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“SHE’S NOBODY’S CHILD/THE LAW CAN’T TOUCH HER AT ALL”: SEEKING TO BRING DIGNITY TO LEGAL PROCEEDINGS INVOLVING JUVENILES¹

Michael L. Perlin and Alison J. Lynch

Inquiries into a range of issues involving juveniles in the psychiatric hospitalization and criminal trial process reveal that, regularly, juveniles are subject to shame and humiliation in all aspects of the legal system that relate to arrest, trial, conviction, and institutionalization, shame and humiliation that are often exacerbated in cases involving racial minorities and those who are economically impoverished. We contextualize them into the juvenile justice system, and look specifically at how this is reflected in the case law. We then consider these findings through the filters of therapeutic jurisprudence and international human rights laws, concluding that these approaches best remediate the current state of affairs and infuse this system with badly-needed dignity.

Key points for the Family Court Community:

- We discuss why and how all relevant aspects of the legal system shame and humiliate juveniles, and deprive juveniles of dignity, whether in the civil commitment system, the criminal justice system, or the correctional system.
- We explain why this shame and humiliation disproportionately affects racial minorities and those who are economically impoverished.
- We discuss why the application of international human rights law and therapeutic jurisprudence can best remediate this shame and humiliation.

Keywords: *Civil Commitment; Criminal Procedure; Dignity; International Human Rights Law; Juvenile Delinquency; Therapeutic Jurisprudence; and Shame and Humiliation.*

I. INTRODUCTION

Recent Supreme Court decisions declaring unconstitutional both capital punishment² and life without parole³ in cases involving juveniles might lead a casual observer to think that we are now in an era in which dignity of juveniles is privileged in the legal system, and in which humiliation and shame are subordinated.⁴ This observation, sadly, would be wrong.⁵

Inquiries into a range of issues involving juveniles—commitment to psychiatric institutions; trials in juvenile courts; aspects of criminal procedure that, in many jurisdictions, bar juveniles from raising the incompetency status or the insanity defense; waivers that allow juveniles (some younger than fourteen) to be tried as adults; case law that has developed on the question of the validity of *Miranda* waivers in juvenile cases; conditions in juvenile punishment facilities—reveal that, regularly, juveniles are subject to shame and humiliation in all aspects of the legal system that relate to arrest, trial, conviction and institutionalization, shame and humiliation that are often exacerbated in cases involving racial minorities and those who are economically impoverished. As we will discuss subsequently, we believe that these shaming and humiliating policies violate human rights law and constitutional law and fly in the face of therapeutic jurisprudence (TJ) principles.

In this article, we discuss this wretched state of affairs and look to both TJ and international human rights laws as approaches that should be relied upon to remediate the current state of affairs and infuse this system with some badly needed dignity.⁶ Although scholarship by judges concludes that “[j]uvenile justice professionals should treat family members with dignity and respect,”⁷ it is

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clear that this is, more often than not, not the case. We believe that due process is an essential element of dignity and that this is abjectly absent in most aspects of the juvenile justice system and that authentic dignity requires a genuine understanding of the individual before the court both as an individual and in the context of their actions.

We believe that a turn to TJ—a school of thought that we discuss extensively below⁸—requiring that we focus on the law’s influence on emotional life and psychological well-being,⁹ while mandating that inquiries into therapeutic outcomes do not mean that “therapeutic concerns ‘trump’ civil rights and civil liberties,”¹⁰ is the best response to the current state of affairs. In this context, a system that relies on shaming and humiliation¹¹ is utterly inimical to the bases of TJ.¹² If we embrace TJ, shame and humiliation will diminish and greater dignity will be provided.

Remarkably, there is a paucity of recent legal scholarship available on much of what is discussed in this article.¹³ We hope that this article encourages others—judges, scholars, and policy makers—to think carefully about the questions we address here and to weigh equally carefully the ultimate impact that our current policies—drenched in shame and humiliation—have on the population in question.

First, we discuss the meanings of shame and humiliation in these contexts and explain how the practices of shaming and humiliation are even more troublesome in the context of cases involving juveniles.¹⁴ Next, we review the substantive relevant areas of the law: commitment to psychiatric institutions¹⁵ and the multiple relevant aspects of the criminal process (related to juvenile courts, matters related to questions of mental status, waivers of constitutional rights, waivers to adult courts, and juvenile correctional facilities).¹⁶ We then look carefully at the issues related to the employment of TJ¹⁷ (including specifically, the relationship between TJ and problem-solving courts)¹⁸ and international human rights,¹⁹ then conclude with some modest suggestions.²⁰

II. ON SHAME AND HUMILIATION

Shame is used as a modality to control behavior.²¹ We believe that—together—humiliation and shaming “contravene basic fundamental human rights.”²² In an earlier article with another colleague, one of the coauthors (Perlin) has urged that “humiliating and shaming techniques be banned in order to enhance dignity for society and the legal system.”²³ Although juvenile justice issues were but one subtopic of that piece,²⁴ we believe that our ultimate conclusion there—that “the law regularly shames and humiliates those who come before it”²⁵—will apply equally to an analysis of the range of issues that we are discussing in this article.²⁶

Shaming practices lead to recidivism, inhibit rehabilitation, discourage treatment, and injure victims.²⁷ Shame forces a downward redefinition of oneself²⁸; “the thrust of [shame’s] aggression is to *dehumanize*.”²⁹ It is bordered by “embarrassment, humiliation, and mortification, in porous ways that are difficult to predict or contain”³⁰ and is “one of the most important, painful and intensive of all emotions.”³¹ Shaming is public; its dehumanization and social demotion occurs when a shameful trait or act becomes “visible, and is exposed to others.”³² Shaming sanctions may be psychologically debilitating. The director of a mental health program for juveniles has directly criticized the shaming approach, stating that “[a]ll of our mental health programs end up having more and more people come in with trauma at the hands of humiliation . . . the behavior [will] show up in different ways . . . [and] unfortunately, the morgue may see that person.”³³

Humiliation has been broadly defined as “the rejection of human beings as human, that is, treating people as if they were not human beings but merely things, tools, animals, subhuman, or inferior humans.”³⁴ Humiliation can also reflect “a loss of control over one’s identity”³⁵ or “being denied a certain status in communion with others.”³⁶ The predictable response to humiliation is for its target to “lash out at the humiliator” via a combination of anger and fear.³⁷ Aggression seems to be predictably, automatically, and at times uncontrollably activated in response to humiliation.³⁸ Studies show the devastating consequences of systematic humiliation³⁹ and demonstrate that humiliation may cause depression, paranoia, violence, generalized and social anxiety, and suicide.⁴⁰ Importantly, in

the context of the institutionalization of juveniles, shaming “exploits one’s fear of shunning by others, or banishment from the community.”⁴¹

These impacts of shame and humiliation are equally, if not more, problematic for juveniles. Their ongoing psychological development can be more heavily influenced by the negative reactions that shame and humiliation are likely to evoke. Their brains continue to wire and rewire, whereas adults have more stable neural connections; this could lead to greater internalization of shame and trauma in the juvenile population. Both the civil and criminal legal processes to which juveniles are subject are rife with policies and procedures that expose them to shame and humiliation, causing unnecessary trauma. We explore these processes below.

III. COMMITMENT TO PSYCHIATRIC INSTITUTIONS

In 1979, the U.S. Supreme Court held that juveniles were entitled to less due process in the civil commitment process than were adults⁴² because counseled, due process precommitment hearings would be little more than “time-consuming procedural minuets.”⁴³ Neither data nor theory was offered by the Supreme Court in support of this assertion.⁴⁴

That case—*Parham v. J.R.*—discussed the state’s interest “in not imposing procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance.”⁴⁵ This observation simultaneously assumed that (1) the persons at risk are genuinely mentally ill, (2) they are in need of psychiatric assistance, and (3) such psychiatric assistance is available at the institutions in question.⁴⁶ The Court continued that the risk of erroneous hospitalization was low, because, according to the majority, “historically . . . natural bonds of affection lead parents to act in the best interests of their children.”⁴⁷

Central to the Court’s opinion in *Parham* was this thought: “The *parens patriae* interest in helping parents care for the mental health of their children cannot be fulfilled if the parents are unwilling to take advantage of the opportunities because the admission process is too onerous, too embarrassing or too contentious.”⁴⁸ However, no explanation is offered as to how the process is “too onerous, too embarrassing, or too contentious,” nor is there any basis suggested for the speculation that a significant percentage of patients would forgo state-provided hospital care if it is “contingent on participation in an adversary proceeding.”⁴⁹ Further, *Parham* concluded:

Pitting the parents and child as adversaries often will be at odds with the presumption that parents act in the best interests of their child. It is one thing to require a neutral physician to make a careful review of the parents’ decision in order to make sure it is proper from a medical standpoint; it is a wholly different matter to employ an adversary contest to ascertain whether the parents’ motivation is consistent with the child’s interests.⁵⁰

Again, no supporting citation, behavioral research, or reference to the court record is offered to bolster these assertions.

No modern U.S. Supreme Court civil case dealing with the rights of people with mental disabilities has been criticized as consistently or as thoroughly as has *Parham*.⁵¹ The decision has been criticized for the Court’s “confusing and inaccurate” interpretations of the lower court decisions, for “misstatements” of the factual record of the cases,⁵² and—most importantly, for the purposes of this article—for “according little weight to the juveniles’ interest in self-respect.”⁵³ Other scholars flayed the opinion for improperly relying “on the technique of judicial notice to carve rather elaborate, if one-sided, images of the functioning of American families, mental hospitals and judicial proceedings,”⁵⁴ concluding that it was premised on “erroneous assumptions of social fact.”⁵⁵

Without supporting evidence, the chief justice “made no fewer than fifteen empirical assumptions, many of them directly contrary to existing social-science research, about the psychology and sociology of juvenile mental institutions”⁵⁶ and filled the opinion with social facts of questionable veracity, accompanied by the authority to propel these facts into subsequent case law and, therefore,

a spiral of less than rational legal policy making.⁵⁷ The decision misused behavioral science in an “unsophisticated and non-comprehensive manner for support of specific value positions.”⁵⁸

A fact not in evidence that is assumed in *Parham* is that adequate and ameliorative treatment would be available to the juveniles committed to psychiatric institutions (and, by making it easier to commit juveniles to such facilities, it is not unreasonable to assume that this was an end with which a majority of the Supreme Court was comfortable). Yet, an evaluation of the constitutional right to treatment cases—both individual and class action—litigated at such facilities belies this convenient (and lazy) assumption.⁵⁹

Parham thus not only shames juveniles in the first instance by treating them as second-class citizens (saying they are not due the same panoply of due process rights as are adults), but humiliates them in the second instance by sanctioning their institutionalization in facilities that, by way of example, sanctioned the use of “tear gas and other chemical crowd-control devices.”⁶⁰

IV. THE CRIMINAL PROCESS

A. JUVENILE COURTS

As we will discuss below, we believe that the current system of juvenile justice—a system that is, in virtually all respects, a dignity-free zone⁶¹—betrays all that was good about the progressive ideals of the early years of the juvenile justice system. Initially, juvenile courts were conceived of as places where, “seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.”⁶² These courts were conceived of as nonpunitive in nature so as to “get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; . . . to protect it from the stigma,—this is the work [of the juvenile court].”⁶³ Early legislation thus clarified that juvenile adjudication could never be treated as a criminal conviction.⁶⁴

The rationale for these attitudes flowed from the Progressive movement; progressives believed that benevolent state action guided by experts could alleviate social ills; they created agencies to inculcate their middle-class values and to assimilate and “Americanize” immigrants and the poor to become virtuous citizens like themselves.⁶⁵ Theoretically, a child’s “best interests,” background, and welfare guided dispositions. Because a youth’s offense was only a symptom of her “real” needs, sentences were indeterminate, nonproportional, and potentially continued for the duration of minority.⁶⁶

Of course, there was another side to the same coin. In a typical case, the Minnesota Supreme Court ruled that determinations of delinquency did not require due process because it is the “right of the state to step in and *save the child*.”⁶⁷ Thus, by the 1950s, commentators criticized this approach, concluding that, “if the result of an adjudication of delinquency is substantially the same as a verdict of guilty, the youngster has been cheated of his constitutional rights by false labeling.”⁶⁸

And then came the 1960s. The Progressive Era consensus about state benevolence, the legitimacy of imposing certain values on others, and what rehabilitation entailed had become matters of intense dispute. Pluralism, racial diversity, and cultural conflicts challenged the consensus about the goals of rehabilitation. Empirical evaluations of rehabilitation programs undermined Progressives’ assumptions that correctional personnel possessed the technical ability to treat offenders effectively. Further, perhaps most importantly, civil rights advocates questioned the benevolence of justice system officials and objected to the invidious and discriminatory consequences of discretionary decision making.⁶⁹ Thus, “despite attempts to purge the term ‘juvenile delinquent’ of pejorative implications, it [came] to have as much dramatic significance for community disapproval as the label—‘criminal’—which it replaced.”⁷⁰

At about the same time, the Supreme Court initially stepped in. In *Kent v. United States*,⁷¹ the Supreme Court ruled that some procedural due process in judicial waiver hearings was required. Per Justice Fortas, the Court reasoned that “[t]he child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated

for children.”⁷² Then, finally, in the next year, in *Matter of Gault*,⁷³ the Court mandated procedural safeguards in delinquency proceedings and focused initial judicial attention on whether the child committed an offense as a prerequisite to sentencing.⁷⁴ *Gault* held that juvenile offenders were constitutionally entitled to the assistance of counsel in juvenile delinquency proceedings because “a proceeding where the issue is whether the child will be found to be delinquent” and subjected to the loss of his liberty for years is comparable, in seriousness, to a felony prosecution.”⁷⁵

In shifting the formal focus of juvenile courts from “real needs” to legal guilt, *Gault* identified two crucial disjunctions between juvenile justice rhetoric and reality: the theory versus practice of rehabilitation and the differences between the procedural safeguards afforded adults and those available to juveniles.⁷⁶ These tensions remain, after fifty years, the heart of the controversies surrounding juvenile courts.

And there is irony. We learned that providing a modicum of procedural justice legitimated greater punitiveness in juvenile courts because once states granted even a semblance of procedural justice, however inadequate, they more readily departed from a purely “rehabilitative” model of juvenile justice.⁷⁷

By the early 1970s, both liberal and conservative critics of rehabilitation and indeterminate sentencing began to swing the penal policy pendulum toward retribution, determinate sentences, and principles of “just deserts.” As part of the “law of unintended consequences,” “get tough” legislation emerged in the late 1980s and early 1990s, in significant part, as a result of this focus on juveniles’ rights; its granting of procedural safeguards facilitated the increased severity of delinquency sanctions, precipitated the transformation of the juvenile court into a wholly owned subsidiary of the criminal justice system, and legitimated the imposition of the punitive sentences that—not unimportantly—have fallen most heavily on minority offenders.⁷⁸ And as part of the *denouement* of *Gault*, doubts about the ability of juvenile courts either to rehabilitate chronic and violent young offenders or to protect public safety bolstered policies to crack down on youth crime and to prosecute larger numbers of youths as adults.⁷⁹ Thus, in the 1980s and early 1990s, most states amended their juvenile codes either to simplify the transfer of young offenders to criminal courts or to require juvenile court judges to impose longer, determinate, or mandatory sentences on those youths who remained within an increasingly punitive juvenile system.⁸⁰

Not surprisingly, in recent years juvenile correctional facilities have become punitive and humiliating places, in many jurisdictions made worse by state laws that require juvenile court judges to impose longer, determinate, or mandatory sentences on those youths who remained within that system.⁸¹ These legislative strategies deemphasize rehabilitation and the circumstances of the offender, while they stress personal and justice system accountability and punishment.⁸² Similarly, state laws enabling juvenile transfer to adult court, mandatory minimum sentences, and reduced confidentiality provisions have continued to move the juvenile court farther away from the rehabilitative ideal.⁸³

There is no room for dignity in such proceedings. Making already bad matters worse, juveniles—including “exceptionally young juveniles”—are frequently shackled when they appear before the court in juvenile proceedings, causing intense embarrassment and humiliation.⁸⁴ Such shackling involves more than just pernicious physical and psychological effect, “it also affects a juvenile’s agency and dignity.”⁸⁵ Juveniles forced to appear in court shackled “suffer embarrassment and humiliation and ‘feel like captive animals.’”⁸⁶

And this shackling is done without any evidence that the juveniles in question are a danger to anyone or a flight risk.⁸⁷ Consider the practice in Michigan:

Detained children routinely appear before Michigan’s juvenile courts shackled with handcuffs, leg irons, and belly chains. Once security officers bring a child to court in these shackles, the child usually remains in them for her hearing or trial. In Michigan, as in many other states, no statute or court rule requires the judge to decide whether shackles are necessary.⁸⁸

Juveniles are robbed of their dignity in juvenile court proceedings in other ways as well. During court proceedings, “a wide array of otherwise private, largely irrelevant, and prejudicial information may be presented in court in a manner that can feel gratuitous, stigmatizing, and judgmental.”⁸⁹ Not only is this type of information “frequently irrelevant and gratuitously prejudicial, it shames youth and diminishes their character in ways that go beyond the alleged delinquent act.”⁹⁰ And such shaming may be counterproductive; it is likely to prevent the development of a healthy attitude toward socially acceptable goals and activities.⁹¹ In an earlier article, one of the coauthors (Perlin), writing about the severe penalties for “teen sexting,”⁹² noted that “subjecting [juveniles] to a ‘lifetime of shame’ is not consistent with the central aim of the juvenile justice system—rehabilitation.”⁹³

B. MENTAL STATE STATUSES AND DEFENSES⁹⁴

The criminal justice system has not made substantial efforts to clarify the application of the incompetency status to juveniles awaiting trial.⁹⁵ In many jurisdictions, juveniles are barred from raising the incompetency status or the insanity defense, and juveniles are typically presumed competent to stand trial.⁹⁶ Some states even—astonishingly—preclude consideration of juveniles’ competency by prohibiting mental health evaluations prior to the entry of delinquency adjudications.⁹⁷ Although in most states, the standards for juvenile and adult competency are the same,⁹⁸ this must be contextualized with valid and reliable findings that juveniles under the age of fifteen tended to perform at a level of impairment consistent with that of adults who have been found incompetent to stand trial.⁹⁹ Importantly, although some courts have mandated appropriate treatment for juveniles found incompetent to stand trial,¹⁰⁰ “[l]ittle is known about the nature of [the] treatment” such juveniles actually receive.¹⁰¹

Multiple jurisdictions do not allow a juvenile to raise the insanity defense,¹⁰² and most juvenile justice jurisdictions “have never seen” an insanity defense.¹⁰³ This means that, in some states, seriously mentally ill juveniles will be sent to juvenile (or adult) prisons, where their chances of receiving any mental health treatment are minimal, at best.¹⁰⁴ Making already bad matters worse, at least one court has held that a state postinsanity acquittal commitment statute was not to be applied to cases in which juveniles had been found not guilty by reason of insanity.¹⁰⁵

Extensive citations should not be necessary to support the assertion that severe mentally ill juveniles will be shamed and humiliated in punishment facilities.¹⁰⁶ And there can be little question that this issue will grow in importance in the future as evidence continues to accumulate that the juvenile justice system is generally failing in its primary, articulated rehabilitative goal.¹⁰⁷

C. WAIVERS OF CONSTITUTIONAL RIGHTS

The best evidence tells us that juveniles of ages fourteen and under regularly demonstrate incompetence to waive their rights to silence and legal counsel.¹⁰⁸ This conclusion is generally supported across measures of both understanding and perception in our studies, and in relation to both absolute and relative (adult norm) standards.¹⁰⁹

Thus, as a class, juveniles of ages fifteen and sixteen who have IQ scores of eighty or below lack the requisite competence to waive their rights to silence and counsel. About one third to one half of juveniles fifteen and sixteen years of age with IQ scores above eighty lack the requisite competence to waive their rights when competence is defined by absolute standards (i.e., the satisfaction of scoring criteria for adequate understanding). As a class, however, this group demonstrates a level of understanding and perception similar to that of seventeen- to twenty-one-year-old adults for whom the competence to waive rights is presumed in law.¹¹⁰

How does this play out in the specific context of *Miranda* waivers? This evidence is “particularly disturbing when viewed in light of the disproportionate number of juveniles adjudicated delinquent who have been diagnosed as learning disabled,”¹¹¹ a population especially susceptible to confess falsely to crimes they did not commit.¹¹² As one of the authors (Perlin) has previously noted:

Because the criminal justice system ignores the fact that juveniles may not be competent to stand trial and the fact that they may not be criminally responsible, their opportunities for diversion to mental health facilities are diminished. Because the system, in large part, shuts its eyes to the meaninglessness of *Miranda* waivers (and subsequently countenances the conviction of confessing juveniles), even more juveniles wind up in long-term detention facilities. When added to the data reported on above, the results are especially toxic.¹¹³

Such policies, again, lead to greater use of shaming and humiliating punishment facilities for juveniles with mental disabilities, ones that are “morally bereft.”¹¹⁴

D. WAIVERS TO ADULT COURTS

It is likely that this issue has both the most profound impact on juveniles in the justice system, and leads—inexorably—to the most shaming and humiliation.¹¹⁵ The impact of juvenile waiver and transfer policies is profound:

- In all states, special proceedings are available to transfer youths under the usual age threshold from juvenile to criminal court.¹¹⁶
- Judicial transfers require a hearing and findings as to the juvenile’s “dangerousness” and “amenability to treatment.”¹¹⁷
- Statutory exclusion transfers and prosecutorial discretion transfers rarely include any consideration of the juvenile’s psychological characteristics or mental state.¹¹⁸

Current policies rob the individual of dignity because, from the start, they fail to recognize that the individual involved is more than the sum of his/her alleged criminal acts. The transfers that we refer to here are often pretextual¹¹⁹ and just as often done for “cosmetic purposes to create the impression or illusion that juvenile court is enforcing a ‘get tough’ policy.”¹²⁰ Waivers are invariably based upon prosecutorial discretion; in those jurisdictions where there is automatic transfer, the sole emphasis is on the underlying crime alleged to the near exclusion of consideration of the juvenile as a person.¹²¹ Transfer appears to be counterproductive; transferred youths are more likely to reoffend, and to reoffend more quickly and more often, than those retained in the juvenile justice system.¹²² The data are clear; juveniles incarcerated in adult institutions are “[five] times more likely to be sexually assaulted, twice as likely to be beaten by staff, and 50% more likely to be attacked with a weapon than youth in juvenile facilities.” These conditions may be especially damaging for youths with mental disorders, who are almost eight times more likely to commit suicide in adult jails than in juvenile institutions.¹²³ In addition, fewer than one third of juveniles institutionalized through the criminal justice system are in facilities that require screening to be done by mental health professionals.¹²⁴ The conditions faced by juveniles in detention and incarceration in adult facilities are dangerous, damaging, and life threatening.¹²⁵ Stupefyingly, states are expanding the scope of allegedly felonious behaviors by juveniles; in a law that went into effect on January 1, 2017, schoolyard fights in Missouri may now be prosecuted as felonies.¹²⁶

Juveniles treated in adult facilities—thus subject to assault and sexual abuse—are regularly shamed and humiliated simply by the reality of their institutionalization.¹²⁷

E. CORRECTIONAL FACILITIES

What about the state of affairs of juvenile correctional facilities? In a prior article, one of the coauthors (Perlin) concluded:

Juvenile punishment and incarceration schemes are morally bereft. They subject the most at-risk population to unspeakably brutal conditions, they ignore the ubiquity of mental disabilities in this population, and they provide few meaningful diversion programs.¹²⁸

This is not news, but it is incomprehensible how policy makers—judges, legislators, and prosecutors—have turned a blind eye to the, again, uncontradicted data.¹²⁹ We know—and have known for years—that youths in the justice system are at high risk for mental health problems that may have contributed to illegal behavior.¹³⁰ Sixty percent of male juvenile detainees and more than two-thirds of female detainees meet diagnostic criteria for one or more psychiatric disorders (and these figures probably reflect underestimations)¹³¹; if, however, undetected learning disabilities are included, the prevalence rate climbs to at least eighty percent.¹³² In California, seventy percent of juveniles being held in juvenile facilities “for mental health purposes” have attempted suicide.¹³³ In short, most states are barely able to ensure the physical safety of their juvenile inmates; “inhumane conditions of confinement . . . and inadequate rehabilitative services” are still common.¹³⁴

While the mental fragility of youths and the perils it presents for their confinement is well documented,¹³⁵ so too are the instances of physical mistreatment in juvenile facilities. Criminological research, judicial opinions, and investigative studies report staff beatings of inmates, the use of medications for social control purposes, extensive reliance on solitary confinement, and a virtual absence of meaningful rehabilitative programs.¹³⁶ Reports on vile conditions of confinement surpass—by a large margin¹³⁷—the “shock the conscience” standard articulated by the U.S. Supreme Court in the stomach-pumping case of *Rochin v. California*.¹³⁸

The treatment of juvenile offenders not only causes significant trauma in cases like those referenced above, but it also enforces systematic shame and humiliation, which become a regular part of confinement for these children. Enduring the abuse and having others witness the abuse regularly subjects these juveniles to shame and humiliation that they will continue to internalize. This psychological trauma at the hands of so-called caretakers will ultimately cause harm to these children and very likely have a negative effect on what should be a rehabilitative environment.¹³⁹

We believe that TJ is an important lens through which to view these issues. TJ allows us to recognize the legal, social, and psychological complexities that shame and humiliation can trigger. It is also critical to recognize the role of international human rights laws in this discussion. Many nations have specific regulations that deal extensively with treatment of juveniles and juvenile offenders, and this will be an important tool in linking the inadequacies of our current system with ways in which we may be able to improve.¹⁴⁰

V. THERAPEUTIC JURISPRUDENCE

A. BACKGROUND¹⁴¹

TJ¹⁴² “look[s] at law as it actually impacts people’s lives”¹⁴³ and assesses law’s influence on “emotional life and psychological well-being.”¹⁴⁴ TJ mandates that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness.”¹⁴⁵

The ultimate aim of TJ is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.¹⁴⁶ On this point, we agree fully with Professor Nigel Stobbs that “[t]he claim that TJ poses any threat to due process rights . . . is simply unsustainable.”¹⁴⁷

From TJ, we gain “a new and distinctive perspective utilizing socio-psychological insights into the law and its applications.”¹⁴⁸ TJ is “a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . [emphasizing] psychological wellness over adversarial triumphalism.”¹⁴⁹ It thus supports an ethic of care.¹⁵⁰

Professor Amy Ronner describes the “three Vs”: voice, validation, and voluntariness,¹⁵¹ arguing:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge

from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.¹⁵²

The question we must confront is this: do our practices related to the treatment of juveniles in the civil commitment and criminal justice system comport with the “3 V’s” seen by Professor Ronner as the *sine qua nons* of TJ? As we discuss below, we believe the answer is, sadly, “absolutely not.”

B. TJ AND JUVENILES

There is a limited database of TJ literature (and some case law) on the questions of whether juveniles have a right to counsel in civil commitment hearings,¹⁵³ of the extent of rights to be granted to foster children in juvenile and family court proceedings,¹⁵⁴ the civil commitment trial itself,¹⁵⁵ the implications of TJ for juvenile cases involving *Miranda* issues,¹⁵⁶ the need for coordination between juvenile justice and mental health systems,¹⁵⁷ and the waiver/transfer issue.¹⁵⁸ But there has been—other than a piece written by one of the coauthors of this article¹⁵⁹—nothing on the relationship between TJ and issues of juvenile mental status defense or juvenile punishment schemes. Also, it is more troubling that, with the exception of this latter piece, none of the articles referred to have been written in the past decade.¹⁶⁰

Differences between juveniles and adults need to be taken into account to create a truly therapeutic environment. Juveniles cannot be treated as smaller adults; advocates need to tailor their advocacy approach, both in and out of the courtroom, to working with a juvenile population.¹⁶¹ This means learning to work with the individual and providing explanations at the level they are able to understand,¹⁶² as well as recognizing that it may be necessary to work within a family structure, including the child’s support system in discussions or decisions.¹⁶³

Recognizing and acknowledging juvenile brain development in the context of sentencing and potential rehabilitation programs: it is a well-established fact that juvenile brain development is ongoing until at least age twenty-five.¹⁶⁴ As part of a TJ approach to dealing with juvenile cases, advocates need to be aware of why a more traditional route of punishment, such as prison sentences or programs without juvenile-focused therapy or treatment will be ineffective, and potentially detrimental to psychological development, for this population.¹⁶⁵

In practice, this type of intervention, with emphasis on the therapeutic benefits of assigning counsel and treating juveniles as a discrete category, would likely have a transformative effect on the decisions in many juvenile cases. With less of an emphasis on punishment and deterrence, and with an eye toward treatment and rehabilitation, TJ-inclined appointed counsel would likely have a greater impact in cases where interventional services would potentially benefit the juvenile. Judges may also be more likely to consider diversion based on arguments from counsel, taking into account background, mental health history, and support from family when considering placement options. Ultimately, a practice of assigning counsel that understands both the legal and therapeutic benefits that these types of hearings can have for the juvenile could dramatically change the landscape in a number of jurisdictions where formulaic punishments and sentences are handed out; such a change in practice would pay due regard to the individual qualities that should be taken into account in each separate case, presented in order to provide the most effective representation of each individual.

1. On Intersectionality¹⁶⁶

It is essential that TJ principles be followed in all cases in which juveniles are involved (individuals who may not be as able as some to counteract the biases they face). Advocates must recognize

the intersecting issues of one's juvenile status, as well as potential issues of race, class, gender, and mental health status when working with an individual on a juvenile case.¹⁶⁷ Judges and juries will often unconsciously use these markers in their decision making, so advocates need to be proactive in recognizing and fighting the biases.

2. On Mental Health Courts

How does TJ relate to problem-solving courts?¹⁶⁸ Such TJ-based courts handle a wide array of issues, ranging from family problems and domestic violence to substance abuse and mental health concerns.¹⁶⁹ These courts draw together the efforts of legal and mental health professionals to fashion treatment plans and supervision models.¹⁷⁰ In them, judges seek to facilitate creative solutions to the issues presented by each individual offender, encouraging defendants to complete treatment plans in the hopes of increasing compliance with programs tailored to ensure that individuals will avoid the justice system in the future.¹⁷¹

Problem-solving juvenile courts universally strive to use both consequences and incentives in treatment and recovery plans and focus on "the role and functioning of the youth's family in terms of rehabilitating the youth."¹⁷² Ostensibly, the juvenile justice system—an institution designed to treat and rehabilitate youth—offers a unique opportunity to intervene in the lives of children with mental disabilities before any negative behavioral or psychological patterns take hold. Although the procedures employed by courts may vary, all appear to focus on the importance of developing individualized treatment programs for offenders and returning to the rehabilitative ideal.¹⁷³ In this context, the juvenile mental health court¹⁷⁴ may offer some innovative and transformative remediation to the current state of affairs in which juveniles are trapped in court and administrative proceedings in which dignity and due process are sorely lacking.

There are now, according to the Council of State Governments' Justice Center, over 375 such courts in operation in the United States.¹⁷⁵ The research literature tells us that both of the primary mental health court goals—reduced criminal justice involvement and increased community treatment—were met.¹⁷⁶ Participants had significantly lower arrest rates after enrollment than before enrollment and lower postenrollment arrest rates than comparison groups. Importantly, these courts were more successful at reducing recidivism—recidivism rates of twenty-five percent versus ten to fifteen percent—than were drug courts.¹⁷⁷ In a comprehensive analysis of one such court in Colorado, researchers found that results "clearly support the efficacy of the Colorado First Judicial District's juvenile mental health court for reducing both recidivism while in the program and during at least [one] year following successful completion."¹⁷⁸ There also is preliminary evidence that post-release recidivism rates of youth in the court were significantly lower than those for a sample of other youth in the juvenile justice system diagnosed with mental disorders.¹⁷⁹

3. In Summary

TJ teaches us that the types of interventions employed by problem-solving courts—especially in matters involving juvenile offenders and other vulnerable populations—are extremely beneficial in not only stopping a pattern of problematic behavior and helping to promote better mental health but also in working to ensure that there is less of a chance for these juveniles to face the shame and humiliation that they may otherwise have endured in a secure facility or treatment center.

"One of the central principles of therapeutic jurisprudence is a commitment to dignity."¹⁸⁰ In a recent article about dignity and the civil commitment process, Professors Jonathan Simon and Stephen Rosenbaum embrace TJ as a modality of analysis and focus specifically on this issue of voice: "When procedures give people an opportunity to exercise voice, their words are given respect, decisions are explained to them their views taken into account, and they substantively feel less coercion."¹⁸¹ If we embrace the dignity-enhancing principles of TJ—both in traditional courts and in

problem-solving courts¹⁸²—we enhance the likelihood that shame and humiliation will diminish and that greater dignity will be provided.¹⁸³

C. INTERNATIONAL HUMAN RIGHTS

There is a rich body of literature that discusses the intersection between international human rights law and the Supreme Court's death penalty and life without parole (LWOP) decisions as they apply to juveniles.¹⁸⁴ Most of this literature focuses on the UN Convention on the Rights of the Child's prohibition of "torture or other cruel, inhuman or degrading treatment or punishment."¹⁸⁵ We believe, though, that it is necessary to extend our focus beyond these questions, and specifically consider the potential impact of the UN Convention on the Rights of Persons with Disabilities (CRPD)¹⁸⁶ on the population in question.¹⁸⁷

Briefly, the CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities, a category that includes most juveniles in the psychiatric commitment system and many juveniles in the criminal justice system.¹⁸⁸ It not only clarifies that states should not discriminate against persons with disabilities, but it also explicitly sets out the many steps that states must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.¹⁸⁹ When we consider some of the realities of the juvenile correctional facility data—that two thirds of all incarcerated juveniles have a mental disorder¹⁹⁰; that minorities are "disproportionately" locked up in juvenile detention facilities¹⁹¹; that staff beatings of inmates; the use of medications for social control purposes, extensive reliance on solitary confinement, and a virtual absence of meaningful rehabilitative programs are all common¹⁹²—it is clear that we must confront the fact that conditions in these facilities, globally, violate international human rights laws and standards.¹⁹³ We believe that these international human rights instruments do have the potential to neutralize and/or mediate punitive trends in juvenile law.¹⁹⁴ However, there has been little movement to actualize this potential. Certainly, the needs to examine, understand, and expand the relationship between international human rights and all aspects of TJ are essential.¹⁹⁵

Although many of the post-*Roper/Graham* cases signaled a "greater willingness to consider international human rights standards and practices when assessing sentencing practices within the United States," it is still unclear whether the Supreme Court will continue to analyze cases with any attention paid to international human rights. However, it does seem clear that the Court has begun to establish a trend of acknowledging that juveniles need to be treated differently, which falls in line with international human rights standards, even if that is not the direct intention of the Court.¹⁹⁶

The United States has signed, but not yet ratified, the CRPD. Under such circumstances, "a state's obligations under it are controlled by the Vienna Convention on the Law of Treaties . . . which requires signatories 'to refrain from acts which would defeat [the Disability Convention's] object and purpose.'"¹⁹⁷ Domestic courts in New York have thus cited the CRPD approvingly in cases involving guardianship matters. In one such case, Surrogate Judge Kristin Booth Glen noted that the CRPD was "entitled to 'persuasive weight' in interpreting our own laws and constitutional protections."¹⁹⁸ Thus, it is entirely appropriate for judges in domestic cases involving any of the substantive topics we have written about in this article to consider this body of the law.

VI. CONCLUSION

Our treatment of juveniles—in the civil commitment process, in all aspects of juvenile delinquency cases, in waiver proceedings, and in institutional settings—shames and humiliates them, robs them of their dignity, and violates the essence of TJ. Although recent U.S. Supreme Court cases—by drawing on international human rights precedents—appear to augur a new day in this area of law and policy, the on-the-ground reality shows that this is still, at this point in time, highly aspirational. We

believe that a conscious turn toward TJ and a greater emphasis on international human rights law may, finally, bring about a new day for all concerned.¹⁹⁹

Our title for this article, *She's Nobody's Child/The Law Can't Touch Her at All* comes from Bob Dylan's 1965 hit, *She Belongs to Me*.²⁰⁰ One of the many interpretations of the lyric suggests, "The girl has the freedom of the world—which only the young have. And yet she belongs to the adult in her life."²⁰¹ Juveniles enmeshed in the civil commitment and juvenile delinquency systems lose out on the "freedom of the world." The adult in their life is the state. We hope that the application of TJ principles and international human rights precepts can help change that state of affairs.

NOTES

1. A portion of this paper was presented to the Human Dignity & Humiliation Studies Network Conference, at the Morton Deutsch International Center for Cooperation and Conflict Resolution of Columbia University, New York City, December 8, 2016, and another portion at the annual meeting of the National Association of Rights, Protection and Advocacy (co-sponsored with Disability Rights Maine), in Portland, Maine, September 9, 2017.

2. *Roper v. Simmons*, 543 U.S. 551, 567–75 (2005).

3. *Graham v. Florida*, 560 U.S. 48 (2010) (regarding nonhomicide offenses); *see also* *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (regarding all offenses). *See generally* Samuel Pillsbury, *Talking about Cruelty: The Eighth Amendment and Juvenile Offenders after Miller v. Alabama*, 46 LOY. L.A. L. REV. 885 (2013) (author is a law professor and volunteer chaplain in Los Angeles jails and juvenile detention halls).

4. Certainly, respected commentators reasonably saw *Roper* as "herald[ing] a major shift in the perspective of the legal system-and the culture at large-towards adolescents who commit crimes." Tamar Birkhead, *The Age of the Child: Interrogating Juveniles after Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 385 (2008), and *Graham* as having "the potential to profoundly impact the field of juvenile justice and youth policies as a whole." Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 100 (2010). And, in fact, it is likely that these cases did inspire decisions by other courts. *See, e.g., In re C.P.*, 967 N.E.2d 729, 751 (Ohio 2012) (statute mandating juveniles' automatic lifetime registration as a sex offender constituted cruel and unusual punishment in violation of the Eighth Amendment and Ohio's own constitutional prohibition against cruel and unusual punishment, following *Roper* and *Simmons*). *C.P.* is discussed carefully in Ben Blumenthal, *In Re C.P.: The Ohio Supreme Court's Expansion of Roper v. Simmons and Graham v. Florida to the Realm of Juvenile Sex Offender Registration*, 41 HASTINGS CONST. L.Q. 457 (2014).

5. An important recent case that takes *Roper* and *Graham* seriously concludes that sentencing judges should evaluate the *Miller* factors when a juvenile facing a lengthy term of imprisonment that is the practical equivalent of life without parole is first sentenced, so as to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *State v. Zuber*, 152 A.3d 197, 214 (N.J. 2017) (quoting *Miller*, 132 S. Ct. at 2469); *see also id.* at 213 ("Defendants' potential release after five or six decades of incarceration, when they would be in their seventies and eighties, implicates the principles of *Graham* and *Miller*.").

6. The U.S. Supreme Court has acknowledged that all persons possessed dignity by virtue of their basic humanity, at least since *McNabb v. United States*, 318 U.S. 332, 343 (1943) ("[a] democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process"), and continues to write about it to this day; *see, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (finding "[fundamental] liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

7. T. Bennett Burkemper, Jr. et al., *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128, 134 (2007).

8. *See infra* text accompanying notes 142–53.

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

10. Michael L. Perlin & Alison J. Lynch, "Toiling in the Danger and in the Morals of Despair": *Risk, Security, Danger, the Constitution, and the Clinician's Dilemma*, 5 IND. J.L. & SOC. EQUALITY 409, 434 n.181 (2017).

11. *See infra* text accompanying notes 21–41.

12. *See, e.g.,* Michael L. Perlin & Naomi Weinstein, "Friend to the Martyr, a Friend to the Woman of Shame": *Thinking About The Law, Shame and Humiliation*, 24 SO. CAL. REV. L. & SOC. JUST. 1, 4 (2014); *see also* Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation By Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, FLA. J.L. & PUB. POL'Y (forthcoming 2017); Naomi Weinstein & Michael L. Perlin, "Who's Pretending to Care For Him?" *How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives Persons with Mental Disabilities the Right to Continuity of Care*, WAKE FOREST J.L. & POL'Y (forthcoming 2018).

13. We recognize that the scope of substantive topics that we address in this article is a wide and ambitious one. We consciously have chosen to do that because we believe that the shameful and humiliating underpinnings of *all* the juvenile

justice systems are similar and that the solutions we recommend—a turn to therapeutic jurisprudence and adherence to international human rights standards—apply equally to all.

14. *See infra* text accompanying notes 21–41.
15. *See infra* text accompanying notes 42–60.
16. *See infra* text accompanying notes 61–140.
17. *See infra* text accompanying notes 141–52.
18. *See infra* text accompanying notes 168–79.
19. *See infra* text accompanying notes 183–97.
20. *See infra* text accompanying notes 198–200.
21. Perlin & Weinstein, *supra* note 12, at 4.
22. *Id.* at 5.
23. *Id.* at 6.
24. We also considered “scarlet letter”-like criminal sanctions, police stop-and-frisk practices, the treatment of persons with mental disabilities in the justice system, and the use of sex offender registries. *Id.* at 2.
25. *Id.* at 50.
26. *See generally* Cucolo & Perlin, *supra* note 12.
27. Perlin & Weinstein, *supra* note 12, at 2.
28. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1901 (1991).
29. LEON WURMSER, *THE MASK OF SHAME* 81 (1981) (emphasis added).
30. Toni M. Massaro, *The Meaning of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL’Y & L. 645, 655 (1997).
31. Robert Svensson et al., *Moral Emotions and Offending: Do Feelings of Anticipated Shame and Guilt Mediate the Effect of Socializing on Offending?*, 10 EUR. J. CRIMINOLOGY 2, 3 (2012).
32. Massaro, *supra* note 28, at 1902 (citing CARL D. SCHNEIDER, *EXPOSURE AND PRIVACY* 34–35 (1977)).
33. Luke Coyne, *Can Shame Be Therapeutic?*, 7 ARIZ. SUMMIT L. REV. 539, 557 (2012) (quoting Tracey Read, *Most Influential: Judge Cicconetti’s Alternative Sentences Leave Impression (with Video)*, NEWS-HERALD, Dec. 31, 2012, 12:00 AM).
34. Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 487 n.266 (1997) (quoting AVISHAI MARGALIT, *THE DECENT SOCIETY* 1 (1996)).
35. Claire Wright, *Censoring the Censors in the WTO: Reconciling the Communitarian and Human Rights Theories of International Law*, 3 J. INT’L MEDIA & ENT. L. 17, 102 n.534 (2010).
36. Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 CORNELL INT’L L.J. 675, 691 n.120 (2008).
37. Jeremy Waldron, *On Humiliation*, 93 MICH. L. REV. 1787, 1801 (1995).
38. Diane Trumbull, *Humiliation: The Trauma of Disrespect*, 36 J. AM. ACAD. PSYCHOANALYSIS & DYNAMIC PSYCHIATRY 643 (2008).
39. Catherine L. Fiske, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 77 (2001) (citing FRANCIS J. BROUCEK, *SHAME AND THE SELF* 75 (1991)).
40. *Id.* at 78 (citing Donald C. Klein, *The Humiliation Dynamic: An Overview*, 12 J. PRIMARY PREVENTION 93, 107–12 (1991)).
41. Massaro, *supra* note 28, at 1903. On how banishment is used as a tool of punishment in sex offender cases, see Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 30 (2012).
42. *Parham v. J.R.*, 442 U.S. 584, 603 (1979).
43. *Id.* at 605–06.
44. *See* Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption*, 1 PSYCHOL. PUB. POL’Y & L. 80, 93 (1995).
45. *Parham*, 442 U.S. at 605.
46. *See* Michael L. Perlin, *Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger’s “Time-Consuming Procedural Minuets” Theory in Parham v. J. R.*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 149, 151 (1981). Interestingly, although the lower court opinions in both *Parham* and its companion case—*Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles*, 442 U.S. 640 (1979)—, discussed many individual cases at length (some of which fit none of the Court’s three assumptions on this point), the Court made no reference to any case history, supporting data, or scientific research on this point, *id.*; see also Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 ARIZ. ST. L.J. 373 (2016). On the “psychiatrization of children” in this context, see Maria Liegghio, *Too Young to Be Mad: Disabling Encounters with “Normal” from the Perspectives of Psychiatrized Youth*, 5 INTERSECTIONALITIES: A GLOBAL J. SOC. WORK ANALYSIS, RES., POLITY, & PRAC. 110 (2016).
47. *Parham*, 442 U.S. at 611. The Court here simply cited to 1 W. BLACKSTONE, *COMMENTARIES* *447, and 2 J. KENT, *COMMENTARIES ON AMERICAN LAW* *190, *id.* On the relationship between subsequent civil commitment and prior sexual or physical abuse, see, e.g., P. E. Mullen et al., *The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study*, 20 CHILD ABUSE & NEGLECT 7 (1996).
48. *Parham*, 442 U.S. at 611.
49. Perlin, *supra* note 46, at 151.

50. *Parham*, 442 U.S. at 610.
 51. See MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 4-3.1.1, at 4-154 to 4-155 n.1168 (3d ed. 2017).
 52. Allen Schoenberger, "Voluntary" Commitment of Mentally Ill or Retarded Children: Child Abuse by the Supreme Court, 7 U. DAYTON L. REV. 1, 30-31 (1981).
 53. *Id.* at 30.
 54. Gail Perry & Gary Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as an Example*, 22 J. FAM. L. 633, 634 (1983-84).
 55. Gary Melton, *The Significance of Law in the Everyday Lives of Children and Families*, 22 GA. L. REV. 851, 872 n.6 (1988).
 56. Perry & Melton, *supra* note 54, at 635.
 57. *Id.* at 645.
 58. Winsor Schmidt, *Considerations of Social Science in a Reconsideration of Parham v. J.R. and the Commitment of Children to Public Mental Institutions*, 13 J. PSYCHIATRY & L. 339 (1985).
 59. See facts developed in cases such as *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 353 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *PeDna v. Division of Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976), *aff'd*, 708 F.2d 877 (2d Cir. 1983); and *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on procedural grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977) (involving challenges to institutional conditions such as the use of corporal punishment, disciplinary isolation, mechanical restraints, tranquilizers, and tear gas), in addition to inadequate medical and dental care, invidious discrimination based on race and national origin, and overcrowding, as discussed in Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791, 1797-98 (1995).
 60. *Morales*, 383 F. Supp. at 79-80.
 61. On how some courts that characterize themselves as problem-solving courts actually operate in a due process-free zone, see Michael L. Perlin, "John Brown Went Off to War": Considering Veterans' Courts as Problem-Solving Courts, 37 NOVA L. REV. 445, 449 (2013) (hereinafter Perlin, *John Brown*); see also Michael L. Perlin, "There Are No Trials Inside the Gates of Eden": Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence, in COERCIVE CARE: RIGHTS, LAW AND POLICY 193, 207 (Bernadette McSherry & Ian Freckelton eds., 2013).
 62. Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909). *Id.* at 109:
- The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit.
- Id.*
 63. *Id.* at 109.
 64. See, e.g., 1917 MINN. LAWS 561, 569-70.
 65. Barry Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 693 (1991).
 66. *Id.* at 695.
 67. *Peterson v. McAuliffe*, 187 N.W. 226, 226 (Minn. 1922) (emphasis added), *quoted in* John M. Stuart & Amy K.R. Zaske, *What Does a "Juvenile Adjudication" Mean in Minnesota? Some New Answers after a Century of Change in Juvenile Court*, 32 WM. MITCHELL L. REV. 919, 923 (2006).
 68. Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 550 (1957).
 69. See generally Barry Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 MINN. L. REV. 1447, 1448 (2003).
 70. Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1160 (1968).
 71. *Kent v. United States*, 383 U.S. 541, 561-62 (1966).
 72. *Id.* at 556.
 73. *In re Gault*, 387 U.S. 1 (1967).
 74. *Id.* at 29.
 75. *Id.* at 36 ("The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, and to insist upon regularity of the proceedings. . . The child 'requires the guiding hand of counsel at every step in the proceedings against him.'").
 76. Feld, *supra* note 65, at 695.
 77. Compare Feld, *supra* note 69, at 1494 with Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1454 (2009) ("courts should allow empirical research evaluating adolescents' appraisals of the fairness of a decision-making process—also known as procedural justice—to inform the decision.").
 78. Feld, *supra* note 69, at 1451.

79. See generally Barry C. Feld, *The Transformation of the Juvenile Court-Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327 (1999).

80. Feld, *supra* note 69, at 1506.

81. For an overview, see, for example, Heidi Treiber, *Juvenile Justice: Rehabilitating the System after the Introduction of Mandatory Minimum Sentences*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 175 (1998). On the need for a significant shift in the role of judges in juvenile cases, see Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 767–68 (2016).

82. See, e.g., JUVENILE CRIME, JUVENILE JUSTICE 210 (Joan McCord et al. eds., 2001); see generally Barry Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11 (2007).

83. For a novel potential solution, see Katherine I. Puzone, *A Proposal to Allow the Presentation of Mitigation in Juvenile Court So That Juvenile Charges May Be Expunged in Appropriate Cases*, 36 PACE L. REV. 558, 559 (2016) (arguing that “foreclosing a young person’s future based upon behavior that is linked to circumstances beyond their control violates the Eighth Amendment’s proscription on cruel and unusual punishment.”). See also Katherine Hunt Federle, *The Right to Redemption: Juvenile Disposition and Sentencing*, 77 LA. L. REV. 47 (2016).

84. Leah Rabinowitz, *Due Process Restrained: The Dual Dilemmas of Discriminate and Indiscriminate Shackling in Juvenile Delinquency Proceedings*, 29 B.C. THIRD WORLD L.J. 401, 410 (2009).

85. Alicia N. Harden, *Rethinking the Shame: The Intersection of Shaming Punishments and American Juvenile Justice*, 16 U.C. DAVIS J. JUV. L. & POL’Y 93, 122 (2012).

86. *Id.* (citing Bernard P. Perlmutter, *Unchain the Children: Gault, Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1, 19–20 (2007)); see also Rabinowitz, *supra* note 84, at 410.

87. Donna Quigley Groman, *Juvenile Shackling Reform: The Judicial Role in Ensuring Trauma-Informed Courts and Why States Are Rethinking Restraints*, 66 JUV. & FAM. CT. J. 19 (2015).

88. Gabe Newland, *A Solution to Michigan’s Child Shackling Problem*, 112 MICH. L. REV. FIRST IMPRESSIONS 161 (2014). See also Amy Miller, *Campaign against Indiscriminate Juvenile Shackling Comes to Oregon*, 36 OR. DEF. ATT’Y 16 (Jan.–Mar. 2015).

89. Candace Johnson & Mae Quinn, *Chaining Kids to the Ever Turning Wheel: Other Contemporary Costs of Juvenile Court Involvement*, 73 WASH. & LEE L. REV. ONLINE 159, 165 (2016); see also *id.* at 165–66:

Intimate and potentially embarrassing family histories are highlighted without sufficient regard for the privacy of the family and feelings of the accused child. Probation officer reports may describe whether a child’s mother is married, how many different men had fathered her children, and if the children were born out of wedlock.

Id.

90. *Id.* at 166.

91. Paul R. Kfoury, *Confidentiality and the Juvenile Offender*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 55, 56 (1991).

92. See, e.g., FLA. STAT. § 847.0141(1)(a):

A minor commits the offense of sexting if he or she knowingly . . . [u]ses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of any person which depicts nudity, as defined in s. 847.001(9), and is harmful to minors, as defined in s. 847.001(6).

Id. See generally PERLIN & CUCOLO, *supra* note 51, § 5-5.5.1, at 5–247 to 5–248 (discussing the implications of sexting prosecutions).

93. Perlin & Weinstein, *supra* note 12, at 46 n. 309, (quoting Sidney L. Leasure, *-Teenage Sexting in Arkansas: How Special Legislation Addressing Sexting Behavior in Minors Can Salvage Arkansas’s Teens’ Futures*, 35 U. ARK. LITTLE ROCK L. REV. 141, 150 (2012)).

94. See generally PERLIN & CUCOLO, *supra* note 51, § 13-1.8.1, at 13–89 to 13–93 & § 14-1.8.1, at 14–131 to 14–132.

95. THOMAS GRISSO, *DOUBLE JEOPARDY* 176 (2004).

96. See generally David Katner, *Eliminating the Competency Presumption in Juvenile Delinquency Cases*, 24 CORNELL J.L. & PUB. POL’Y 403 (2015). Although it can be argued that this presumption is dignity reinforcing, see, e.g., *Indiana v. Edwards*, 554 U.S. 164, 186–89 (2008) (Scalia, J., dissenting) (critiquing the majority opinion that had held that the Constitution permits states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point that they are not competent to conduct trial proceedings by themselves), we believe that this is simply a false consciousness. See PERLIN & CUCOLO, *supra* note 51, § 13-2.4.1, at 13–131 to 13–132; Michael L. Perlin, “*God Said to Abraham/Kill Me a Son*”: *Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 AM. CRIM. L. REV. 477, 491 (2017) (asking “how can our legal system allow a person who did not have the ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [or] a rational as well as factual understanding of the proceedings against him’” go to trial? (see *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam))).

97. Thomas Grisso et al., *Competency in Juvenile Court*, 10 INT'L J.L. & PSYCHIATRY 1 (1987); see, e.g., Mary Sue Backus, *Achieving Fundamental Fairness for Oklahoma's Juveniles: The Role for Competency in Juvenile Proceedings*, 65 OKLA. L. REV. 41 (2012); but see State v. T.S. (*In re T.S.*), 2011 ND 118, 798 N.W.2d 649 (2011) (juveniles had a due process right not to be subjected to the adjudicative stage of juvenile proceedings while incompetent, but no due process violation found where court failed to order competency proceeding); State *ex rel.* J.P., 2011 N.J. Super. Unpub. LEXIS 2614 (Oct. 18, 2011) (10-year-old with a full-scale I.Q. of 51 was not competent to proceed to trial). It has been suggested that intellectual disability plays the biggest role in juvenile competency determinations. See Emily Haney-Caron et al., *Diagnostic Changes to DSM-5: The Potential Impact on Juvenile Justice*, 44 J. AM. ACAD. PSYCHIATRY & L. 457, 458–59 (2016).

98. W. Lawrence Fitch, *Competency to Stand Trial and Criminal Responsibility in the Juvenile Court*, in JUVENILE HOMICIDE: CLINICAL AND FORENSIC ISSUES 145, 150 (Dewey G. Cornell & Elisa T. Benedek eds., 1989). In one jurisdiction, however, it has been suggested that, given the inherently reduced ability of juveniles to understand legal proceedings and to cooperate with counsel, the standard for competency in juvenile court might be lower than the applicable adult standard. State in Interest of Causey, 363 So. 2d 472, 476 (La. 1978).

99. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003).

100. *E.g.*, T.L. v. State, 670 So. 2d 172 (Fla. Dist. App. 1996); see also Brantley v. Rubio, 870 So. 2d 49 (Fla. Dist. Ct. App. 2003), *reh'g denied* (2003).

101. Grisso, *supra* note 95, at 170.

102. See, e.g., Commonwealth v. Chatman, 538 S.E.2d 304 (Va. 2000) (finding juvenile had neither a due process nor a statutory right to assert an insanity defense in the adjudicatory phase of a juvenile delinquency proceeding).

103. THOMAS GRISSE, FORENSIC EVALUATION OF JUVENILES 174 (1998).

104. On how abolition of the (adult) incompetency status and the insanity defense would lead predictably to the torture of seriously mentally ill adults in prisons, see Perlin, *supra* note 96.

105. *In re Weaver*, 929 P. 2d 445 (Wash. App. 1996).

106. See *infra* Part IV.E at 34–38; see generally Michael L. Perlin, “Yonder Stands Your Orphan with His Gun”: The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes, 46 TEX. TECH L. REV. 301 (2013).

107. See generally PERLIN & CUCOLO, *supra* note 51, § 14-1.8.1. *E.g.*, Daniel C. Murrie et al., *Psychiatric Symptoms among Juveniles Incarcerated in Adult Prison*, 60 PSYCHIATRIC SERV. 1092 (2009); Andre van der Laan & Veroni Eichelsheim, *Juvenile Adaptation to Imprisonment: Feelings of Safety, Autonomy and Well-Being, and Behaviour in Prison*, 10 EUR. J. CRIMINOLOGY 424 (2013).

108. THOMAS GRISSE, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 193–94 (Bruce D. Sales ed., 1981).

109. See Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 28 (2006); see also Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1, 6–20 (2013) (updating Professor Feld's research on interrogation of juveniles).

110. GRISSE, *supra* note 108, at 193–94; see also Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 138–39 (2012); see generally Perlin, *supra* note 106, at 313–15; Laurel LaMontagne, *Children under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 29 (2013).

111. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 630 (2002) (citing Steven A. Greenburg, *Learning Disabled Juveniles & Miranda Rights—What Constitutes Voluntary, Knowing, & Intelligent Waiver*, 21 GOLDEN GATE U. L. REV. 487, 490 (1991)).

112. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 441 (2013).

113. Perlin, *supra* note 106, at 315.

114. *Id.* at 337.

115. There are embedded issues of racial disparity here that must be considered. By way of example, an Illinois study found that African Americans constitute 15% of the state's juvenile population, but 85.5% of the juveniles transferred to adult court. Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 121 n.39 (2007).

116. David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); see also David Pimentiel, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71 (2013).

117. GRISSE, *supra* note 108, at 192.

118. *Id.* at 192–93; see also Vanessa L. Kolbe, *A Cloudy Crystal Ball: Concerns Regarding the Use of Juvenile Psychopathy Scores in Judicial Waiver Hearings*, 26 DEV. IN MENTAL HEALTH L. 1 (2007).

119. On pretextuality, see generally Michael L. Perlin, *Half-Wracked Prejudice Leaped Forth: Sanism, Pretextuality, and Why and How Mental Disability Law Developed as it Did*, 10 J. CONTEMP. LEGAL ISSUES 3 (1999).

120. CLEMENS BARTOLLAS & STUART J. MILLER, JUVENILE JUSTICE IN AMERICA 214 (2d ed. 1998).

121. Barry C. Feld, *Juvenile Transfer*, 3 CRIMINOLOGY & PUB. POL'Y 599, 602 (2004). On the potential significance of the differences in processing adult and juvenile cases, see David P. Farrington et al., *Increasing the Minimum Age for Adult Court: Is It Desirable, and What are the Effects*, 16 CRIMINOL. & PUB. POL'Y 83 (2017).

122. See, e.g., Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, in A SOURCEBOOK: SERIOUS, VIOLENT, & CHRONIC JUVENILE OFFENDERS 238, 245 (James C. Howell et al. eds., 1995).

123. Patrick Geary, *Juvenile Mental Health Courts and Therapeutic Jurisprudence: Facing the Challenges Posed by Youth with Mental Disabilities in the Juvenile Justice System*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 671, 700 (2005). See also Karen M. Koliviski & Jeffrey Shook, *Incarcerating Juveniles in Adult Prisons: Examining the Relationship between Age and Prison Behavior in Transferred Juveniles*, 43 CRIM. JUST. & BEHAV. 1242 (2016) (African-American youths and youths with mental health disorders accumulated more prison misconducts than did other youths).

124. Aaron Sussman, *The Paradox of Graham v. Florida and the Juvenile Justice System*, 37 VT. L. REV. 381, 400 (2012).

125. Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 393 (2012). See also GRISSO, *supra* note 108, at 196 ("[T]ransferring youths with mental disorders to the criminal justice system is almost certain to provide some volume of cases in which the justice system fails to provide treatment in the interest of long-range public safety.").

126. MO. REV. STAT. § 565.054.1 (2017).

127. See, for example, in the context of solitary confinement policies, Jessica Lee, *Lonely Too Long: Redefining and Reforming Juvenile Solitary Confinement*, 85 FORDHAM L. REV. 845 (2016).

128. Perlin, *supra* note 106, at 337. On the special issues that affect transgender youths in such punishment facilities, see Sonja Marrett, *Beyond Punishment: Constitutional Violations Associated with the Isolation and Discrimination of Transgender Youth in the Juvenile Justice System*, 58 B.C. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2872304.

129. Law professors are probably no less guilty. See Federle, *supra* note 83, at 47 ("The punishment of juveniles remains a troubling yet under-theorized aspect of the criminal and juvenile justice systems.").

130. Gail A. Wasserman et al., *The Voice DISC-IV With Incarcerated Male Youths: Prevalence of Disorder*, 41 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 314, 314 (2002).

131. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1113, 1137 (2002). On the impact of diagnosis on all stages of the juvenile justice system, see Haney-Caron et al., *supra* note 97, at 457–58.

132. Michael L. Perlin, *Simplify You, Classify You: Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 625 (2009).

133. Kasey Corbit, *Inadequate and Inappropriate Mental Health Treatment and Minority Overrepresentation in the Juvenile Justice System*, 3 HASTINGS RACE & POVERTY L.J. 75, 82 (2005).

134. Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51, 55 (2012); Jennifer K. Pokempner et al., *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 570–71 (2012).

135. See, e.g., Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005).

136. Feld, *supra* note 79, at 378–79. For a recent article arguing that solitary confinement of juveniles *in se* violates the Eighth Amendment, see Carina Muir, *Protecting America's Children: Why an Executive Order Banning Juvenile Solitary Confinement Is Not Enough*, 44 PEPP. L. REV. 151 (2016).

137. E.g., Abrams, *supra* note 135, at 1046–48:

Girls [incarcerated in a juvenile "training schools" in Mississippi] reported being forced to eat their own vomit if they threw up while exercising in the hot sun. Youths recommitted to Oakley were taken to an isolation room and punched and slapped by staff as punishment. Staff confirmed that one counselor choked a boy, and another boy reported that a staff member had shoved his head into a toilet

Id.

138. *Rochin v. California*, 342 U.S. 165, 172 (1952).

139. See Haney-Caron et al., *supra* note 97, at 467 ("Youths entering the juvenile justice system demonstrate disproportionate rates of traumatic exposure, substance use, and other mental health needs in comparison to nonoffending youths."). See generally Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103 (2013).

140. For a comprehensive and valuable comparative analysis, see THE FUTURE OF JUVENILE JUSTICE: PROCEDURE AND PRACTICE FROM A COMPARATIVE PERSPECTIVE (Tamar Birkhead & Solange Mouthaan eds., 2016) (discussing, inter alia, practice in Italy, India, and Canada). See also, Roger J.R. Levesque, *Future Visions of Juvenile Justice: Lessons from International and Comparative Law*, 29 CREIGHTON L. REV. 1563 (1996); Jelani Jefferson & John W. Head, *In Whose "Best Interests"?—An*

International and Comparative Assessment of US Rules on Sentencing of Juveniles, 1 HUM. RTS. & GLOBALIZATION L. REV. 89 (2008).

141. This section is generally adapted from Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients*”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257 (2014); Michael L. Perlin & Alison J. Lynch, “*In the Wasteland of Your Mind*”: *Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304 (2016); Michael L. Perlin & Naomi Weinstein, “*Said I, ‘But You Have No Choice’*”: *Why a Lawyer Must Ethically Honor a Client’s Decision about Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, 15 CARDOZO PUB. L., POL’Y & ETHICS J. 73 (2016); and Michael L. Perlin & Heather Ellis Cucolo, “*Tolling For the Aching Ones Whose Wounds Cannot Be Nursed*”: *The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER, RACE & JUSTICE 431 (2017). Further, it distills the work of one of the coauthors (Perlin) over the past two decades-plus, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

142. See, e.g., DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990); LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); BRUCE J. WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL* (2005); PERLIN & CUCOLO, *supra* note 51, § 2–6, at 2–43 to 2–66; David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008). Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 L. & HUM. BEHAV. 27, 27, 32–33 (1992).

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

144. Wexler, *supra* note 9, at 45. For an important recent paper emphasizing the necessary integral relationship between therapeutic jurisprudence and due process, see Nigel Stobbs, *Therapeutic Jurisprudence and Due Process—Consistent in Principle and Practice*, 26 J. JUD. ADMIN. 1 (2017).

145. 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).

146. See, e.g., Michael L. Perlin, “*Everybody Is Making Love/Or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481 (2008); Michael L. Perlin, “*And My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005).

147. Stobbs, *supra* note 144, at 21.

148. Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 576 (2008). It is also part of a growing comprehensive movement in the law toward establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully. Susan Daicoff, *Afterword: The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis P. Stolle et al. eds., 2000).

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

150. See, e.g., Winick & Wexler, *supra* note 149, at 605–07; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Brookbanks, *supra* note 149 (use of the phrase dates to CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982)).

151. Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of voice, see also Freckelton, *supra* note 148, at 588.

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

153. Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel? A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115 (2002). For relevant cases, see, for example, *M.W. v. Davis & DCF*, 756 So. 2d 90, 108–09 (Fla. 2000); Amendment to Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 804 So. 2d 1206 (Fla. 2001); Amendment to Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 842 So. 2d 763 (Fla. 2003) (adopting rule of juvenile procedure requiring counsel and hearings for children objecting to placement in residential treatment centers); *S.C. v. Guardian Ad Litem*, 845 So. 2d 953 (Fla. Dist. Ct. App. 2003). In a future paper, the authors will explore the therapeutic jurisprudence implications of the quality of counsel made available to juveniles in such proceedings.

On the significance of trust in the context of youth and family courts, see Karni Perlman, *It Takes Two for TJ: Correlation Between Bench and Bar Attitudes Towards Therapeutic Jurisprudence—An Israeli Perspective*, 33 T. JEFFERSON L. REV. 351 (2008).

154. Bernard Perlmutter, *George’s Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 580–81 (2005).

155. Jan Costello, *Why Have a Hearing for Kids if You're Not Going to Listen: A Therapeutic Jurisprudence Approach to Mental Disability Proceedings for Minors*, 71 U. CIN. L. REV. 19 (2002); Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153 (2001).

156. Ronner, *supra* note 151.

157. See, e.g., Gene Griffin & Michael J. Jenuwine, *Using Therapeutic Jurisprudence to Bridge the Juvenile Justice and Mental Health Systems*, 71 U. CIN. L. REV. 65 (2002), as discussed in Buss, *supra* note 81, at 750–51.

158. Bruce Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1078 (1999); Thomas J. Mescall II, *Legally Induced Participation and Waiver of Juvenile Courts: A Therapeutic Jurisprudence Analysis*, 68 REV. JUR. U. P.R. 707 (1999).

159. See generally Perlin, *supra* note 106.

160. Three years ago, one of the coauthors (Perlin), in suggesting a research agenda based on the intersection between therapeutic jurisprudence and international human rights law, suggested that scholars focus on “the TJ implications of policies that sanction jailing and imprisoning juveniles in adult facilities.” Michael L. Perlin, “*The Ladder of the Law Has No Top and No Bottom*”: *How Therapeutic Jurisprudence Can Give Life to International Human Rights*, 37 INT'L J.L. & PSYCHIATRY 535, 542 (2014). To the best of our knowledge, no one has taken him up on this suggestion.

161. On the need for lawyers to assume the role of zealous advocates in such cases, see Buss, *supra* note 81, at 767:

The lawyer needs to add to the zealous representation of the child client a commitment both to do everything in her power to improve the young person's ability to understand the proceeding and exercise his constitutional rights and also to manifest the caring of a childrearer.

Id. On the need for zealous advocacy in all cases involving the representation of persons with mental disabilities, see Perlin & Weinstein, *supra* note 141. On the unique demands of family attorneys in this context, see Lynda Frost & Connie J.A. Beck, *Meeting the Increasing Demands on Family Attorneys Representing Clients with Mental Health Challenges*, 54 FAM. CT. REV. 39 (2016).

162. Many juveniles may not have the ability to meaningfully participate in court-related proceedings if their advocate or attorney does not provide appropriate guidance and explanations about what is happening in the proceedings. See Deborah K. Cooper, *Juveniles' Understanding of Trial-Related Information: Are They Competent Defendants?*, 15 BEHAV. SCI. & L. 167 (1997); Richard A. Lawrence, *Role of Legal Counsel in Juveniles' Understanding of Their Rights*, 34 JUV. & FAM. CT. J. 34 (1983); see also Ann Tobey et al., *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 225 (Thomas Grisso & Robert G. Schwartz eds., 2000).

163. For an important recent piece looking at juvenile/criminal procedure cases from a therapeutic jurisprudence perspective and characterizing this vision as “developmental jurisprudence,” see Buss, *supra* note 81.

164. “The brain does not mature until well into adulthood.” See Mark Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N. U.L. REV. 697, 716 (2015).

165. Murrie et al., *supra* note 107; van der Laan & Eichelsheim, *supra* note 107.

166. “Intersectionality means that individuals have multiple identities that are not addressed by legal doctrines based solely on a single identity or status.” DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW 47 (8th ed. 2010).

167. On the omnipresence of race as a confounding factor in the juvenile justice system, see Tamar Birkhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2861257. On the potential impact of a right to redemption in this context, see Federle, *supra* note 83, at 72–73.

168. Problem-solving courts include, but are not limited to, drug courts, mental health courts, homelessness courts, domestic violence courts, sex offender courts, and veterans' courts. See generally Bruce Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003); Elizabeth Richardson et al., *The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing*, 25 J. JUD. ADMIN. 148 (2016). On mental health courts in general, see Michael L. Perlin, “*The Judge, He Cast His Robe Aside*”: *Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL'Y J. 1 (2013); Michael L. Perlin, “*There Are No Trials Inside the Gates of Eden*”: *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in COERCIVE CARE: LAW AND POLICY 193 (Bernadette McSherry & Ian Freckelton eds., 2013); 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. (forthcoming 2018) (hereinafter Perlin, *Who Will Judge*). On veterans courts, see Perlin, *John Brown*, *supra* note 61.

169. See PERLIN & CUCOLO, *supra* note 51, § 2.6.

170. On how such courts foster and require team approaches, see, for example, Arthur J. Lurigio & Jessica Snowden, *Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Court*, 30 JUST. SYS. J. 196, 210 (2009); Marlee E. Moore & Virginia A. Hiday, *Mental Health Court Outcomes: A Comparison of Rearrest and Re-arrest Severity Between Mental Health Court and Traditional Court Participants*, 30 L. & HUM. BEHAV. 659, 660 (2006).

171. See Ursula Castellano, *The Politics of Benchcraft: The Role of Judges in Mental Health Courts*, 42 LAW & SOC. INQUIRY 398 (2017).

172. Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1203 (2001).

173. See Mark Fondacaro, *Rethinking the Scientific and Legal Implications of Developmental Differences Research in Juvenile Justice*, 17 NEW CRIM. L. REV. 407, 409–10 (2014) (calling for the inclusion of “a wider range of behavioral scientists and legal scholars to help advance evidence-based reforms of our juvenile justice and adult criminal justice systems.”).

174. For helpful evaluations of such courts, see Morgan Molinoff, *The Age of (Guilt or) Innocence: Using ADR to Reform New York’s Juvenile Justice System in the Wake of Miller v. Alabama*, 15 CARDOZO J. CONFLICT RESOL. 297 (2013); Geary, *supra* note 123. From the mental health provider perspective, see F. Antoinette Burris et al., *Juvenile Mental Health Courts for Adjudicated Youth: Role Implications for Child and Adolescent Psychiatric Mental Health Nurses*, 24 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 114, 115 (2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3807871/>.

175. *How Many Problem-Solving Courts Are There?*, Nat’l Drug Court Res. Ctr., <http://www.ndcrc.org/content/how-many-problem-solving-courts-are-there> as cited in Donald M. Linhorst & P. Ann Dirks-Linhorst, *Mental Health Courts: Development, Outcomes, and Future Challenges*, 54 JUDGES’ J. 22, 22 (Spring 2015).

176. See, e.g., Brian Jay Nicholls, *Justice in the Darkness: Mental Health and the Juvenile Justice System*, 11 J.L. & FAM. STUD. 555, 563 (2009) (“Giving juveniles and their families access to these mental health courts will greatly increase the chances of successfully rehabilitating offenders because there is an intervention at the earliest opportunity.”).

177. Greg Goodale et al., *What Can We Say About Mental Health Courts Today?*, 64 PSYCHIATRIC SERV. 298 (2013).

178. Donna Heretick & Joseph A. Russell, *The Impact of Juvenile Mental Health Court on Recidivism among Youth*, 3 J. JUV. JUST. 1 (2013).

179. *Id.* For a careful analysis of the differences between juvenile mental health courts and traditional juvenile “guilty plea” courts, see Voula Marinos, *Methodologies for the Study of TJ Processes or Procedural Justice Within the Operation of TJ-Related Courts: A Conversation* (paper presented at the annual Therapeutic Jurisprudence Workshop at Osgoode Hall Law School, York University, Toronto, Ontario, Canada, Oct. 15, 2016) (Powerpoints on file with author).

180. Perlin, *supra* note 106, at 333.

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

182. On how traditional civil commitment courts and therapeutic jurisprudence-based mental health courts differ radically in terms of the extent to which litigants are treated with dignity, see Perlin, *Who Will Judge*, *supra* note 168.

183. On the relationship between dignity and therapeutic jurisprudence in general, see Michael L. Perlin, “Have You Seen Dignity?”: *The Story of the Development of Therapeutic Jurisprudence*, U.N.Z. LAW REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932149.

184. Perlin, *supra* note 106, at 321, citing, *inter alia*, Elizabeth Cepparulo, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better Than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225 (2006); Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457 (2012); Stephen C. McCaffrey, *There’s a Whole World Out There: Justice Kennedy’s Use of International Sources*, 44 McGEORGE L. REV. 201 (2013).

185. United Nations Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468–70.

186. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (Dec. 6, 2006).

187. On how the status of children helped inform the debate on the CRPD, see Gerison Lansdown, *Children with Disabilities*, in HUMAN RIGHTS AND DISABILITY ADVOCACY 97 (Maya Sabatello & Marianne Schulze eds., 2014).

188. See Perlin, *supra* note 106, at 307–08 (reporting on research by Dr. Linda Teplin that nearly sixty percent of male juvenile detainees and more than two-thirds of female detainees meet diagnostic criteria for one or more psychiatric disorders and that these findings may underestimate the true prevalence of these disorders—in part because of commonly underreported symptoms and impairments, especially in cases of disruptive behavioral disorders, citing, Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES OF GEN. PSYCHIATRY 1113, 1137 (2002)).

189. Perlin, *supra* note 106, at 327; see, e.g., Bryan Y. Lee, *The U.N. Convention on the Rights of Persons with Disabilities and Its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities*, 44 COLUM. J.L. & SOC. PROBS. 393 (2011). On the potential impact of international human rights law in general in this context, see Barry Goldson & John Muncie, *Toward a “Global Friendly” Juvenile Justice?*, 47 INT’L J.L., CRIME & JUST. 47 (2012).

190. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1113, 1137 (2002).

191. Birkhead, *supra* note 4, at 448; Corbit, *supra* note 133, at 76.

192. Feld, *supra* note 79, at 378–79. See also Alan Feuer, *Upstate County Jails Are Challenged for Sending Juveniles to Solitary*, N.Y. TIMES, Aug. 1, 2017, at A17 (recent suit filed by legal aid office in New York state, alleging that juveniles in Broome County were routinely locked in eight-by-ten-foot jail cells for twenty-three hours a day, “sometimes for weeks on end.”).

193. See generally Perlin, *supra* note 106, 5, at 329–30.

194. See Goldson & Muncie, *supra* note 189, at 47.

195. Perlin, *supra* note 160, at 542. See also Astrid Birgden, *Maximizing Desistance: Adding Therapeutic Jurisprudence and Human Rights to the Mix*, 42 CRIM. JUST. & BEHAV. 19 (2015) (on the relationship between TJ and human rights).

196. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 567–75 (2005) (no execution for individuals who committed offense at issue before age eighteen); *Graham v. Florida*, 560 U.S. 48 (2010) (no LWOP for juvenile offenders). In *Graham*, the Court also noted that LWOP for juveniles violated the CRPD. *Id.*

197. *In re Mark C.H.*, 906 N.Y.S.2d 419, 433 (Surr. Ct. 2010) (citing Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331); see Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 362–63 (2011); e.g., *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848, 854 (Surr. Ct. 2012) (holding that substantive due process requirement to adhere to principal of least restrictive alternative applies to guardianships sought for mentally disabled persons); *Mark C.H.*, 906 N.Y.S.2d at 435 (holding that due process requires that the guardianship appointment be subject to a requirement of periodic reporting and review); *Matter of Michelle M.*, 2016 N.Y. Misc. LEXIS 2719 (Surr. Ct. 2016) (state judge relying on international human rights law (including the CRPD) in rejecting a guardianship appointment petition in a case of a woman with Down's Syndrome living in the community).

198. *Dameris L.*, 956 N.Y.S.2d at 855. See generally Michael L. Perlin & Meredith R. Schriver, "You Might Have Drugs at Your Command": *Reconsidering the Forced Drugging of Incompetent Pre-Trial Detainees from the Perspectives of International Human Rights and Income Inequality*, 8 ALB. GOV'T L. REV. 381, 387 (2015). See generally PERLIN & CUCOLO, *supra* note 51, § 2–8, at 2–73 to 2–78; Perlin, *supra* note 96, at 486 n.57.

199. On the convergence between therapeutic jurisprudence and human rights values in civil commitment procedures such as liberty, due process, and the rights to treatment and to refuse treatment, see Bruce J. Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y. L. SCH. J. INT'L & COMP. L. 537 (2002).

200. Bob Dylan, *She Belongs To Me*, BOB DYLAN, <http://bobdylan.com/songs/she-belongs-me/> (last visited September 21, 2017).

201. Tony Attwood, *Dylan's "She Belongs to Me": Never Has a 12 Bar Blues Sounded More Beautiful*, UNTOLD DYLAN (Nov. 21, 2008), <http://bob-dylan.org.uk/archives/24>.

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