough to be decertified. The post-school careers of these students are equally distressing: approximately

38. Philip W. Clements, Bd. of Educ. v. Rowley: *The Supreme Court Takes a Conservative Approach to the Education of Handicapped Children*, 61 N.C. L. REV. 881, 883 (1982–1983) (discussing Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972)).

39. *Mills*, 348 F. Supp. at 876.

40. *Id.* at 878.

41. Seligmann, *supra* note 36, at 783–84. *See also*, *e.g.*, Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 262 (Mont. 2005) (on the relationship between budgeted costs for special education and "quality education"). On the funding incentives for school districts to over-identify students as learning disabled, see Robert A. Garda, Jr., *Untangling Eligibility Requirements under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 447–48 (2004), and see also Theresa M. Willard, *Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students*, 31 IND. L. REV. 1167, 1185 (1998).

> one-third are unemployed, and almost one-half of the youth out of school for two years have arrest records.[42]

There have been few studies on the impacts of "co-mingling" children with different disabilities. Statistics show that for the cases identifiable in terms of the child's disability, these classifications were the most frequent: learning disability (27.4%), physical impairment (22.3%), emotional disturbance (13.8%), and mental retardation (20.1%).[43] This issue is inextricably interlinked with the *politics* of special education labeling. Among the reasons suggested for the increase in the number of children categorized as having learning disabilities is that this category is often viewed by parents (and, perhaps, by school administrators) as less stigmatizing than more antiquated labels like mild, or educable mental retardation,[44] a categorization known in some circles as the results of "classification plea bargaining."[45] In short, this is a very culturally, socially, and politically complex issue.[46]

Third, a debate continues to rage as to the amount of time students with learning disabilities should spend in mainstreamed classrooms as opposed to separate classrooms.[47] While the IDEA mandates that

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42. Glennon, *supra* note 14, at 305–06.

43. Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 ED. LAW REP. 731, 734 (2002).

44. Seligmann, *supra* note 36, at 770.

45. Alan Gartner & Dorothy Kerzner Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 HARV. EDUC. REV. 367, 373 (1987).

46. It must be stressed that many students with learning disabilities who receive appropriate accommodations are successful in academic programs. *See* Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner*, 6 NEV. L.J. 116, 122 (2005–2006) ("With advances in knowledge about education, including knowledge about different learning styles, appropriate accommodations, strategies, and compensations for both students with physical and learning disabilities, many students are matriculating through undergraduate programs with a high degree of success.").

47. *See* David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst: *A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1236 n.165 (2003):

> Indeed, a longstanding debate in special education circles concerns the question of the relative amount of time disabled students should spend in mainstream as opposed to separate classrooms. Special education experts cast the debate in terms of "inclusion" versus "placement diversity." Michael A. Rebell & Robert L. Hughes, *Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC.

children with learning disabilities be educated, wherever possible, in a regular classroom, they may be educated outside of such classrooms if mainstreaming would not provide a satisfactory education program.[48] Also, courts have held that academic achievement is *not* the only reason for mainstreaming:

> [O]ur inquiry must extend beyond the educational benefits that the child may receive in regular education. We also must examine the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child.[49]

The overwhelming majority of evidence, by way of example, suggests that "language and role modeling from association with non-disabled peers are essential benefits of mainstreaming."[50]

Yet there is still a smattering of case law that points out that there may be negative side-effects of mainstreaming: that the child may suffer interpersonally if she falls significantly behind her peers who are not disabled,[51] and that there may be services simply unavailable in a mainstreamed setting.[52] These are issues that cannot be ignored in this investigation.

523, 536–45 (1996) (classifying proponents of inclusion as those who favor moving existing special education services into mainstream settings, and supporters of placement diversity as those who prefer to leave the question of placement up to the educators' individual assessments). In the context of this debate, placing responsibility for the actual provision of educational services in one set of hands makes sense as an implementation matter, particularly where optimizing the mix of mainstream and separate instruction for disabled students involves shuttling students between mainstream and specialized classroom settings.

48. 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv) (2005).

49. Daniel R.R. v. State Bd. of Ed., 874 F.2d 1036, 1049 (5th Cir. 1989). The *Daniel R.R.* case is discussed in this context in Michael Hazelkorn, *Reasonable v. Reasonableness: The* Littlegeorge *Standard*, 182 ED. LAW REP. 655, 661–62 (2004).

50. Oberti v. Bd. of Educ., 995 F.2d 1204, 1216 (3d Cir. 1993). *But see* W. N. Bender, *The Case Against Mainstreaming: Empirical Support for the Political Backlash*, 105 EDUC. 279 (1985) (arguing the contrary view that mainstreaming of children with disabilities compromises the education of other children, and discussing negative attitudes expressed by teachers and peers).

51. Greer v. Rome City Sch. Dist., 950 F.2d 688, 697 (11th Cir. 1991).

52. Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1982), *cert. den.*, 464 U.S. 864 (1983).

Fourth, the issue of denial of reality is a difficult one, and is probably beyond the law's reach, but there are some examples in the legal literature that should force us to consider the potential impact of this issue. One article quotes a letter from the parents of a child with a learning disability to a New York state senator:

> We admit that when she was around 4 years old that our goal was to somehow get her mainstreamed—we thought it was best for her, but actually as we ponder[ed] that thought—it was to fulfill a need of ours—because if she was in a regular school setting we would feel we did our part as parents giving her the 'normalcy' that she deserved.[53]

Another quotes a parent describing her daughter, "I was not willing to accept the slow theory."[54] There is no evidence that these are universal attitudes, but they, again, are ones that must be factored into any analysis of the overarching issues that are at the core of this paper.

Fifth, we need to consider the difficult question of whether new stereotypes may be created, and if that happens, the relevance of that phenomenon. It is black-letter law that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[55] This, however, does not conclude the inquiry. One commentator questioned, by way of example, how clients will respond to lawyers that they believe were able to pass the bar only because of special accommodations.[56] For example, the "extra-time on the bar" attorney may be stereotyped as needing more time to work on a case than a "regular time" attorney, and a client may

53. Therese Craparo, *Remembering the "Individuals" of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 467, 522 (2002–2003) (emphasis added).

54. W. Ray Williams, *Hand-up or Handout? The Americans with Disabilities Act and "Unreasonable Accommodation" of Learning Disabled Bar Applicants: Toward a New Paradigm*, 34 CREIGHTON L. REV. 611, 633 (2001–2002).

55. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

56. *See infra* text accompanying notes 100–05. It may belabor the obvious to ask whether similar questions as to the abilities of female or African-American attorneys would be taken even remotely seriously.

question the number of billable hours.[57] Also, managers who consider hiring workers with disabilities express concerns that "the disabled worker's personal needs will affect job performance."[58]

Again, these attitudes cannot—and *must not*—stand in the way of civil rights legislation on behalf of persons with disabilities. But when we think about stigma and stereotypes, it would be short-sighted for us to "put our heads in the sand" and make believe that these attitudes do not exist.

III. SANISM AND PRETEXTUALITY

As I already indicated, I believe that it is impossible to understand anything about the way we construct persons with disabilities in the community, the classroom, and the courtroom without understanding the deep textures of sanism and or pretextuality.[59]

Sanism 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.[60] It 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.[61] Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law, and all aspects of the

57. *See* Williams, *supra* note 54, at 659.

58. Marjorie L. Baldwin, *Can the ADA Achieve its Employment Goals?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 47 (1997).

59. *See generally* Perlin, *Lepers and Crooks*, *supra* note 4.

60. *See generally* PERLIN, *supra* note 3. The classic study is GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1955). *But see* ELISABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICES (1996) (questioning Allport's conclusions). The word "sanism" was, to the best of my knowledge, coined by Dr. Morton Birnbaum. *See* Morton Birnbaum, *The Right to Treatment: Some Comments on Its Development*, *in* MEDICAL, MORAL AND LEGAL ISSUES IN HEALTH CARE 97, 105 (Frank Ayd ed., 1974) [hereinafter Birnbaum, *Right to Treatment: Comments*]; *see also* Koe v. Califano, 573 F.2d 761, 764 n.12 (2d Cir. 1978). Dr. Birnbaum is universally regarded as having first developed and articulated the constitutional basis of the right to treatment doctrine for institutionalized mental patients. *See* Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960), discussed in 2 PERLIN, *supra* note 11, § 3A-2.1, at 8–12 (2d ed. 1999).

61. On the way that sanism affects lawyers' representation of clients, see PERLIN, *supra* note 3, at 28, 55–56, and Perlin, *Lepers and Crooks*, *supra* note 4, at 689–90.

criminal process (pretrial, trial, and sentencing). It reflects what civil rights lawyer Florynce Kennedy has characterized the "pathology of oppression."[62]

Sanist myths exert especially great power over lawyers who represent persons with mental disabilities.[63] The use of stereotypes, typification, and deindividualization inevitably means that sanist lawyers will trivialize both their clients' problems and the importance of any eventual solution to these problems. Sanist lawyers implicitly and explicitly question their clients' competence and credibility,[64] a move that significantly impairs the lawyers' advocacy efforts.[65]

Pretextuality defines the ways in which courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making. In many cases, courts allow witnesses, especially expert witnesses, to purposely distort their testimony in order to achieve desired ends. 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.[66] All aspects of mental disability law are pervaded by sanism and by pretextuality, no matter whether the specific presenting topic is involuntary civil commitment law, right to refuse treatment law, the sexual rights of persons with mental disabilities, or any aspect of the criminal trial process.[67]

Both sanism and pretextuality are further contaminated by our reliance on non-reflective "ordinary common sense" (OCS). OCS is a

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62. S*ee* Birnbaum, *Right to Treatment: Comments*, supra note 60, at 107 (quoting Kennedy); *see also id.* at 106 ("It should be clearly understood that sanists are bigots."). For a subsequent consideration in this context, see Bruce G. Link et al., *The Consequences of Stigma for Persons with Mental Illness: Evidence from the Social Sciences*, *in* STIGMA AND MENTAL ILLNESS 87 (Paul Fink & Allan Tasman eds. 1992).

63. *See* Perlin, *supra* note 1; Perlin, *Lepers and Crooks*, *supra* note 4; PERLIN, *supra* note 3.

64. *See generally* PERLIN, *supra* note 3; Perlin, *Lepers and Crooks*, *supra* note 4, at 684.

65. *See* Keri K. Gould & Michael L. Perlin, *"Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE U. L. REV. 339 (2000).

66. 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 (2003–2004).

67. *Id.*

"powerful unconscious animator of legal decision making."[68] It is "prereflective" and is susceptible to precisely the type of idiosyncratic, reactive decision-making that has traditionally typified all mental disability legislation and litigation.[69] It is supported by our reliance on a series of heuristics—cognitive-simplifying devices that distort our abilities to rationally consider information.[70]

Our special education system is rife with sanism and pretextuality. It relies on shopworn myths, creates stigma, and demands reductionist deindividualization in textbook examples of sanism. Whether we are looking at the impact of special education labeling, the purported threat of disability classification "gaming," the relationship between special education and the criminal justice system, or the relationship between special education and socioeconomic questions of race and class, the specter of pretextuality looms as a nearly unmovable presence. For the remainder of this paper, I will address each of these issues.

IV. RACE AND CLASS

It is no surprise to learn that "[c]hildren of color are vastly over represented in both the juvenile justice and special education systems,"[71] and that studies unanimously reveal that "race plays a powerful role in the placement of children in special education"[72] and

68. *Id.*; *see also* Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737 (1988) (OCS exemplified by the attitude of "What I know is 'self evident'; it is 'what everybody knows'").

69. Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 29 (1990).

70. *See, e.g.*, Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 421–23 (2000); Perlin, *supra* note 66, at 26–27; PERLIN, *supra* note 3, at 4–16. The use of such heuristics "allows us to willfully blind ourselves to the 'gray areas' of human behavior." Perlin, *supra* note 66, at 27.

71. Theresa Glennon & Robert G. Schwartz, *Foreword: Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557, 1566 (1995) [hereinafter Glennon & Schwartz, *Looking Back*]; *see generally*, Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237 [hereinafter Glennon, *Race*].

72. Matthew Ladner & Christopher Hammons, *Special But Unequal: Race and Special Education*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 107–08 (Chester E. Finn et al. eds., 2001) (*quoted in* Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of it All*, 15 HASTINGS WOMEN'S L.J. 1, 30 n.164 (2004)).

exerts a "disparate impact" on such placements.[73] In 1992, by way of example, "blacks made up sixteen percent of public school students, but represented nearly forty percent of those in 'special' education classes"—classes for students with mental disabilities or other special needs.[74] And there are confounding interstate rate differentials. "[I]n thirteen states, African-American students are at least three times more likely than white students to be identified as having mild mental retardation," but "[i]n other states . . . African-American students are identified as having mild mental retardation at rates much closer to their presence in the student population."[75] To this end, we must also recall the description of some special education classes as being the end product of "classification plea bargaining."[76] Again, considerations of race cannot be avoided.[77]

There are also gender issues to consider as well. Professor Glennon points out:

> When the special education identification and placement figures are broken out by race and gender, a stark picture appears. Using white female students as the baseline, African American boys are the most overrepresented by very significant degrees in the categories of mental retardation and serious emotional disturbance. The race and gender disparities are striking: while African American females are 2.02 times as likely as white

73. Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 422 (2001).

74. Sharon E. Rush, *Identity Matters*, 54 RUTGERS L. REV. 909, 919 (2002).

75. Glennon, *Race*, *supra* note 71, at 1253 (relying upon OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 1992 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS COMPLIANCE REPORT: PROJECTED VALUES (1992)).

76. Gartner & Lipsky, *supra* note 45, at 373.

77. On the subjectivity of some such judgments, see Regina Austin, *Back to Basics: Returning to the Matter of Black Inferiority and White Supremacy in the Post-*Brown *Era*, 6 J. APP. PRAC. & PROCESS 79, 85 (2004). "For example, education researchers considering the disproportionate placement of black students in special education have argued that labeling black students, particularly black males, retarded or emotionally disturbed is highly subjective and may be based on white female teachers' misinterpretation of or lack of tolerance for the students' verbal, behavioral, or cognitive styles." *Id.* On gender issues, *see infra* text accompanying note 78.

> females to be identified as mentally retarded, African American males are 3.26 times as likely.[78]

Beyond this, Glennon notes that "studies and litigation demonstrate that African American males, once identified, are even more likely than other special education students to be placed in separate classes or separate schools which exert greater external controls over them."[79] Professor W. Ray Williams thus concludes that:

> The manner in which learning disabilities are defined and diagnosed implicates race, economic and class-based discrimination. When individuals, the benefactors of privilege and class, perform poorly, it is assumed to be due to some neurological or organic source. After all, as one commentator observed, these children "are by cultural definition intelligent and enjoy a presumption of intelligence because of their station in society." Similarly, poor children are by cultural definition assumed dull, slow learners because of their place in the societal hierarchy.[80]

It should be clear by now that we cannot consider learning disability and labeling questions in a hermetic vacuum. Decision-making about learning disabilities inevitably implicates questions about race, gender, and social status, and interacts with decision-making in the criminal justice system.[81] Perhaps most important of all, the decision to label a child as "learning disabled"—although

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78. Theresa Glennon, *Knocking Against the Rocks: Evaluating Institutional Practices and the African American Boy*, 5 J. HEALTH CARE L. & POL'Y 10, 20 (2002) [hereinafter Glennon, *Knocking*] (citing Donald P. Oswald et al., *Community and School Predictors of Over Representation of Minority Children in Special Education*, *in* THE CIVIL RIGHTS PROJECT, THE CONFERENCE ON MINORITY ISSUES IN SPECIAL EDUCATION IN PUBLIC SCHOOLS 19, http://www.dimenet.com/dpolicy/archive.php?mode=P&id=523(last visited, Feb. 12, 2009)).

79. Glennon, *Knocking*, *supra* note 78, at 20 (citing Glennon, *Race*, *supra* note 71, at 1255).

80. Williams, *supra* note 54, at 631 (quoting in part, Brian Mikulak, *Classism and Equal Opportunity: A Proposal for Affirmative Action in Education Based on Social Class*, 33 HOW. L.J. 113, 118 (1990–1991)).

81. *See infra* text accompanying notes 95–98.

often the only way to make it even remotely likely that the child will get educational services that provide him/her with "an appropriate education"[82]—may have a negative, irreversible, and life-long impact on the way the child thinks about herself (and her subsequent behavior) both as a child and an adult in the full range of social contexts.[83] We cannot ignore this in our consideration of these issues.

V. THE CRIMINAL JUSTICE SYSTEM

There is no question that children with learning disabilities are disproportionately over represented in the criminal justice system[84] and remain at high risk in that system[85] for a variety of reasons, including judicial confusion between behavior and disabilities. Studies suggest that at least 40-50% of all jail and prison inmates have been classified as learning disabled;[86] if *undetected* learning disabilities are included, some estimates rise to 80%.[87] Learning

82. 20 U.S.C. § 1401(a)(16).

83. My colleague Mark Weber notes: "Or it may be liberating. The student no longer blames himself or is considered 'stupid' or 'lazy', and may—one hopes—learn some tricks to survive in the educational system and beyond." Personal communication with Mark Weber, St. Vincent DePaul Professor of Law, DePaul University College of Law (April 28, 2007).

84. *See generally* Deborah Shelton, *A Study of Young Offenders With Learning Disabilities*, 12 J. CORRECTIONAL HEALTH CARE 36, 40 (2006) (explaining that 38% of youth met diagnostic criteria for learning disability; 22% had co-existing psychiatric disorder; of this category, more than one-third were diagnosed with multiple psychiatric disorders); *see also* William S. Koski, *Foreword: The Political Construction of Youth Crime and Its Policy Consequences*, 14.1 STAN. L. & POL'Y REV. 5, 6 (2003); Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 HARV. L. REV. 1560, 1573 n.90 (1998) (citing Stanley J. Antonoff, *We Can Make a Difference*, *in* THE CONFERENCE ON JUVENILE JUSTICE, DYSLEXIA AND OTHER LEARNING DISABILITIES I, 2–3 (Stanley J. Antonoff ed. 1993)).

85. Robert E. Shepherd, Jr., *The "Child" Grows Up: The Juvenile Justice System Enters Its Second Century*, 33 FAM. L.Q. 589, 604 (1999).

86. Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 442 (1993); Philip J. Kinsler et al, *The Vermont Defendant Accommodation Project*, 10 PSYCHOL. PUB. POL'Y & L. 134, 159 (2004). On the question of concerns about the validity of such classifications, see Maureen A. Weston, *Academic Standards or Discriminatory Hoops? Learning-Disabled Student-Athletes and the NCAA Initial Academic Eligibility Requirements*, 66 TENN. L. REV. 1049, 1104-05 (1999).

87. Jane Babin, *Adequate Special Education: Do California Schools Meet the Test?*, 37 SAN DIEGO L. REV. 211, 286 n. 473 (2000) (citing Clyde A. Winters, *Learning Disabilities, Crime Delinquency, and Special Education Placement*, 32 ADOLESCENCE 451, 451–60 (1997)). *See also*, Larkin McReynolds & Gail Wasserman, *Risk for Disciplinary Infractions Among Incarcerated Male Youths: Influence of Psychiatric Disorder*, 35 CRIM. JUST. & BEHAV. 1174, 1175 (2008), citing Gail Wasserman et al, *The*

disabled children are an astonishing "220% more likely to be adjudicated delinquents than non-disabled youths."[88] Scholars have speculated that at least one reason for this link may be the disability itself:

> Compounding this problem is the reality that characteristics common to children with learning disabilities such as difficulty in listening, thinking, and speaking often lead to misinterpretation of a child's behavior. As a result, a disabled minor's poor presentation in court or during interrogation may be interpreted as dangerous, resulting in detention.[89]

Much of this has been well documented for years, but there is now a new nuance which has received sparse attention[90]—the potential relationship between a learning disability label and an individual being subject to capital punishment. In the 2002 case of *Atkins v. Virginia*, the Supreme Court held that the execution of people with mental retardation violated the Eighth Amendment's prohibition

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Voice DISC-IV with Incarcerated Male Youth: Prevalence of Disorder, 41 J. AMER. ACAD. CHILD & ADOLESCENT PSYCHIATRY 314 (2002) (among incarcerated juveniles, the rate of mental illness rises to as high as 65%).

88. *Id.* (quoting Francis T. Murphy, *Learning Disabilities and the Courts: Taking a Stand Against Indifference*, N.Y.L.J., Jan. 24, 1996, at S1 (Justice Murphy, at the time, was the Presiding Judge of the NY Appellate Division)).

89. Kathleen Kelly, *The Education Crisis for Children in the California Juvenile Court System*, 27 HASTINGS CONST. L.Q. 757, 760 (1999–2000); *see also* Peter E. Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389, 391–92 (1995). 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*, 47 AM. PSYCHOLOGIST 511, 511 (1992), as discussed in Perlin, *Lepers and Crooks*, *supra* note 4, at 688 n.19.

90. *But see* Smith v. Texas, 543 U.S. 37, 41 (2004) (reversing death penalty conviction in case in which defense counsel had presented mitigating evidence that Smith had learning disabilities and an IQ of seventy-eight which resulted in him being placed in special education classes). *See also* Holly Geerdes & Nikki Cox, *Death Penalty Law*, 57 MERCER L. REV. 479, 504 (2006) (discussing *Smith v. Texas* in this context); Francine Banner, *Rewriting History: The Use of Feminist Narratives to Deconstruct The Myth of the Capital Defendant*, 26 N.Y.U. REV. L. & SOC. CHANGE 569, 598 (2000–2001) (discussing capital sentencing and stating, "Other conditions that can lead to marginalization and may best be explored through counter-narrative are mental difficulties and learning disabilities.").

against cruel and unusual punishment.[91] The opening paragraph of Justice Stevens' majority opinion speaks to the question at hand:

> Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.[92]

In coming to its conclusion, the Court drew on evidence persuading it that:

> Exempting the mentally retarded from that punishment will not affect the 'cold calculus that precedes the decision of other potential murderers . . . . Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders . . . . Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.[93]

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91. 536 U.S. 304, 321 (2002). I discuss *Atkins* in detail in Michael L. Perlin, *"Life Is in Mirrors, Death Disappears": Giving Life to* Atkins, 33 N.M. L. REV. 315 (2003) [hereinafter Perlin, *Mirrors*], in Michael L. Perlin, *Recent Criminal Legal Decisions: Implications for Forensic Mental Health Experts*, *in* FORENSIC PSYCHOLOGY: EMERGING TOPICS AND EXPANDING ROLES 333 (Alan Goldstein ed., 2006), and MICHAEL L. PERLIN & HEATHER ELLIS CUCULO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (2008 Cum. Supp.), § 12-4.2b, at 124–36.

92. *Atkins*, 536 U.S. at 306.

93. *Id*. at 320 (citing, in part, Gregg v. Georgia, 428 U.S. 153, 186 (1976)).

Clearly, many persons with learning disabilities will fit into the Court's language in *Atkins*.[94]

Five years ago, I presented a paper on *Atkins* at the annual meeting of the American College of Forensic Psychology in San Francisco, California.[95] After my presentation concluded, an audience member (a forensic psychologist) approached me in the hall and told me this story.[96] He had been asked to consult with defense counsel on a death penalty case in which the defendant's IQ was clearly within the mental retardation range, but in which the defendant had never been classified as retarded or in need of special education. Puzzled, the psychologist investigated and contacted the school system that the defendant had attended. He was told that the decision to not so classify the person in question was a deliberate one, in spite of the fact that there was no question that he was, in fact, retarded.

The reasoning went like this: the individual was African-American from an economically impoverished background and a shattered nuclear family. It was likely that he was going to have so many hurdles to face as he grew up, that, by avoiding the "mentally retarded" label (and keeping him out of special education classes), the school district was "doing him a favor" by placing one less obstacle in his way.[97] Now, given the Court's finding in *Atkins* that mental retardation involves "not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that bec[o]me manifest

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94. The Court defined mental retardation as involving "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.* at 318.

95. Michael L. Perlin, *Atkins* for Experts (unpublished manuscript, on file with author) (presented in April 2004).

96. I have no independent verification of the story, but I cannot fathom why he would tell me this if it were not true.

97. Rebekah Gleason, *Charter Schools and Special Education: Part of the Solution or Part of the Problem?*, 9 UDC/DCSL L. REV. 145, 164 (2007) (discussing schools surveyed in a Department of Education study used that "did not believe in labeling students as needing special education"); Moira O'Neill, *Delinquent or Disabled? Harmonizing the IDEA Definition of "Emotional Disturbance" with the Educational Needs of Incarcerated Youth*,57 HASTINGS L.J. 1189, 1207 (2006) ("[S]chools often use . . . exclusionary language to avoid labeling students as emotionally disturbed, preventing intervention and appropriate services while the youth is still in school.").

before age 18,"[98] the fact that there is no record of the defendant manifesting these characteristics before that age may ultimately lead to his death.

I raise this here because it suggests to me how confounding any inquiry into all of the potential outcomes of a labeling decision, (or non-decision,) may be. No decisions in American courts are truly politics-free. The school district officials who declined to categorize the person to whom I just referred to as "mentally retarded" thought they were doing him a favor, and presumably were acting with munificent intentions. And they overtly premised their decision on political grounds. Yet, the implications of this decision could be the most profound of any decision-maker in American society—even though motivated by altruism, it could cost the individual his life.[99]

VI. LABELING AND GAMING

Over the years, scholars devoted much attention to what is commonly referred to as "labeling theory." They concluded that, when individuals are labeled as social deviants, labeling can often lead to social ostracism, social fragmentation, and social conflict.[100] The "very pattern of identification has consequences for the labeled person that are difficult to escape and contribute to recurring patterns of exclusion and deviant behavior."[101] Or, to put it simply, "the label

98. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

99. This conundrum may be one to inspire further inquiry from the perspective of therapeutic jurisprudence and its relationship to the criminal law. *See*, *e.g.*, David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS. L. REV. 743 (2005); DAVID B. WEXLER, REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (2008); David B. Wexler, *A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law, Research, and Practice,* 7 FLA. COASTAL L. REV. 95 (2005); Astrid Birgden & Tony Ward, *Pragmatic Psychology Through a Therapeutic Jurisprudence Lens*, 9 PSYCHOL. PUB. POL'Y & L. 334 (2003).

100. Claire B. Steinberger, *Persistence and Change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 LAW & PSYCHOL. REV. 55, 65 n.63 (2003) (citing Douglas Raybeck, *Anthropology and Labeling Theory: A Constructive Critique*, 16 ETHOS 371, 376 (Dec. 1988)).

101. Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 169 (1987).

of one as a deviant furthers one's self-identification as a deviant."[102] As Professor Martha Minow has noted, "The effect of others' views, when those views assign the label of deviance, may well cause the individual to internalize that label, and feel degraded."[103] "The labeling theory approach emphasizes the community's responsibility in assigning that label and attributing particular meanings of exclusion to it."[104] On the specific question of labeling and mental disability, she added:

> As used in the past by advocates for reform of the treatment of the mentally disabled, labeling theory focused attention on the majority that both assigned the label of mental incompetence and created the label's exclusionary effect. The approach contended that some of the characteristics used to support the label were either figments of the majority's imaginations, or responses of the labeled person to the effect of the label. These advocates did not assert that mental disability is itself fictional, but instead challenged particular consequences of the label's application.[105]

According to Matt Cohen, a special education attorney:

> The label becomes a scarlet letter branded on the person's identity, shaping people's assumptions and provoking their prejudices. The labels shape people's assumptions about a person's intellectual ability, about their personality, about their aspirations. In the school environment, the child's label may have a significant impact on the teachers' expectations for that child. Similarly, a particular label may have a profound impact on a parent's perception of their child.[106]

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102. Darryl Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1358 (2001).
103. Minow, *supra* note 101, at 170 (citing EDWIN PFUHL, THE DEVIANCE PROCESS 213 (1980)).
104. *Id.* at 171.
105. *Id.* at 170–71.
106. http://www.ldonline.org/legal/cohen_paper_label.html (last visited, May 25, 2004).

As Jan Hunt, an education specialist has put it, "'Labeling is disabling' because children believe what we tell them."[107]

On the specific question of the relationship between labeling and learning disabilities, Professor Bruce Winick is explicit:

> Labeling the student as *learning disabled* may further this tendency, but an individual who truly has a learning disability may learn strategies and techniques to mitigate or overcome this disability. If the student is labeled as incompetent at reading or arithmetic, however, he or she may never again attempt these activities with the degree of commitment and energy required to master them.[108]

Other studies demonstrate that students who are deemed eligible to receive special education services are "unnecessarily isolated, stigmatized, and confronted with fear and prejudice."[109]

Because of these potentially serious consequences, the IDEA requires school administrators to make independent decisions as to whether or not to conduct an evaluation to determine whether a child is disabled for purposes of the IDEA. Parental consent must be

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107. Jan Hunt, "Learning Disability": A Rose by Another Name, http://www.naturalchild.com/jan_hunt/learning.html (last visited Feb. 12, 2009).

108. Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 19 (1995). For further discussion, see Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999), and S. Elizabeth Wilborn Malloy, *The Interaction of the ADA, the FMLA, and Workers' Compensation: Why Can't We be Friends?*, 41 BRANDEIS L.J. 821 (2002–2003) (Although an individual can benefit from the ADA, social security and workers' compensation concurrently, the differences in qualifications to gain the benefit and the subsequent benefits can create adverse consequences.).

109. Losen & Welner, *supra* note 73, at 407. *See also* Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1082 (2004–2005) (discussing House of Representatives Committee Report, H.R. REP. NO. 108-77, at 84, 98 (2003), that concluded that "the mislabeling of minority students has `significant adverse consequences' because of the stigma attached to labeling a child with a disability, the decreased self-perception of the labeled child, and the reduced curriculum that eligible children often receive"). On the "inevitability" of stigma in a race-based context, see Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 725.

obtained as a predicate to such actions.[110] Further, as Professor Glennon has explained:

> Evaluations must meet numerous criteria designed to protect against mistaken identifications. For example, evaluation data must be collected by individuals with relevant training, and tests and other evaluation materials must be tailored to assess specific areas of educational need, such as reading and communication skills. These statutory protections extend to the interpretation of the data. A group of knowledgeable persons must consider evaluation data in light of a variety of factors, including the student's social or cultural background, physical condition, and any adaptive behavior. A child may be placed in special education only if the team determines that (1) the child has one or more of the listed disabilities; (2) the disability interferes with educational performance; and (3) due to the disability, the child needs special education.[111]

But there is another important side to all of this, and it is one that requires serious attention. The OCS[112] "take" on special education and learning disabilities is radically different. To much of the public, *this* labeling is a game, a game controlled by the wealthy and the ambitious who, by manipulation and with the aid of conspiring educational evaluators, are able to have their children labeled as "LD" so as to "buy" them more time on tests (especially standardized college board-type tests) to increase the likelihood that they will get into more prestigious universities, and that, once at such universities, will be given more time on exams and on standardized tests needed for graduate schools (such as the law boards), thus improperly enhancing their grade point averages and their chances of admission

110. 34 C.F.R. § 300.504(b) (1994). However, if a parent refuses consent, the school district can initiate an administrative hearing process to seek an order requiring an evaluation. *Id.*

111. Glennon, *Race*, *supra* note 68, at 1248 (citing 34 C.F.R. § 300.532 (1994), 20 U.S.C. §§ 1412(5)(C), 1414(a)(5) (1994)); 34 C.F.R. § 300.533 (1994), and 34 C.F.R. § 533(b) (1994)).

112. *See* Sherwin, *supra* note 68, at 737; Perlin, *Psychodynamics*, *supra* note 69, at 29; Perlin, *A Law of Healing*, *supra* note 70, at 421–23.

to a more prestigious law school or other graduate program.[113] Beth Robinson, who administers student-disability issues for the College Board, has been quoted as saying, "And it doesn't matter what test you're taking. If people can find a way to give their kid an advantage, that family will do it, whether it's the SAT or something else."[114] Again, there are social and racial politics at play here.[115] At least one important critic has charged that the expansion of the "learning disability" category serves as a means of creating "a protective category for . . . white students or as a more 'acceptable' than labels of mental retardation or emotional disturbance for students of color experiencing school difficulties"[116] in a way that

113. *See*, *e.g.*, Weston, *supra* note 86, at 1059 (discussing critique charging that disabilities law give some a "competitive advantage"); *id.* at 1059 n.44 (conveying the allegations by some that "a little learning disability can be an advantageous thing"). Due to differences in definitions between the ADA and IDEA, students with a disability who did not receive services in primary and secondary school have a greater chance of receiving services during higher education. Under the ADA, an individual is eligible if he or she either has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having such an impairment. 42 U.S.C. § 12102(2) (2006). In contrast to the ADA, which uses broad terms to define impairment, the IDEA specifically lists the impairments that are considered disabilities. 20 U.S.C. § 1401(3) (2006).
On the significant differences (for funding purposes) between the IDEA and § 504 of the Rehabilitation Act of 1973, see Garda, *supra* note 41, at 447 ("Because states receive no federal monies for children eligible solely under [§] 504, there is arguably a strong incentive to over-identify children as IDEA eligible.").

114. Michael Scott Moore, *Buying Time*, available at http://archive.salon.com/books/it/2000/02/09/test/print.html (last visited Feb. 12, 2009). There is no valid and reliable empirical evidence that the perception that "gaming the system" actually "buys" an advantage for a test-taker without a disability, but in this area, as in so many other areas of law, society and policy, the "vividness heuristic" overwhelms the evidentiary database. *See* Perlin, *Psychodynamics*, *supra* note 69. On the pernicious role of related perceptions in all of law school admissions, see Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41, 93–94 (2006).

115. In *Forest Grove School Dist. v. T.A.*, 129 S.Ct. 2484 (2009), the Supreme Court held that the IDEA did not categorically bar reimbursement of private-education tuition if a child had not previously received special education and related services through the public school, and that it authorized reimbursement of the costs of child's private special-education services. On the multiple issues raised by questions involving the interplay of special education and reimbursement for private education, see Mark C. Weber, *Services for Private School Students Under the Individuals with Disabilities Education Improvement Act: Issues of Statutory Entitlement, Religious Liberty, and Procedural Regularity*, 36 J.L. & EDUC. 163 (2007).

116. Christine E. Sleeter, *Radical Structuralist Perspectives on the Creation and Use of Learning Disabilities*, *in* DISABILITY & DEMOCRACY 153, 161–62 (Thomas M. Skrtic ed. 1995).

allows white middle-class parents to obtain special benefits for their children.[117]

For a period of time, the Educational Testing Service (ETS) "flagged" test scores of students who received extra time on exams.[118] A panel of experts, however, found that this practice "appear[ed] to single out and treat the group with learning disabilities unequally, [and] diminish[ed] fair chances for college admission."[119] ETS eventually settled litigation, and agreed to stop flagging exams.[120]

There is little question that the number of students in higher education reporting learning disabilities, as a percentage of those reporting any disability, continues to grow geometrically. In 1988, 16.1% of students with disabilities reported a learning disability. In 2001, the percentage more than doubled, rising to 40.1%, while at the same time the number of students reporting other disabilities declined.[121] To many, this takes the form of evidence that "some parents purposely take advantage of a learning disability label to give

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117. Christine E. Sleeter, *Learning Disabilities: The Social Construction of a Special Education Category*, 53 EXCEPTIONAL CHILD. 46, 47–48 (1986).

118. On ETS's practice of "flagging," see, for example, Nancy Leong, *Beyond* Breimhorst: *Appropriate Accomodation of Students with Learning Disabilities on the SAT*, 57 STAN. L. REV. 2135, 2136–37 (2005). *Compare* Wong v. Regents of Univ. of California, 410 F.3d 1053, 1066 (9th Cir. 2005) (Medical school applicant's "reading comprehension scores, when allowed to read without time limits, were at the 99.5 percentile, but *under time constraints*," were at the eighth grade level.).

119. Noel Gregg et al., *The Flagging Test Scores of Individuals with Disabilities Who Are Granted the Accommodation of Extended Time: A Report of the Majority Opinion of the Blue Ribbon Panel on Flagging*, *available at* http://www.dralegal.org/downloads/cases/breimhorst/majority_report.txt (last visited Feb. 12, 2009). *See generally* Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?* 38 CUMB. L. REV. 33 (2008-09).

120. The flagging case—*Breimhorst v. Educational Testing Service*, No. C-99-3387, 2000 WL 34510621 (N.D. Cal. Mar. 27, 2000)—is discussed extensively (and criticized) in Michael Edward Slipsky, *Flagging Accommodated Testing on the LSAT and MCAT: Necessary Protections of the Academic Standards of the Legal and Medical Communities*, 82 N.C. L. REV. 811 (2003-2004).

121. Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 217–18 (2003) (citing AM. COUNCIL ON EDUC., COLLEGE FRESHMEN WITH DISABILITIES: A BIENNIAL STATISTICAL PROFILE 7 tbl.2 (2001). The author speculates that among the possible reasons for the increase in students reporting learning disabilities was "the relatively recent discovery of handicapping earning disabilities, such as dyslexia, dyscalculia, dysgraphia, dyspraxia, Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD)." *Id.* at 218. As she notes further, "Learning disorders have always existed; they simply were not recognized as disabilities requiring accommodations." *Id.*

their fast-track children a hand-up."[122] Other authors are more malignant,[123] referring to invokers of disability laws as "opportunists,"[124] or as "malingerers,"[125] or "shameless shirkers,"[126] and criticizing such laws as providing a "lifelong buffet of perks [and] special breaks."[127] Others claim that "many students, possibly goaded by their disappointed parents, simply fake their impairment in order to get a free ride."[128] One critic in the popular press has characterized learning disabilities as an "opportunistic tautology."[129]

The reality, of course, is quite different. In the most important legal challenge to a policy by which Boston University (BU) made accommodations to students with learning disabilities:

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122. Williams, *supra* note 54, at 662 n.226 (citing Ruth Shalit, *Defining Disability Down*, NEW REPUBLIC, Aug. 25, 1997, at 16).

123. So are some judges. *See* Atkins v. Virginia, 536 U.S. 304, 354 (2002) (Scalia, J., dissenting) (charging, with no supporting evidence, that "nothing has changed" in over 300 years since Lord Hale discussed "the easiness of counterfeiting [mental] disability"). *Compare* Perlin, *Mirrors*, *supra* note 91, at 344 (characterizing this aspect of Justice Scalia's opinion as a "pathetic recapitulation of [the] dreary myth" reflected in the "fear of faking" by criminal defendants alleging mental disability). Valid and reliable instruments that expose feigned malingering have been available to researchers for years, and have been written about extensively in articles in databases that are readily available to Supreme Court justices. *See*, *e.g.*, Richard Rogers et al., *Explanatory Models of Malingering*, 18 LAW & HUM. BEHAV. 543 (1994); Richard Rogers et al., *Feigning Neuropsychological Impairment: A Critical Review of Methodological and Clinical Considerations*, 13 CLINICAL PSYCHOLOG. REV. 255 (1993) (cited in William Wilkinson, *Therapeutic Jurisprudence and Workers' Compensation*, 30 ARIZ. ATT'Y 28, 29 n.12 (April 1994)); Shayna Gothard et al., *Detection of Malingering in Competency to Stand Trial Evaluations*, 19 LAW & HUM. BEHAV. 493 (1995) (cited in, *inter alia*, David R. Katner, *Raising Mental Health Issues—Other than Insanity—in Juvenile Delinquency Defense*, 28 AM. J. CRIM. L. 73, 90 n.101 (2000)).

124. Jessica Barth, *Disability Benefits and the ADA after* Cleveland v. Policy Management Systems, 75 IND. L.J. 1317, 1320 (2000) (citing John Leo, *Let's Lower the Bar*, U.S. NEWS & WORLD REP., Oct. 5, 1998, at 19).

125. *See* Ann Hubbard, *A Military-Civilian Coalition for Disability Rights*, 75 MISS. L.J. 975, 1000–01 (2005–2006); *see also supra* note 123.

126. Michelle Stevens, *High Court Must Define Disability*, CHI. SUN TIMES, May 2, 1999, at 35.

127. Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 240 (2001) (quoting Shalit, *supra* note 122, at 16).

128. Samuel S. Heywood, *Without Lowering the Bar: Eligibility for Reasonable Accommodations on the Bar Exam for Learning Disabled Individuals Under the Americans with Disabilities Act*, 33 GA. L. REV. 603, 633 (1998-1999) (quoting critics).

129. Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning-Disabled Students and Student-Athletes Under the Rehabilitation Act and the Americans with Disabilities Act*, 41 AM. BUS. L.J. 145, 163 n.84 (2003) (quoting Shalit, *supra* note 122, at 16, 21).

> The court found that, not only were the university's initial policies toward students with learning disabilities based on uninformed stereotypes, myths, and misconceptions, there was not a *single* documented instance at BU in which a student with a learning disability had fabricated a disorder to claim eligibility for academic accommodations.[130]

In fact, the empirical research reveals this pattern:

> Further, when given extra time, students with learning disabilities score at comparable levels to students without disabilities. But these studies also find that students *without* disabilities do not improve their scores significantly when given extra time. In contrast, students with learning disabilities who are given extra time, although improving substantially from the regularly-timed exam condition, still score lower than students without disabilities given no extra time.[131]

Yet, the position of disparagement is still the one consonant with the public's OCS, and has served to malignantly contaminate the debate and discourse over special education law. If the common wisdom is right—which it definitely is not—then that would call into question all of the theory and policy that led to the creation of special education law. It would suggest that all special education law is a

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130. Peter David Blanck, *Civil Rights, Learning Disability, and Academic Standards*, 2 J. GENDER, RACE & JUST. 33, 49 (1998) (emphasis added) (discussing the decision in Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997), which held that Boston University discriminated against students with learning disabilities by establishing unreasonable eligibility criteria for qualifying as a student with a learning disability; by not providing reasonable procedures for evaluating their requests for academic accommodations; and by instituting a blanket policy precluding course substitutions in foreign language and mathematics as academic accommodations). *Cf.* Wong v. Regents of Univ. of California, 410 F.3d 1053 (9th Cir. 2005).

131. Blanck, *supra* note 130, at 49–50 (citing Elaine H. Alster, *The Effects of Extended Time on Algebra Test Scores for College Students with and Without Learning Disabilities*, 30 J. LEARNING DISABILITIES 222, 225 (1997), and M. Kay Runyan, *The Effect of Extra Time on Reading Comprehension Scores for University Students With and Without Learning Disabilities*, 24 J. LEARNING DISABILITIES 104, 108 (1991)) (emphasis added).

pretext, and that, with regard to this population, at least, the remedial and prophylactic aspects of IDEA are no more than a sham.

But when this position is examined critically, it reveals the same sort of sanism that pervades all aspects of mental disability law. Among the most common sanist myths[132] are the myths that (1) persons with mental disabilities are "faking"[133] and (2) such persons would not be mentally disabled if they only "tried harder."[134] The "gaming take" on special education and learning disabilities plays directly into these sanist myths in extremely troubling ways. In fact, this entire controversy appears to be a textbook reflection of the pernicious impact of the vividness heuristic.[135] One vivid, negative anecdote—perhaps even an apocryphal one with no basis in fact—overwhelms an extensive contrary statistical database.[136]

CONCLUSION

We cannot meaningfully and coherently think seriously about the special education/learning disability system without thinking about stigma, and we cannot think seriously about stigma without acknowledging its potential disparate impacts. I stated earlier that the learning disability descriptor was a multi-edged sword;[137] I have the inchoate suspicion that there are even more dimensions to this puzzle than I have been able to articulate here. But I believe that any analysis of the question at hand must begin with an acknowledgment of the complexity of the underlying social issues.

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132. *See generally* Perlin, *supra* note 1, at 393–97.

133. *See* 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 (1996–1997).

134. *See* Perlin, *supra* note 66, at 8.

135. *See* Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 536–37 (1993–1994). On the failures of the vividness heuristic as a cognitive device, see Amitai Aviram, *The Placebo Effect of Law: Law's Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54, 74–75 (2006–2007).

136. *See supra* text accompanying notes 112–14.

137. *See* Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 51 (2006) (discussing how changes in IDEA law "are, at best, double-edged").

Recall my discussions of sanism and pretextuality. Disability law policy reflects sanism and pretextuality at every important juncture. And this is no less so in matters of learning disabilities and special education law. Labeled children are—via sanism—typified, slotted, and stereotyped.[138] Pretextuality—reflected in decision-making that is infected by racial, class, and gender biases—dominates the entire system. Society's OCS—self-referential and non-reflective—lazily relies on the vividness heuristic (by way of stories that appear to be no more than "urban myths") to shape the public's views on difficult and complicated issues. And we are left with a system that is, in many important ways, stunningly incoherent.[139]

Earlier, I identified several pitfalls that must be considered if we are to understand the underlying issues: problems of funding, problems with the ways that mainstreaming is operationally done, and problems with the creation of new stereotypes.[140] Thinking about these again, we are once more confronted with the impact of sanism and pretextuality on each one of these "pitfalls."[141]

Recall finally my reference to a Bob Dylan line in the title of this paper today: "Simplify you, classify you." This is *precisely* what we do through our special education/learning disability system. We simplify complicated issues and categorize children's lives through rigid classification schemes. And, in doing so, to continue with the couplet in question, we also "deny [you]" and "defy [you]."[142] We deny the complexity of the issues, and we defy those—such as

138. On "slotting" in a related context, see Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111, 125 (1991) (The use of the typification heuristic by which treating doctors slot "patients into certain categories, and prescribes a similar regimen for all.").

139. *See* Perlin, *supra* note 3, at 3–5, 28–36 (concluding that mental disability law "is irrational and incoherent, and this irrationality and incoherence disables civil commitment law, institutional treatment law, civil rights law, and criminal procedure law").

140. *See supra* text accompanying notes 55–58.

141. *Compare* Weber, *supra* note 137, at 51 ("It is the vision of special education as something not all that special which should be driving reform. The vision should be that of children with disabilities whose progress is indistinguishable from that of their peers, due to intense and effective services and accommodations not restricted by the hours of the ordinary school day or the strictures of traditional educational programming. It is the vision of those children doing so, while mixed in with other children, without any stigma imposed on those who learn in different ways or with additional support.").

142. DYLAN, *supra* note 8.

Professors Glennon or Blanck or Weber—who seek to explicate these issues and to redefine them in socially progressive ways. All *I* really want to do—as Dylan might have said—is to shed some new light on the issue at hand. Perhaps then, we will take one step on the journey of making meaningful education for all children with disabilities a true and authentic reality.