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# Equality, I Spoke That Word/ As If a Wedding Vow: Mental Disability Law and How We Treat Marginalized Persons

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MICHAEL L. PERLIN AND JOHN DOUARD

“Equality, I Spoke That Word/As If a  
Wedding Vow”: Mental Disability Law and  
How We Treat Marginalized Persons

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## I. INTRODUCTION

Nearly thirty years ago, when I was the director of the New Jersey Division of Mental Health Advocacy, I litigated a case that changed my life.<sup>1</sup> That case—*Falter v. Veterans Administration*—was about the way veterans with mental illness (at that time, especially Vietnam veterans) were treated at the Veterans Administration (“VA”) Medical Center in Lyons, New Jersey.<sup>2</sup> Following the litigation in the *Falter* case, the VA promulgated the first Patients’ Bill of Rights on behalf of persons in its facilities,<sup>3</sup> and attention was paid to substantive areas of patients’ rights that all too often were previously ignored,<sup>4</sup> areas that have fallen again mostly into desuetude since the case.<sup>5</sup>

But what has lasted with me most vividly from *Falter* was one line of Judge Harold Ackerman’s initial decision: “[In this opinion], I am referring to how [plaintiffs] are treated as human beings.”<sup>6</sup> I read that line in the slip opinion, and for a moment, my breath stopped. Prior to that time, I had been representing persons with mental disabilities for nearly a decade,<sup>7</sup> and litigated other class actions that truly had a vast impact on the New Jersey mental health system.<sup>8</sup> But never before had a judge written a line like this in an opinion in one of my cases.

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1. The introduction relates Michael Perlin’s personal account of the *Falter* case and its importance to mental health law. We use the first-person pronoun here to avoid awkwardness (and factual inaccuracy).
  2. 502 F. Supp. 1178 (D.N.J. 1980).
  3. *Falter v. Veterans Admin.*, 632 F. Supp. 196, 203 (D.N.J. 1986) (“In December 1982, the V.A. Patients’ Bill of Rights was promulgated.”).
  4. See, e.g., *id.* at 203–08 (noting patients’ rights such as rights to privacy while using telephones, to privacy in reading mail, to visitation, and to attend religious services).
  5. See Michael L. Perlin, “*Through the Wild Cathedral Evening*”: *Barriers, Attitudes, Participatory Democracy, Professor ten Broek, and the Rights of Persons with Mental Disabilities*, TEX. J. C.L. & C.R. (forthcoming 2008) (manuscript at 4–5, on file with author) (discussing the paucity of recent developments in the area of “other institutional rights” in patients’ rights litigation).
  6. *Falter*, 502 F. Supp. at 1185.
  7. For a discussion of my early work in this context, see MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* xviii (2000) [hereinafter PERLIN, *HIDDEN PREJUDICE*]; Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 6–8 (1999) [hereinafter Perlin, *Half-Wracked*].
  8. See, e.g., *Doe v. Klein*, No. L12088-74 P.W. (N.J. Super. Ct. Law Div. 1977) (final order), reprinted in 1 MENT. DIS. L. REP. 475 (1977), and discussed in 2 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 3A-8, at 86 n.655 (2d ed. 1999) [hereinafter PERLIN, *MENTAL DISABILITY LAW*] (discussing the right of patients to specific staffing ratios in different state hospital units); *Schindewolf v. Klein*, No. L41293-75 P.W. (N.J. Super. Ct. Law Div. 1975), reprinted in 5 PERLIN, *MENTAL DISABILITY LAW*, *supra*, § 14-4, at 66–74 (2d ed. 2002), and discussed in 2 PERLIN, *MENTAL DISABILITY LAW*, *supra*, § 3C-7.ii, at 441–42 (discussing the right of patients to participate in voluntary, therapeutic compensated work programs as an aspect of the right to treatment); *Dixon v. Cahill*, No. L30977/y-71 P.W. (N.J. Super. Ct. Law Div. 1973), reprinted in 5 PERLIN, *MENTAL DISABILITY LAW*, *supra*, § 14-7, at 119–21 (2d ed. 2002), and discussed in Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 206–07 n.94 (2000) (citing *Jackson v. Indiana*, 406 U.S. 715 (1972) (applying Due Process Clause to incompetent-to-stand-trial defendants)).

I have thought about this sentence countless times in the intervening twenty-eight years (and have cited it many, many times).<sup>9</sup> When I became a professor and turned my scholarly attention to the ravages of sanism<sup>10</sup> and pretextuality,<sup>11</sup> and how they have contaminated—and continue to contaminate—all of mental disability law, this sentence was always the foil, the response to the bigoted statements made to me so many times by other judges.<sup>12</sup> If only all judges deciding cases involving persons with mental disabilities *got* what Judge Ackerman expressed in this opinion, how different the legal landscape would be.

9. See, e.g., 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, 754 n.120 (2005) [hereinafter Perlin, *Best Friend*]; Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 698 n.84 (2003) [hereinafter Perlin, *Lepers*]; Michael L. Perlin, *Things Have Changed: Looking at Non-institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 541 n.49 (2002–03) [hereinafter Perlin, *Things Have Changed*]; Michael L. Perlin, “*Where the Winds Hit Heavy on the Borderline*”: *Mental Disability Law, Theory and Practice, Us and Them*, 31 LOY. L.A. L. REV. 775, 789 (1998).

10. I have defined sanism as:

[A]n irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and de-individualization, 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.

Perlin, *Half-Wracked*, *supra* note 7, at 4–5; see also PERLIN, *HIDDEN PREJUDICE*, *supra* note 7, at xviii–xix. On the roots of such stigma, see generally Patrick Corrigan et al., *From Whence Comes Mental Illness Stigma?*, 49 INT’L J. SOC’L PSYCHIATRY 142 (2003).

11. Pretextuality refers to the ways in which courts

accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decisionmaking, specifically where witnesses, especially expert witnesses, show a high propensity 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.

Michael L. Perlin, “*She Breaks Just Like a Little Girl*”: *Neonaticide, the Insanity Defense, and the Irrelevance of “Ordinary Common Sense”*, 10 WM. & MARY J. WOMEN & L. 1, 25 (2003) [hereinafter Perlin, *She Breaks Just Like a Little Girl*]; see also Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of “Ordinary Common Sense,” Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 135 (1991); *infra* text accompanying note 76.

12. No example is perhaps as chilling as the following:

Sometime after the trial court’s decision in *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) (granting involuntarily committed mental patients a limited right to refuse medication), I had occasion to speak to a state court trial judge about the *Rennie* case. He asked me, “Michael, do you know what I would have done had you brought Rennie before me?” (the *Rennie* case was litigated by counsel in the N.J. Division of Mental Health Advocacy; I was director of the Division at that time). I replied, “No,” and he then answered, “I’d’ve taken the son-of-a-bitch behind the courthouse and had him shot.”

Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 421 n.94 (2000) [hereinafter Perlin, *A Law of Healing*].

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The *Falter* opinion also contains the roots of what has come to be known as therapeutic jurisprudence (“TJ”). TJ presents a new model by which we can assess the ultimate impact of case law and legislation that affects mentally disabled individuals; study the role of the law as a therapeutic agent; recognize that substantive rules, legal procedures, and lawyers’ roles may have either therapeutic or anti-therapeutic consequences; and question whether such rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles.<sup>13</sup> Judge Ackerman’s insight—that the *Falter* case was, basically, about whether the plaintiffs, institutionalized because of their mental disability, were treated “as human beings”—is as concise and perfect an expression of TJ as exists in the legal canon.<sup>14</sup>

This is especially important, for the law can and should use TJ as a mechanism “to expose pretextuality and strip bare the law’s sanist façade,”<sup>15</sup> and thus become a powerful tool to serve as “a means of attacking and uprooting ‘the we/they distinction that has traditionally plagued and stigmatized the mentally disabled.’”<sup>16</sup> It is an approach that scholars, litigators, decision-makers, and policymakers must always keep in mind.

The papers that are collected in this issue of the *New York Law School Law Review* all, in different ways, explore this theme and the tension that comes with it.<sup>17</sup> One article deals with the ways that society treats sex offenders.<sup>18</sup> Another article deals with the ways society provides advocacy services to persons institutionalized because of mental disabilities.<sup>19</sup> Two articles deal with core aspects of institutional mental disability law (civil commitment and institutional rights),<sup>20</sup> and one note deals

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13. See Perlin, *Best Friend*, *supra* note 9, at 751.

14. The *Falter* case preceded the publication of Professor David Wexler’s first TJ book by a decade. See DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990).

15. Perlin, *Things Have Changed*, *supra* note 9, at 544.

16. PERLIN, *HIDDEN PREJUDICE*, *supra* note 7, at 301 (quoting David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 776 (1993)).

17. All of these papers also have a thematic connection to New York Law School. They were either authored by New York Law School adjunct professors or presented at the 30th International Congress on Law and Mental Health, in Padua, Italy, on panels where Perlin participated or moderated. See XXXth International Congress on Law and Mental Health, Final Program, [http://ialmh.org/Padua2007/Final\\_Program.doc](http://ialmh.org/Padua2007/Final_Program.doc) (last visited Nov. 25, 2008) (listing presentations).

18. John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 1, 31 (2008) (this issue).

19. Karen O. Talley, *Independent Protection and Advocacy: The Role of Counsel in Institutional Settings*, 53 N.Y.L. SCH. L. REV. 1, 55 (2008) (this issue).

20. Henry A. Dlugacz, *Outpatient Commitment: Some Thoughts on Promoting a Meaningful Dialogue*, 53 N.Y.L. SCH. L. REV. 1, 79 (2008) (this issue); Maureen Hackett, *Smoke-Free State Psychiatric Facility Grounds: Is Legislation Necessary and Appropriate to Remove Tobacco from These Treatment Settings?*, 53 N.Y.L. SCH. L. REV. 1, 99 (2008) (this issue).

with medical errors and health care confidentiality.<sup>21</sup> But all of these papers share a constant leitmotif: the ways that society does not take seriously the impact of institutionalization on persons with mental disabilities,<sup>22</sup> and the ways that society continues to marginalize and dehumanize such individuals, sometimes under the guise of public protection, sometimes under the guise of benevolence.

Moreover, an underlying concern of these papers is the extent to which hospitalization may affect other institutions—such as the criminal justice system—in ways that are potentially damaging to the rights of citizens generally. When read together as a unit, these papers reinforce—nearly two decades after the initial *Falter* opinion was published—Judge Ackerman’s prescient admonition.

In this essay, John Douard and I will discuss the papers that comprise this extraordinary symposium, keeping in mind this unifying theme. In Part II, we will discuss the shift from what criminologists call the carceral state to the therapeutic state, and the implications of that change. In Part III, we will discuss the papers in this special issue. In closing, we will seek to identify the common strands of scholarship that are reflected in these papers and that, we believe, unify critique of this area of the law.

Our title comes from Bob Dylan’s majestic and early anthem, *My Back Pages*, best known for its verse, “I was so much older then/I’m younger than that now.”<sup>23</sup> The line that we have chosen comes from this verse:

A self-ordained professor’s tongue  
Too serious to fool  
Spouted out that liberty  
Is just equality in school  
“Equality,” I spoke the word  
As if a wedding vow.  
Ah, but I was so much older then,  
I’m younger than that now.<sup>24</sup>

In an unpublished work, I explained why I used this lyric as the title of that paper:<sup>25</sup>

This lyric may be the reason I went to law school (it was a long time ago, and my memory is a little hazy). I tell it to people, but who knows? The point is

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21. Katherine Mikk, *Making the Plaintiff’s Bar Earn Its Keep: Rethinking the Hospital Incident Report*, 53 N.Y.L. SCH. L. REV. 1, 133 (2008) (this issue).
  22. Although Mikk’s note deals broadly with health care and hospitals, the issues she considers are as pronounced—perhaps *more* pronounced—in matters involving persons with mental disabilities. See, e.g., David R. Katner, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 WM. & MARY BILL RTS. J. 511 (2004).
  23. BOB DYLAN, *My Back Pages*, on ANOTHER SIDE OF BOB DYLAN (Columbia Records 1964).
  24. *Id.* Those who have visited Perlin’s office may recall that this verse is on the outside door.
  25. Michael L. Perlin, “Equality, I Spoke That Word/As If a Wedding Vow”: Therapeutic Jurisprudence and Social Justice (Mar. 2007) (unpublished paper, presented at conference at John Jay College of Criminal Justice, New York) (on file with author).

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that, for many persons, the idea of a legal system that incorporates concepts of the “autonomous individual” has been a myth (or, perhaps, more accurately, a cruel hoax) for centuries. If the “autonomous individual” was truly the legal system’s focus, we would not—50 years after *Brown*, 35 years after *Jackson v. Indiana*, and 30 years after *Roe v. Wade*—acknowledge that the disenfranchised and insular minorities that were the subject of the Supreme Court’s famous “footnote 4” in the *Carolene Products* case nearly 70 years ago remain,<sup>26</sup> all too often, disenfranchised and insular.

I believe that the use of TJ—as a tool for the exposure of these hoaxes and as a mechanism for advancing social justice is a way (perhaps the only way) to redeem the law for persons who have been marginalized. And perhaps, we will finally be able to say, to extend Dylan’s equality/wedding metaphor, “I do.”<sup>27</sup>

We come back to this lyric for this paper, because we believe that the individuals that all of the authors in this issue are writing about are the “disenfranchised and insular” that were the concern of the U.S. Supreme Court in *Carolene Products* and the twenty-three year old Bob Dylan. The line that we are using for the title has been quoted epigrammatically in prior law review articles, but has never before been deployed in a paper about this universe of disenfranchised and marginalized individuals.<sup>28</sup> The relationship between “equality” and “liberty” has been a vexed one in the history of political philosophy, but Dylan’s lyric captures the extent to which we speak these words without thinking about their scope and meaning. In the papers collected here, the focus is on a category of persons who too often are not regarded as worthy of equal concern and respect: persons with mental disabilities. Because such persons are often treated as less than equal citizens, the extent to which they are unjustly deprived of liberty goes unnoticed. This symposium issue is intended to help rectify that situation.

## II. FROM THE CARCERAL STATE TO THE THERAPEUTIC STATE

A nation’s criminal justice system reflects its primal fears of social anomie. The manner in which violent offenders are treated in the prison system of the United States is only the most superficial expression of those fears. Indeed, periodic movements to improve prison conditions, and to develop humane approaches to incarceration, may mask far more disturbing anxieties about social crises that threaten to undermine the social norms that structure our daily lives—norms regarding the

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26. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

27. Perlin, *supra* note 25, manuscript at 18–19.

28. For prior law review articles quoting this line, see James M. Binnall, *Deterrence Is Down and Social Costs Are Up: A Parolee Revisits Pennsylvania Board of Probation & Parole v. Scott*, 32 VT. L. REV. 199, 199 (2007); Dennis Ford Eagan, *The Past, Present, and Future of School Desegregation Law in Massachusetts*, 34 SUFFOLK U. L. REV. 541, 541 (2001). For a discussion on marginalization and mental disability in a related context, see Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63 (1991).

nature of families, the stability of communities, the proprieties of sexual conduct, and, more generally, the moral bonds and constraints of what sociologist Norbert Elias called “the civilizing process.”<sup>29</sup>

Criminologists describe the United States as a carceral or penal state, with a social organization shaped by methods of mass incarceration.<sup>30</sup> Since the mid-1970s, the dominant strategy for addressing violations of social rules has been imprisonment, with increasingly lengthy prison terms for the most violent crimes committed against the most vulnerable social groups.<sup>31</sup>

Recently, however, new strategies of social control are emerging that threaten or promise, depending on one’s point of view, to utilize civil commitment and new technologies of tracking offenders indefinitely.<sup>32</sup> These strategies tie professions designed to diagnose and treat mental disorders—psychiatry and psychology—to the criminal justice system with the aim of predicting and preventing putatively dangerous conduct.<sup>33</sup> Preventive detention, glossed as treatment rather than punishment, would supplant long prison terms for persons who can be identified as at high risk for committing dangerous crimes because of a mental illness or personality disorder.<sup>34</sup>

Civil commitment statutes, the most explicit model of preventive detention, make it possible to detain convicted sex offenders at the expiration of their prison terms.<sup>35</sup> A close cousin of institutional preventive detention in this area is Megan’s Law, a version of which has been implemented in every state.<sup>36</sup> Megan’s Law utilizes

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29. NORBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* (Erik Dunning et al. eds., Edmund Jephcott trans., 2000).
  30. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 27–73 (2001); Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235 (2008); Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693 (2006).
  31. See Michael Tonry, *Crime and Punishment in America*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 3 (Michael Tonry ed., 1998); James Lynch, *Crime in International Perspective*, in *CRIME* 36–37 (James Q. Wilson & Joan Petersilia eds., 1995).
  32. See Cecil E. Greek, *Tracking Probationers in Space and Time: The Convergence of GIS and GPS Systems*, 66 FEDERAL PROBATION 51 (2002); Mara Lynn Krongard, *A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks*, 90 CAL. L. REV. 111 (2002).
  33. See Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157 (1996).
  34. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001).
  35. For a discussion of this issue, see Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 489, 490 (2006).
  36. See David S. DeMatteo, Note, *Welcome to Anytown, U.S.A.—Home of Beautiful Scenery (And a Convicted Sex Offender): Sex Offender Registration and Notification Laws in E.B. v. Verniero*, 43 VILL. L. REV. 581, 632 (1998).



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a complex web of restrictions on the movements of sex offenders released into the community, resulting in a kind of de-institutionalized preventive detention.<sup>37</sup>

We now turn to a discussion of the individual papers in this symposium issue, keeping in mind at all times the issues of social control and the ways that persons with mental disabilities (especially those institutionalized) are systematically treated.

### III. THE PAPERS IN THIS ISSUE

#### A. Douard

The article by John Douard may strike many readers as contrary and wholly counterintuitive to a useful social strategy for reducing recidivism rates among the most reviled of criminal offenders: sex offenders.<sup>38</sup> His article is nothing less than a repudiation of the entire enterprise of demonizing the “monstrous” sex offender.<sup>39</sup> His article forces us to consider how our blind fury—in the light of a series of horrific and heavily publicized sexual crimes against young children—has led us to enact a series of purportedly prophylactic laws that are based in large part on facts-not-in-evidence about (1) the incidence of sexually violent crime, (2) the relationships between offenders and victims, (3) the treatability of victims, and (4) the role of mental disorders in the commission of sex offenses.<sup>40</sup> The ways sex offenders are framed rhetorically as monsters shape the social and legal response to sex offending far more than empirical data about recidivism rates warrant. Moreover, mentally-ill people are stigmatized in the aggregate as being disproportionately and idiosyncratically dangerous when sex offenders are categorized as persons with mental disorders.

Douard argues that sex offenders are framed as monsters, and their behavior is framed as monstrous, denying them basic characteristics of personhood: the capacity to control one’s sexual behavior and normal cognitive and affective abilities of persons.<sup>41</sup> The framing of sex offenders as monsters serves an important social function: scapegoats for anxieties about social disorder. Sex offenders are a kind of domestic terrorist, threatening our social norms of stability, love, and parenting responsibility.<sup>42</sup> That these norms may be intrinsically unstable in the modern world

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37. See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 902–07 (2000); Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL’Y & L. 452 (1998); cf. Dlugacz, *supra* note 20.

38. Douard, *supra* note 18.

39. *Id.* at 41–45.

40. See Ahluwalia, *supra* note 35, at 494; R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-analysis of Sex Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348 (1998).

41. Douard, *supra* note 18, at 37; see also John Douard, *Loathing the Sinner, Medicalizing the Sin: Why Sexually Violent Predator Statutes Are Unjust*, 30 INT’L J. L. & PSYCHIATRY 36 (2007).

42. See Heather Ellis Cucolo, *Right to Sex in the Treatment and Civil Commitment of Sexual Violent Predators* (June 5, 2007) (unpublished paper, presented at 30th International Congress on Law and Mental Health, Padua, Italy), as discussed in Michael L. Perlin, “Everybody Is Making Love/Or Else

is a possibility society cannot easily accept, because it implicates everyone. Stigmatizing scapegoats distracts individuals from their own roles in producing social anomie. Society has an ally in creating this class of scapegoats: psychiatric and other mental health experts, whose diagnoses and testimony are legally the most powerful instruments in grounding civil commitment of convicted offenders who have served their terms in prison, and in constraining and stigmatizing released sex offenders when they attempt to re-enter society.<sup>43</sup>

The rhetoric of rampant child sexual abuse in the media and among lawmakers is part of the dramatic narrative of sexual identity and power that is also used to symbolically construct the role of sex and its repression in American society as a whole.<sup>44</sup> Because sex offenders are at loose in society, threatening not only our children but our social stability, some people believe that society needs to affirm the boundary between the normal and the abnormal. The alternative would be to acknowledge that the impulses we believe are the causal source of sexual deviance are the all-too-human impulses to which we may all be subject. The only solution then, according to those in social power, is to purify sexual deviance, often with the law, by isolating the shameful source of deviance and rendering it harmless.

But of course, as Douard concludes, this is no solution at all to the very real harmful sexual conduct of child sex abusers, because it makes treatment both too mundane to serve our symbolic needs and impossible to achieve. The result is a denial of the humanity of sex offenders, and refusal to do the work required by rehabilitation and re-entry. It is a form of what Perlin calls pretextuality.<sup>45</sup>

Little has changed in the decade since Perlin wrote the following words about the most pretextual of all opinions, the U.S. Supreme Court's decision in *Kansas v. Hendricks*:<sup>46</sup>

*Hendricks*—in upholding a state law sanctioning long-term institutionalization of “sexually violent predators”—is not simply, in my mind, a constitutionally indefensible and intellectually muddled opinion. It is also a pretextual opinion. Mental disability law is permeated by a kind of meretricious pretextuality that is outcome-driven, acontextual and amoral. The *Hendricks*

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*Expecting Rain*: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, U. WASH. L. REV. (forthcoming 2008) (manuscript at 2, on file with author).

43. See JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 156 (1992); Michael L. Perlin et al., “*The Witness Who Saw/He Left Little Doubt*”: *A Comparative Consideration of Expert Testimony in Mental Disability Law Cases*, J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING (forthcoming 2008) (manuscript at 4, on file with author) (“Just as we ‘tend to ignore, subordinate or trivialize behavioral research in this area, especially when acknowledging that such research would be cognitively dissonant with our intuitive—albeit empirically flawed views,’ we give such evidence too *much* weight when it reinforces our previously internalized positions.” (quoting Perlin, *A Law of Healing*, *supra* note 12, at 422)).
44. See generally PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTIONS OF THE CHILD MOLESTER IN MODERN AMERICA (1998).
45. For a definition of pretextuality, see *supra* note 11.
46. 521 U.S. 346, 371 (1997) (upholding the Kansas Sexually Violent Predator Act).

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case reflects this pretextuality, and in so doing, reveals to us much of what is wrong with the development of mental disability law jurisprudence.<sup>47</sup>

But now consider the meretricious role of “ordinary common sense” (“OCS”).<sup>48</sup> Underlying much pretextuality is society’s use of OCS, a “powerful unconscious animator of legal decision making.”<sup>49</sup> “[W]here defendants do not conform to ‘popular images of craziness,’ the notion of handicapping mental disability is flatly and unthinkingly rejected.”<sup>50</sup> In arguing why it is essential to understand OCS if one is to understand why insanity defense attitudes have developed as they have, Perlin has written:

Not only is it “prereflective” and “self-evident,” it is susceptible to precisely the type of idiosyncratic, reactive decisionmaking that has traditionally typified insanity defense legislation and litigation. It also ignores our rich, cultural, heterogenic fabric that makes futile any attempt to establish a unitary level of OCS to govern decision making in an area where we have traditionally been willing to base substantive criminal law doctrine on medieval conceptions of sin, redemption, and religiosity.<sup>51</sup>

We believe that it is society’s reliance on OCS—a self-referential, non-reflective, self-absorbed way of seeing the world at large and the legal system in particular—that helps to illuminate much of what happens when people think about the sorts of cases discussed in Douard’s article. Individuals seek to simplify their information-processing tasks by engaging in heuristic thinking and by taking refuge in a false OCS.<sup>52</sup> Both of these limiting and narrowing devices cut the individual adrift from critical thinking and both offer overly-pat solutions for complex behavior. OCS, simply put, is an “incomplete and imperfect tool by which to assess criminality.”<sup>53</sup>

Our students’ responses in class mirror these attitudes. Perlin teaches Survey of Mental Disability Law each fall.<sup>54</sup> Students are, by and large, receptive to

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47. Michael L. Perlin, “*There’s No Success Like Failure/And Failure’s No Success at All*”: *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247, 1248–49 (1998).

48. See Perlin, *She Breaks Just Like a Little Girl*, *supra* note 11, at 25; 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, 1376 (1997) [hereinafter Perlin, *Insanity Defense*].

49. Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3, 22–23 (1990) [hereinafter Perlin, *OCS and Heuristic Reasoning*].

50. *Id.* at 24 (quoting Harold Lasswell, *Foreward to RICHARD ARENS, THE INSANITY DEFENSE xi* (1974)).

51. *Id.* at 29 (citation omitted).

52. Heuristics are “cognitive-simplifying devices that frequently lead to systematically erroneous decisions through ignoring or misusing rationally useful information.” Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 57 n.115 (1992) [hereinafter Perlin, *Fatal Assumption*].

53. MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 291 (1994); see also Perlin, *She Breaks Just Like a Little Girl*, *supra* note 11, at 26.

54. New York Law School also offers a separate stand-alone course in *Sex Offenders*. See New York Law School: Online Program in Mental Disability Law, <http://www.nyls.edu/mdl> (last visited Sept. 20, 2008). As the course description explains:

counterintuitive information (e.g., that not all mental patients are dangerous to others; that predictions of dangerousness are difficult to make,<sup>55</sup> and most predictive errors are “false positives”;<sup>56</sup> that most persons with serious mental illness are competent to engage in medication decision-making).<sup>57</sup> But they reject—flatly and

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This course will review contemporary public policy regarding sexually coercive behavior. A major focus will be the aggressive legislative approaches to sexual violence developed in the United States over the past 15 years. We will examine and evaluate these controversial legal approaches, as well as alternative approaches to the societal effort to address sexual violence. The course will include an examination of the current state of social science research into sexual violence, including etiology, classification, treatment, supervision, recidivism, and risk assessment. Our examination of legislative approaches to sexual violence will seek an understanding of the operation of these laws, the constitutional litigation challenging them, the legal issues currently in controversy, and an attempt to assess their efficacy as part of a system for addressing sexual violence in society. The course will address issues at a variety of levels of abstraction, examining the morality of the laws, their implications for public policy and the fight against sexual violence, as well as the practical skills and knowledge necessary for lawyers and other professionals to operate effectively.

New York Law School, Online Mental Disability Law Program: Course Description, <http://nyls.edu/pages/167.asp> (last visited Sept. 20, 2008).

55. The inability of psychiatric professionals to predict violence has been specifically recognized by the U.S. Supreme Court. *See, e.g., Heller v. Doe*, 509 U.S. 312, 323–24 (1993) (There are “difficulties inherent in diagnosis of mental illness. It is thus no surprise that many psychiatric predictions of future violent behavior by the mentally ill are inaccurate.” (internal citation omitted)).

56. Perlin has explained the following about false positives:

Errors in overpredicting violence are known as “false positives,” i.e., a person falsely predicted to be dangerous, as opposed to “false negatives,” i.e., a person falsely predicted to be not dangerous. *See, e.g., Wilkins, The Case for Prediction*, in 3 CRIME & JUSTICE 375 (1971). False positives have generally been “seen as preferable” errors for medical predictors to make. *See, e.g., H. STEADMAN & J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE* 110 (1974). *But see, e.g., Von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 731 (1972) (“[W]e can afford little tolerance, indeed, of prediction methods that show a high yield of false positives.”).

Ironically, researchers have suggested that the false negative rate is much lower than the false positive rate. *See, e.g., Wenk, Robison & Smith, Can Violence Be Predicted?*, 18 CRIME & DELINQ. 393, 394 (1972) (“The best prediction available today, for even the most refined set of offenders, is that any particular member of that set will not become violent.”). *See generally Petrunik, The Politics of Dangerousness*, 5 INT’L J.L. & PSYCHIATRY 225, 244 (1982) (discussing heavy media focus on the problem of “false negatives[] individuals diagnosed as insufficiently dangerous enough to confine (or as safe enough to release) who are later found to have committed serious acts of personal violence or nonconsensual sexual offences,” in spite of research reports of a higher level of false positives.) (footnote omitted).

On the way courts err by making too many “false positives,” see Boehnert, *Characteristics of Successful and Unsuccessful Insanity Pleas*, 13 LAW & HUM.BEHAV. 31, 38 (1989).

Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 693 n.441 (1989).

57. *See Perlin, Lepers, supra note 9*, at 696 (“The presumption in which courts have regularly engaged—that there is both a de facto and de jure presumption of incompetency to be applied to medication decision

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without brooking any possible doubt or ambiguity—the presentation of *any* empirical evidence that the recidivism rate among sex offenders is lower than that of many other cohorts of felons, and the presentation of *any* such evidence that some treatment programs for sexual offenders are, in fact, successful.<sup>58</sup>

Douard has exposed students in his undergraduate ethics and philosophy of law courses to the major actuarial risk assessment instrument, the Static-99,<sup>59</sup> used to determine if sex offenders, at the expiration of their prison terms, are highly likely to reoffend if released. The instrument uses only historical and primarily unchangeable information about an offender to determine whether they belong to a class of high-risk offenders. High scores are presented in court as evidence that offenders should be civilly committed pursuant to the New Jersey Sexually Violent Predator Act.<sup>60</sup> The students are stunned when they learn that they, who have never committed a sex offense, nonetheless may have a relatively high Static-99 score on the basis of other historical information.<sup>61</sup>

Every time Detective Benson or Stabler—on NBC’s popular *Law and Order: SVU* program—says, “There’s no cure. And they all do it again,” that speaks to society’s OCS about this topic. Every newspaper article reporting that a sex offender was released into the community expresses the public misconception that there are reliable and valid ways to assess recidivism risk. Douard exposes the flaws of this OCS, and does it in a sober yet provocative way that is sure to charge the debate in this area of law and policy for years.

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making—appears to be based on an empirical fallacy.”); Bruce J. Winick, *The MacArthur Treatment Competence Study: Legal and Therapeutic Implications*, 2 PSYCHOL. PUB. POL’Y & L. 137 (1996).

58. See generally Hanson & Bussiere, *supra* note 40; U.S. DEP’T OF JUSTICE, BUREAU OF JUVENILE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003) (emphasis added), <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>.
59. The Static-99 is an actuarial sex offender risk assessment instrument. See Andrew Harris et al., Static-99 Coding Rules Revised—2003, [http://ww2.ps-sp.gc.ca/publications/corrections/pdf/Static-99-coding-Rules\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/corrections/pdf/Static-99-coding-Rules_e.pdf) (last visited Nov. 20, 2008). For further background, see generally Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL’Y & L. 357 (2006).
60. See N.J. STAT. ANN. §§ 30:4-27.24–27.38 (West 2008).
61. The Static-99 utilizes ten risk factors to place sex offenders in recidivism risk categories, some of which are not related directly to sex offending. Each risk factor is assigned a rating of zero, one, two, or three. In the case of sex offenders, a score over five represents a high risk to reoffend. Even a score of two or three represents a medium low, but non-negligible, risk to reoffend. Now, if we score only the non-sex offending factors, a subject who is eighteen to just shy of twenty-five years old received a score of one; who has not lived with an intimate partner for at least two years receives a score of one; who has been convicted of a non-sexual violent offense receives a score of one; and who has had four or more prior sentencing dates for any criminal offense receives a score of one. If the subject scores one of all of these non-sexual factors, they have a score of four independently of any sex offenses they may have committed. While the students did not commit sex offenses, some of their scores still resulted in showing that they had a non-negligible risk. Thus, while the Static-99 can be used only to place convicted sex offenders in categories of recidivism risk, the instrument utilizes non-sexual static risk factors to define an actuarial sex offense recidivism risk assessment.

*B. Talley*

Karen O. Talley's paper deals with a topic that is much less controversial—the quality and scope of advocacy services made available to persons institutionalized because of mental disability—but one that is no less important. It also shares one important commonality with the paper previously discussed as it demonstrates how the discourse on this topic is also premised on a fact-not-in-evidence: that robust advocacy services are available in abundance to all individuals so institutionalized. The data, rather, suggests that, in many jurisdictions, such counsel is woefully inadequate, disinterested, uninformed, and often hostile. A model of “paternalism/best interests” is substituted for a traditional legal advocacy position, and this substitution is rarely questioned. Few courts have ever grappled with adequacy of counsel questions in this context; fewer yet have found assigned counsel in involuntary civil commitment proceedings to be inadequate.<sup>62</sup> But advocacy, as Talley shows, can increase the sense of empowerment experienced by people with mental disabilities who are institutionalized only if the advocate has some independence and can help clients achieve a measure of legal competence, i.e., can advocate for themselves.

The federally-funded Protection and Advocacy (“P&A”) system began twenty-five years ago, after congressional hearings revealed that people with disabilities were being warehoused and deprived of basic rights.<sup>63</sup> P&A organizations are in every state and are mandated to provide protection and advocacy for people with disabilities, including mental disabilities.<sup>64</sup> Talley, who has twelve years of experience as a P&A attorney, lays out the advantages and disadvantages of attorney-advocates for people with mental disabilities in institutional settings. She notes that P&A attorneys who are assigned to psychiatric facilities, and thus have ongoing contact with their clients and with facility staff, can provide much needed communication and collaboration with court-appointed counsel.<sup>65</sup> Although, the mission of P&A attorneys does not generally extend to cases concerning civil commitment or court-ordered treatment (where there is a due process right to appointed counsel,<sup>66</sup> court-appointed attorneys often do not have the knowledge of their clients and often cannot or have not nurtured the cooperative relationships with institutional staff they need to serve their clients' interests).<sup>67</sup> Thus, P&A attorneys can make counsel's role more effective.

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62. Perlin, *Best Friend*, *supra* note 9, at 738. *See generally* Perlin, *Fatal Assumption*, *supra* note 52, at 39.

63. *See* Talley, *supra* note 19, at 56. *See generally* 3 PERLIN, *MENTAL DISABILITY LAW*, *supra* note 8, § 5B-3.2a, at 238–43 (2d ed. 2000).

64. *See* Talley, *supra* note 19, at 56.

65. *See id.* at 70–75.

66. *See, e.g.*, *Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983) (“A right to counsel in civil commitment proceedings may be gleaned from the Supreme Court's recognition that commitment involves a substantial curtailment of liberty and thus requires due process protection.”). On the right to counsel in involuntary civil commitment proceeding in general, see 1 PERLIN, *supra* note 8, § 2B, at 191–292 (2d ed. 1998).

67. *See* Talley, *supra* note 19, at 59.

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Talley also examines some of the conflicts that P&A attorneys must confront in institutional settings. Where they are informed of abuse of their clients by staff, they may have to litigate cases that can affect the trust built up over time with staff. P&A attorneys may also have to represent clients who have engaged in abusive conduct toward institutional staff members. Talley concludes that P&A attorneys in institutional settings can help to increase the sense of empowerment of people with mental disabilities, who are often among the most vulnerable and least powerful members of society.<sup>68</sup>

Although the intervening years have given us a maturing national P&A system<sup>69</sup> and have seen the expansion of advocacy networks in other nations,<sup>70</sup> it is clear that there is still much work to be done before we can safely and accurately assert that the population in question has access to effective, vigorous, advocacy-centered counsel. All too often, the charge leveled by Judge David Bazelon in 1973—that lawyers assigned to represent criminal defendants with mental disabilities are “walking violations of the Sixth Amendment”—still rings true.<sup>71</sup>

Talley’s paper demands that in the face of sanism,<sup>72</sup> advocacy should foster empowerment,<sup>73</sup> and that advocates should make clients into “effective self-advocates.”<sup>74</sup> Sanism permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, and expert and lay witnesses. Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law, and all aspects of the criminal process (pretrial, trial, and sentencing). It reflects what civil rights lawyer Florynce Kennedy has characterized as the “pathology of oppression.”<sup>75</sup> It is essential that lawyers—both occasional counsel and regularly-appointed counsel—begin to confront sanism and attack pretextuality as part of their advocacy role in precisely the ways that Talley suggests.<sup>76</sup> Also consider the role of pretextuality. Pretextuality’s poisonous nature is well known to frequent consumers of judicial services in this area: to mental health advocates and other public defender/legal aid/

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68. *See id.* at 75.

69. For a complete description of the Protection and Advocacy System, see National Disability Rights Network, <http://www.napas.org> (last visited Sept. 20, 2008).

70. *See* NATIONAL DISABILITY AUTHORITY, EXPLORING ADVOCACY: FULL REPORT (2003), *available at* <http://www.nda.ie>.

71. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973).

72. For a definition of sanism, see *supra* note 10.

73. *See* Talley, *supra* note 19, at 75.

74. *Id.* Inquiries into the role of self-advocacy are not new. For a discussion of the role of consumer groups in shaping mental health law policy, see Peter Margulies, *The Cognitive Politics of Professional Conflict: Law Reform, Mental Health Treatment Technology, and Citizen Self-Governance*, 5 HARV. J.L. & TECH. 25 (1992).

75. Perlin, *Half-Wracked*, *supra* note 7, at 9; Michael L. Perlin, *On “Sanism”*, 46 SMU L. REV. 373, 374 (1992).

76. PERLIN, HIDDEN PREJUDICE, *supra* note 7, at 32–33.

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.<sup>77</sup>

Talley's paper is a tonic for much of what ails mental health law.<sup>78</sup> As Talley argues, P&A attorneys who work in institutions can and do cut through the sanism and pretextuality that affects psychiatric staff and court-appointed attorneys. In an article about sanism and representation of persons with mental disabilities, Perlin wrote this several years ago:

In the past two decades, the myth has developed that organized, specialized and aggressive counsel is now available to mentally disabled individuals in commitment, institutionalization and release matters. The availability of such counsel is largely illusory; in many jurisdictions, the level of representation remains almost uniformly substandard, and, even within the same jurisdiction, the provision of counsel can be "wildly inconsistent." Without the presence of effective counsel, substantive mental disability law reform recommendations may turn into "an empty shell." Representation of mentally disabled individuals falls far short of even the most minimal model of "client-centered counseling." What is worse, few courts even seem to notice.<sup>79</sup>

Our hope is that Talley's article will force courts to notice.

### C. *Dlugacz & Hackett*

The core building blocks of modern mental disability law remain the law of involuntary civil commitment and the law of the civil rights of persons institutionalized in psychiatric institutions.<sup>80</sup> The otherwise-unrelated papers by Dlugacz and Hackett explore very different aspects of this area of the law: the constitutionality and feasibility of assisted outpatient treatment laws (as exemplified by New York's well-known and controversial Kendra's Law)<sup>81</sup> and the constitutionality and feasibility of hospital policies that do (or do not) allow patients to smoke tobacco on hospital grounds.<sup>82</sup> The first of these topics has been the subject of dozens of law review

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77. For a definition of pretextuality, see *supra* note 11; Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J. L. & HEALTH 15, 32 (1993).

78. Cf. 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, 343 (2000) ("[W]e contend that the incorporation of TJ into clinical methods can be a tonic—for students, for teachers, and ultimately, for case clients.").

79. Perlin, *Lepers*, *supra* note 9, at 690 (citations omitted).

80. See 1 PERLIN, MENTAL DISABILITY LAW, *supra* note 8, § 2C (2d ed. 1998); 2 PERLIN, MENTAL DISABILITY LAW, *supra* note 8, § 3C (2d ed. 1998).

81. See N.Y. MENTAL HYG. LAW § 9.60 (McKinney 2008).

82. See generally 2 PERLIN, MENTAL DISABILITY LAW, *supra* note 8, § 3C-6.6 (2d ed. 1999).



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articles and some symposia;<sup>83</sup> the second has been the subject of none. The first contains many of the high cards of mental disability law: the balance between autonomy and social control, the extent to which a person in the community can still be subject to social control, and the right of a person with a mental disability to refuse the imposition of antipsychotic medications. The second, at first blush, appears to be an issue of interest to only a handful of hospital administrators. Yet, as these two papers thoughtfully tell us, there is a great overlap of issues in play in both cases.

In his paper, Dlugacz—a practicing lawyer, law professor, and clinical social worker—embeds a series of issues, referred to as dialogue points, in his efforts to examine “the underlying assumptions of each stakeholder to the [involuntary outpatient commitment (“OPC”)] dialogue” in order to help us “examine how the interests related to those assumptions are vindicated (or not vindicated) in any proposed or existing OPC legislation.”<sup>84</sup> He notes the ways that the mass media has “reduced the ability for rational discourse about OPC,”<sup>85</sup> how our views on OPC are, to some extent, a *trompe d’oeil* illusion (“[w]here you stand on OPC depends upon where you sit”),<sup>86</sup> noting perceptively that “[e]xamining OPC as an alternative to inpatient commitment focuses on fundamentally different aspects of its effects than does an analysis viewing OPC as an autonomy reducing statute.”<sup>87</sup> He stresses the “visceral, polarizing reactions among many stakeholders on all sides of the issue,”<sup>88</sup> urging, in the words of John Monahan and his colleagues, that “[t]he ideologic posturing that currently characterizes the field [referring to OPC] must be replaced by an evidence-based approach.”<sup>89</sup>

Dlugacz’s analysis leads him to conclude that advocates in OPC cases “significantly influence the outcomes,”<sup>90</sup> and asks a question that is, at its base, a pure application of TJ to the question at hand: “what services would be useful to, and accepted by, any given client, and how would greater consumer participation in the development of treatment plans improve adherence to treatment with or without a

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83. See, e.g., Dora W. Klein, *Autonomy and Acute Psychosis: When Choices Collide*, 15 VA. J. SOC. POL’Y & L. 355 (2008); Bruce J. Winick et al., *Therapeutic Jurisprudence and Outpatient Commitment: Kendra’s Law as Case Study*, 9 PSYCHOL. PUB. POL’Y & L. 183 (2003) [hereinafter Winick et al., *Therapeutic Jurisprudence*]; Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL. PUB. POL’Y & L. 107 (2003).

84. Dlugacz, *supra* note 20, at 83.

85. *Id.* at 85.

86. *Id.* at 87.

87. *Id.* at 88.

88. *Id.* at 90.

89. John Monahan et al., *Mandated Community Treatment: Beyond Outpatient Commitment*, 52 PSYCHIATRIC SERVICES 1198, 1198 (2001).

90. Dlugacz, *supra* note 20, at 90.

court order?”<sup>91</sup> In answering this question, he stresses the significance of—perhaps the primacy of—empirical socio-economic data, quoting a report by the New York Lawyers for the Public Interest:

There are major racial, ethnic, and geographic disparities throughout New York State in the implementation of “Kendra’s Law.” Black people are almost five times as likely as White people to be subjected to this law—which dramatically reduces freedom of choice over their treatment and their lives—and Hispanic people are two and a half times as likely as non-Hispanic White people. People who live in New York City are more than four times as likely to be subjected to orders as people living in the rest of the state. Also, contrary to how it has been sold, the law is used mainly on people with multiple psychiatric hospitalizations but no histories of hurting others.<sup>92</sup>

Here, he poses a question that has not received nearly enough attention:

Is the assertion that, in specific instances, the provisions of Kendra’s Law are applied disproportionately to people of color because of their membership in racial groups? Or is the suggestion that, like other putatively neutral laws or social policies, the statute’s negative, disparate impact on racial minorities is reflective of broader social inequities? If an examination were to reveal the former, the issue does not warrant status as a dialogue point, but rather should be dealt with promptly and robustly under existing civil rights statutes.<sup>93</sup>

Dlugacz calls for a textured and nuanced analysis of the underlying issues, and this call reminds us how difficult it is to leave dogma behind in consideration of the charged issues that are topic of his paper.<sup>94</sup>

Hackett—a psychiatrist and law professor—looks at the question of the implications of the removal of tobacco in state hospital treatment settings, and shows how this ostensibly narrow question is, in reality, a surrogate for multiple complex questions related to the role of aggression in the hospital milieu.<sup>95</sup> Her paper demonstrates clearly and forcefully that the removal of tobacco from state hospitals

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91. *Id.* at 93. His follow-up questions are also, at their base, the essence of TJ inquiries:

For an advocate to answer this requires the examination of some tricky questions. One is foundational—what is the role of an advocate in the representation of the mentally disabled? But, given the number of jurisdictions nationally and internationally which have adopted OPC schema, a second could be characterized as strategic—has the battle engaged in by some to defeat the advance of OPC statutes been lost? If so, should the focus shift toward ensuring adequate representation of subjects of OPC proceedings and toward using OPC orders as leverage to secure scarce services for clients?

*Id.* at 93 n.60.

92. *Id.* at 95 (quoting N.Y. LAWYERS FOR PUB. INTEREST, IMPLEMENTATION OF “KENDRA’S LAW” IS SEVERELY BIASED, (Apr. 7, 2005), available at [http://nylpi.org/pub/Kendras\\_Law\\_04-07-05.pdf](http://nylpi.org/pub/Kendras_Law_04-07-05.pdf)).

93. *Id.*

94. *See id.* at 81–82.

95. *See* Hackett, *supra* note 20, at 102. For an earlier inquiry, see Edward R. Lyon, *A Review of the Effects of Nicotine on Schizophrenic and Antipsychotic Medications*, 50 PSYCHIATRIC SERVICES 1346 (1999).

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“creates a less aggression-prone treatment milieu and facilitates a higher likelihood for more effective treatment.”<sup>96</sup>

Her prism for purposes of analysis is a Minnesota law prohibiting the use of tobacco at state treatment centers,<sup>97</sup> the etiology of that law, the opposition to that law, and the need for supplemental prophylactic legislation “to protect the health and safety of our most vulnerable citizens.”<sup>98</sup> Her conclusion is clear: legislation to remove tobacco from state hospitals was medically necessary.<sup>99</sup>

Hackett’s paper also incorporates important aspects of TJ by demonstrating the collateral impacts of a smoking-tolerance policy. She notes, by way of example, how “staff and patients describe feeling intimidated by the intensity of patients’ drive to smoke and are fearful of the consequences of interfering with that desire.”<sup>100</sup> More starkly, she calls our attention to a positive correlation between suicide and smoking<sup>101</sup> and data that suggests that smoking “may actually predispose individuals to develop anxiety disorders”<sup>102</sup> and major depression.<sup>103</sup>

When read together, the Dlugacz and Hackett papers reflect the interplay between sanism/pretextuality and TJ. Dlugacz’s article mirrors Talley’s focus on the significance of effective advocacy (a reflection of the reality that inadequate counsel often makes the mental disability law process a pretextual sham),<sup>104</sup> and his rejection of “ideologic posturing”<sup>105</sup> harkens back to Judge Bazelon’s admonition that we need to be vigilant about not “overgeneraliz[ing] about citizens whom it is easy to overgeneralize about.”<sup>106</sup> Hackett’s article reminds us of how policies are established without due consideration of their impact on the lives of those whose activities are being regulated, a reflection of core sanist behavior.<sup>107</sup> Both articles employ a TJ-based analysis of the problems at hand as a means of dealing with the underlying

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96. Hackett, *supra* note 20, at 102.

97. See MINN. STAT. ANN § 246.0141 (2008).

98. Hackett, *supra* note 20, at 103.

99. *Id.* at 130.

100. *Id.* at 118 (citing NAT’L ASS’N OF STATE MENTAL HEALTH PROGRAM DIRECTORS, TECHNICAL REPORT ON SMOKING POLICY AND TREATMENT IN STATE OPERATED PSYCHIATRIC FACILITIES 7 (Joseph Parks & Peggy Jewell eds., Maile Burke, technical writer, 2006), available at <http://www.nasmhpd.org>).

101. See *id.* at 114 (citing David Hemenway et al., *Smoking and Suicide Among Nurses*, 83 AM. J. PUB. HEALTH 249, 250 (1993)).

102. *Id.* at 112 (citing Jeffrey G. Johnson et al., *Association Between Cigarette Smoking and Anxiety Disorders During Adolescence and Early Adulthood*, 284 JAMA 2348, 2350 (2000)).

103. See *id.* at 111 (citing Holly E. R. Morrell & Lee M. Cohen, *Cigarette Smoking, Anxiety and Depression*, 28 J. PSYCHOPATHOLOGY & BEHAV. ASSESSMENT. 283, 290 (2006)).

104. See, e.g., Perlin, *Best Friend*, *supra* note 9, at 750–52.

105. Dlugacz, *supra* note 19, at 90.

106. David Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897, 909 (1975).

107. On our failure to care about what happens to such individuals, and the implications of that failure to care, see Perlin, *Insanity Defense*, *supra* note 48, at 1425–26 (discussing insanity defense pleaders).

dilemmas, and both take seriously Judge Ackerman's observation about how persons with mental disabilities are "treated as human beings."<sup>108</sup>

*D. Mikk*

In her note, Katherine Mikk examines the role of hospital incident reports in both hospital quality assurance strategies and malpractice litigation. Mikk's analysis reveals the extent to which OCS may undermine the process of improvement of quality of care that incident reports are intended to promote.<sup>109</sup> An incident report documents the occurrences of unusual events, or events that are outside routine hospital procedures. While it is an internal report hospitals use to improve quality, the incident report may also be discoverable by plaintiffs in malpractice lawsuits. But these purposes of the incident report are in tension with one another. Absent a high degree of confidentiality, unusual incidents may not be reported by hospital staff, and allowing incident reports to be discoverable violates any confidentiality incident reports are thought to enjoy.<sup>110</sup> Thus, if we want hospitals to improve hospital conditions and reduce medical errors, our legal system will have to ensure that incident reports have a high level of confidentiality. To do so, we must conceive of incident reports as documents that "compile the results of a hospital's investigation into what went wrong" for the purpose of improving quality of care.<sup>111</sup> According to OCS, hospital quality assurance programs are promulgated to decrease hospital errors. However, incident reports compiled by hospitals, which presumably play a role in quality assurance programs, become part of litigation. Because hospital staffs loathe enabling lawsuits, the legal role of incident reports may reduce their impact on quality of care. As in other institutional contexts considered in the papers by Talley and Hackett, the interests of patients are not always the interests served by institutional processes. Often, concerns about litigation dominate institutional decision-making.

#### IV. CONCLUSION

When taken as a whole, there are multiple important strands of thought that dominate this scholarship.

*A. OCS is usually wrong.*

We assume that all sex offenders are monsters and not able to be rehabilitated. We assume that advocacy services are plentifully available to all persons institutionalized because of mental illness. We assume that legislation like Kendra's Law will prevent tragedies like the death of Kendra Webdale from recurring. We assume that mental disability law decision-making is done in a neutral way. We

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108. *Falter*, 502 F. Supp. at 1185.

109. *See* Mikk, *supra* note 21.

110. *Id.* at 157-59.

111. *Id.* at 164.

## INTRODUCTION

assume that hospital policies are promulgated for the betterment and general welfare of patients. We assume that quality assurance programs are designed to reduce medical error. In each instance, our OCS is fatally flawed, and we must first come to grips with that stark reality.

*B. Sanism and pretextuality continue to dominate our social policies.*

Each of the topics discussed in the articles in this symposium reflects the ways that sanism and pretextuality shape all of mental disability law. There may be no area of mental disability law that is more pretextual than that governing the incapacitation of sex offenders.<sup>112</sup> Our failure to provide meaningful and robust advocacy services to all citizens—even in the face of broadly-crafted legal mandates—is both sanist and pretextual.<sup>113</sup> Legislative reliance on statutory interventions such as Kendra’s Law threatens to make this area of the law even more pretextual.<sup>114</sup> The hospital incident report threatens to be a pretextual device for furthering litigation while undermining hospitals’ efforts to improve the rate of error. Again, we must confront the sanist and pretextual bases of mental disability law and seek to eradicate these factors from our jurisprudence.

*C. Issues of mental disability cannot be meaningfully uncoupled from other social issues such as race or class discrimination.*

Race, ethnicity, and class matter in all mental disability law decision-making, whether we study cohorts in New York City, or elsewhere. We must accept the fact that the notion of neutrality in this area of the law is a myth, and then weigh how this insight affects every aspect of this body of law.

*D. Therapeutic jurisprudence is a necessary palliative to remediate the factors just discussed.*

The TJ filter can be used to shine light on the presence of sanism and pretextuality and the false use of OCS in considerations of sex offender law,<sup>115</sup> the inadequacy of advocacy systems,<sup>116</sup> outpatient commitment,<sup>117</sup> institutional rights law,<sup>118</sup> the right to refuse treatment law,<sup>119</sup> or health care/hospital law.<sup>120</sup> It is, we believe, an obligatory

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112. See generally Perlin, *OCS and Heuristic Reasoning*, *supra* note 49.

113. See generally *id.*

114. See Michael L. Perlin, *The Blurring of the Borders Between Civil and Criminal Mental Disability Law*, 10 WASEDA BULL. COMP. L. 263 (2007).

115. See, e.g., Astrid Birgden, *Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 351 (2004).

116. See, e.g., Jan Costello, “Why Would I Need a Lawyer?” *Legal Counsel and Advocacy for Persons with Mental Disabilities*, in LAW, MENTAL HEALTH, AND MENTAL DISORDER 15 (Bruce D. Sales & Daniel W. Shuman eds., 1996).

117. See, e.g., Winick et al., *Therapeutic Jurisprudence*, *supra* note 83.

tool for scholars and advocates to use in their analyses of all of the issues discussed in this symposium.

The individuals written about in the essays here are all marginalized. Their marginalization has led to their being treated as somehow less worthy of legal protection than others. For nearly three decades, we have continued to ignore Judge Ackerman's cautionary advice—to treat them “like human beings.” Over forty-five years ago, Bob Dylan wrote about the profundity of equality. It is time that we take Judge Ackerman and Dylan seriously.

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118 See, e.g., Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL'Y & L. 80 (1995).

119 See, e.g., *id.*

120 See, e.g., Mark A. Hall, *Law, Medicine and Trust*, 55 STAN. L. REV. 463 (2002).

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