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# SAID I, 'BUT YOU HAVE NO CHOICE': WHY A LAWYER MUST ETHICALLY HONOR A CLIENT'S DECISION ABOUT MENTAL HEALTH TREATMENT EVEN IF IT IS NOT WHAT S/HE WOULD HAVE CHOSEN[+]

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[+] An earlier version of this paper was given by one of the co-authors (MLP) as the keynote presentation at the annual conference on Ethics and Mental Health, sponsored by the Journal of Ethics in Mental Health, Thompson Rivers University, and McMaster University, Kamloops, BC, Canada, June 2016.

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## INTRODUCTION

In this paper, we address a question that has been raised to each of us innumerable times since we began to practice law: "How can you possibly represent to the court what your client is asking for?" We are asked this question – and many variations on the theme – because of who our clients are: by and large, persons who have been committed to, or had been committed to, or are subject to being committed to) psychiatric institutions.

For the purposes of this article, it is necessary to start with a bit about us.[1] Before becoming a law professor, the first author (MLP) litigated on behalf of persons with mental disabilities in the civil and criminal justice system for eleven years: three years as the head of the Mercer County (Trenton, NJ) Office of the Public Defender, and eight years as director of the Division of Mental Health Advocacy in the NJ Department of the Public Advocate.[2] The second author (NMW) has spent six years doing similar work with the Mental Hygiene Legal Service in NYC, and continues to do so. So, the questions we address here

1 We realize that this information is usually shortened and relegated to an asterisked footnote after the title of the article. We include it in the body of the text here, however, to emphasize how the issues we discuss in this paper have always been central to our practices.

2 While he was a professor, besides teaching multiple courses in mental disability law and other subjects, MLP provided legal services to persons with mental disabilities through a "live client" clinic (Federal Litigation Clinic), through a "placement" clinical-type program (Mental Disability Litigation Seminar and Workshop) and through an advocacy/human rights-based clinic (Building a Disability Rights Information Center in Asia and the Pacific Clinic).

are ones that we have confronted hundreds of times in "real life" as practicing attorneys.

And, more times than we care to count, we have been asked–dating back to the 1970s in MLP's case–"how can you represent those people?!"[3] In the context of mental disability law cases, it is sometimes slightly more nuanced: "How can you argue that your client has a right to refuse treatment?" (Or, "how can you argue that your client has a right to sexual interaction?" (Or, "how can you argue [insert description of controversial legal issue]?").[4]

These have never been particularly complicated questions for us to answer. We believe that lawyers have an ethical responsibility to represent their clients in accordance with their clients' wishes.[5] But–focusing

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3 This is not a particularly original question. See e.g., How Can You Represent Those People? (Abbe Smith & Monroe Freedman eds., 2013); James S. Kunen, How Can You Defend Those People?: The Making of a Criminal Lawyer (1983).

4 Organized psychiatry staked out a contrary position quickly. See e.g., Darold A. Treffert, Dying with Their *Rights* On, 130 AM. J. PSYCHIATRY 1041, 1041 (1973); Paul S. Appelbaum & Thomas G. Gutheil, *Rotting* With Their *Rights* On: Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients, 7 BULL. AM. ACAD. PSYCHIATRY & L. 306 (1979). Of course, "anecdotal accounts of patients who have 'died with their rights on' are easily countered by other stories of patients who, under looser commitment criteria, have been needlessly confined for decades." See Douglas S. Stransky, Civil Commitment and the Right to Refuse Treatment: Resolving Disputes from a Due Process Perspective, 50 U. MIAMI L. REV. 413, 418 n. 31 (1996), citing Stephen J. Morse, A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered, 70 CAL. L. REV. 54, 67-79 (1982). See Grant Morris, Judging Judgment: Assessing the Competence of Mental Patients to Refuse Treatment, 32 SAN DIEGO L. REV. 343, 343 (1995) (discussing this issue in the context of the right to refuse medication). Similarly, in this context, Dr. Paul Chodoff recommended exercising "wise and benevolent paternalism," leading to a "moral judgment" that hospitalization is appropriate for patients "incapable of voluntarily accepting help," in spite of laws rejecting "need of treatment" as a commitment standard. Paul Chodoff, *The Case for Involuntary Hospitalization of the Mentally Ill,* 133 AM. J. PSYCHIATRY 494, 501 (1976). For a response to Dr. Chodoff, see 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 (1991).
It should be noted that Professors Appelbaum and Gutheil have, in subsequent years, been among the leading psychiatrists who have pointed out that the "ordinary common sense" assumption that psychiatric patients are globally incompetent to engage in independent and autonomous decision-making is erroneous. See infra note 16, and text accompanying note 18.

5 There is extensive literature about this in the context of the criminal law, but far less in the context of mental disability law. For a rare example, see Henry A. Dlugacz & Christopher Wimmer, The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 353-54 (2011), quoted in this context in

here more closely on civil matters involving persons in the mental disability law system–the answers to these questions are complicated here in the public's view because of the erroneous, sanist,[6] and pretextual[7] assumption that persons institutionalized because of mental disabilities are presumptively incompetent to engage in autonomous decision–making,[8] and that the lawyer should substitute his/her "ordinary common sense"[9] as to the client's "best interests,"[10] a position often abetted by the use of the vividness heuristic.[11] A model of "paternal-

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Michael L. Perlin, *Wisdom Is Thrown into Jail: Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness,* 17 MICH. ST. U. J. MED. & L. 343, 369 (2013): "It is not reasonable to expect a client to repose trust in an attorney unless she is confident that he is acting in accordance with her wishes."

[6] Sanism is an "irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry." Michael L. Perlin, *"They Keep It All Hid": The Ghettoization of Mental Disability Law and Its Implications for Legal Education,* 54 ST. LOUIS U. L.J. 857, 860-61 (2010). See infra text accompanying notes 40-65.

[7] Pretextuality defines the ways in which courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends. See 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, 750 (2005); Perlin, *supra* note 4. See *infra* text accompanying notes 66-75.

[8] See Michael L. Perlin, *Everybody Is Making Love/Or Else Expecting Rain: Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia,* 83 U. WASH. L. REV. 481, 503 (2008), discussing the myth that "mentally ill individuals are presumptively incompetent to participate in 'normal' activities [or] to make autonomous decisions about their lives."

[9] "[O]rdinary common sense" is a "'prereflective attitude' exemplified by the attitude of 'What I know is "self-evident"; it is "what everybody knows."' 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, 357 (2000) (citing Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions,* 136 U. PA. L. REV. 729, 737 (1988). See *infra* text accompanying notes 95-104.

[10] On how some commentators believe that the ABA's Model Rules of Professional Conduct (especially Rule 1:14) "give lawyers representing the mentally disabled 'unchecked authority,'" *see* Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 FAM L.Q. 329, 330 (1999), quoting Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 FORDHAM L. REV. 1429, 1436 (1994) (discussing the role of the lawyer as de facto guardians under the rule). On Rule 1:14 in this context, *see infra* text accompanying notes 118-22.

[11] The vividness heuristic is the cognitive-simplifying device through which a "single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made." 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.

ism/best interests" is regularly substituted for a traditional legal advocacy position, and this substitution is rarely questioned.[12]

Our position is a simple one: this presumption flies in the face of statutory law,[13] constitutional law,[14] and international human rights law,[15] and must be rejected. It also is contrary to the principles of the school of therapeutic jurisprudence[16] with which we both firmly align ourselves.[17] Moreover, this presumption is also contrary to all the valid and reliable evidence that has been available for decades.[18]

Virtually no one ever says that a lawyer should substitute his/her view of "best interests" in a divorce case, a malpractice case, or a contract case. Consider the recent case of Kevin Durant, the star professional basketball player. Apparently, Durant was offered $40.7 million dollars to return to play another season for the Oklahoma City Thunder,[19] but he turned that down for a contract that paid $27 million per

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1375, 1417 (1997) (Perlin, *Borderline*). In this context, one vivid, negative anecdote–perhaps even an apocryphal one with no basis in fact–overwhelms an extensive contrary statistical database. Michael L. Perlin, *"Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 637 (2009) (Perlin, *Borderline*). *See supra* text accompanying notes 76-94, for an extended discussion of the significance of heuristics in this context.

[12] Perlin, *supra* note 7, at 738; *see also* Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases,* 16 LAW & HUM. BEHAV. 39, 43-44 (1992).

[13] *E.g.*, State v. Kingsley, 383 N.W.2d 828, 831 (N.D. 1986) (Levine, J., specially concurring).

[14] *E.g.*, Rivers v. Katz, 495 N.E.2d 337, 341-42 (N.Y. 1986).

[15] G.A. Res. 61/611, U.N. GAOR, 61st Sess., Supp. No. 49, U.N. Doc. A/61/611 (Dec. 6, 2006)(CRPD), Article 12.

[16] On the question of presumption of incompetency, see Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Commitment: Kendra's Law as Case Study*, 9 PSYCHOL. PUB. POL'Y & L. 183, 193 (2003) ("In short, 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 making – appears to be based on an empirical fallacy: psychiatric patients are not necessarily more incompetent than non-mentally ill persons to engage in independent medication decision making"); *see also* PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 218, 220 (1991) ("The mere presence of psychosis, dementia, mental retardation, or some other form of mental illness or disability is insufficient to constitute incompetence.").

[17] *See e.g.*, Michael L. Perlin & Naomi Weinstein, *"Friend to the Martyr, a Friend to the Woman of Shame": Thinking About The Law, Shame and Humiliation*, 24 SO. CAL. REV. L. & SOC'L JUST. 1, 9-13 (2014).

[18] *See e.g.*, Thomas Grisso & Paul Appelbaum, *The MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric and Medical Treatments*, 19 L. & HUM. BEHAV. 149 (1995).

[19] Marc J. Spears, *Expect a Happy Ending for OKC in Durant's Free-Agent Drama*, THE UNDEFEATED (June 30, 2016), http://theundefeated.com/features/expect-a-happy-ending-for-

year for two years to play for the Golden State Warriors, the team that had defeated the Thunder in the 2016 NBA Western Conference finals.[20] His attorney might have persuaded him to not sign the contract (as it was less financially attractive), but no one–to our knowledge–has ever suggested that, in such a situation, the attorney should usurp his client's decision–making power and force him to sign another contract with another team.[21]

When it comes to mental disability law, the law is clear: if there is an issue as to the client's capacity to engage in autonomous decision–making, then the lawyer must aid the client in supported decision–making, rather than impose substituted_decision–making.[22] This is the centerpiece of an Article in the UN's Convention on the Rights of Persons with Disabilities (CRPD)[23] and must be at the forefront of any discussion of this area of law and social policy. The difference between supported and substituted decision–making is a critical one in international human rights law, yet is rarely discussed domestically. It is time that that changes. In this paper, we will look at the issues that are raised by this state of affairs, and we will focus on these points:

Why a lawyer must always honor her client's choices, even if they are not the ones that the lawyer would have chosen, except in very lim-

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okc-in-durants-free-agent-drama/.

[20] Sam Amick, *Kevin Durant Announces He Will Sign with Golden State Warriors,* USA TODAY (July 5, 2016), http://www.usatoday.com/story/sports/nba/2016/07/04/kevin-durant-nba-free-agency/86565344/.

[21] Because of the intricacies in the NBA compensation rules, Durant could have earned up to $153 million total over five years had he stayed with Oklahoma City, whereas the most his salary could have been with another team would be $114 million over four years, substantially less. *See* Jason Patt & Mark Hinog, *How Kevin Durant Could Make an Extra $100 Million by Signing a 1-Year Contract,* USA TODAY (July 4, 2016), http://www.sbnation.com/nba/2016/6/28/12050498/kevin-durant-contract-salary-money-nba-free-agent-rumors.

[22] On how the "paradigm shift" in the CRPD from substituted to supported decision-making is a critical one, see Robert Dinerstein, *Implementing Legal Capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making,* 19 HUM. RTS. BRIEF 8, 8 (Winter 2012).

[23] *See e.g.*, Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law,* 117 PENN ST. L. REV. 1159, 1177-78 (2013); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act,* 81 U. COLO. L. REV. 157, 161 (2010).

ited circumstances, in accordance with the American Bar Association Model Rules of Professional Conduct

The implications of criminal law, elder law, and juvenile law, and how the ethical obligations in these types of law are no different than in cases of clients with mental disabilities or those institutionalized

The multi–textured meanings of "competency" and "capacity" and how they affect resolution of these issues, especially in the context of forced medication, psychiatric advance directives, and sexual autonomy

The implications of rules governing counsel–client relationships for implementation of the supported decision–making requirement of Article 12 of the UN Convention on the Rights of Persons with Disabilities and under the American with Disabilities Act

The relationship between these issues and therapeutic jurisprudence, and why adherence to TJ is further demanded as a matter of dignity[24]

First though, we consider the four factors that contaminate the practice of all aspects of mental disability law: sanism,[25] pretextuality,[26] heuristic thinking,[27] and false "ordinary common sense" (OCS).[28] These factors – that we will explain in depth subsequently – must be kept in mind at all times in any consideration of the issues at hand. We cannot forget how they poison all of mental disability law, specifically including what counsel does in the representation of persons with mental disabilities;[29] it is thus impossible to give any meaning to the ques-

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[24] R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527 (2006)

[25] *See generally* Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEG. ISS. 3, 4-5 (1999).

[26] *Id.* at 5.

[27] *See generally* Michael L. Perlin & Alison J. Lynch, *How Teaching about Therapeutic Jurisprudence Can Be a Tool of Social Justice, and Lead Law Students to Personally and Socially Rewarding Careers: Sexuality and Disability as a Case Example*, 16 NEVADA L.J. 209, 216-17 (2015).

[28] *See generally* Michael L. Perlin, *"I Expected It to Happen/I Knew He'd Lost Control": The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5,* 2015 UTAH L. REV. 881, 905-06 (2015).

[29] *See generally* Michael L. Perlin, *"Baby, Look inside Your Mirror": The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities,* 69 U. PITT. L. REV. 589 (2008) (Perlin, *Mirror*); Michael L. Perlin, *Representing Clients with Mental Health and/or Cognitive Impairments In Treatment Courts*, American University Justice Programs Office 2016 (Perlin, *Representing Clients).*

tions before us without taking these seriously.

At the same time, it is also critical that we consider how therapeutic jurisprudence offers us a means of redemption.[30] Again, as we will discuss at length subsequently, therapeutic jurisprudence (TJ) offers us a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.[31] Its ultimate aim–to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles[32]–is one that must be central to our consideration of the questions that we raise.[33]

Our paper's title comes from Bob Dylan's song, As I Went out One Morning,[34] a song that, unfortunately, he has only performed once in public.[35] Of significance to our title is the opening couplet:

> As I went out one morning
> To breathe the air around Tom Paine's.[36]

Thomas Paine considered "rights of the mind" among the natural liberties,[37] and has often been cited as an inspiration for much of the early litigation on behalf of persons with mental disabilities, seeking to grant them autonomy in decision–making and behavior.[38] We use the

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[30] Perlin, *Mirror, supra* note 29, at 591.

[31] *See* Michael L. Perlin & Meredith R. Schriver, *"You Might Have Drugs at Your Command": Reconsidering the Forced Drugging of Incompetent Pre-trial Detainees from the Perspectives of International Human Rights and Income Inequality,* 8 ALBANY GOV'T L. REV. 381, 399 (2015).

[32] *See* Perlin & Lynch, *supra* note 27, at 213.

[33] On this question, see e.g., Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process,* 4 VA. J. CRIM. L. 304 (2016) (Perlin, *Wasteland)*; Michael L. Perlin, *"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence,* AM. CRIM. L. REV. (forthcoming 2016).

[34] Bob Dylan, *As I Went Out One Morning,* http://bobdylan.com/songs/i-went-out-one-morning/.

[35] *Id.*

[36] *Id.*

[37] *See* THOMAS PAINE, RIGHTS OF MAN (1791), reprinted in THE ESSENTIAL THOMAS PAINE 151 (1969).

[38] *See* THOMAS SZASZ, ANTIPSYCHIATRY: QUACKERY SQUARED (2009), likening involuntary psychiatric institutionalization to involuntary servitude, invoking Paine.

quote from this song here to underscore that the lawyer—if s/he is to provide constitutionally adequate representation–has no choice but to honor her client's wishes, and to keep in mind the centrality of individual autonomy to all questions that arise in any discussion of mental disability law.[39]

And we believe – without equivocation – that that is a good thing.

## I. THE CONTAMINATING FACTORS

### *A. Sanism*[40]

Sanism infects both our jurisprudence and our lawyering practices.[41] Sanism is largely invisible and largely socially acceptable.[42] It is based predominantly upon stereotype, myth, superstition, and deindividualization,[43] and reflects the assumptions that are made by the legal system about persons with mental disabilities—who they are, how they got that way, what makes them different, what there is about them that lets society treat them differently, and whether their condition is immutable.[44] These assumptions—that reflect societal fears and apprehensions about mental disability, persons with mental disabilities,[45] and the possibility that any individual may become mentally disabled[46]—ignore

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[39] For an overview of some specific questions that a competent lawyer will have to ask him/herself in the representation of persons with mental disabilities, see Perlin, *Representing Clients, supra* note 29, at 4.

[40] This section draws significantly upon Perlin, *Mirror, supra* note 29, and Perlin, *supra* note 25.

[41] *See e.g.*, Perlin, *supra* note 8, at 486; *see generally* Michael L. Perlin, *"My Sense of Humanity Has Gone Down the Drain": Stereotypes, Stigma and Sanism*, in STEREOTYPING AS A HUMAN RIGHTS ISSUE 95 (Alexandra Timmer & Eva Brehms, eds. 2015).

[42] *See e.g.*, Perlin, *supra* note 6, at 873.

[43] *Id.*

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

[45] *See* H. Archibald Kaiser, *The Convention on the Rights of Persons with Disabilities: Beginning to Examine the Implications for Canadian Lawyers' Professional Responsibilities,* 20 HEALTH L. REV. 26 (2012).

[46] *See* Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization,* 28 HOUS. L. REV. 63, 108 (1991) (on society's fears of persons with mental disabilities), and *id.* at 93 n.174 ("[W]hile race and sex are immutable, we all *can* become mentally ill, homeless, or both. Perhaps this illuminates the level of virulence we experience here") (emphasis in

the most important question of all—why do we feel the way we do about "these people" (quotation marks understood)?[47]

Decision–making in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias–driven stereotypes[48] and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decision–making.[49] Sanist decision–making infects all branches of mental disability law and distorts mental disability law jurisprudence.[50] Paradoxically, while sanist decisions are frequently justified as being therapeutically based, sanism customarily results in anti–therapeutic outcomes.[51]

We thus 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.[52] "Sensational media portrayals of mental illness" exacerbate the underlying tensions.[53] We believe that "[m]ental illness can be easily identified by lay persons and matches up closely to popular media depictions."[54] It is commonly assumed that persons with mental illness cannot be trusted.[55] Common stereotypes about people with mental

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original).

[47] *See e.g.*, Perlin, *supra* note 25, at 17; *see generally* Marchell Goins, Kyneitres Good & Cori Harley, *Perceiving Others as Different: A Discussion on the Stigmatization of the Mentally Ill*, 19 ANN. Health L. 441 (2010). On how sanism is more pernicious than other stigmas, see Matthew Large & Christopher J. Ryan, *Sanism, Stigma and the Belief in Dangerousness,* 46 AUST. & N.Z. J. PSYCHIATRY 1099 (2012).

[48] *See e.g.,* Wim De Neys et al, *Biased but in Doubt: Conflict and Decision Confidence,* 6 PLOS ONE 1 (2011). On disability stereotypes in general, see Bradley A. Areheart, *Disability Trouble,* 29 YALE L. & POL'Y REV. 347 (2011).

[49] *See* Perlin, *On Sanism,* 46 SMU L. REV. 373, 373-77 (1992).

[50] On the ways that judges conceptualize mental disability professionals in forensic testimonial contexts, see Douglas Mossman, *"Hired Guns," "Whores," and "Prostitutes": Case Law References to Clinicians of Ill Repute,* 27 J. AM. ACAD. PSYCHIATRY & L. 414 (1999).

[51] *See e.g.,* David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence,* 40 CLEV. ST.L. REV. 517 (1992); THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990).

[52] *See e.g.*, Michael L. Perlin, *A Law of Healing,* 68 U. CIN. L. REV. 408, 422 (2000).

[53] *See* Bruce J, Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier,* 50 B.C. L. REV. 785, 837 (2009). See generally in the specific context of sex offender law, Heather Ellis Cucolo & Michael L. Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy* 3 U. DENV. CRIM. L. REV. 185 (2013).

[54] 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. 239, 257 (1994).

[55] *See* Michael L. Perlin, *Promoting Social Change in Asia and the Pacific: The Need for a Disability*

illness include the beliefs that they are invariably dangerous, unreliable, lazy, responsible for their illness or otherwise blameworthy, faking or exaggerating their condition, or childlike and in need of supervision or care.[56]

Social science research confirms that mental illness is "one of the most—if not the most–stigmatized of social conditions."[57] Historically, individuals with psycho–social disabilities "have been among the most excluded members of society.... Research firmly establishes that people with mental disabilities are subjected to greater prejudice than are people with physical disabilities."[58] One might optimistically expect, though, that this gloomy picture should be subject to change because of a renewed interest in the integration of social science and law, and greater public awareness of defendants with mental disabilities. One might also expect that litigation and legislation in these areas would draw on social science data in attempting to answer the questions at hand.

But yet, any attempt to place mental disability law jurisprudence in context, results in confrontation with a discordant reality: social science is rarely a coherent influence on mental disability law doctrine.[59] Rather, the legal system selectively – teleologically[60]–either accepts or rejects social science data depending on whether or not the use of that data meets the a priori needs of the legal system. In other words, social science data is privileged when it supports the conclusion the fact finder wishes to reach, but it is subordinated when it questions such a conclu-

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*Rights Tribunal to Give Life to the UN Convention on the Rights of Persons with Disabilities,* 44 GEO. WASH. INT'L L. REV. 1, 15 (2012), discussing K, Y, & W v. Secretary for Justice, H.K.C. 796 (2000) (explaining why applicant was rejected for a public job due to her relation to a person with mental illness).

[56] For a list of all primal myths about mental illness in this context, see Perlin, *supra* note 49, at 393-97.

[57] SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 4-5 (2001).

[58] Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1363-64 (2008).

[59] *See, e.g.*, Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 658 n.256 (1989-90) (federal legislators ignored empirical evidence about the insanity defense in the debate leading to the passage of the Insanity Defense Reform Act of 1984).

[60] The legal system selectively–teleologically–either accepts or rejects social science evidence depending on whether or not the use of that data meets the *a priori* needs of the legal system. *See* Perlin, *supra* note 54, at 261.

sion.[61] These ends are sanist. In other words, decision-making in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decision-making.

Judges are not immune from sanism.[62] "[E]mbedded in the cultural presuppositions that engulf us all,"[63] judges reflect and project the conventional morality of the community; judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes,[64] a global error that is most critical in criminal law and procedure cases. Judges' refusals to consider the meaning and realities of mental illness cause them to act in what appears, at first blush, to be contradictory and inconsistent ways and, teleologically, to privilege (where that privileging serves what they perceive as a socially–beneficial value) and subordinate (where that subordination serves what they perceive as a similar value) evidence of mental illness.[65]

### *B. Pretextuality*[66]

Sanist attitudes lead to pretextual decisions. "Pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision–making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to

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[61] Perlin, *Mirror, supra* note 29, at 599-600. On how elected judges are more subject to bias in a parallel area of the law (sex offender cases), see Cucolo & Perlin, *supra* note 55, at 218 ("Elections have a 'chilling effect' on judicial independence, and even, in the cases of appellate judges, on the issuance of dissents from majority opinions") (citations omitted).

[62] *See e.g.*, Michael L. Perlin, *"Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization,* 46 DEPAUL L. REV. 947, 976 (1997).

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

[64] *See* Perlin, *supra* note 49, at 400-01.

[65] 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).

[66] This section draws significantly upon 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, 1256 (1998) (Perlin, *Exposing*), and Michael L. Perlin, *Pretexts and Mental Disability Law : The Case of Competency*, 47 U. MIAMI L. REV. 625, 636 (1993) (Perlin, *Pretexts*).

achieve desired ends.[67] 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.[68]

Pretextual devices such as condoning perjured testimony, distorting appellate readings of trial testimony, subordinating statistically significant social science data, and enacting purportedly prophylactic civil rights laws that have little or no "real world" impact, dominate the mental disability law landscape.[69] Judges in mental disability law cases often take relevant literature out of context,[70] misconstrue the data or evidence being offered,[71] and/or read such data selectively,[72] and/or inconsistently.[73] Other times, courts choose to flatly reject this data or ignore its existence.[74] In other circumstances, courts simply "rewrite" factual records so as to avoid having to deal with social science data that is cognitively dissonant with their view of how the world "ought to be."[75]

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[67] *See e.g.*, Perlin, *Mirror, supra* note 29, at 602.

[68] *See* Michael L. Perlin, *"Through the Wild Cathedral Evening": Barriers, Attitudes, Participatory Democracy, Professor Tenbroek, and the Rights of Persons with Mental Disabilities,* 13 TEX. J. C.L. & C.R. 413, 416-17 (2008).

[69] Perlin, *Exposing supra* note 66, at 1257.

[70] David Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 577 (1991).

[71] *Id.* at 581.

[72] *See e.g.*, Perlin, *supra* note 54, at 264, citing inter alia, J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 153–54 (1990).

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

[74] *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 897–902 (1983), discussed in this context in MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 21-27 (2013).

[75] *See e.g.*, Perlin, *supra* note 54, at 264. The classic example is Chief Justice Burger's opinion for the court in *Parham,* 442 U.S. at 605–10 (approving more relaxed involuntary civil commitment procedures for juveniles than for adults). *See e.g.*, Gail Perry & Gary Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as an Example,* 22 J. FAM. L. 633 (1984), critiquing *Parham.*

### C. *Heuristics*[76]

"Heuristics" is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information–processing tasks,[77] the use of which frequently leads to distorted and systematically erroneous decisions,[78] and causes decision–makers to "ignore or misuse items of rationally useful information."[79] One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.[80] Empirical studies reveal jurors' susceptibility to the use of these devices.[81] Similarly, legal scholars are notoriously slow to understand the way that the use of these devices affects the way individuals think.[82] The use of heuristics "allows us to willfully blind ourselves to the 'gray areas' of human behavior,"[83] and predispose "people to beliefs that accord with, or are heavily influenced by, their prior experiences."[84]

Experts are similarly susceptible to heuristic biases,[85] specifically

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[76] This section draws significantly upon Perlin, *supra* note 54, at 254-55; Perlin, *Pretexts*, *supra* note 66, at 660.

[77] *See* Michael L. Perlin, *Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic Reasoning*, 69 NEB. L. REV. 3, 12-17 (1990).

[78] *See* Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123 (1980–81).

[79] *See e.g.*, Michael L. Perlin, *Are Courts Competent to Decide Competency Questions? Stopping the Facade from United States v. Charters*, 38 U. KAN. L. REV. 957, 966 n.46 (1990), discussing John S. Carroll & John W. Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology, in* COGNITION AND SOCIAL BEHAVIOR 13, 21 (John S. Carroll & John W. Payne eds. 1976).

[80] *See e.g.*, Perlin, *Borderline*, *supra* note 11, at 1417, discussing David Rosenhan, *Psychological Realities and Judicial Policy* 19 STAN. LAW. 10, 13 (1984).

[81] Jonathan Koehler & Daniel Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 264-65 (1990).

[82] Thomas Tomlinson, *Pattern-Based Memory and the Writing Used to Refresh*, 73 TEX. L. REV. 1461, 1461-62 (1995).

[83] 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, 27 (2003).

[84] *See* Cucolo & Perlin, *supra* note 55, at 213, quoting Russell Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1381 (2009).

[85] *See* Oren Perez, *Can Experts Be Trusted and What Can Be Done About It? Insights from the Biases and Heuristics Literature, in* Nudge and the Law: A European Perspective (Alberto Alemanno & Anne-Lise Sibony, eds. 2015).

the seductive allure of simplifying cognitive devices in their thinking.[86] Further, they frequently employ such heuristic gambits as the vividness effect or attribution theory in their testimony.[87] Also, biases are more likely to be negative; individuals retain and process negative information as opposed to positive information.[88] Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.[89] As discussed earlier, the vividness heuristic is "a cognitive–simplifying device through which a 'single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made."[90] Through the "availability" heuristic, we judge the probability or frequency of an event based upon the ease with which we recall it.[91] Through the "attribution" heuristic, we interpret a wide variety of additional information to reinforce pre–existing stereotypes.[92] Through the "typification" heuristic, we characterize a current experience via reference to past stereotypic behavior.[93] And through "confirmation bias," people tend to favor information that confirms their theory over disconfirming information.[94]

### *D. "Ordinary Common Sense"*[95]

"Ordinary common sense" (OCS) is a "powerful unconscious animator of legal decision making."[96] It is a psychological construct that

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[86] *See e.g.*, Perlin, *Mirror, supra* note 29, at 602.

[87] Perlin, *Pretexts, supra* note 66, at 629; Perlin, *supra* note 6, at 875; Perlin & Lynch, *Wasteland, supra* note 33, at 343 n.134.

[88] Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain's "Negative Bias" and Persuasion,* 15 NEV. L.J. 605 (2015).

[89] Perlin, *Pretexts, supra* note 66, at 629; Perlin, *supra* note 6, at 874-75.

[90] *See* Perlin, *Borderline, supra* note 11, at 1417.

[91] *See e.g., id.*

[92] *See e.g.*, Michael L. Perlin, **Error! Main Document Only.** *'His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 892 (2009).

[93] *See e.g.*, Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111, 125 (1991).

[94] Cucolo & Perlin, *supra* note 55, at 214, citing Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006).

[95] This section draws significantly upon MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW 31 (2013).

[96] *See e.g.*, Perlin, *supra* note 83, at 25.

reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities .[97] OCS is self–referential and non–reflective: "I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is."[98] It is supported by our reliance on a series of heuristics–cognitive–simplifying devices that distort our abilities to rationally consider information. [99]

Trial judges typically say, "he [the defendant] doesn't look sick to me," or, even more revealingly, "he is as healthy as you or me." [100] In short, advocates of OCS believe that simply by using their OCS, jurists can determine whether defendants conform to "popular images of 'craziness.'" [101] If they do not, the notion of a handicapping mental disability condition is flatly, and unthinkingly, rejected. [102] Such views – reflecting a false OCS – are made even more pernicious by the fact that we "believe most easily what [we] most fear and most desire." [103] Thus, OCS presupposes two "self-evident" truths: "First, everyone knows how to assess an individual's behavior. Second, everyone knows when to blame someone for doing wrong." [104]

### *E. Conclusion*

It is impossible to understand any aspect of mental disability law without coming to grips with the "malignant and corrosive impact" of the factors we have just discussed.[105] We have discussed the significance of understanding the power of these factors in a previous article

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[97] Perlin, *supra* note 5, at 365 n.127.

[98] Perlin, *supra* note 83, at 8.

[99] Perlin, *Borderline, supra* note 11, at 622.

[100] Michael L. Perlin, *Psychiatric Testimony in a Criminal Setting*, 3 BULL. AM. ACAD. PSYCHIATRY & L. 143, 147 (1975).

[101] Perlin, *supra* note 83, at 25.

[102] *Id.*

[103] Thomas D. Barton, *Violence and the Collapse of Imagination*, 81 IOWA L. REV. 1249, 1249 (1996) (book review of WENDY KAMINER, IT'S ALL THE RAGE: CRIME AND CULTURE (1995)).

[104] Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5, 16-17 (1996).

[105] *See e.g.*, Perlin, *supra* note 83, at 6. *See generally* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (2000).

on shame and humiliation and the law,[106] and one of the co–authors (MLP) has discussed that significance in multiple papers about such topics as the death penalty,[107] neonaticide,[108] criminal sentencing, [109] disability classification systems,[110] the Americans with Disabilities Act,[111] and on all "aspect[s] of mental disability law."[112] We must focus on this reality as we consider the role of counsel in the representation of this population.

Importantly, "it is not enough that lawyers and judges learn about mental illness, diagnoses, etc.; it is essential that they learn also about attitudes."[113] Consider the disappointing results reported nearly 40 years ago by Dr. Norman Poythress–that merely training lawyer about psychiatric techniques and psychological nomenclature made little difference in ultimate case outcomes, unless they were also trained about attitudes.[114] It is critical that lawyers understand those factors that poison the entire criminal justice system in the context of the representation of persons with mental disabilities to be able to do an effective job of representing drug court defendants.[115]

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[106] *See* Perlin & Weinstein, *supra* note 17.

[107] *See e.g.*, 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).

[108] *See* Perlin, *supra* note 83.

[109] *See* Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431 (1995).

[110] *See* Perlin, *Borderline*, *supra* note 11.

[111] *See* Perlin, *supra* note 59.

[112] 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, 536 (2002-03).

[113] Perlin, *supra* note 7, at 754 n.119.

[114] Norman Poythress, *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope with Expert Testimony,* 2 L. & HUM. BEHAV. 1, 15 (1978) (Concluding that "trained" lawyers' behavior in court was not materially different from that of "untrained" lawyers because the former group's attitudes toward their clients had not changed. Mere knowledge of cross-examination methods, he noted, "did not deter them from taking [the] more traditional, passive, paternal stance towards the proposed patients." As one trainee noted: "I really enjoyed your workshop, and I've been reading over your materials and its [sic] all very interesting, but this is the real world, and we've got to do something with these people. They're sick.").

[115] *See* Perlin, *Representing Clients, supra* note 29, at 6.

## II. THE ROLE OF COUNSEL

We begin with what courts have made clear forever: "The governing standard for the representation of [persons with disabilities] is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences."[116] This is at the core of the attorney–client relationship, whether the substantive issues in questions relate to criminal law (generally, the focus of this conversation) or other areas in which the question of "how can you do that?" might be raised, such as elder law or juvenile law. Model rules dealing with professional standards of practice attempt to address these ethical issues that may arise when representing someone with diminished capacity.

### *A. Model Rules*

The Model Rules of Professional Conduct of the American Bar Association ("ABA") guide attorneys through ethical issues involving persons with diminished capacity.[117] Rule 1.14 states:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client–lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under

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[116] Gross v. Rell, 40 A.3d 240, 269 (Conn. 2012).

[117] MODEL RULES OF PROFESSIONAL CONDUCT (AM. BAR ASS'N, 2015) [hereinafter ABA Model Rules].

Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[118]

The commentary to the ABA Rule notes, "when the client is a minor or suffers from diminished mental capacity, maintaining the ordinary client–lawyer relationship may not be possible in all respects."[119] However, the ABA concedes that a client with diminished capacity "often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well–being."[120] Further, the fact that a client suffers from a disability "does not diminish the lawyer's obligation to treat the client with attention and respect."[121] In cases where an attorney may have to take protective action, a client's poor judgment does not suffice to warrant protective action under Rule 1.14(b).[122]

Although Rule 1.14 seeks to enhance the representation of persons with disabilities, the rule is inconsistent and vague in certain aspects, which leads to confusion when applying the rule to the practical world.[123] Rule 1.14 does not define impaired capacity or "seriously diminished capacity" yet places the onus on the attorney to make this determination.[124] "The lack of a clear test leads to a circular [and subjective] determination of diminished capacity."[125]

Another criticism of the rule is that it can encourage an attorney to disclose attorney–client communications for the purposes of institutional proceedings, like guardianships or civil commitment hearings.[126] Further, the rule is silent with regard to some of the most serious ethical dilemmas facing attorneys who represent clients with mental disabilities including the right to refuse treatment, the right of a defendant to choose their own defense including the rejection of an insanity defense,

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[118] *Id.* at § 1.14.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] ABA FORMAL ETHICS OP. 96-404 (1996).

[123] Elizabeth Lafitte, *Model Rule 1.14: the Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 GEO. J. LEGAL ETHICS 313 (2003).

[124] *Id.* at 325.

[125] James D. Gallagher & Cara M. Kearney, *Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go*, 16 GEO. J. LEGAL ETHICS 597, 607 (2003).

[126] Laffitte, *supra* note 123, at 318.

and the right to sexual interaction.[127]

Competency applies not just to the client, but to the attorney as well.[128] Model Rule 1.1 defines competent representation as having "the legal knowledge, skill, and thoroughness and preparation necessary for the representation."[129] Attorneys practicing elder law, disability law, or estate planning often need to go beyond basic services in order to serve their clients so it is important that they have the requisite knowledge and skill to help their clients.[130] An attorney must obtain informed consent from the client, which is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[131] An attorney also has the duty to effectively communicate with the client, which means that the lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.[132]

A lawyer also has to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the

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[127] Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 L. & CONTEMP. PROBS. 161, 180 (1983); Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257 (2014).

[128] *See supra* text accompanying notes 113-15.

[129] ABA Model Rules, *supra* note 117, at § 1.1.

[130] A. Frank Johns, *Revised ABA Model Rules of Professional Conduct Applied in Elder Law: The Basics Framed in Core Values Get Complicated Fast - MRCP 1.0-1.6*, 1 NAELA J. 59, 65 (Spring 2005).

[131] ABA Model Rules, *supra* note 117, at § 1.0(e).

[132] *Id.* at § 1.4(a).

representation."[133]

Although the Model Rules provide a starting point for addressing ethical issues that may arise when representing clients with mental disabilities, there is much that is not covered. The overlap between criminal law, elder law, juvenile law, and mental disability law illustrate how sanism and other biases can prevent the ethical and zealous representation for persons with disabilities. We now turn to each of these areas of the law.

### *B. Criminal Law Analogies*

Historically, "[t]he American lawyer's professional model is that of zeal: a lawyer is expected to devote energy, intelligence, skill, and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client."[134] By way of example, Abbe Smith tells us that the requirement of zealous advocacy is "the central ethical mandate for criminal lawyers."[135] The question that we must confront is this: Can it/should it/may it be any less of a "central ethical mandate" for lawyers who represent persons with mental disabilities?[136] It is not insignificant that the phrase "zealous advocacy" has been used in over 2400 published cases but, when the phrase < /p "civil commitment" "psychiatric hospitalization"> is added to a WESTLAW search, there are zero cases to be found.[137]

There is nothing in the law–or in valid/reliable research–that tells us that there should be any difference in the cases of representation of persons with mental disabilities. We know, of course, that a client's mental health and cognitive impairment matter at every stage of the lawyer–client relationship in the criminal justice process, from the first meeting to case strategizing to the plea/trial decision to the sentencing process and beyond. At each juncture, defense counsel must take seri-

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[133] *Id.*

[134] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 578 (1986).

[135] Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1589 (1999).

[136] *See generally* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207 (2008).

[137] WESTLAW search conducted Aug. 16, 2016.

ously all issues related to such impairments.[138] But this reality has never been effectively "translated" into the civil commitment process.

In this context, reflect on the circumstances of institutionalization in se,[139] and its impact on an individual's sense of self.[140] Think also of the overlap between those in the criminal justice system and those in the institutional mental health system.[141] And think of the tension that may arise – in most cases, inevitably arises – in the ethical decision–making process in the context of representing a client with mental disabilities.[142] As in the criminal context, it is just as important when representing someone with mental illness to make sure that the process lacks coercion, especially when considering issues of informed consent in treatment issues.[143]

Professor John King clearly sets out the blueprint for counsel, in the context of criminal cases, and we see no reason it should be otherwise in civil cases:

The conscientious defense lawyer should attempt not to do necessarily what is "best" for the mentally impaired client, but attempt to

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[138] *See generally* Perlin, *Representing Clients, supra* note 29, at 1.

[139] *See* Addington v. Texas, 441 U.S. 418, 425-26 (1979) (explaining "significant impact" of social stigma generated by involuntary psychiatric institutionalization in America).

[140] *See e.g.*, Bruce Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 537, 554-55 (2002) ("For many patients, even those with serious mental illness, hospitalization can be iatrogenic, creating an institutional dependency that such facilities often condition in their inmates and a form of learned helplessness that debilitates motivation and effective functioning and produces a form of clinical depression."), citing, inter alia, Edmund G. Doherty, *Labeling Effects in Psychiatric Hospitalization: A Study of Diverging Patterns of Inpatient Self-Labeling Process*, 32 ARCHIVES GEN. PSYCHIATRY 562-63 (1975), and Johnson v. Solomon, 484 F. Supp. 278, 308 (D. Md. 1979) ("inappropriate and excessive hospitalization fosters deterioration, institutionalization, and possible regression").

[141] *See e.g.*, Michael L. Perlin, *International Human Rights and Institutional Forensic Psychiatry: The Core Issues, in* THE USE OF COERCIVE MEASURES IN FORENSIC PSYCHIATRIC CARE: LEGAL, ETHICAL AND PRACTICAL CHALLENGES 9 (Profs. Birgit Völlm &Norbert Nedopil, eds., 2016); Michael L. Perlin & Meredith R. Schriver, *"You That Hide Behind Walls": The Relationship Between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients,* in TORTURE AND ILL-TREATMENT IN HEALTH-CARE SETTINGS: A COMPILATION 195 (American University Center on Humanitarian Law ed., 2013).

[142] King, *supra* note 136, at 209.

[143] Erin Talati, *When A Spoonful of Sugar Doesn't Help the Medicine Go Down: Informed Consent, Mental Illness and Moral Agency*, 6 IND. HEALTH L. REV. 171 (2009) ("...coercing 'consent' for treatment in mentally ill patients legally and ethically invalidates informed consent.").

discern what the client's wishes would be absent the mental impairment that prevents the client from making a rational decision. This approach could include consultations not only with the client but also with family members and others who are close with the defendant. Such an approach may be cumbersome and is certainly easier in theory than in practice. It has, however, the virtues of imposing some sort of check on the discretion of the defense lawyer and of honoring the true autonomy of the client.[144]

But, somehow, this seems "different" to so many of us, in large part because we (the global "we") assume that persons institutionalized because of mental disability are presumptively incompetent to enter into autonomous decision–making.[145] This is a reflection of the basest sort of sanism that contaminates the legal process and often poisons the attorney–client relationship. Consider, from this perspective, the question of whether lawyers are very different than, say, police officers in this context. We know that "[police] officers' stereotypes included the idea that it is not possible to have a meaningful conversation with [persons with mental disabilities,] and officers hold on to the idea that [mentally disabled] persons are completely irrational and cannot be reasoned with."[146] Can we safely say that lawyers, in the aggregate, are any different?

This sanist assumption (fueled by the vividness heuristic and false OCS) is rebutted by (1) case law and statutes that explicitly forbid mak-

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[144] King, *supra* note 136, at 264.

[145] *See* Michael L. Perlin, *"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 696-97 (2003); 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 Individual Right to Refuse Treatment Cases*, 2 PSYCHOL. PUB. POL'Y & L. 114, 121 (1996), citing Brian Ladds et al., *The Disposition of Criminal Charges After Involuntary Medication to Restore Competency to Stand Trial*, 38 J. FORENS. SCI. 1442 (1993) (showing how this is regularly done by hospital psychiatrists); Brian Ladds et al., *Involuntary Medication of Patients Who Are Incompetent to Stand Trial: A Descriptive Study of the New York Experience with Judicial Review*, 21 BULL. AM. ACAD. PSYCH. & L. 529 (1993).

[146] Michael L. Perlin & Alison J. Lynch, *"Had to be Held Down by Big Police": A Therapeutic Jurisprudence Perspective on Interactions between Police and Persons with Mental Disabilities*, FORDHAM URBAN L.J. (2016, forthcoming) (quoting Robert Panzarella & Justin O. Alecia, *Police Tactics in Incidents with Mentally Disturbed Persons*, 20 POLICING: INT'L J. POLICE STRAT. & MGMT. 326, 335-36 (1997).

ing this presumptive assumption,[147] and (2) the best available research (from the MacArthur Group and others) that tells us that mental patients are not inherently more incompetent than non-mentally ill medical patients.[148] As Professor William Brooks has perceptively noted, "That psychiatrists do not generally complain about intensive cross–examination in other legal contexts may well mean the general lack of adversarialness in the civil commitment context has created an expectation that patients' lawyers should play only a perfunctory role in the commitment process."[149]

### *C. Conclusion*

Consider the specific circumstances of the issues we are addressing here in these contexts. When the presumption of incompetency exists, so too does the possibility for disparate treatment of people–virtually always improperly–deemed incompetent. As noted above, our research in this area and our experience as trial lawyers shows that this is most prevalent in cases involving the refusal of medication[150] and the right to

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[147] *See, e.g.*, Rivers v. Katz, 504 N.Y.S.2d 74, 79 (1986) (construing N.Y. MENTAL HYG. LAW § 33.01 (McKinney 1986)) (There, the court specifically rejected the defendants' argument that involuntarily committed mental patients were "presumptively incompetent" to exercise this right because involuntary commitment included an implicit determination "that the patient's illness has so impaired his judgment as to render him incapable of making decisions regarding treatment and care.").; *see generally* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 8-6.3.1 (3d ed., 2016); Perlin & Dorfman, *supra* note 145. It should be pointed out that this is a relatively new development in the law. As recently as 1972, a federal district court invalidated a Wisconsin statute that had presumed the opposite: a civilly committed individual was presumed to be *incompetent,* although that presumption was rebuttable. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1088 (E.D. Wis. 1972), vacated, 414 U.S. 473 (1974).

[148] *See e.g.*, Grisso & Appelbaum, *supra* note 18.

[149] William Brooks, *The Tail Still Wags the Dog: The Pervasive and Inappropriate Influence by the Psychiatric Profession on the Civil Commitment Process*, 86 N.D. L. REV. 259, 288 (2010). *See id.*:

> In the civil commitment context, instances of vigorous cross-examination often generate hostility from both judges and psychiatric witnesses. Judges often discourage zealous advocacy and make clear vigorous representation does not impact the decision-making process when the position put forth by counsel controverts the opinions put forth by psychiatric experts. As a result, attorneys will limit their advocacy efforts to what they believe judges will tolerate.

[150] Perlin & Dorfman, *supra* note 145.

engage in voluntary sexual interaction[151]–the two precise categories of cases in which the "how can you do that?" question is most often raised to lawyers. These questions, of course, ignore the fact that courts have ruled–with virtually no exceptions–that competent patients who are not currently an active danger to self or others have a constitutional right to refuse antipsychotic medication,[152] and that institutionalized patients had a right to engage in voluntary sexual relations as an aspect of the patient's rights to be placed either in the "least restrictive environment."[153] But, of course, these decisions are dissonant with the community's (false) "ordinary common sense."[154]

The task of improving the skills level of defense counsel in the representation of persons with mental disabilities thus has to be approached on two parallel, interlocking tracks:

1. Education about mental disabilities and their impact on defendants in the criminal justice system, especially those in drug courts, and

2. Education about factors that contaminate the entire criminal justice process: sanism, pretextuality, heuristics, and the use of false "ordinary common sense."

It is clear that unless the second track is included, education about disabilities – standing alone – is not a sufficient predicate for systemic meaningful change.[155]

## III. IMPLICATIONS OF COUNSEL DUTIES AND RESPONSIBILITIES IN RELATED/OVERLAPPING AREAS OF THE LAW

In this section, we will consider the issues we are discussing in

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[151] Perlin & Lynch, *supra* note 127. *See generally* MICHAEL L. PERLIN & ALISON J. LYNCH, SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER? (2016).

[152] *E.g.* Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978) (individual case), *supp'l,* 476 F. Supp. 1294 (D.N.J. 1979) (class action), *modified,* 653 F.2d 836 (3d Cir. 1981), *en banc, vacated,* 458 U.S. 1119 (1982), *and on remand,* 720 F.2d 266 (3d Cir. 1983).

[153] Foy v. Greenblott, 190 Cal. Rptr. 84 (Ct. App. 1983). *See* Michael L. Perlin, *"Hospitalized Patients and the Right to Sexual Interaction": Beyond the Last Frontier?* 20 NYU REV. L. & SOC'L CHANGE 517, 521 (1993-94) ("Rules that appear intended to protect individuals with mental disabilities by limiting or subordinating their sexual autonomy are actually the product of a patronizing paternalism toward persons with mental disabilities in institutions.").

[154] *See supra* note 9.

[155] Perlin, *Representing Clients*, *supra* note 29, at 4.

this paper in the context of related and overlapping areas of the law: elder law, juvenile law and the case law interpreting the Americans with Disabilities Act.

### *A. Elder Law*

Elder law raises fundamental issues involving capacity, property, health care, and zealous advocacy.[156] As medical and technological advances allow persons to live longer, one of the greatest fears (as with mental illness) is to "lose one's mind." Yet, the mere fact that a person may be experiencing cognitive issues does not mean that his or her needs, wants, and desires should be ignored. Even a client who arguably lacks legal competence often has the ability to "understand, deliberate upon, and reach conclusions about matters affecting [his or her] own well–being."[157] Further, capacity is fluid and different legal acts require different degrees of capacity.[158]

Elder law is different from many other types of law in that it often involves transactional and litigation matters where there is no clear winner or loser.[159] Guardianships take away many, if not all, rights of allegedly incapacitated persons, and can take away their dignity by stripping away the ability of such persons to make any decisions involving their life.[160] Respect for client autonomy is a key component of zealous advocacy.[161] Moreover, the attorney should start with the presumption that the client has the necessary capacity to make decisions, much like the presumption of innocence in criminal law.[162] A lawyer representing an elderly person facing guardianship must take into ac-

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[156] Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 LOY. U. CHI. L.J. 403, 405 (2000).

[157] Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. REV. 54, 67 (1991).

[158] Robert B. Fleming & Rebecca C. Morgan, *Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and their Families*, 35 GA. L. REV. 735, 742 (2001).

[159] Rosenberg, *supra* note 156, at 444 (Arguing that resolving ethical dilemmas "involves a reconception of zealous advocacy, because the interests of the client may be difficult to discern and the goals of representation do not always involve an easily quantified, win-lose outcome.")

[160] Perlin, *supra* note 23.

[161] Rosenberg, *supra* note 156, at 427. (Explaining how, in many nations, guardianship is a kind of "civil death."). *See* Perlin, *supra* note 23, at 1166.

[162] Falk, *supra* note 157, at 68.

count his client's wishes and not substitute his own judgment or take a paternalistic approach.[163] Further, attorneys who represent persons facing guardianships should take on an adversarial role in order to protect the civil rights of their clients.[164]

Like persons with mental illness, elderly persons with cognitive issues face sanism, heuristic biases and OCS, all of which lead to poor outcomes for the marginalized individuals. Persons who suffer from mental illness and are elderly "endure a double prejudice about who they are, what desires and needs they have, and to what sort of life they aspire."[165] These desires include the right to sexual freedom.[166] Yet due to sanism and ageism,[167] elderly people are perceived as asexual, or, if interested in sex, then hypersexual to the point of perversion.[168] In some cases, sexual activity can lead to criminal prosecution.[169] Elderly persons face the same issues of unnecessary institutionalization that persons with mental illness face, and despite the deinstitutionalization movement, much of this population continues to reside unnecessarily in institutions for years.[170] For elderly persons committed to, and unable to be discharged from psychiatric institutions or nursing care facilities against their will, presumptions about their abilities should be chal-

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163 Fleming & Morgan, *supra* note 158, at 749. ("Lawyers are tempted to be paternalistic, to protect the demented client by acting in her best interest, rather than advocating her wishes."). *See infra* text accompanying notes 243-57 (explaining supported decision-making vs. substituted).

164 Rosenberg, *supra* note 156, at 473.

165 Arlene S. Kanter, *Abandoned but Not Forgotten: The Illegal Confinement of Elderly People in State Psychiatric Institutions*, 19 N.Y.U. REV. L. & SOC. CHANGE 273, 276 (1992).

166 Stephanie L. Tang, *When "Yes" Might Mean "No": Standardizing State Criteria to Evaluate the Capacity to Consent to Sexual Activity for Elderly with Neurocognitive Disorders*, 22 ELDER L.J. 449 (2015).

167 Linda S. Whitton, *Ageism: Paternalism and Prejudice,* 46 DEPAUL L. REV. 453, 456 (1997) (stereotyping and discrimination against people based on their age, including the rise of age consciousness and age segregation).

168 Tang, *supra* note 166, at 458; *see generally* PERLIN & LYNCH, *supra* note 127.

169 Pam Belluck, *Sex, Dementia and a Husband on Trial at Age 78*, N.Y. TIMES, Apr. 13, 2015 at A1 (covering an incident where husband of wife with dementia faced criminal prosecution for third-degree felony sexual abuse for having sex with his wife in a nursing home); Pam Belluck, *Iowa Man Found Not Guilty of Abusing Ailing Wife with Alzheimer's*, N.Y. TIMES, Apr. 22, 2015 at A18 (covering an incident where husband found not guilty by the jury). *See* PERLIN & LYNCH, *supra* note 127, at 79-81

170 Kanter, *supra* note 165, at 276.

lenged and litigation brought on their behalf to establish a right to treatment in a community setting.[171]

Cultural competence is a key component in providing effective representation and resolving any ethical dilemmas that may arise in elder law, just as it is in mental disability law.[172] The link between illness and the cultural and social context of a person's identity and community influences the way in which illness is defined and perceived.[173] Being culturally competent is also a way to combat sanism, OCS, and heuristics.[174] Providing culturally competent representation ensures that clients' civil rights will be protected and that their wishes are being followed.

### *B. Juvenile Law*

Many of the same ethical issues that arise in elder and mental disability law, are also present when representing juveniles. The Supreme Court in In Re Gault, recognized that due process requires the right to counsel for juveniles facing delinquency cases.[175] The Court found that proceeding where the child could be found delinquent and subject to the loss of liberty for years is "comparable in seriousness to a felony prosecution" and requires "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the child] has a defense and to prepare and submit it."[176]

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[171] *Id.* at 307.

[172] *See e.g.*, Casey Schutte, *Mandating Cultural Competence Training for Dependency Attorneys*, 52 FAM. CT. REV. 564 (2014); Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37 (2008); *see generally* Michael L. Perlin & Valerie R. McClain, *"Where Souls Are Forgotten": Cultural Competencies, Forensic Evaluations and International Human Rights*, 15 PSYCHOL., PUB. POL'Y & L. 257 (2009).

[173] Rosenberg, *supra* note 156, at 463.

[174] *Compare* Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373 (2002) (on the use of heuristics as practical tools to focus on aspects of culture that may affect the communication process in efforts to become more culturally competent in the interviewing and counseling context).

[175] In re Gault, 387 U.S. 1 (1967).

[176] *Id.* at 36. As Rob Mason, Director of the Juvenile Division of the Fourth Circuit Public Defender's Office stated "juvenile law is a special area of the law anchored in juvenile-specific training and practice skills, and requires zealous advocacy that is individualized and develop-

Despite the growing consensus on following a client–centered approach when representing juveniles, there is a lack of specialized training on how to interact with children in a non–suggestive and developmentally–sensitive way.[177] The role of a zealous advocate is "far from uniform in juvenile practice,"[178] and goes beyond zealous advocacy to include "social work"–based legal practice.[179] In child custody cases involving abuse or neglect, the role of the lawyer is even more unclear and inconsistent.[180] This lack of specialized training and consistency in representation exists also for persons with mental illness involved in the justice system.

One of the major ethical dilemmas that face attorneys who represent juveniles is when counsel may usurp the client's autonomous decision–making rights and raise the issue of whether the client is competent over the client's objection.[181] Some child advocates argue for a paternalistic approach because the legal rights of juveniles are routinely restricted in many areas; like the inability to vote, purchase alcoholic beverages, work, and obtain medical care.[182] Paternalistic advocacy persists in efforts to not only rehabilitate children but also to completely transfer decision-making authority from children to adults.[183] Yet the client may have a legitimate reason in not wanting his or her competency raised as an issue at trial.[184] If a guardian is appointed or other agencies become involved as part of a protective action under Model Rule 1.14, disclosures could be made to the Court and others that could hurt the client at trial.[185]

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mentally appropriate." Jan Pudlow, *Juvenile Law Was a Long Time Coming,* FLA. B. NEWS 1, 2 (Oct. 1, 2015).

[177] David R. Katner, *Revising Legal Ethics in Delinquency Cases by Consulting with Juveniles' Parents*, 79 UMKC L. REV. 595, 599 (2011).

[178] Kristen Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 246 (2005).

[179] Mary Leigh Martin, *Specializing in an Area of Need: Child Welfare Law Certification for Vermont Attorneys*, 41 VT. B.J. 39 (Winter 2016).

[180] Suparna Malempati, *Ethics, Advocacy, and the Child Client*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 633, 639 (2014).

[181] David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases*, 16 S. CAL. INTERDISC. L.J. 293, 295 (2007). *See also* infra, text accompanying notes 243-57.

[182] *Id.* at 308.

[183] Henning, *supra* note 178, at 262.

[184] Katner, *supra* note 181, at 311.

[185] *Id.* at 319.

Another ethical issue that often arises is whether parents should be consulted. Model Rule 1.14 appears to imply that counsel should seek the appointment of a guardian rather than consult with the child's parents, caregivers, or immediate family members.[186] Nonetheless, if there is an adverse relationship between the child and parent, to consult with the parent would create a conflict of interest.[187] Further, the parent–directed approach assumes that the parents have a desire to act in the best interests of their child, that the parents are more competent than the child, and that the parents have a sufficient understanding of the legal issues that face their child.[188]

Finally, the issue of capacity of a child due to cognitive and developmental limitations can potentially have a negative impact on the attorney–client relationship.[189] Zealous advocacy not only depends on the attorney's efforts but also on the ability of the child to engage in effective cognitive reasoning.[190] Instead of focusing on whether the child is making the "correct" decision, the lawyer should focus on the ability of the child to engage in the decision–making process.[191] Juveniles involved in the justice system face the same prejudices and sanism that elderly persons and persons with mental illness face.[192]

Paternalistic approaches can lead to unnecessary and unjustified institutionalization. Effective representation can combat paternalistic attitudes and ensure that a juvenile's rights are protected.

## IV. THE MULTI–TEXTURED MEANINGS OF CAPACITY AND COMPETENCY

As previously discussed, the issue of capacity affects not just men-

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[186] Katner, *supra* note 177, at 612.

[187] *Id.* at 613.

[188] Henning, *supra* note 178, at 297. *See also* Matter of Williams, 356 A.2d 468 (N.J. Juv. & Dom. Rel. Ct. 1976) (minor admitted to psychiatric hospital upon parental signature has the right to sign himself out without parental consent).

[189] Henning, *supra* note 178, at 270.

[190] *Id.* at 271.

[191] Malempati, *supra* note 180, at 655.

[192] *Id.*; *see also supra* note 166. On the relationship between sanism and therapeutic jurisprudence, see *infra* text accompanying notes 274-76, in the context of juvenile punishment, see Michael L. Perlin, *"Yonder Stands Your Orphan with His Gun": The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH L. REV. 301 (2013).

tal disability law, but also touches upon all aspects of the law including criminal law, elder law, and juvenile law.[193] Complicating the issues of capacity is the fact that capacity (competency) is fluid. Further, different legal acts require different thresholds for capacity.[194] A finding of incapacity in one area does not mean a person is incompetent for all decisions or all future decisions.[195] It is also important to distinguish incapacity from undue influence by a third party.[196]

One of the ethical issues that criminal attorneys face is whether or not to raise the issue of competency and by extension, whether to raise the issue of competency over the defendant's objection.[197] The issue of competency for mentally ill defendants is further complicated by the pretextuality that permeates all aspects of the court process.[198] An attorney must be both a zealous advocate and an officer of the Court and those duties conflict when a criminal defendant may be incompetent.[199] Before a defense attorney makes the determination that a competency evaluation is necessary, the potentially disastrous consequences for the defendant for even merely participating in the evaluation must be considered.[200]

Raising the issue of competency of a client can lead to a guardian-

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[193] *See infra* text accompanying notes 135-49 and 155-92.

[194] Raymond C. O'Brien, *Attorney Responsibility and Client Incapacity*, 30 J. CONTEMP. HEALTH L. & POL'Y 59, 72 (2013). *See also* Rivers v. Katz, 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986). Some advocates also argue that there is a distinction with juvenile decision-making capabilities when facing criminal charges verses juveniles seeking to make healthcare decisions without knowledge or consent of their parents. *See* Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-making and Criminal Responsibility*, 6 NEV. L.J. 927 (2006).

[195] Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 585 (2016).

[196] O'Brien, *supra* note 194, at 72.

[197] Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1998). *See generally* American Bar Association, *Criminal Justice Section Standards*, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html (last visited August 7, 2016). *See also* Perlin, *supra* note 5, at 358-61.

[198] Perlin, *Pretexts, supra* note 66, at 631-39.

[199] John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV 207, 209 (2008)

[200] King, *supra* note 199, at 239

ship proceeding.[201] For persons subject to guardianships, whether they are limited or plenary guardianships, they still can – at least theoretically under prevailing domestic law – maintain meaningful rights under state and constitutional law.[202] Being subject to a guardianship does not prevent a person from entering into an enforceable, implied contract for certain attorney services.[203] Further, the right to procedural and substantive due process is not extinguished by guardianship.[204] For an attorney representing someone subject to a guardianship, the attorney must maintain a normal attorney–client relationship unless the attorney reasonably believes that doing so would place the client at risk of substantial physical, financial or other harm.[205]

### *A. Forced Treatment Issues*

Persons with mental illness are often subject to forced treatment that occurs both in an institutional and outpatient setting.[206] The right to refuse treatment is a constitutionally protected right and the burden is on the proponent of involuntary medication to prove that the person lacks capacity in order to override this right.[207] When representing persons with mental illness facing forced treatment it is important that the attorney is aware of the humiliating consequences that arise from taking away their client's autonomy and ability to direct their own care.[208]

Informed consent has become the basis for all medical intervention and requires that that the person is capable of understanding the information presented, competent, free from undue influence, and that

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[201] ABA Model Rules, *supra* note 117, at § 1.14 (b).

[202] Kohn & Koss, *supra* note 195 at 590-91.

[203] *Id.* at 594.

[204] *Id.* at 598. *See also* Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (where persons with mental disabilities who were involuntarily committed were found to have constitutionally protected due process rights) and Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (discussing that procedural due process depends on; the private interest affected, the risk of erroneous deprivation of such interests, the probable value of additional procedural safeguards and the government's interest including fiscal and administrative burdens that the additional due process requirement would entail).

[205] Kohn & Koss, *supra* note 195, at 636.

[206] *See generally* Perlin & Cucolo, *supra* note 147, § 8-1 et seq.

[207] Mills v. Rogers, 457 U.S. 291 (1982).

[208] Perlin & Weinstein, *supra* note 17 at 30.

the decision is voluntary.[209] Regarding the right to refuse treatment, the issue becomes not only whether the person is incompetent, but also whether the treatment is the least restrictive alternative and whether the benefits of treatment outweigh the risks.[210] Coercing consent for treatment of persons with mental illness legally and ethically invalidates informed consent.[211]

For persons with mental illness facing criminal charges, the issue of forced treatment remains controversial and highly contested.[212] In Sell v. United States, the Supreme Court held that when a mentally ill defendant faces serious criminal charges, the government may involuntarily administer antipsychotic drugs if the treatment is medically appropriate, substantially unlikely to have side effects that undermine the trial's fairness, and necessary to further important government trial–related interests.[213] This test is different from the one set forth in Washington v. Harper, which limited the right of convicted felons to refuse treatment and found the need to balance the liberty interest in avoiding unwanted treatment with prison safety and security.[214] Sell also differs from Riggins v. Nevada (a case involving a competent insanity defense–pleader), where the Supreme Court held that use of antipsychotic medication violated the defendant's right to a fair trial and focused on the litigational side effects that might have compromised the defendant's participation in trial.[215] Attorneys representing criminal defendants with mental illness must not only be familiar with the law, but also the consequences of forced treatment on their clients' potential outcomes at trial.

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[209] Talati, *supra* note 143 at 174, 176-77. *See also* Perlin & Cucolo, *supra* note 147, § 12-1.5.

[210] Rivers v. Katz, 67 N.Y.2d 485, 497-98 (1986).

[211] Talati, *supra* note 143, at 199.

[212] Perlin & Cucolo. *supra* note 147.

[213] Sell v. United States, 539 U.S. 166 (2003).

[214] Washington v. Harper, 494 U.S. 210 (1990); Perlin & Cucolo, *supra* note 147; Michael L. Perlin & Naomi Weinstein, *The Right to Refuse Treatment in a Forensic Setting*, in PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY (Richard Rosner et al eds. 2016) (forthcoming).

[215] Riggins v. Nevada, 504 U.S. 127 (1992), Perlin & Cucolo, *supra* note 147; §§ 8-7-8-7.4. Perlin & Weinstein, *supra* note 17.

### *B. Psychiatric Advance Directives*

One way to address the issue of wavering capacity for persons with mental illness is through the use of psychiatric advance directives.[216] A psychiatric advance directive is a legally enforceable document that specifies the manner in which treatment decisions are to be made in the event the person later becomes incompetent.[217] It can specify both who should make treatment decisions and also what specific treatment should be administered, including psychiatric medication, in the event of incapacity. Competency to execute a psychiatric advance directive requires the ability to understand and appreciate the risks and benefits of treatment, the ability to engage in rational deliberation, and the capability of understanding the meaning and significance of the delegation.[218]

The use of these psychiatric advance directives may have significant therapeutic value.[219] Such directives can empower persons with mental illness to have control over their treatment and may encourage their clinicians to treat them with dignity and respect, rather than paternalistically.[220] They can foster a more collaborative model of care for psychiatric treatment and encourage voluntary treatment.[221] They may also avoid the need for a finding of judicial incapacity[222] and could avoid the need for a guardian.[223]

Nevertheless, psychiatric advance directives raise serious ethical is-

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[216] For an earlier consideration in the commitment context, see Rebecca Dresser, *Ulysses and the Psychiatrists: A Legal and Policy Analysis of the Voluntary Commitment Contract,* 16 HARV. L. REV. 777 (1981-82). This flows from the theory first advanced in ALAN A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 66-70 (1975) (in some cases physicians are justified in overriding a patient's wishes because the patient would thank the physician if she could); this has been labeled as the "Thank You Theory," discussed in this context in Dresser, *supra*, at 789-91.

[217] Elizabeth M. Gallagher, *Advance Directives for Psychiatric Care: A Theoretical and Practical Overview for Legal Professionals,* 4 PSYCHOL. PUB. POL'Y & L. 746 (1998).

[218] *Id.* at 777.

[219] Bruce J. Winick, *Advance Directive Instruments for Those with Mental Illness*, 51 U. MIAMI L. REV. 57, 81 (1996).

[220] *Id.* at 81, 83.

[221] Gallagher, *supra* note 217, at 783.

[222] Winick, *supra* note 219, at 84.

[223] Judy A. Clausen, *Making the Case for a Model Mental Health Advance Directive Statute*, 14 YALE J. HEALTH POL'Y, L. & ETHICS 1, 19 (2014).

sues when it comes to the issue of potential revocation is raised.[224] The most important issue to be considered is whether psychiatric advance directives should override the constitutional right to refuse medication.[225] This issue applies not just to persons facing institutionalization but also persons with mental illness who are in the criminal justice system.[226] Some psychiatric advance directives purport to be irrevocable which can cause particular problems for patients who have chosen to be treated with specific medication.[227] Even if refusing psychiatric treatment may limit the person's ability to act autonomously and even to lose competency, the person may authoritatively choose that course of action while still competent.[228] Consider the case of a patient who seeks to enforce her right to refuse antipsychotic medication but who previously agreed to a psychiatric advance directive listing specific medication to which she would consent; should the advance directive override her right to refuse treatment? Does it matter if the client can articulate the side–effects she is experiencing?[229] What if the client no longer believes he or she is suffering from a mental illness; would that automatically make them incompetent?[230]

Psychiatric advance directives also create issues when a treating clinician who is unfamiliar with the patient may be reluctant to administer the specific treatment,[231] or does not think following the patient's

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[224] Winick, *supra* note 219, at 86. On the question of increased costs connected to the use of such directives, see Nancy Rhoden, *The Limits of Legal Objectivity,* 68 N.C.L. REV. 845 (1990).

[225] Gallagher, *supra* note 217, at 762-67.

[226] Robert D. Miller, *Advance Directives for Psychiatric Treatment: A View from the Trenches*, 4 PSYCHOL. PUB. POL'Y & L. 728, 743 (1998).

[227] Gallagher, *supra* note 217 at 779.

[228] Mark J. Cherry, *Non-Consensual Treatment is (Nearly Always) Morally Impermissible*, 38 J.L. MED. & ETHICS 789, 792 (2010).

[229] The Supreme Court has specifically identified the potential of side effects as a factor to be considered in refusal of medication decision-making. *See, e.g.*, Riggins v. Nevada, 504 U.S. 127 (1992).

[230] *See generally* Winick, *supra* note 219. In one study, 21% of medication refusers denied being mentally ill, *see* Steven Ken Hoge et al., *A Prospective Multicenter Study of Patients' Refusal of Antipsychotic Medication*, 47 ARCHIVES GEN. PSYCHIATRY 949, 951 (1990).

[231] Winick, *supra* note 219, at 71. *See also* Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901, 903 (1998) ("A court may, in the event of their incompetency, choose someone else to play this role, perhaps someone unfamiliar with the person's values and preferences.").

advance directives would be in the patient's best interests.[232] Further, patients may be subject to coercion with regard to their decision-making as to whether or not to accept a psychiatric advance directive.[233] In an ideal world, psychiatric advance directives could provide a meaningful way for clients to direct their own care according to their own wishes.[234] However, because of the limitations of the mental health system that already exists, there are ethical issues and concerns that attorneys must be aware of in order to provide the best representation for their clients.

### *C. Right to Sexual Interactions*

The right to voluntary sexual interaction for persons with mental disabilities is a controversial topic.[235] The Supreme Court has implicitly recognized the right to sexual privacy in Lawrence v. Texas.[236] In striking down a Texas statute that criminalized certain intimate voluntary sexual conduct engaged in by two persons of the same sex, the Court emphasized the respect the Constitution demands for the autonomy of a person making intimate and personal choices.[237] However, the Supreme Court has not directly addressed issues involving collateral sexual privacy rights, such as individual right to purchase and use of sexual aids, a question about which the federal circuit courts have split.[238]

Sanism and pretexuality rob persons with mental disabilities from basic dignity and from exercising their right to sexuality in institutional settings.[239] Compounding the issue is that there is no standard to de-

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[232] Miller, *supra* note 226, at 732.

[233] Winick, *supra* note 219, at 88.

[234] Gallagher, *supra* note 217, at 782.

[235] Perlin, *supra* note 8, at 483.

[236] Lawrence v. Texas, 539 U.S. 558 (2003).

[237] *Id.* at 574.

[238] *Compare* Williams v. Attorney Gen. of Alabama, 378 F.3d 1232, 1250 (11th Cir. 2004) (declining to extrapolate from dicta in *Lawrence* a right to sexual privacy triggering strict scrutiny in upholding a statutory ban on the sale of sexual devices), *with* Reliable Consultants v. Earle, 517 F.3d 738 (5th Cir. 2008) (striking down statute criminalizing sale of sexual devices, finding that statute impermissibly burdened customer's due process rights to engage in private intimate conduct).

[239] Perlin & Lynch, *supra* note 127, at 272-73.

termining competency to engage in sexual interaction because of the fluidity of such a determination.[240] At the most basic, the test requires that an individual have the capacity to understand there is a decision to be made and have an ability to consent or not.[241]

Elderly persons face the same discrimination when it comes to voluntary sexual interaction that persons with mental disabilities face. Sexuality does not disappear with age and it may take on even greater importance for persons with dementia because it can provide a sense of connection to other people.[242] As with other aspects of the law, it is important for attorneys in dealing with these issues to not substitute their own judgment in place of that of their clients.[243]

### *D. Supported Decision–Making under International and Domestic Law*

As we noted earlier, supported decision–making rather than substituted decision–making is the centerpiece of the CRPD under Article 12 and must be at the forefront of any discussion on this area of law and social policy.[244] Article 12 of the CRPD guarantees that persons with disabilities have the right to recognition everywhere as persons before the law.[245] To be recognized as full persons before the law means that one's legal capacity, including the capacity to act, is equally recognized.[246] Article 12 underscores the importance of legal capacity as an

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[240] *Id.* at 264.

[241] Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1217 (2015).

[242] *Id.* at 1248.

[243] *See* Perlin & Lynch, *supra* note 151, at 139.

[244] *See supra* notes 22-23. Although the United States has not ratified the CRPD, "a state's obligations under it are controlled by the Vienna Convention of the Law of Treaties[,] which requires signatories 'to refrain from acts which would defeat [the Disability Convention's] object and purpose.'" Henry A. Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 362-63 (2011) (discussing In re *Mark C.H.*, 906 N.Y.S.2d 419, 433 (N.Y. Sur. Ct. 2010) (finding that guardianship appointments must be subject to requirements of periodic reporting and review). We discuss this in Perlin & Weinstein, *supra* note 17, at 31 n. 187.

[245] CRPD Article 12, *supra* note 15.

[246] International Disability Alliance, *Legal Opinion on Article 12 of CRPD*, 2010, http://www.internationaldisabilityalliance.org/resources/legal-opinion-article-12-crpd (last visited Aug. 14, 2016). *See also* Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST.

inalienable right and provides for safeguards to ensure that a person's capacity is not subject to abuse.[247] Instead of paternalistic guardianship laws, the CRPD's supported–decision making model "recognizes first, that all people have the right to make decisions and choices about their own lives."[248] This principle must guide attorneys when faced with ethical questions regarding a client's capacity.

Supported decision–making is also reinforced in US law under the American with Disabilities Act ("ADA"). Title II of the ADA prohibits discrimination based on disabilities by public entities in their services, programs, or activities.[249] Guardianships unnecessarily isolate persons with psychosocial impairments.[250] This unjustified isolation can be viewed as discrimination based on a disability in violation of the ADA.[251] A declaration of incapacity by the Court can lead to feelings of helplessness and loss of control, which are detrimental to a person's mental well-being and create feelings of shame and humiliation.[252] Substituted decision-making can lead to unjustified confinement for persons with mental illness.[253] When attorneys use substituted judgment in making legal decisions for their clients, there are no checks and balances.[254]

Supported decision-making allows individuals with limitations to receive support in order to understand relevant information and available choices in order to make decisions based on their preferences, instead of completely taking away their ability to make any decisions.[255] Attorneys representing persons with diminished capacity must carefully consider their client's wishes and assist them in making legal decisions. It is important to consider the context in which individuals face deci-

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U. L. REV. 527, 559 (2009); Perlin, *supra* note 23, at 1176.

[247] Robert Dinerstein, Esme Grant Grewal & Jonathan Martinis, *Emerging International Trends and Practices in Guardianship Law for People with Disabilities*, 22 ILSA J. INT'L & COMP. L. 435, 444 (2016).

[248] Kanter, *supra* note 246, at 563.

[249] 42 U.S.C. § 12132 (2006).

[250] Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 ST. LOUIS U.J. HEALTH L. & POL'Y, 279, 289 (2011).

[251] Kevin M. Cremin, *Challenges to Institutionalization: The Definition of "Institution" and the Future of Olmstead Litigation*, 17 TEX. J. ON C.L. & C.R. 143, 152 (2012).

[252] Salzman, *supra* note 23, at 184. *See also* Perlin & Weinstein, *supra* note 17 at 38.

[253] Salzman, *supra* note 250, at 290.

[254] Ross, *supra* note 197, at 1373.

[255] Salzman, *supra* note 250, at 306.

sions and not just the personal characteristics of the individual with a disability.[256] Education and training are also important for all parties involved in supported decision-making, including the clients.[257] Attorneys should only intrude on their clients' autonomy in the short–term and only to the extent necessary to facilitate their clients' autonomy in the long term.[258]

## V. THERAPEUTIC JURISPRUDENCE[259]

Over the past two decades, one of the most significant legal theoretical developments has been the creation and dynamic growth of therapeutic jurisprudence.[260] One of the co–authors (MLP) has described this development:

[T]herapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law [] can have therapeutic or anti–therapeutic consequences.[261] The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating

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[256] Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?,* 117 PENN ST. L. REV. 1111, 1153 (2013).

[257] *Id.*

[258] Dlugacz, *supra* note 5, at 340.

[259] This section is generally adapted from Perlin, *supra* note 192; Perlin & Lynch, *supra* note 146, and Perlin, *Wasteland*, *supra* note 33. Further, it distills the work of one of the co-authors (MLP) over the past two decades, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

[260] *See, e.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); PERLIN & CUCOLO, *supra* note 147, § 2-6, at 2-43–2-66. Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 27, 32–33 (1992).

[261] *See* Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009); *see also* Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, *in* DISPUTES AND DILEMMAS IN HEALTH LAW 91 (Ian Freckelton & Kate Peterson eds., 2006) (for a transnational perspective).

due process principles.[262]

David Wexler clearly identifies how the inherent tension inherent in this inquiry must be resolved: "[T] he law's use of mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[263] As one of us (MLP) has written elsewhere, "[A]n inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[264]

Therapeutic jurisprudence "look[s] at law as it actually impacts people's lives"[265] and assesses law's influence on "emotional life and psychological well–being."[266] Therapeutic jurisprudence mandates that "law should value psychological health, should strive to avoid imposing anti–therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness."[267] From therapeutic jurisprudence, we gain "a new and distinctive perspective utilizing socio–psychological insights into the law and its applications."[268] Therapeutic jurisprudence is ". . . a sea-

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[262] *E.g.*, Michael L. Perlin, *"The Judge, He Cast His Robe Aside": Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL'Y J. 1, 7–8 (2013); Perlin, *supra* note 7, at 751. On how therapeutic jurisprudence "might be a redemptive tool in efforts to combat sanism, as a means of 'strip[ping] bare the law's sanist façade,'" *see* Perlin, *Mirror*, *supra* note 29, at 591 (quoting, in part PERLIN, *supra* note 105, at 301). *See also* Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585–86 (2008). On sanism, *see supra* text accompanying notes 40-65.

[263] David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993). *See generally* David Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179 (1996).

[264] Perlin, *supra* note 52, at 412 (emphasis in original); 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, 782 (1998).

[265] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

[266] David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis P. Stolle et al. eds., 2000).

[267] Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, *in* INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

[268] Freckelton, *supra* note 261, at 576. It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully. Susan Daicoff, *Afterword: The Role of*

change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . [emphasizing] psychological wellness over adversarial triumphalism."[269] It thus supports an ethic of care.[270]

Professor Amy Ronner describes the "three Vs": voice, validation and voluntariness,[271] arguing:

What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.[272]

### *A. The Role of Dignity*

A core central principle of therapeutic jurisprudence is a commit-

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*Therapeutic Jurisprudence within the Comprehensive Law Movement*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 265, at 465.

269 Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); *see also* Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006).

270 *See e.g.*, Winick & Wexler, *supra* note 268, at 605–07; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Brookbanks, *supra* note 268. The use of the phrase dates to CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

271 Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of "voice," *see also* Freckelton, *supra* note 261, at 588.

272 Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002) (internal citations omitted). *See generally* AMY D. RONNER, LAW, LITERATURE AND THERAPEUTIC JURISPRUDENCE (2010).

ment to dignity.[273] In a recent article about dignity and the civil commitment process, Professors Jonathan Simon and Stephen Rosenbaum embrace therapeutic jurisprudence as a modality of analysis, and focus specifically on this issue of voice: "When procedures give people an opportunity to exercise voice, their words are given respect, decisions are explained to them their views taken into account, and they substantively feel less coercion."[274]

The question to be posed here is this: can we adhere to Professor Ronner's "3 V's", unless we eschew the level of paternalism that is mandated by the "best interests" model? David Wexler made it clear almost a quarter of a century ago that "[t]herapeutic jurisprudence in no way supports paternalism, coercion, or a therapeutic state."[275] The "paternalistic role" of lawyers at [civil commitment] hearings represents sanism and pretextuality, and turns the adversary process into a "farce and a mockery,"[276] in such a way that repudiates therapeutic jurisprudence. Forensic psychologist Kathy Faulkner Yates has urged the use of therapeutic jurisprudence as a "diagnostic tool to identify the malignant way that pretextuality poisons forensic and judicial relationships."[277]

The best interests model – one that inevitably leads to substituted decision–making – is the essence of the paternalism that Professor Wexler rejects. It is utterly incompatible with any and all of the precepts of therapeutic jurisprudence. We believe that it is only through the embrace of TJ can the issues that we raise here be resolved in a way that, per Professor Ronner, provides dignity to persons with mental disabilities by honoring the principles of "voice, validation and voluntariness."[278]

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[273] *See* BRUCE J. Winick, Civil Commitment: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005). On dignity in the sentencing process generally, *see* PERLIN, *supra* note 95, at 214–15.

[274] Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIAMI L. REV. 1, 51 (2015).

[275] David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 762 (1993).

[276] Perlin, *supra* note 25, at 26 (quoting, in part, Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 41 (1999)).

[277] Kathy Faulkner Yates, *Therapeutic Issues Associated With Confidentiality and Informed Consent in Forensic Evaluations*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 345, 357-58 (1994).

[278] See Ronner, *supra* note 271, at 94-95.

## VI. CONCLUSION

As we noted above,[279] the law review literature is astonishingly bereft of considerations of "zealous advocacy" in the context of the representation of persons with mental disabilities. We hope, modestly, that this article leads others to consider the issues we discuss here, and build on our work. We offer these thoughts in the hopes that that does happen.

First, client autonomy must be in the forefront of any client–attorney relationship, and an attorney must thus always follow their clients' wishes except for in very limited cases (where there is a pre–existing finding of civil incompetency). Second, if an attorney feels that a client is unable to make a decision completely on her own, the attorney should seek out others who might assist in supported decision–making; an attorney should never substitute her own judgment for "what is best."[280] Third, persons with mental disabilities have the same civil rights as all other persons; the existence of a question as to competency does not mean that a person is stripped of all their decision–making power, or that the person's expressed needs/desires are not valid.

Fourth, the pressure will likely be the greatest in cases that involve the exact controversies (the ""How can you do that?" cases)[281] that create the most dissonance and are likely of the greatest importance to the client – questions involving involuntary medication and sexual autonomy. Fifth, attorneys must take seriously international human rights law that mandates such supported decision–making. Finally, attorneys must embrace the principles and tenets of therapeutic jurisprudence as a means of best ensuring the dignity of their clients and of maximizing the likelihood that voice, validation and voluntariness[282] will be enhanced.

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279 *See supra* text accompanying note 137.

280 Compare e.g., Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 J. L. & HEALTH 15, 25 (1993-94) ("Thus, employment decisions cannot be based on 'paternalistic views' of ***what is best*** for a person with a disability") (emphasis added).

281 *See supra* text accompanying notes 3-5, and 193-242.

282 *See* Ronner, *supra* note 271.

The narrator of Dylan's song, As I Went out One Morning,[283] locates himself clearly in the ambit of Tom Paine.[284] Paine was the philosopher who considered "rights of the mind" among the natural liberties.[285] We hope that this article encourages lawyers who represent persons with mental disabilities to similarly locate themselves, and to privilege–not subordinate–the autonomy in decision–making that all persons with mental disabilities deserve. As with the narrator in Dylan's song, simply put, she has no choice.

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[283] *Supra* note 34.

[284] *See supra* text accompanying notes 36-37.

[285] *See supra* text accompanying notes 37-39.