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# Therapeutic Jurisprudence: Understanding The Sanist and Pretextual Bases of Mental Disability Law

*Michael L. Perlin\**

## I. INTRODUCTION

The articles in this Symposium teach several important lessons about therapeutic jurisprudence. First, they demonstrate that therapeutic jurisprudence is not simply an academic discipline by which law professors can reinterpret doctrinal change. Nor is it a carefully articulated rationale by which treatment professionals can convince the judiciary that it is appropriate to return to the days of the "hands off" doctrine so as to insulate treatment decisions from judicial scrutiny.<sup>1</sup> Rather, these articles show that therapeutic jurisprudence can be a powerful method of illuminating the "real life" impact of statutes,<sup>2</sup> court decisions,<sup>3</sup> and administrative systems,<sup>4</sup> the effects of

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1. 1 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 1.03, at 5-6 (1989); see, e.g., *Banning v. Looney*, 213 F.2d 771 (10th Cir. 1954), cert. denied, 348 U.S. 854 (1954) ("Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."); *Siegel v. Ragan*, 180 F.2d 785, 788 (7th Cir. 1950).

2. See Joel Haycock, *Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301 (1994).

3. See Richard Barnum & Thomas Grisso, *Competency to Stand Trial in Juvenile Court in Massachusetts: Issues in Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 321 (1994).

4. See Ira K. Packer, *The Court Clinic System in Massachusetts: A Therapeutic Ap-*

relationships between forensic mental health professionals and the mentally disabled persons they are evaluating,<sup>5</sup> as well as lawyering practices.<sup>6</sup> Not coincidentally, David Wexler puts forth precisely this vision in the preface to his first collection of essays, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent*.<sup>7</sup>

Second, these articles tellingly reveal that therapeutic jurisprudence principles can be applied to a myriad of legal issues confronting mentally disabled persons. Such issues include the ultimate impact of court clinical evaluations,<sup>8</sup> the special problems faced in cases involving mentally disabled juveniles charged with crimes,<sup>9</sup> the appropriate role of counsel in the involuntary civil commitment process,<sup>10</sup> and the actual impact of an obscure financial recoupment statute on the liberty rights of institutionalized mental patients.<sup>11</sup> Importantly, most of these topics have been the focus of astonishingly little scholarly attention or litigation.<sup>12</sup>

Third, therapeutic jurisprudence can be a powerful tool for studying mental health systems.<sup>13</sup> Although the papers focus almost exclu-

*proach vs. a Rights-Oriented Approach*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 291 (1994).

5. See Kathy Faulkner Yates, *Therapeutic Issues Associated With Confidentiality and Informed Consent in Forensic Evaluations*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 345 (1994).

6. See Joel Haycock et al., *Mediating the Gap: Thinking About Alternatives to the Current Practice of Civil Commitment*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265 (1994).

7. David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 3 (David B. Wexler ed., 1990) [hereinafter TJ]; David B. Wexler, *An Orientation to Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 259 (1994) [hereinafter Wexler, *Orientation*].

8. See Packer, *supra* note 4.

9. See Barnum & Grisso, *supra* note 3.

10. See Haycock et al., *supra* note 6.

11. See Haycock, *supra* note 2.

12. I do not believe that this is coincidental. In a work-in-progress, Deborah Dorfman and I argue that scholars on all points of the political spectrum continue to ignore important developments in mental disability law jurisprudence as a reflection of the way that the legal problems of mentally disabled persons are ignored by society. See Michael L. Perlin & Deborah A. Dorfman, *The Invisible Renaissance of Mental Disability Law Scholarship: A Case Study in Subordination* (manuscript-in-progress, on file with authors).

13. For recent important systems-based studies of mental disability law, see Ingo Keilitz & Ronald Roesch, *Improving Justice and Mental Health Systems Interactions: In Search of a New Paradigm*, 16 LAW & HUM. BEHAV. 5 (1992); Pamela Casey et al., *Toward an Agenda for Reform of Justice and Mental Health Systems Interactions*, 16 LAW & HUM. BEHAV. 107 (1992).

sively on Massachusetts-specific questions,<sup>14</sup> the analyses and conclusions are generally applicable to parallel situations in other jurisdictions.<sup>15</sup>

As discussed below, these papers demonstrate how therapeutic jurisprudence functions as a vital, interpretive tool through which mental disability law can be studied.<sup>16</sup> The papers are most valuable, however, for their explicit and implicit illustration of three collateral points that must be evaluated in any therapeutic jurisprudence analysis. Wexler has stressed one of these points in his recent work. I have begun turning my attention to the second point in other essays. The third point is just beginning to be explored in therapeutic jurisprudence literature.

First, these papers acknowledge the importance (and in some cases the primacy) of civil libertarian interests, while reminding us that justice must remain the primary focus of the resolution of any forensic mental health issue. Although Professor Wexler has stressed this point on numerous occasions,<sup>17</sup> it is a point sometimes in danger of being ignored or trivialized if therapeutic jurisprudence is (incorrectly) viewed as merely a fancy rearticulation of what Nicholas Kittrie called the "therapeutic state."<sup>18</sup> Joel Haycock makes this point explicitly in this volume: "Therapeutic jurisprudence represents a means for redress, and for [legal] reform, and to that extent, it is salutary and illuminating."<sup>19</sup>

Additionally, the papers remind the readers that therapeutic jurisprudence analyses must be undertaken with a full awareness of the impact of sanism<sup>20</sup> and pretextuality<sup>21</sup> on all aspects of the mental

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14. Dr. Yates' paper is the sole exception to this statement.

15. See David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243 (1994).

16. See 1 PERLIN, *supra* note 1, § 1.05A, at 5 (Supp. 1993); Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 20 N.Y.L. SCH. J. HUM. RTS. 623 (1993); Michael L. Perlin, *LAW AND MENTAL DISABILITY* § 5.01 (1994).

17. Wexler, *Orientation*, *supra* note 7, at 259-60; David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAVIORAL SCI. & L. 17 (1993); David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759 (1993) [hereinafter Wexler, *New Directions*].

18. See generally NICHOLAS KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* (1971); Finkelman & Grisso, *supra* note 15, at 249.

19. Haycock, *supra* note 2, at 318.

20. See Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373 (1992); Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental*

disability law system. Further, we are reminded that therapeutic jurisprudence can be an effective and dramatic tool for ferreting out sanism and pretexts by judges, legislators, administrators and counsel.<sup>22</sup> Finally, the essays point out a potentially serious gap in the therapeutic jurisprudence methodology recognized by John Petrilla—namely, its failure to explicitly incorporate the perspective of both the voluntary and involuntary consumer of mental health services in crafting a therapeutic jurisprudence perspective.<sup>23</sup> Here, Haycock states that “[t]he success of therapeutic jurisprudence will depend in part on the degree to which it *empowers* the objects of therapeutic and judicial attention.”<sup>24</sup>

In the remainder of this article, I will focus solely on the therapeutic jurisprudence/sanism-pretextuality overlap. I do this because I believe it is absolutely essential that any and all analyses of mental disability law jurisprudence—theoretical or doctrinal, empirical or anecdotal—recognize the relationship between sanist stereotypes and behaviors and pretextual testimony and court decisions. It is also necessary that we acknowledge: (a) the way that mental disability law jurisprudence develops out of our unconscious fears about mentally disabled persons;<sup>25</sup> (b) the way that heuristics (cognitive simplifying devices) further drive this jurisprudence;<sup>26</sup> and (c) the teleolog-

*Disability Law Jurisprudence*, 11 BEHAVIORAL SCI. & L. 47 (1993).

21. See Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993) [hereinafter Perlin, *Pretexts*]; 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) [hereinafter Perlin, *Morality*].

22. See generally Perlin, *supra* note 16, at 636. See also Michael L. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990’s*, 16 LAW & PSYCHOL. REV. 29 (1992); Michael L. Perlin, *Reading the Supreme Court’s Tea Leaves: Predicting Judicial Behavior in Civil and Criminal Right to Refuse Treatment Cases*, 12 AM. J. FORENSIC PSYCHIATRY 37 (1991); Michael L. Perlin, *Decoding Right to Refuse Treatment Law* 16 INT’L J.L. & PSYCHIATRY 181 (1993) [hereinafter Perlin, *Decoding*].

23. John Petrilla, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 877 (1993) (review of ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991)).

24. Haycock, *supra* note 2, at 317 (emphasis added).

25. See, e.g., Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599 (1989-90); MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1994).

26. See, e.g., Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990) [hereinafter Perlin, *OCS*]; Michael L. Perlin, *Are Courts Competent to Decide Competency Questions? Stripping the Facade From United States v. Charters*, 38 U. KAN. L. REV. 957 (1990).

ical basis of many of the cases that form the corpus of much of this law.<sup>27</sup>

What is meant by sanism and pretextuality?<sup>28</sup> Sanism refers to the irrational prejudices that cause, and are reflected in, prevailing social attitudes toward mentally disabled persons, and those so perceived. Although sanism infects our jurisprudence, our lawyering practices, and our forensic practices, it is largely invisible and largely socially acceptable. Sanism is based upon stereotype, myth, superstition and deindividualization. It is sustained and perpetuated by our use of a false "ordinary common sense" and heuristic reasoning in our unconscious responses to events in everyday life and the legal process.<sup>29</sup> Sanism's effects are especially pernicious in the ways that social science is accepted or rejected in the formulation of a mental disability law jurisprudence.<sup>30</sup>

Pretextuality relates to the courts' acceptance (either implicit or explicit) of testimonial dishonesty and their decisions to engage in dishonest decisionmaking in mental disability law cases. This pretextuality infects all participants in the system, breeds cynicism and disrespect for the law, demeans participants and reinforces shoddy lawyering, blase judging and, at times, perjury.<sup>31</sup>

Both sanism and pretextuality need to be considered in any therapeutic jurisprudence inquiry. Unless we determine *why* the law has developed as it has, it will make little difference if we determine whether it is developing in a "therapeutically correct" way. In short, even if the legal system were to come to grips with *all* therapeutic jurisprudence issues in *all* aspects of mental disability law, these additional inquiries are still required. While I am convinced that therapeutic jurisprudence is an essential tool in the reconstruction of mental disability law, if it is to truly illuminate the underlying system, we must place it in the proper social/political context. This context examines why and how mental disability law has developed and what conscious and unconscious motivations have contributed to the law's development.<sup>32</sup>

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27. See Perlin & Dorfman, *supra* note 20.

28. See generally Perlin, *supra* note 16, at 630-31.

29. Perlin, *supra* note 20; Perlin, *OCS*, *supra* note 26.

30. See generally Perlin & Dorfman, *supra* note 20.

31. See generally Perlin, *Pretexts*, *supra* note 21; Perlin, *Morality*, *supra* note 21.

32. See, e.g., Michael L. Perlin, Law as a Therapeutic and Anti-Therapeutic Agent, Address Before Annual Conference of the Massachusetts Dep't of Mental Health's Division

Thus, I believe that only through these perspectives can the "doctrinal abyss" that appears to define mental disability law be understood.<sup>33</sup> Therapeutic jurisprudence—by forcing us to focus on the therapeutic and antitherapeutic outcomes of court decisions, statutes, rules and roles—illuminates the way that pretextuality and sanism drive the mental disability law system.<sup>34</sup> The articles in this symposium remind us that scholars and researchers in this area partially fulfill the role of systemic archaeologists who continue to unearth new discoveries that explain how and why the mental disability law system operates as it does.<sup>35</sup>

## II. THIS SYMPOSIUM ISSUE

Each of the symposium papers reflects realities about both therapeutic jurisprudence and the mental disability law system. Richard Barnum and Thomas Grisso's article provides examples illustrating

of Forensic Mental Health (May 28, 1992) (discussing, inter alia, *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992) (rejecting the state's argument that it could indefinitely confine an insanity acquittee who was no longer mentally ill) and *Riggins v. Nevada*, 112 S. Ct. 1810 (1992) (reversing a conviction in which a defendant's right to a fair trial was compromised by the involuntary imposition of a high dosage of neuroleptic medication)); see generally 3 PERLIN, *supra* note 1, § 15.25A (Supp. 1993) (discussing *Foucha*), and 2 *id.* § 5.65 (Supp. 1993) (discussing *Riggins*). For a recent therapeutic jurisprudence reading of *Riggins*, see Bruce J. Winick, *Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of Riggins v. Nevada*, 10 N.Y.L. SCH. J. HUM. RTS. 637 (1993).

33. See, e.g., Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss?"*, 29 ARIZ. L. REV. 1 (1987).

34. For an especially rich example of the integration of therapeutic jurisprudence and pretextuality theory, see Deborah A. Dorfman, *Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 805 (1993).

35. In other recent important work, scholars are also applying therapeutic jurisprudence theories to such areas as the federal sentencing guidelines which encourage defendants to inform on co-defendants and friends to lessen their own sentences. See Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835 (1993); see also Daniel W. Shuman, *Making the World A Better Place Through Tort Law?: Through the Therapeutic Jurisprudence Looking Glass*, 10 N.Y.L. SCH. J. HUM. RTS. 739 (1993) (discussing the tort compensation system); Fred Cohen & Joel A. Dvoskin, *Therapeutic Jurisprudence and Corrections: A Glimpse*, 10 N.Y.L. SCH. J. HUM. RTS. 777 (1993) (discussing the impact of jail and prison reform litigation on institutional conditions); Murray Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. SCH. J. HUM. RTS. 711 (1993) (discussing the impact of statutes making it mandatory for therapists to report evidence of child abuse).

that the application of procedures to determine competency to stand trial in juvenile cases is often pretextual and that court ordered evaluations may be sought for reasons that have little to do with the actual competency inquiry.<sup>36</sup> Joel Haycock's piece reflects on the sanist behavior of the Massachusetts legislature in passing a seemingly innocuous financial recoupment law<sup>37</sup> which has ominous therapeutic and humanitarian implications. Joel Haycock, David Finkelman and Helene Presskreischer's article strips the facade from the pretextual level of representation often afforded to persons facing the involuntary civil commitment process.<sup>38</sup> Ira Packer's essay shows the pretextual nature of one of the strongest arguments in support of "widening the net"<sup>39</sup> in civil commitment (that stricter, behavior-based criteria lead to the "criminalization" of the mentally ill).<sup>40</sup> Finally, both Wexler's general introduction to the concept of therapeutic jurisprudence and Grisso and Finkelman's introduction to these papers demonstrate how each of these individual inquiries must be reconsidered in light of both the entire mental disability law system<sup>41</sup> and the legal system.<sup>42</sup>

An examination of each lead article is instructive. Barnum and Grisso carefully analyze the discontinuities between section 15(a) and section 15(f) of the Massachusetts juvenile justice act<sup>43</sup> in an attempt to decipher the legislature's ambiguities and to offer an explanation of an otherwise incoherent statute.<sup>44</sup> Their analysis is careful and convincing, in stark juxtaposition to the sloppily-drafted law they analyze. The paper highlights the lack of attention legislatures generally devote to mental disability law questions, which is another reflection of the sanist way that mentally disabled persons, and their legal problems, are marginalized.<sup>45</sup> Their careful review of commit-

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36. See *infra* text accompanying notes 43-48.

37. See *infra* text accompanying notes 80-83.

38. See *infra* text accompanying notes 54-61.

39. *In re S.L.*, 462 A.2d 1252, 1257 (N.J. 1983).

40. See *infra* text accompanying notes 76-79.

41. See Finkelman & Grisso, *supra* note 15.

42. See Wexler, *Orientation*, *supra* note 7.

43. MASS. GEN. L. ch. 123, § 15 (1992).

44. Barnum & Grisso, *supra* note 3, at 322-25.

45. This is especially ironic in light of the fact that the entire juvenile court system was premised on a therapeutic basis, a premise that has failed miserably in the ensuing decades. See, e.g., Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference Treatment Makes*, 68 B.U. L. REV. 821 (1988); Charles



ment of juveniles to determine their competency to stand trial<sup>46</sup> can support an argument that the screening law has a pretextual basis, by giving the court an apparent "objective" and disinterested basis (the testimony of mental health professionals) on which to support (or, perhaps, to "take the weight" of) the outcome it wished to reach.<sup>47</sup> Their focus on courts' *confusion*<sup>48</sup> demonstrates again the devaluation of these questions in the legal process.

Another issue that could benefit from an ongoing therapeutic jurisprudence analysis is a consideration of the general level of sloppiness that permeates mental health legislation and court opinions. Statutes define mental illness and dangerousness using circular reasoning, and, in describing mental disability, employ terminology that is antiquated.<sup>49</sup> Judicial decisions conflate inapposite legal constructs, and remain similarly wedded to arcane and dated terminology.<sup>50</sup>

However, poorly crafted mental health laws stand in stark contrast to other substantive areas of the law where Restatements and American Law Institute drafts provide careful codifications.<sup>51</sup> I doubt that this is coincidental. Mental disability law has always been a poor

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Springer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397 (1991). See generally *In re Gault*, 387 U.S. 1, 14-16 (1967) (historical roots of juvenile court jurisdiction).

46. Barnum & Grisso, *supra* note 3, at 322-32. The underlying issues will become even more confounded in the future following the Supreme Court's decision in *Godinez v. Moran*, 113 S. Ct. 2680 (1993) (holding that the standard for assessing competency to enter guilty pleas or waive counsel is no higher than to stand trial). See 3 PERLIN, *supra* note 1, at §§ 14.20A-14.21 (Supp. 1993) (criticizing *Godinez*).

47. Perlin, *Morality*, *supra* note 21, at 137 (discussing the pretextual nature of this exact behavior). For a discussion on the ways that expert witnesses may shape their testimony to comport with a judge's pre-existing position on a case, see Perlin, *Pretexts*, *supra* note 21, at 653-58.

48. Barnum & Grisso, *supra* note 3, at 333-42.

49. See *Jackson v. Indiana*, 406 U.S. 715, 721 (1972) (state statutes referred to institutions for the "feeble-minded"); see also, e.g., *Addkinson v. State*, 608 So. 2d 304, 308 (Miss. 1992) (psychiatrist characterized defendant as "high-end imbecile").

50. Perlin, *Pretexts*, *supra* note 21, at 679-80 (discussing courts' continued conflation and misunderstanding of different tests for incompetency to stand trial and insanity).

51. The two exceptions are: MODEL PENAL CODE § 4.01-.10 (Proposed Official Draft 1962) (insanity defense formulation) and RESTATEMENT (SECOND) OF TORTS § 315-20 (1965) (duty of psychotherapists to protect potential victims of acts by mentally disabled persons). It is no coincidence that these are the only two areas of mental disability law in which lawyers are regularly available to litigate the issues in question. On the generally substandard job done by counsel in this area, see Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992).

stepchild of the law. For example, not one law school includes it as part of the core curriculum. Mental disability law cases are never favored assignments for trial judges. The civil commitment process is subject to delegalization in a variety of ways.<sup>52</sup> Much of the empirical literature that has developed around the question of the procedures needed to implement the constitutional right to refuse treatment focuses on ways in which this stage can be de-legalized.<sup>53</sup>

This apathy toward and disinterest in precision and accuracy in terminology is far from coincidental. Rather, it reflects the sanist ways that both legislators and judges subordinate mental disability law issues (a reflection and extension of their subordination of mentally disabled persons). And given the frequency with which this sort of subordination occurs, it is difficult to conceive how therapeutic ends could ever be met in such a system.

Other essays also uncover sanist and pretextual undercurrents in mental disability law. Haycock, Finkelman and Presskreischer, for example, begin by informing readers of the historical fact--well-known to all who are familiar with this field but utterly and remark-

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52. See, e.g., 1 PERLIN, *supra* note 1, at § 3.15 (discussing the question of whether a judicial officer must conduct the involuntary civil commitment hearing); for an important criticism of the use of nonjudicial hearing officers on the basis discussed here, see Serena Stier & Kurt Stoebe, *Continuing Studies Project: Involuntary Hospitalization of the Mentally Ill in Iowa: The Failure of the 1975 Legislation*, 64 IOWA L. REV. 1284 (1979). On the ways that more formalized civil commitment hearings might be therapeutic, see generally John J. Ensminger & Thomas Liguori, *The Therapeutic Significance of the Civil Commitment Hearing*, 6 J. PSYCHIATRY & L. 5 (1978), reprinted in TJ, *supra* note 7, at 245.

53. See generally 2 PERLIN, *supra* note 1, at § 5.43; Perlin, *Decoding*, *supra* note 22, at 157 n.50. For typical analyses following the decision of *Rivers v. Katz*, 495 N.E.2d 337, 504 N.E.2d 74 (N.Y. 1986) (finding broad right to refuse antipsychotic drug treatment), see generally Francine Cournois et al., *A Comparison of Clinical and Judicial Procedures for Reviewing Requests for Involuntary Medication in New York*, 39 HOSP. & COMMUN. PSYCHIATRY 851 (1988) (discussing how *Rivers* procedures neither delayed nor diminished the use of involuntary medication in large state hospital); J. Richard Ciccone et al., *Right to Refuse Treatment: Impact of Rivers v. Katz*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 203, 214 (1990) (discussing *Rivers* "diminished responsiveness, increased expense, and decreased the number of patients who had formal reviews of their refusal; in the process, the quality of care for some patients was significantly reduced"); Karen McKinnon et al., *Rivers in Practice: Clinicians' Assessments of Patients' Decision-Making Capacity*, 40 HOSP. & COMMUNITY PSYCHIATRY 1159 (1989) (discussing how even though doctors may find capacity assessments "irrelevant," procedure may still be useful as it "encourages clinicians to discuss the proposed treatment with patients and to present information more effectively in court"); Francine Cournois et al., *Outcome of Involuntary Medication in a State Hospital System*, 148 AM. J. PSYCHIATRY 489 (1991) (discussing how involuntary medications did not appear to enhance insight or cooperation in cases of chronically severely ill patients).

ably ignored by courts and legislatures--that "[r]eports on the failure . . . to abide by procedural and substantive standards, and regular criticism of that failure . . . , have not appreciably advanced the practice of rights-based civil commitment."<sup>54</sup> They explain the shoddy job traditionally performed by lawyers assigned to represent patients in such hearings, and question assumptions about the role of lawyers in the involuntary civil commitment process.<sup>55</sup> They quote Paul Appelbaum's rueful conclusion that "[a]t best . . . we have a justice system that is *marginally interested* in the civil commitment process[.]"<sup>56</sup> and note with painful poignancy the *sadness* of providing commitment hearings in which courts mechanically allow patients to make extemporaneous speeches protesting their commitments.<sup>57</sup> Additionally, they consider the therapeutic jurisprudence implications of both an "adversarial" model and a "best interests" model, while offering a third option, a mediation model, as a potential alternative.<sup>58</sup> Although I ultimately disagree with the "mediation alternative" (my opinion<sup>59</sup> is that the authors' criticisms<sup>60</sup> are far more persuasive than the points they cite in its support), this does not diminish the paper's value as a means of employing therapeutic jurisprudence to expose the pretextual nature of the civil commitment system.<sup>61</sup>

Kathy Faulkner Yates' paper exposes sanism and pretextuality in the mental disability law system in a very different context. She

54. Haycock et al., *supra* note 6, at 265-66.

55. *Id.* at 266; *see generally* Perlin, *supra* note 51.

56. Haycock et al., *supra* note 6, at 274 (quoting Paul S. Appelbaum, *Civil Commitment From a Systems Perspective*, 16 LAW & HUM. BEHAV. 61, 66 (1992) (emphasis added)).

57. Haycock et al., *supra* note 6, at 277-78.

58. *Id.* at 269-87. *See also* Janet B. Abisch, *Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Counsel Role Dilemma* (manuscript-in-progress, on file with author).

59. For eight years, I was director of the New Jersey Division of Mental Health Advocacy, a state-level subcabinet office vested with the authority to provide representation in, inter alia, involuntary civil commitment cases. *See* Michael L. Perlin, *Mental Patient Advocacy by a Public Advocate*, 54 PSYCHIATRIC Q. 169 (1982).

60. For example, lack of potentially-adversarial counsel would "further imbalance an already imbalanced relationship"; that the disparity of bargaining positions would put patients "at an even greater disadvantage than they are now." Haycock et al., *supra* note 6, at 283. On the ways that hospital staff can routinely manipulate such disparity in bargaining to coerce patients into accepting voluntary commitment status (thus avoiding court hearings), *see* Susan Reed & Dan Lewis, *The Negotiation of Voluntary Admission in Chicago's State Mental Hospitals*, 18 J. PSYCHIATRY & L. 137 (1990).

61. *See, e.g.*, Haycock et al., *supra* note 6, at 278 ("[The patient's lawyers], in collusion with the care-givers, disempower him or her and effectively thwart the establishment of a voluntary treatment compact between the patient and mental health professionals.").

examines constitutional decisions that shape the contours of the relationship between forensic evaluations, confidentiality, and the *Miranda* doctrine,<sup>62</sup> relating them to other Supreme Court decisions on competency to stand trial<sup>63</sup> and competency to be executed.<sup>64</sup> Her analysis leads to a series of recommendations on how to improve the forensic testimony and the forensic evaluative process.<sup>65</sup>

In the course of her analysis—one within the core of therapeutic jurisprudence envisioned by Wexler in his first collection<sup>66</sup>—Yates shows how legal pretexts lead to antitherapeutic law. Although competency to stand trial appears to be grounded in constitutional doctrine,<sup>67</sup> research demonstrates that judges regularly and uncritically accept conclusions of forensic experts.<sup>68</sup> This is so despite confusion as to the meaning of the evidentiary standard that must be fulfilled before acceptance of opinion testimony<sup>69</sup> and the actual substantive terminology employed in competency determinations.<sup>70</sup> This confusion becomes even more troubling in light of evidence that professionals' attitudes, orientations and political opinions have an impact on their forensic evaluations,<sup>71</sup> and that the likelihood of subjective bias "is enhanced when clinical factors are not clear-cut and critical legal definitions are not present."<sup>72</sup>

Professional associations have failed to craft coherent and practical ethical guidelines,<sup>73</sup> adding another layer of pretextuality. Such

62. See, e.g., *Estelle v. Smith*, 451 U.S. 454 (1981); *Powell v. Texas*, 492 U.S. 680 (1989); *Buchanan v. Kentucky*, 483 U.S. 402 (1987).

63. See, e.g., *Dusky v. United States*, 362 U.S. 402 (1960); *Jackson v. Indiana*, 406 U.S. 715 (1972).

64. See, e.g., *Ford v. Wainwright*, 477 U.S. 399 (1986); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

65. Yates, *supra* note 5, at 362-68.

66. TJ, *supra* note 7, at 5-6.

67. *Dusky v. United States*, 362 U.S. 402 (1960); *Jackson v. Indiana*, 406 U.S. 715 (1972).

68. See Yates, *supra* note 5, at 349-52 (discussing research reported in Stephen Golding, *Mental Health Professionals and the Courts: The Ethics of Expertise*, 13 INT'L J.L. & PSYCHIATRY 281 (1990), and in RONALD ROESCH & STEPHEN GOLDING, *COMPETENCY TO STAND TRIAL* (1980)).

69. See, e.g., Richard Rogers, *Ethical Dilemmas in Forensic Evaluations*, 5 BEHAVIORAL SCI. & L. 149 (1987).

70. See, e.g., THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* (1986); Perlin, *Pretexts*, *supra* note 21.

71. See, e.g., Charles Ewing, *Psychologists and Psychiatrists in Capital Sentencing: Experts or Executioners?*, 8 SOC'L ACTION & L. 67 (1982); Perlin, *Pretexts*, *supra* note 21.

72. Yates, *supra* note 5, at 356.

73. See *id.* at 352-56.

an omission becomes more troubling in cases such as that of Dr. James Grigson, who testified in defiance of all existing professional ethical guidelines.<sup>74</sup> The problems are further exacerbated by evidence that courts misuse competency evaluations, employing them to inappropriately address issues of guilt and punishment, and erroneously conflate concepts of competency and responsibility.<sup>75</sup> In short, Yates employs therapeutic jurisprudence as a diagnostic tool to identify the malignant way that pretextuality poisons forensic and judicial relationships, and offers a series of prescriptive measures in an attempt to eliminate bias in the forensic process.

Packer, in his paper, employs therapeutic jurisprudence methods to assess the Western Massachusetts Court Clinic's system of evaluating the competency of criminal defendants to stand trial, NGRI assessments and presentencing examinations,<sup>76</sup> studying whether this system has led to increased "back door" admissions to forensic psychiatric facilities.<sup>77</sup> He concludes that the data rejects the popular "criminalization hypothesis" and that restrictions on commitment have led and will lead to more mentally ill persons being arrested on a variety of nuisance charges.<sup>78</sup> Furthermore, Packer demonstrates how the court clinic has actually resulted in a *decrease* in the psychiatric hospitalization of mentally ill criminal defendants.<sup>79</sup>

Haycock's paper provides the ultimate unmasking of the

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74. See 3 PERLIN, *supra* note 1, § 17.13, at 529 n.270 (discussing testimony of Dr. James Grigson and citing sources criticizing Dr. Grigson's testimony); see generally RONALD ROSENBAUM, TRAVELS WITH "DR. DEATH" (1991).

75. Yates, *supra* note 5, at 357-58 (reporting on research in Howard Owens et al., *The Judge's View of Competency Evaluations*, 13 BULL. AM. ACAD. PSYCHIATRY & L. 389 (1985)); see generally, Perlin, *Pretexts*, *supra* note 21.

76. Packer, *supra* note 4, at 291-92.

77. *Id.* at 293-96.

78. See, e.g., E. FULLER TORREY, NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL 13-14 (1988).

79. Packer, *supra* note 4, at 294-96. Accord Thomas Arvanites, *The Impact of State Mental Hospital Deinstitutionalization on Commitments for Incompetency to Stand Trial*, 26 CRIMINOLOGY 307, 318 (1988); see generally 2 PERLIN, *supra* note 1, § 6.24 n.632 (citing sources) (Supp. 1993).

Packer's article also raises intriguing therapeutic jurisprudence questions about the use (and avoidance) of the insanity defense in pretrial plea bargaining. See Packer, *supra* note 4, at 296-97 (discussing the entry of guilty pleas to minor charges as a way of avoiding the sometimes-draconian impact of a successful insanity defense). This lawyering gambit is an important (and perhaps troubling) one that re-raises questions about the role of pretextuality in the trial of insanity defense cases and is worthy of significant further attention. See PERLIN, *supra* note 25, at 417-45.

pretextual charade of mental disability law. He discusses a Massachusetts statute<sup>80</sup> which was enacted in response to "hoary anecdotes" about the occasional patient who receives large Veterans Administration checks.<sup>81</sup> The statute mandates that psychiatric patients who have funds held in trust must "contribute toward the cost of any counsel appointed" for that patient in an involuntary commitment or medication refusal hearing.<sup>82</sup> Haycock exposes the cruelty and cynicism underlying the statutory enactment. Additionally, he demonstrates the unfairness of a law that "penalizes those psychiatric patients who exercise their constitutional rights, while rewarding those compliant or simply needy individuals who decide to forgo legal representation."<sup>83</sup>

Importantly, he disavows the characterization of this analysis as one that derives from therapeutic jurisprudence. He notes that a recitation of the law's antitherapeutic consequences "did not carry much weight with those who passed it" and that a rights-led attack was needed to challenge it successfully.<sup>84</sup> However, Haycock sells his own analysis short. He states, persuasively and eloquently, that in this case and in the vast majority of cases heretofore considered through this means of analysis, a rights-based critique *is*, ultimately, a therapeutic means of empowerment. His analysis of this shoddy and petty law indicates that the use of therapeutic jurisprudence may be the best means to erode the law's sanist and pretextual bases.

### III. CONCLUSION

One of the major forces that has shaped the development of therapeutic jurisprudence was a belief that the federal courts were no longer interested in theoretical or constitutional arguments made on behalf of mentally disabled persons, nor were they sympathetic to

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80. Haycock, *supra* note 2, at 306-10 (discussing MASS. GEN. L. ch. 123, § 18A (1992)).

81. *Id.* at 307. He notes with absolute accuracy that this is the mental disability equivalent of stories, "so beloved by politicians about the welfare mother picking up her check in a Cadillac." *Id.* I believe that this analogy is an enormously important one, and that this sort of "vividness" heuristic, drives the mental disability law system in a variety of important meretricious ways. See David Rosenhan, *Psychological Realities and Judicial Policies*, 10 STAN. LAW 10, 13-14 (1984); Marilyn Ford, *The Role of Extralegal Factors in Jury Verdicts*, 1 JUST. SYS. J. 16, 23 (1984); Perlin, *OCS, supra* note 21, at 12-14.

82. MASS. GEN. L. ch. 123, § 18A (1992).

83. Haycock, *supra* note 2, at 308.

84. *Id.* at 309-10.

(nor could they empathize with) the plight of such persons, especially in an institutional context.<sup>85</sup> Therapeutic jurisprudence was seen as an antidote judicial antipathy, as a palliative for the "sterility" of mental disability law jurisprudence,<sup>86</sup> and as a response to the lack of any "social echo" in the current development of that law.<sup>87</sup>

The papers in this symposium advance the cause of therapeutic jurisprudence and demonstrate its value in analyzing the forensic mental health law system in Massachusetts. In addition, they illuminate two separate points. First, they demonstrate how the sanist and pretextual ways that mental disability has developed in Massachusetts reflect the sanist and pretextual bases that underlie the entire mental disability system. Second, they indicate that any effort to explain that system solely on the bases of legal doctrine will fail. In doing so, they also force us to consider the issues of empowerment and disempowerment<sup>88</sup> that confront the mental disability system, the mental disability legal system, and the mental disability lawyering system. The use of therapeutic jurisprudence to expose pretextuality and strip the law's sanist facade will become a powerful tool that

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85. See, e.g., TJ, *supra* note 7; Wexler, *Orientation*, *supra* note 7; David Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992) [hereinafter Wexler, *Mental Health*]; Wexler, *New Directions*, *supra* note 17.

86. Wexler, *Mental Health*, *supra* note 85, at 29-31; John Petrla, *Redefining Mental Health Law: Thoughts on a New Agenda*, 16 LAW & HUM. BEHAV. 89, 89-92 (1992). I generally concur with this pessimistic analysis of the way that the once "seeming-endless expansion of civil rights decisions involving the constitutional and civil rights of mentally disabled persons has come to a stuttering halt." See Perlin, *supra* note 14, at 1-2; see generally Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A. L. REV. 1249 (1987). Yet, I believe that this may overstate the case a bit.

An argument can be made that the Supreme Court's decisions in *Riggins v. Nevada*, 112 S. Ct. 1780 (1992), and *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992), see generally *supra* note 28, along with other more recent lower court decisions reinterpreting the "substantial professional judgment" standard of *Youngberg v. Romeo*, 457 U.S. 307 (1982), see generally 2 PERLIN, *supra* note 1, §§ 4.43, 7.18 (Supp. 1993) (discussing cases), and construing such prophylactic statutes as the Americans with Disabilities Act, see 42 U.S.C. § 12101-213 (1992), and the Fair Housing Amendments Act of 1988, see 42 U.S.C. § 3601-31 (1988), see 2 PERLIN, *supra* note 1, §§ 6.44A-B, suggest that the death of doctrinal mental disability law might be greatly overexaggerated. For a comprehensive, thoughtful and penetrating critique of the *Youngberg* professional judgment standard, see Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992).

87. See Haycock, *supra* note 2, at 317.

88. *Id.* at 317-20; Haycock et al., *supra* note 6, at 277-86; see generally Petrla, *supra* note 23.

will serve as a means of attacking and uprooting “the we/they distinction that has traditionally plagued and stigmatized the mentally disabled.”<sup>89</sup> As I have recently suggested elsewhere, “that result *will be* therapeutic: for the legal system, for the development of mental disability law, and ultimately, for all of us.”<sup>90</sup>

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89. Wexler, *New Directions*, *supra* note 17, at 776.

90. Perlin, *supra* note 16, at 636.



