Temptation's Page Flies Out the Door: Navigating Complex Systems of Disability and the Law from a Therapeutic Jurisprudence Perspective

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"TEMPTATION’S PAGE FLIES OUT THE DOOR”:
NAVIGATING COMPLEX SYSTEMS OF
DISABILITY AND THE LAW FROM A
THERAPEUTIC JURISDICTION PERSPECTIVE

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INTRODUCTION

Disabilities systems are complex. Legal systems are complex. When the two are combined, the complexity is increased exponentially. Remarkably, there has been little scholarly attention paid to this important phenomenon. In this paper, we consider some of the difficulties of navigating two targets that often seem to be moving in opposite directions, of addressing a question that, to the best of our knowledge, has never previously been addressed. Consider these preliminary thoughts. For these purposes, “the law” includes many different areas: criminal law and procedure (among others, the relationship between mental disability and the incompetency status, the insanity defense, sentencing, and statuses such as that of one being a persistent sex offender); civil rights law (the rights of persons with disabilities to adequate treatment, to aftercare, to refuse the imposition of unwanted antipsychotic medication, and the scope of anti-discrimination law); international human rights law (its interrelationship with domestic law and the extent to which the latter needs to be modified if it conflicts with the former); benefits law (social welfare, veterans’ laws, more), and the relationship between mental disabilities and other areas of the law (family law, private civil law [separately, looking at tort law, contracts law, trusts and estates law], sexual autonomy, and others).1

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1. For an overview of most of these as they relate to mental disability, see generally MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (3d ed. 2018).
For these purposes, "disability" also includes many different statuses: from one perspective, psychosocial disability, intellectual disability, those with dual diagnoses; from another, the extent and the severity of the disability, and its impact on the person in question; from yet another, whether the person with a disability is in the community or an institution (or, if in the community, in danger of being institutionalized). One example of conflict: antidiscrimination law can make it unlawful for an employer to refuse to hire someone with a disability, but many governments will only provide benefits (including health care and insurance) if a person proves complete disability, thus prohibiting him or her from working. Anti-discrimination laws are based on social models of disability; social benefits laws often on the (discarded-in-international-law) medical model. Virtually no attention has been paid to these conflicts in cases involving criminal prosecutions.

Making this assignment even more challenging is an assumption that governs much of the literature about the relationship between these two systems: that when questions of disability are considered in the context of the legal system, the person at risk has counsel that is competent to represent her. This is the ultimate assumption of a fact-not-in-evidence; it is one that one of the co-authors (Mr. Perlin) has written about in many other contexts, but has never before considered in this sense.

2. It is also necessary to consider—in the broader context—the impact of the law on persons who are treated or perceived as being disabled, but who, in fact, are not. See, e.g., Thomas N. Abbott, Kaplan and Regarded As: Does the ADA Discriminate between Real and Perceived Disability, 39 LOY. L.A. L. REV. 883, 883 (2006).


We believe that any conclusions we come to must be filtered through the reality that (1) many individuals with disabilities have no counsel at all (for multiple legal, political, social, and cultural reasons), and (2) many of the lawyers who represent these individuals do an obscenely inadequate job, whether the case is a civil commitment matter, a death penalty sentencing, or a guardianship case, to posit three disparate examples. By way of examples, in a recent article contrasting counsel in traditional civil commitment cases and in problem-solving mental health courts, Mr. Perlin characterized many lawyers in the traditional court setting as "bored or contemptuous [of their clients]." Stephen Bright, one of the pre-eminent death penalty lawyers of the modern era, has said flatly that "[t]he death penalty will too often be punishment not for committing the worst crime, but for being as-


6. See, e.g., Perlin, Your Funeral, supra note 5, at 241.
7. See, e.g., Perlin, Executioner's Face, supra note 5, at 201.
9. Michael L. Perlin, "Who Will Judge the Many When the Game is Through?": Considering the Profound Differences between Mental Health Courts and “Traditional” Involuntary Civil Commitment Courts, 41 SEATTLE U. L. REV. 937, 938 (2018) [hereinafter Perlin, Who Will Judge]. Mr. Perlin had occasion to speak to private counsel who had been assigned to represent a patient in a county in which the New Jersey Division of Mental Health Advocacy [which the author then directed] . . . did not represent patients. The assigned counsel asked [the author], "Why is the State wasting money to pay me to do this bullshit?" Michael L. Perlin & Alison J. Lynch, "Mr. Bad Example": Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root Out Sanism in the Representation of Persons with Mental Disabilities, 16 WYO. L. REV. 299, 314 n.96 (2016) [hereinafter Perlin & Lynch, Mr. Bad Example].
signed the worst lawyer.” Additionally, the reporters are replete with cases in which lawyers in guardianship cases provided pitifully inadequate counsel. In this paper, we will attempt to “tease out” some of the main threads in this discourse in the following manner.

First, we will consider the hopelessness of conceptualizing “law” as a single system, especially when it comes to dealing with questions of disability, using the topic of criminal incompetency as an example, and then looking at these questions in the specific context of international human rights law. Then, we will look at the futility of seeking to create a uniform view of a “disability” system, as that phrase has little meaningful content, given the range of disabilities, the range of attitudes towards persons with different disabilities, and the futility of trying to come up with a single formulation that would cover individuals in the community and those institutionalized. After this, we will consider the role of lawyers in both of these systems, and how the “wild card” of sanism ultimately controls the extent to which these two systems can ever be meaningfully navigated. Finally, we will consider the potential impact of the school of law and policy known as “therapeutic jurisprudence,” and how a turn to therapeutic jurisprudence might, optimally, offer us a solution.

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11. See, e.g., In re Lichtenstein, 652 N.Y.S.2d 682 (Sup. Ct. 1996), as discussed in A. Frank Johns, *Three Rights Make Strong Advocacy for The Elderly in Guardianship: Right to Counsel, Right to Plan, and Right to Die*, 45 S.D. L. REV. 492, 497-98 (2000). In some cases, however, in spite of patent inadequacy, guardianship findings are affirmed. See, e.g., In re Guardianship and Custody of Angela Marie N., 636 N.Y.S.2d 758 (A.D. 1996) (counsel for a parent whose rights were terminated exhibited reasonable competence, and the parent did not receive ineffective assistance of counsel, even though counsel chose not to offer evidence or delve deeper into participation by the parent in a treatment program and the number and quality of the parent’s visits with the children).

12. See infra notes 29-67 and accompanying text.

13. See infra notes 68-97 and accompanying text.


15. See infra notes 150-54 and accompanying text.

16. See infra notes 156-85 and accompanying text.
Our title comes from Bob Dylan’s masterpiece, *It’s Alright Ma (I’m Only Bleeding)*. The lyric we use—“Temptation’s page flies out the door”—begins this remarkable verse:

Temptation’s page flies out the door  
You follow, find yourself at war  
Watch waterfalls of pity roar  
You feel to moan but unlike before  
You discover that you’d just be one more  
Person crying.  

First, consider the “war” between those who support the “empowering idea that people with disabilities can and should work once discriminatory societal barriers are removed,” and those who “treat people with disabilities through a medical model, seeking to objectively evaluate whether their medical situation entitles them to governmental benefits.” Professor Michael Waterstone has explicitly referred to this as a reflection of the ways that “Federal laws and policies as they relate to the employment of people with disabilities are at war with themselves.” Then, think about how the complexity of the laws in this area—and the generally ineffective level of counsel made available to persons with disabilities—causes any reasonable on-looker to “moan.” Finally, consider the “temptation” of allowing ourselves to fall into the trap of believing that the systems in question are somehow easy to maneuver. If we so succumb, we “[fly] out the door,” and our hopes of truly navigating these contradictory systems will disappear.

I. THE “LEGAL” SYSTEM

First, when we discuss the legal system in this paper, we are not talking about one legal system; rather, we are talking about many. The parable about the group of blind men and the elephant—each blind man touches a different part of the elephant’s body and then incorrectly proclaims that the
entire elephant resembles his section\textsuperscript{22}—has been quoted in hundreds of law review articles and cases, and likely comes to us from a Buddhist fable.\textsuperscript{23} It has been quoted by, among others, former U.S. Vice President Al Gore, while writing about environmental issues.\textsuperscript{24} It has also been used to explain the radically different views among the American public about the O.J. Simpson trial.\textsuperscript{25} However, we do not believe it has ever been invoked in a discussion of what we are discussing here—how our views of “the legal system” depend on which part of the legal system we are examining, an especially important issue in the context of disability law. As we have noted, there are at least five overarching areas that need to be considered: the criminal law system, the civil rights law system, the international human rights law system, the public benefits law system, and the private law system. Each system is complex, and each must be navigated carefully in matters involving litigants with disabilities.

In this paper, we will address only one aspect of one of these systems.\textsuperscript{26} In the criminal law system, we will examine the question of criminal competencies, a category that extends far beyond the typically focused on question of fitness to proceed to trial.\textsuperscript{27} Importantly, this is not a topic generally on the research or policy agenda of persons who characterize themselves as “disability rights activists.”\textsuperscript{28} The authors’ decision to so limit their focus should in no way suggest that the other systems (or the remainder of the criminal law system) are not important. We think these other systems are vitally important and that the same points we seek to make about this system will apply, in parallel ways, to those as well. Of course, none of these systems stand alone. In many important ways, they are interconnected, and must be looked at in the context of the other systems.

We start with criminal law. Within this one “system,” there are multiple systems to navigate in the context of criminal defendants who may have


\textsuperscript{26} The authors hope to address some of the others in subsequent papers.


\textsuperscript{28} Mr. Perlin draws on 45+ years of experience in coming to this conclusion.
a psychosocial or intellectual disability. These systems include: the system of competency statuses, the system of criminal responsibility determinations, the system of sentencing (and the production of mitigating evidence), and the system of determining whether an individual is a sexually violent predator. Each of these raises discrete, complex, conceptual, strategic, and ethical issues that must be “gotten” by practitioners and judges if adequate representation is to be provided to the individual at risk.

Again, we limit ourselves here to questions of competency. The standard for competency to stand trial in the United States is, on paper, fairly straightforward. The question to be asked is whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and whether he has a “rational as well as factual understanding of the proceedings against him.” Does this standard apply in the same way if the question is whether a defendant is competent to represent himself? The U.S. Supreme Court said “yes” to this question in 1993, but backpedaled away from it in 2008. It still adheres to this standard in cases involving the competence of a defendant to plead guilty.

What about all the other areas of criminal competency: competency to consent to a search? To confess? To testify? To be sentenced? Or to file an appeal?

Judicial decisions in these latter areas appear to all be the classic “n of 1”; judges decide these cases without paying much attention to other similar cases that have been decided in other jurisdictions, “surpris[ingly]” failing “to consider carefully” other decisions in the same substantive sub-areas of

29. We use “mental disability” to subsume both these characterizations. Of course, there are many defendants whose diagnoses overlap the two.


33. Godinez, 509 U.S. at 402.

34. For a discussion of multiple areas of the criminal law to which questions of competency are relevant, see generally Perlin, supra note 27.
competency law.\textsuperscript{35} As Mr. Perlin and a colleague recently noted in an article about criminology, scientific discoveries, and the judicial process, "the danger in failing to recognize the precedential value of decisions from other jurisdictions is the creation of an inevitably divided legal system, in which a person in one jurisdiction has the ability to introduce evidence that another individual elsewhere could not."\textsuperscript{36} A lawyer seeking to navigate this system must understand these realities.

Importantly, in his dissent from the Supreme Court's decision that had imposed a unitary standard for competency determinations, Supreme Court Justice Harry Blackmun noted archly, "[a] person who is 'competent' to play basketball is not thereby 'competent' to play the violin... Competency for one purpose does not necessarily translate to competency for another purpose."\textsuperscript{37} This prescient rejection of a "one size fits all" standard—at least partially vindicated fifteen years later in the Edwards decision—is another important piece of this puzzle that lawyers must understand.\textsuperscript{38}

It is imperative that lawyers understand and advocate for their clients' needs, particularly for clients with mental disabilities. Lawyers are generally held to a standard of reasonable competence.\textsuperscript{39} They have a duty to stay abreast of changes in the law and are charged with being vigorous advocates for their clients. When representing a client with a mental disability or dealing with an involuntary civil commitment hearing, a lawyer faces heightened obligations in providing effective counsel. At a minimum, counsel should have a "competent understanding of the legal process of involuntary commitments, as well as the range of alternative, less restrictive treatment and care options available."\textsuperscript{40} Prior to an involuntary civil com-
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mitment hearing or trial, counsel should fully investigate and comprehend the client’s circumstances. This involves extensive work with the client to understand the client’s needs. Counsel must wear two complementary hats, acting as both an advocate and an adversary.

Finally, we are just beginning to understand the scope of a dilemma that has been under the radar for far too long. Merely raising the incompetency status is often a perilous decision. One of the most vexing ethical issues that criminal attorneys face is whether to raise the issue of competency, and by extension, whether to raise the issue of competency over the defendant’s objection. There are multiple reasons why an effective and competent defense lawyer might not raise the question of incompetency, among them being the subsequent lack of availability of bail, the conditions of institutionalization at the referral hospital, and the possible iatrogenic or ameliorative impact of psychiatric institutionalization on the defendant.

Josephine Ross has suggested that an “ethic of care” might call for disregarding incompetency concerns,

and Christopher Slobogin and Amy Mashburn underscore that the raise-or-not-raise decision is necessarily a “nuanced” one.

In a particularly thoughtful piece, Keri Gould has described that the Sixth Amendment right to effective counsel may ethically

K.G.F. and J.S.). Notwithstanding the decision in J.S., we believe that the standards laid out in K.G.F. are the appropriate ones that should prevail.

41. K.G.F., 401 P. 3d at 492. On how this is regularly not done in civil commitment cases, see Perlin, Who Will Judge, supra note 9, at 939-45.
42. K.G.F., 401 P. 3d at 498.
43. Id. at 500.
46. Perlin & Cucolo, supra note 1, § 13-1.5.4, 13-59 to13-67 (discussing the role of counsel in incompetency proceedings).
support the decision to ignore the competency question entirely. This issue is of special importance in the case of defendants charged with petty offenses who face little or no jail time if convicted, but may be institutionalized for years in maximum security facilities once the status issue is raised.

The stakes are raised here because of the reality that, when the incompetency status is raised in a criminal case, "many lawyers also [often] impute a blanket incompetency in all aspects of life decision-making to such clients." Thus, the late Bruce Winick and his colleagues have suggested that, in view of this reality and the negative psychological effects of incompetency labeling, criminal attorneys can help their clients interpret that legal label in a way that "minimizes the risk of adverse psychological consequences." This contrasts—totally—with the ways that lawyers must navigate the disability law system, in which they often must assert their client’s complete disability, an assertion that, inevitably, often brings with it a claim of incompetency.

Also, we need to consider the constellation of issues raised when the state seeks to involuntarily medicate an incompetent defendant in order to make him competent to stand trial, or when the state institutionalizes and


52. Id. (citing, in part, BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 63-65 (1997), as quoted in Dennis Stolle et al., Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering, 34 CAL. W. L. Rev. 15, 37 (1997)). For dialogues that an attorney might have with her client in such cases, see Perlin, supra note 51, at 480.


54. Patrick W. Corrigan et al., Structural Stigma in State Legislation, 56 PSYCHIATRIC SERV. 557, 558 (2005) (discussing the difference between “mental illness” and “incompetence” and how the two are often improperly equated, creating an environment that fosters discrimination and restricts rights).

55. See generally Michael L. Perlin & Meredith R. Schriver, “You Might Have Drugs at Your Command”: Reconsidering the Forced Drugging of Incompetent Pre-
forcibly medicates a person with a disability. Contrary to popular belief, locking up and forcibly medicating people with mental disabilities is frequently not in their best interests, nor is it in the best interest of society as a whole. A strong argument can be made that, rather than protecting the public, our current policies decrease safety, harming many psychiatric patients, both civil patients and those in the forensic system. Rather than encouraging persons with mental disabilities to seek meaningful treatment and to promote inclusion into society, this method segregates people with mental disabilities, and denies individuals their right to freedom and the right to decline psychiatric treatment. Further, this methodology ignores the fact that many people with mental disabilities are capable of living in society and of making informed decisions regarding their treatment and therapy.

The Supreme Court has spoken on this issue in the specific context of incompetency to stand trial proceedings, some fifteen years ago in *Sell v. United States*, a case that has spawned a “cottage industry of commentary on the question of whether the state can medicate an incompetent defendant for the purpose of making him or her competent to stand trial.” However, we globally ignore the reality that *Sell* and its progeny apply only to poor defendants—those who cannot make bail and thus are subject to the treatment decisions made by their institutional keepers.

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57. *Id.* By way of example, if the medication inhibits the defendant’s capacity to react to the proceedings and to demonstrate “remorse or compassion,” the prejudice suffered by the defendant can be especially acute at the sentencing stage. See Michael L. Perlin, “*Merchants and Thieves, Hungry for Power*”: Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities, 73 *Wash. & Lee L. Rev.* 1501, 1532 (2016) [hereinafter Perlin, *Merchants*] (discussing Justice Kennedy’s concurring opinion in Riggins v. Nevada, 504 U.S. 127, 144 (1992)).

58. See, e.g., Perlin & Cucolo, supra note 1, §§ 8-7.2, at 8-159 to 8-165.


60. *Sell v. U.S.* 539 U.S. 166 (2003). See Perlin & Cucolo, supra note 1, §§ 8-7.3.2 to 8-7.3.2.2, 8-170 to 8-182.

61. Perlin & Schriver, supra note 55, at 382.

62. See id. at 383 (“What happens when a wealthy person, able to make bail on any bailable crime, is in the community pending trial[?]”).
The circumstances under which persons with serious mental illnesses find themselves in jail are dismal. Jail staff workers often have no education or training in the appropriate treatment of detainees with a mental illness; often, they respond aggressively, thus exacerbating the symptoms exhibited by the detainees in question.63 Many individuals with a mental illness are disciplined or placed in solitary confinement rather than being afforded adequate treatment.64 Additionally, persons with mental disabilities are often forcibly medicated in jails and prisons.65 However, even when treatment is administered with good intentions, it often leaves a powerful, sometimes lasting effect on the patient. For example, psychotropic medications are known to affect the mind, intellectual functions, perception, moods, and emotions.66 In short, once the incompetent defendant is jailed pending trial, a constellation of issues emerge that must be considered if we are to come to grips with the inherent policy and behavioral contradictions (premised on disability) that underpin this area of the law.

These issues raise the specter of what is called the "incredible dilemma": what can or should be done when multiple civil, constitutional, or statutory rights and policies clash?67 This dilemma highlights the underlying complexities of this aspect of one branch of the legal system. It is further exacerbated exponentially by the interplay (or, perhaps, lack of interplay) between this strand of law and one aspect of the international human rights law system, a relatively undiscussed, but extraordinarily im-

63. Id. at 396.


66. V. G. LONGO, NEUROPHARMACOLOGY AND BEHAVIOR 182 (1972); Gerald L. Klerman, Psychotropic Drugs as Therapeutic Agents, 2 HASTINGS CTR. STUD. 81, 82 n.1. (1974).

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important topic.\textsuperscript{68} First, consider the Convention on the Rights of Persons with Disabilities (CRPD).\textsuperscript{69} There is no question that the CRPD is the most revolutionary international human rights document ever created that applies to persons with disabilities.\textsuperscript{70} It furthers the human rights approach to disability—endorsing a social model and repudiating a purely medical model—and recognizes the right of people with disabilities to equality in nearly every aspect of life.\textsuperscript{71} Although little attention has been paid to its potential impact on forensic patients,\textsuperscript{72} it is essential that we focus on these questions.

\textsuperscript{68} For an extensive discussion, see Perlin, \textit{supra} note 64. \textit{See also} Michael L. Perlin & Éva Szeli, \textit{Commentary on Article 14 of the Convention on the Rights of Persons with Disabilities}, in \textit{Commentary on UN Convention on the Rights of Persons with Disabilities} 402 (Ilias Bantekas, Dimitris Anastasiou & Michael Stein eds., 2018) [hereinafter Perlin & Szeli, \textit{Commentary}].


notwithstanding the fact (or perhaps because of the fact) that so little con-
sideration of the Convention’s application to this population has yet ap-
peared in the literature.\textsuperscript{73}

The Convention firmly endorses a social model of disability and re-
conceptualizes mental health rights as disability rights—a clear and direct
repudiation of the medical model that traditionally was part-and-parcel of
mental disability law.\textsuperscript{74} “The Convention. . .sketches the full range of
human rights that apply to all human beings, all with a particular applica-
tion to the lives of persons with disabilities.”\textsuperscript{75} It provides a framework for
ensuring that mental health laws “fully recognize the rights of those with
mental illnesses,”\textsuperscript{76} and mandates prescriptive rights in addition to proscrip-

\textsuperscript{73} See generally Perlin & Schriver, supra note 55, at 385-86; Michael L. Perlin,
“Your Old Road Is/ Rapidly Agin’”: International Human Rights Standards and Their
Impact on Forensic Psychologists, the Practice of Forensic Psychology, and the Condi-
tions of Institutionalization of Persons with Mental Disabilities, 17 WASH. U. GLOBAL
STUD. L. REV. 79 (2018). On how the CRPD has brought mental health issues more
forcefully into the field of human rights law than ever previously, see Perlin & Szeli,
Evolution, supra note 70.

\textsuperscript{74} Phil Fennell, Human Rights, Bioethics, and Mental Disorder, 27 MED. & L.
95, 106-07 (2008). See also Mary Crossley, The Disability Kaleidoscope, 74 NOTRE
DA ME L. REV. 621, 649-59 (1999) (addressing the differences between the “social
model” and the “medical model”); Michael L. Perlin, “Abandoned Love”: The Impact
of Wyatt v. Stickney on the Intersection Between International Human Rights and Do-
mestic Mental Disability Law, 35 LAW & PSYCHOL. REV. 121, 139 (2011). On how the
medical model “is in direct violation” of the CRPD, see Michael L. Perlin, Promoting
Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to
Give Life to the UN Convention on the Rights of Persons with Disabilities, 44 GEO.
WASH. INT’L L. REV. 1, 14 (2012). See also id. at 47 (discussing how a “human rights”
model of disability offers an even “more comprehensive framework for achieving social
justice”); Nancy J. Hirshmann, Disability Rights, Social Rights, and Freedom, 12 J.
INT’L POL. THEORY 42 (2016) (critiquing the social rights model for focusing on justice
rather than freedom). See generally PIERS GOODING, A NEW ERA For MENTAL HEALTH
POLICY: SUPPORTED DECISION-MAKING AND THE UN CONVENTION ON THE RIGHTS
OF PERSONS WITH DISABILITIES 47, 259-60 (2017) (discussing even “more comprehensive
framework for achieving social justice); Jonathan Mann, Health and Human Rights: If
Not Now, When? 2 HEALTH HUM. RTS. 113 (1997) (arguing the values and language of
human rights are better suited to addressing public health issues than a strict medical
model).

\textsuperscript{75} Janet E. Lord & Michael Ashley Stein, Social Rights and the Relational Value
of the Rights to Participate in Sport, Recreation, and Play, 27 B.U. INT’L L.J. 249, 256
(2009).

\textsuperscript{76} Bernadette McSherry, International Trends in Mental Health Laws: Introduc-
tion, 26 LAW IN CONTEXT 1, 8 (2008).
There is no question that it “has ushered in a new era of disability rights policy.”

What is the relevance of this to the topic under discussion? Consider Article 12 of the CRPD, which mandates “[e]qual recognition before the law” and requires that “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” Next, consider Article 14, ensuring that persons with disabilities “on an equal basis with others . . . are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.”

According to the General Comments (GCs) drafted by the U.N. Committee on the Rights of Persons with Disabilities, however, declarations of unfitness to stand trial violate these articles, as such declarations, purportedly, “deprive [an individual] of his or her right to due process and safeguards that are applicable to every [other] defendant.” The Committee has also criticized individual governments for maintaining procedures that permit a defendant to be deemed “unfit” to stand trial and subsequently detained. Suffice it to say, we disagree passionately: “[This] statement in the

78. Harpur, supra note 77, at 1295.
79. CRPD, supra note 69, art. 12.1.
80. Id. art. 12.3.
81. Id. art. 14(1)(b). See generally Perlin & Szeli, Commentary, supra note 68.
83. Id.
GCs . . . is the single most wrongheaded (and potentially destructive) statement uttered by any supporter of the CRPD since its initial drafting."\(^{85}\)

Nothing in this CRPD article offers the slightest shred of support to the abolition of the incompetency status. First, international human rights have, for decades, included the right to a fair trial.\(^{86}\) The trial of a person who cannot comprehend what is going on or who cannot cooperate with her counsel cannot be a fair trial. Articulation of the incompetency status in no way indicates factual guilt.\(^{87}\) But if a defendant cannot articulate to her lawyer what her defense is, what other witnesses might be able to shed light on in relation to the underlying facts, or what her relationship with the alleged victim was, then it is incomprehensible to think that in all but the rarest cases such a trial will lead to an acquittal.

Second, the Comment does not address the critical question of what happens if such a person chooses to waive counsel and represent herself. Such self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct her defense without the assistance of counsel.\(^{88}\) The trial of an incompetent defendant mocks any definition of dignity; this is one of the basic tenets of the CRPD.

Third, even assuming there is any textual support within Article 14 for this tortured reading, it is black-letter law that any piece of legislation must be read in pari materia.\(^{89}\) It is axiomatic that a statute "must, to the extent possible, ensure that the statutory scheme is coherent and consistent."\(^{90}\) Consider again other articles of the CRPD: mandating \\
\[\text{[r]espect for inherent dignity};\]
\[\text{[f]reedom from torture or cruel, inhuman or degrading treat-}

\(^{85}\) Perlin, *supra* note 64, at 480.

\(^{86}\) See Charles Chernor Jalloh, *Does Living by the Sword Mean Dying by the Sword?*, 117 Penn St. L. Rev. 707, 740 (2013).

\(^{87}\) Am. Bar Ass'n, Criminal Justice Standards on Mental Health Ch. 7, Pt. IV (2015).


\(^{89}\) Statutes must be "taken, read, and construed together, each enactment in reference to the other, as though they were parts of one and the same law." Peraza v. State, 467 S.W.3d 508, 520 n.29 (Tex. Crim. App. 2015) (quoting Jones v. State, 396 S.W.3d 558, 561–62 (Tex. Crim. App. 2013)).


\(^{91}\) CRPD, *supra* note 69, art. 3(a).
ment or punishment”;92 “[f]reedom from exploitation, violence and abuse”;93 a right to protection of the “integrity of the person”;94 and the retention of any provisions “more conducive to the . . . rights of persons with disabilities.”95 Any interpretation of Article 14 that makes it more likely that factually innocent individuals will be convicted and incarcerated and that makes it less likely that the individual’s trial will be “fair” must be rejected.

Beyond this, consider the “what if?” If the incompetency status were to be abolished, then there is no question that the number of persons with serious mental disabilities in prisons would increase dramatically. A recent exhaustive report erases any shred of doubt that persons with mental disabilities are regularly brutalized and tortured in prison settings.96 Consider these findings by Human Rights Watch:

Corrections officials at times needlessly and punitively deluge them with chemical sprays; shock them with electric stun devices; strap them to chairs and beds for days on end; break their jaws, noses, ribs; or leave them with lacerations, second degree burns, deep bruises, and damaged internal organs. The violence can traumatize already vulnerable men and women, aggravating their symptoms and making future mental health treatment more difficult. In some cases, including several documented in this report, the use of force has caused or contributed to prisoners’ deaths.97

In a recent article on restoration of competency practices, Professor Susan McMahon focuses on the status of such individuals in jail settings: “Unable to follow the strict rules and regulations of a jail environment, they are punished by corrections officials and targeted by fellow in-

92. Id. art. 15.
93. Id. art. 16.
94. Id. art. 17.
95. Id. art. 4(4). See also John Dawson, A Realistic Approach to Assessing Mental Health Laws’ Compliance with the UNCRPD, 40 INT’L J.L. & PSYCHIATRY 70, 71 (2015) (arguing that failure to consider a person’s disability may, under some circumstances, be discriminatory).
mates... [T]hey are relegated to solitary confinement and subject to abuse and neglect in far greater numbers than non-mentally-ill detainees." 98

In short, when seeking to navigate the criminal justice system in the context of the variables on which we focus in this article, this navigation must be done with an eye toward the international human rights system to avoid the peril in which the position taken by some in the disability rights community would place the population in question.

II. THE DISABILITY SYSTEM

Consider now the questions that relate to navigation of the disability system. As already noted, there are also multiple disability "systems." Here, we focus on the incompatibility of the disability law "system" that flows from international human rights, and the one that flows from social benefits law. In many ways, these two systems are in direct opposition to each other, and it is essential that we see the contradictions if we are to better understand the "bigger picture." 99

International human rights law repudiates the medical model that has driven the disability system for centuries. 100 For example, the CRPD flatly rejects this view of the relationship between persons with disability and society. 101 It "responds to traditional models, situates disability within a social model framework, and sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities." 102 It provides a framework for ensuring that

98. McMahon, supra note 50, at 13.
99. Beyond the scope of this article is an extended consideration of how we react to different sorts of disabilities. We note here only that the valid and reliable research is clear: people with mental disabilities—historically, among the most excluded members of society, are subject to greater prejudice than are people with physical disabilities. Susan Stefan, Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act 4-5 (2001); see Michael E. Waterstone & Michael Ashley Stein, Disabling Prejudice, 102 Nw. U. L. Rev. 1351, 1363-64 (2008).
100. See Perlin & Schriver, supra note 55, at 385.
mental health laws "fully recognize the rights of those with mental illness." There is no question that it has changed the conversation surrounding disability rights policy.

This repudiation of the medical model demonstrates, in Professor Gerard Quinn’s eloquent phrase, the way that the CRPD provides a “moral compass for change,” reflecting a “paradigm shift” in the way that we think about and treat persons with disabilities. There is no disputing Professor Penelope Weller’s conclusion that it illustrates “profound shifts both in the conception of human rights and the implementation of human rights in public policy domains.”

Contrarily, if one is, say, seeking government benefits because their disability interferes with their ability to gain paid employment, such a person must rely on the medical model to offer proof that they are unable—either for physical or mental reasons—to work. This model “casts people

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103. McSherry, supra note 76, at 8.


with disabilities as the passive recipients of public welfare or charity.”107 Indeed, many U.S. public assistance and health insurance programs have been criticized for creating incentives for people to not return to work.108 There is no disputing Professor Matthew Diller’s conclusion that such social welfare policies “reflect a series of uneasy compromises between competing principles.”109 As Professor Ani Satz has noted, “The Social Security Act fragments the disability experience in another significant way. Individuals with disabilities must often choose between employment (and civil rights protections in employment) and social support.”110

Another important international document relevant to the human rights of persons with trauma-related disabilities is the WHO International Classification of Functioning, Disability and Health (ICF).111 The ICF—the “WHO framework for measuring health and disability at both individual and population levels”—was officially endorsed “as the international standard to describe and measure health and disability” by all the 191 WHO Member States at the Fifty-Fourth World Health Assembly in May 2001.112

The ICF acknowledges that every individual is capable of experiencing at least some degree of disability throughout their lifetime, whether it be through a change in health or environment,113 and that “disability is a universal human experience, sometimes permanent, sometimes transient” and is not restricted to a small portion of the population.114 Again, this international human rights approach is radically different from the systems in place in many domestic jurisdictions.

It is necessary for one of the authors (Mr. Perlin) to personalize this analysis and share how he has dealt with this issue in the days that he was a

107. Waterstone, supra note 19, at 1087.
108. Id. at 1089 (citing, inter alia, Samuel R. Bagenstos, The Future of Disability Law, 114 YALE L.J. 1, 32 (2004)).
109. Matthew Diller, Entitlement and Exclusion: The Role of Disability in the Social Welfare System, 44 UCLA L. REV. 361, 361 (1996). The ways in which laws such as the Americans with Disabilities Act have been conceived of as “welfare reform” rather than as civil rights are critiqued in Hirschmann, supra note 74.
113. Id.
114. Id.
legal practitioner in two very different ways. First, when Mr. Perlin was in practice in his position as director of the Division of Mental Health Advocacy in the New Jersey Department of the Public Advocate, he litigated a class action/law reform suit, *Schindenwolf v. Klein*, arguing that, if patients at state psychiatric hospitals were to do work for which the state received a consequential economic benefit, they needed to be paid in conformity with the Federal Fair Labor Standards Act and prevailing case law. This was hotly contested by state defendants, but Mr. Perlin wound up prevailing. The Court signed an order, concluding that, “The resumption, continuation and strengthening of voluntary, compensated work programs and participation in vocational rehabilitation services may enhance residents’ sense of self-motivation, self-esteem and usefulness, may diminish boredom and lessen states of dependency and withdrawal, and may protect against exploitation and allow residents to view themselves as worthwhile.” The Court ordered that the state defendant, the Department of Human Services, was to involve no less than 25 percent of all state hospital residents in employment and vocational rehabilitation services.

Some years later, when he became a professor, Mr. Perlin directed the Federal Litigation Clinic at New York Law School. In this role, he supervised students who represented persons with physical and mental disabilities on appeals from decisions by federal Administrative Law Judges in the Eastern and Southern Districts of New York, who had rejected their appli-
cations for SSI and SSDI benefits. To adequately represent their clients, the student attorneys needed to demonstrate that their clients were sufficiently disabled so as to qualify for benefits.\textsuperscript{121} To do so, they sought to amass expert evidence that would attest to the extent of their disability. In other words, to satisfy federal administrative and statutory law, they needed to show that their clients were \textit{fully} medically disabled.\textsuperscript{122}

This predated both the CRPD and the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care of 1991 (MI Priniciples), the forerunner “soft law” document of the United Nations,\textsuperscript{123} and truthfully, no one thought of international human rights law at this time\textsuperscript{124} in this context.\textsuperscript{125} Indeed, it would have been impossible for

\begin{itemize}
  \item \textsuperscript{121} See Arne H. Eide et al., \textit{Participation, in Health and Welfare Services: Professional Concepts and Lived Experience} 146 (2017) (“the medical provider holds the key to eligibility for disability benefits”).
them to have provided adequate representation to their clients had they not, for these purposes, "bought into" the medical model.\textsuperscript{126}

But we believe it is impossible for lawyers to provide adequate and effective representation to persons with disabilities without embracing the social model. Since, to the best of our knowledge, there has been almost no consideration of the impact of the social model on benefits law, it is necessary that practitioners and scholars start taking seriously the way these systems conflict. One example of this conflict is the "tension between the obligation to work and the desire to aid those in need."\textsuperscript{127} According to Professor Diller:

History demonstrates that programs that seek to cast a broad net by relying on inclusive definitions of disability aid more individuals but are less likely to provide a package of benefits that is markedly superior to those offered to the poor generally. On the other hand, programs that emphasize exclusion by relying on narrow definitions of disability aid fewer people but are more likely to provide benefits on dignified and non-punitive terms. This dynamic does not stem simply from the economic equation that, absent lower benefits, broader programs are costlier. Rather, inclusive definitions of disability highlight the fact that disability is not easily separable from other putative "causes" of chronic unemployment. Narrow definitions obscure this difficulty by presenting disability as a status that is medically given, rather than socially constructed.\textsuperscript{128}

The medical model of disability looks at disability as a "problem" that belongs to the disabled individual, forcing the individual to make accommodations in order to adapt to the environment.\textsuperscript{129} The medical model views disability as something that needs to be corrected.\textsuperscript{130} Alternatively, the social model (the view to which the authors adhere) looks at disability

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\textsuperscript{126} On how the medical model itself contributes to the disabling of individuals, see Emma Gieben-Gamal & Sônia Matos, Design and Disability. Developing New Opportunities for the Design Curriculum, 20 Design J. § 2022 (Supp. 1, 2017).

\textsuperscript{127} Diller, supra note 109, at 363-64.

\textsuperscript{128} Id.


as something affecting society as a whole, and puts the burden on society—rather than the individual—to adapt. The medical model sounds in pathology; it views a person in a wheelchair as the problem, while the social model views the stairs obstructing wheelchair access to a building as the problem that society is responsible for fixing.

It is imperative that lawyers take a holistic approach to representing all clients—but particularly those with mental disabilities. Counsel must recognize that there is no "one size fits all" approach to disability; thus, each client should be treated on an individual basis, identifying their needs, wants, and circumstances to provide effective representation that is in line with the principles of therapeutic jurisprudence and human rights discussed throughout this article.

III. COMPETENCY OF COUNSEL

This leads us to re-direct our inquiry to focus on what lawyers do, and what they should do, in navigating these complex systems. When we undertake this investigation, several realities jump out at us:

131. Arlene Kanter, The Law: What’s Disability Studies Got to Do with It, or An Introduction to Disability Law Studies, 42 COLUM. HUM. RTS. L. REV. 403, 420-21 (2011); see also Arlene Kanter & Yotam Tolub, The Fight for Personhood, Legal Capacity, and Equal Recognition under Law for People with Disabilities in Israel and Beyond, 39 CARDOZO L. REV. 557, 559 (2017) ("[The CRPD] changes the focus of legal capacity decisions from a medical model of disability, that addresses the deficit of the individual and emphasizes protection, to a social model of disability, that honors the dignity of the individual and his or her right to exercise legal capacity on an equal basis with others, and with support, if needed.").

132. See Piers Gooding et al., Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change, 40 MELB. U. L. REV. 816, 830 (2017); see also Megan Brooks, How the World’s Best Education Systems Fall Short: Implementing Inclusive Education under the CRPD in High Performing PISA Countries, 45 SYRACUSE J. INT’L. L. & COM. 1, 4 (2017) ("The medical model of disability views an individual’s disability diagnosis and uses a treatment method to ‘fix’ the person and push them to conform to society’s norms.").


134. See generally Perlin & Weinstein, supra note 45. Examples of a lawyer using the social model to represent a client include using larger fonts in preparing documents for a client with a visual impairment or making an easy to read pamphlet explaining a law or motion for a client with an intellectual disability.
1) Counsel assigned to persons with disabilities has historically been inadequate, in both civil and criminal cases.\textsuperscript{135}

2) In some jurisdictions, there is no counsel available at all for this population.\textsuperscript{136}

3) It is essential that there be a “wake up” call for lawyers so that it will be more likely that authentic representation be provided, something that can best be done through dedicated offices of well-trained stand-alone lawyers.

4) We must confront the pervasive stench of sanism that totally contaminates the entire legal process in cases involving persons with disabilities.

We cannot overestimate the impact of these realities on all the questions we have raised here.

First, there is no question as to the inadequacy of counsel assigned to represent persons with disabilities in most jurisdictions.\textsuperscript{137} Nearly a decade ago, Mr. Perlin concluded “if there has been any constant in modern mental disability law in its thirty-five-year history, it is the near-universal reality that counsel assigned to represent individuals at involuntary civil commitment cases is likely to be ineffective.”\textsuperscript{138} Over twenty years ago, Mr. Perlin pointed out that a Presidential Commission on Mental Health noted the frequently substandard level of representation made available to mentally disabled criminal defendants, adding, “Nothing that has happened in the past two decades has been a palliative for this problem.”\textsuperscript{139} In many jurisdictions, such counsel is “woefully inadequate—disinterested, uninformed,

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\textsuperscript{135} For a recent analysis of the abject lack of adequacy of counsel in death penalty cases involving defendants with mental disabilities, see Perlin et al., supra note 10.

\textsuperscript{136} Many are startled to learn that in some U.S. jurisdictions, there is no absolute right to counsel in cases that may result in “sexually violent predators” being incarcerated in prison-like maximum security facilities for life. See, e.g., Cucolo & Perlin, Turbulent Space, supra note 5, at 132 (citing, inter alia, Ramsey v. Runion, No. 2:11cv396, 2012 WL 3883378, at *5 (E.D. Va. Sept. 5, 2012) (stating “there is no federally cognizable right to effective assistance of counsel in a civil commitment proceeding”)).


\textsuperscript{138} Perlin, Your Funeral, supra note 5, at 241. This, of course, presumes that counsel is available to represent these individuals. See, e.g., Lynch & Perlin, supra note 5, at 355–57. Professor Heather Campbell has reminded us that in Canada, such representation is not mandatory in all provinces. Personal communication from Professor Heather Campbell to author (Oct. 15, 2016) (on file with author).

\textsuperscript{139} Perlin, Executioner’s Face, supra note 5, at 207-08.
roleless, and often hostile.”¹⁴⁰ This is nothing new; we knew this at the
dawn of the modern era of mental health law,¹⁴¹ and we know it today.¹⁴²

Second, perilously few jurisdictions have chosen to follow the exam-
ples of New York, New Jersey, and a handful of other American states that
legislatively created regularized, dedicated, and specialized legal services
offices whose primary job is to provide representation to persons with
mental disabilities at involuntary civil commitment hearings.¹⁴³ Even today,
in the highly-charged area of sexual predator civil commitment law,¹⁴⁴
many states in the U.S. make no provision for counsel, basing their inaction
on the (false) premise that these are civil and not criminal cases.¹⁴⁵ The
right to counsel at each stage in the commitment process is not automati-
cally granted and has been denied during pre-commitment evaluations, as
well as during the psychological evaluation for the annual review hear-
ing.¹⁴⁶ We were stunned to read in Australian legal aid lawyer Eleanore
Fritze’s recent brilliant monograph that only a minority of Australian citi-
zens are granted a right to counsel when they appear before the Mental
Health Review Tribunal in that nation.¹⁴⁷ This is utterly unacceptable.¹⁴⁸

¹⁴⁰ Perlin, Best Friend, supra note 5, at 738.
¹⁴¹ Perlin, Your Funeral, supra note 5, at 241.
¹⁴² Perlin & Lynch, Mr. Bad Example, supra note 9, at 299-300 (discussing
“paralytic rolelessness” of counsel); see generally Perlin, supra note 9.
¹⁴³ Perlin, Your Funeral, supra note 5, at 242; see generally Perlin & Cucolo,
supra note 1, §§ 6-4.2, at 6-41 to 6-48.
¹⁴⁴ See supra note 135 and accompanying text.
¹⁴⁵ See, e.g., Kansas v. Hendricks, 521 U.S. 346, 351 (1997). Mr. Perlin has
critiqued this decision. See Michael L. Perlin & Heather Ellis Cucolo, Shaming
the Constitution: The Detrimental Results of Sexual Violent Predator Legis-
lation (2017); see generally Michael L. Perlin, “There’s No Success like Failure/and
Failure’s No Success at All”: Exposing the Pretextuality of Kansas v. Hendricks, 92
¹⁴⁶ Cucolo & Perlin, Promoting Dignity, supra note 5, at 303; Greenfield v. N.J.
offender had no due process right to review materials or meet with a committee
addressing his possible referral to the state’s attorney general for commitment as a sexu-
ally violent predator).
¹⁴⁷ ELEANORE FRITZE, SHINING A LIGHT BEHIND CLOSED DOORS: REPORT OF THE
Jack Brockhoff Foundation Churchill Fellowship to Better Protect the
Human Rights and Dignity of People with Disabilities, Detained in Closed En-
vironments for Compulsory Treatment, Through the Use of Legal Services
¹⁴⁸ Fleur Beaupert & Eleanore Fritze, Ensuring Meaningful Participation in Fair
Mental Health Tribunal Hearings: The Critical Role of Legal Representatives (paper
presented at the Second International Conference on Non-Adversarial Justice, spon-
Third, we must acknowledge that, without a cadre of trained, dedicated, advocacy-focused counsel, it is impossible to aspire to any meaningful level of ameliorative change in this area. Only the appointment and continued presence of such lawyers can make it possible for meaningful law reform in all aspects of commitment and institutional rights law to take place.\(^{149}\) Without the assignment of such counsel, meaningful and ameliorative change is almost impossible to achieve.\(^{150}\)

Fourth, it is impossible to understand why this happens the way it does without understanding the significance of what we call “sanism.” We believe it is impossible to understand anything we are discussing today without an understanding of this invidious “ism.” Sanism infects both our jurisprudence and our lawyering practices; it is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization, 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. These assumptions—those that reflect societal fears and apprehensions about mental disability, persons with mental disabilities, and the possibility that any individual may become mentally disabled—ignore the most important question of all: why do we feel the way we do about “these people” (quotation marks understood)?\(^{151}\) We can make no headway whatsoever in understanding why the navigation of the systems we have discussed is so difficult unless we come to grips with sanism.\(^{152}\)

\(^{149}\) Perlin, supra note 70, at 496. See generally Perlin, Your Funeral, supra note 3.


\(^{152}\) See Perlin & Lynch, supra note 9, at 300 (sanism “makes negative case outcomes nearly inevitable”).
Failure on the part of counsel to embrace representation of this population is, we believe, a direct outgrowth of sanism. Nearly three decades ago, one of the leading civil rights lawyers in this area of the law noted, regrettfully, how “few have been willing to enter the courtroom on behalf of persons labeled as mentally ill or mentally retarded or to speak to a jury about the injuries imposed on these vulnerable citizens.” This lack of counsel, he added, contributed to “their continued legal invisibility.” It is little wonder, then, that these systems remain so hard to navigate.

IV. THERAPEUTIC JURISPRUDENCE

One of the most important legal theoretical developments of the past three decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ). Therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a

153. See Elayne Greenberg, Overcoming Our Global Disability in the Workforce: Mediating the Dream, 86 St. John’s L. Rev. 579, 593 (2012) (“The dynamics of sanism and pretextuality are a toxic combination that potentially weakens any enforcement opportunities of the CRPD.”). “Pretextuality” means that courts regularly accept (either implicitly or explicitly) testimonial dishonesty, countenance liberty deprivations in disingenuous ways that bear little or no relationship to case law or to statutes 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.” Perlin & Cucolo, supra note 1, § 2-3 at 2-10 (citing, in part, 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, 133 (1991)).


155. Id. at 663.


158. See, e.g., Bruce J. Winick, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler & Bruce J. Winick, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); David B. Wexler, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990). Wexler first used the term in a paper he presented to the National Institute of Mental Health
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The therapeutically agent, the law can have therapeutic or anti-therapeutic consequences.159

TJ asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.160 David Wexler clearly identifies how the inherent tension in this inquiry must be resolved: "the law’s use of mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."161 As Mr. Perlin has written elsewhere, "An inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties."162

Using TJ, we "look at law as it actually impacts people’s lives"163 and assess law’s influence on emotional life and psychological well-being.164 One governing TJ principle is 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 at-

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159. 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) (writing from a transnational perspective).


tempt to bring about healing and wellness."165 TJ supports an ethic of care.166

Professor Amy Ronner has argued persuasively that one of the essential values of therapeutic jurisprudence is adherence to what she characterizes as the "three Vs": voice, validation, and voluntariness.167 Professor Ronner concludes:

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.168

One of the central principles of TJ is a commitment to dignity,169 a value that must permeate the justice system. With his colleagues Keri Gould and Deborah Dorfman, Mr. Perlin has concluded that "[t]he perception of receiving a fair hearing is therapeutic because it contributes to the individual's sense of dignity and conveys that he or she is being taken seriously."170 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 coer-

165. 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).


168. Id.


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With his colleague Naomi Weinstein, Mr. Perlin has recently argued that "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 will be enhanced."173

Professor Ronner and Judge Juan Ramirez recognize the right to effective counsel as "the core of therapeutic jurisprudence."174 The attorney is an essential part of the legal context, especially in a criminal proceeding. She assists individuals in articulating their wishes and telling their stories, aids in effectuating individuals' participatory interests, giving them voice and validation.175 The question to be posed here is whether the complex systems we discuss in this paper—the systems of law and disability—can ever be meaningfully and effectively navigated if these principles of therapeutic jurisprudence are ignored. We believe the answer is simply "no."

First, if we look at "the law" as a unitary construct, we ignore the significant differences between the various areas of law that must be analyzed separately. Criminal law, by way of example, involves the state as a party in all proceedings, sees punishment of offenders as one of its goals, and—in the U.S., at least—is limited by a series of constitutional decisions involving such issues as the privilege against self-incrimination, the right to confront witnesses, and a burden of proof of "beyond a reasonable doubt" that are absent from most areas of civil law. We believe that the need to adhere to Professor Ronner's "three Vs" is enhanced in the criminal justice

172. See Amy D. Ronner, Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles, 71 U. CIN. L. REV. 89, 94-95 (2002). Ironically, and importantly, a "voluntary" status in mental health commitment is not always truly voluntary. 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 A. Reed & Dan A. Lewis, The Negotiation of Voluntary Admission in Chicago's State Mental Hospitals, 18 J. PSYCHIATRY & L. 137 (1990); see also Joel Haycock, Mediating the Gap: Thinking About Alternatives to the Current Practice of Civil Commitment, 20 NEW ENG. J. CRIM. & CIV. CONFINEMENT 265, 278 (1994) ("[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.").
173. Perlin & Weinstein, supra note 45, at 115.
system because of the stigma of a criminal conviction and the possibility that a defendant found guilty might lose his liberty. Here, especially, if litigants do not "have a chance to tell their story to a decision maker," then therapeutic jurisprudence cannot be present.

Although there was originally significant scholarly interest in the relationship between TJ and competency to stand trial, that interest has mostly abated in recent years. TJ was introduced in the early 1990s by Professors David Wexler and Bruce J. Winick. It was first applied in drug treatment courts in 1999, then extended to domestic violence courts, mental health courts, re-entry courts, and community courts. It has spread across all areas of law, including criminal law, family law, health law, torts law, contracts and commercial law, and trusts and estates. It became a critical centerpiece of analysis of mental health law generally.

A recent article underscores that "the implications of expanding the scope of the forensic evaluator's role to include therapeutic jurisprudence objectives more explicitly would require further exploration and discussion..."
within the profession.”

Another observes that “TJ-friendly wine includes forensic mental health experts to determine what treatment the minor would benefit the most from, effective mental health programs and institutions, and rehabilitation as a genuine objective of the legal process.” However, there are no considerations of the topics discussed in this paper.

In a series of other papers and books, Mr. Perlin (by himself and with other colleagues) has identified how our systemic failures similarly violate TJ. Mr. Perlin has written in this vein about how the fundamental failures in the interpretation of the CRPD that would abolish the incompetency doctrine (and the insanity defense) grossly violate therapeutic jurisprudence principles. In one of those pieces, Mr. Perlin concluded: “I am convinced, after spending over forty years representing and working closely with per-


188. See generally Perlin, supra note 70; Perlin & Szeli, Evolution, supra note 70; Perlin & Szeli, Challenges, supra note 70.
sons with serious mental disabilities in the criminal-justice system, that [embracing therapeutic jurisprudence] is the only way that we can begin to eradicate the poison of sanism that contaminates our criminal-justice system."189

The authors adhere to that conclusion today. Beyond this, we believe that in the context of social benefits law, it is necessary for lawyers representing persons with disabilities to embrace therapeutic jurisprudence principles in an effort to advance "healing and wellness,"190 and to structure arguments that are consonant with—and not dissonant with—a social model of disability.

We also must consider the near-global ineffectiveness of counsel in cases involving persons with mental disabilities from the perspective of therapeutic jurisprudence.191 Recently, Mr. Perlin asked—quasi-rhetorically—"to what extent do the ample bodies of case law construing the ineffectiveness assistance of counsel standard established by the U.S. Supreme Court in Strickland v. Washington192 even consider the implications of TJ lawyering?"193 To be blunt, with the exception of the now mostly-overruled Montana case of In re Mental Health of K.G.F.,194 the answer is, sadly, "not at all." Until courts begin to consider these issues through a therapeutic jurisprudence filter, it is unlikely there will be any significant ameliorative change. It is important to recognize that the practice of TJ should not, and cannot, stop with lawyers. It is essential that other members of the legal system, including judges, case workers, and judicial staff, be sensitive to the needs of persons with disabilities,195 and that they are sensitized to the pop-

189. Perlin, supra note 70, at 518. Elsewhere, Mr. Perlin has asked: "If a defendant is, in fact, incompetent to stand trial, that means that he does not have 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and/or a rational as well as factual understanding of the proceedings against him;' how can TJ principles be invoked in such a case?" Perlin, supra note 64, at 516-17.


191. See generally Perlin, Who Will Judge, supra note 9.

192. Strickland v. Washington, 466 U.S. 668, 686 (1984) (asking "whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result"). See generally Perlin & Cucolo, supra note 1, ch. 6.

193. Perlin & Lynch, Mr. Bad Example, supra note 9, at 319. On the application of TJ principles to cases relying on Strickland, see Perlin et al., supra note 10, at 81-88.


ulation's diverse needs. This will help prevent dismissive and sanist attitudes.

Finally, Mr. Perlin has suggested often in the past that the use of therapeutic jurisprudence—to strip bare the law's sanist façade—will become a powerful tool that will serve as "a means of attacking and uprooting 'the we/they distinction that has traditionally plagued and stigmatized the mentally disabled'—then that result will be therapeutic: for the legal system, for the development of mental disability law, and ultimately, for all of us."196 We similarly adhere to that conclusion today.197

V. CONCLUSION

In this paper, we have sought to bring some measure of coherence to our discussion of the combined complexities of the law and disability systems, and why navigation of those systems is sometimes so frustrating and difficult. As we noted earlier, Mr. Perlin was truly surprised when he learned that no one had yet tackled this important problem. Our hope is that this paper encourages others—scholars and practitioners alike—to take these issues seriously.

Many of us, to return to the couplet that gave us the title for this paper, "feel to moan" when faced with the reality of how persons with disabilities are treated in the legal system. We hope that, in place of the "waterfalls of pity" that Dylan writes about in the same couplet, we rise to the challenge on behalf of these populations. For, in the most often-cited lyric in the song in question, "He not busy being born is busy dying."198


198. Dylan, supra note 18.