



A PRESCRIPTION FOR DIGNITY

Rethinking Criminal Justice
and Mental Disability Law

MICHAEL L. PERLIN

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Rethinking Criminal Justice and
Mental Disability Law

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ASHGATE

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Contents

<i>Preface</i>	<i>vii</i>
1 Introduction	1
PART I THE FOUR FACTORS	
2 The Four Factors: Sanism, Pretextuality, Heuristics and “Ordinary Common Sense”	15
PART II THE FIVE PERSPECTIVES	
3 Counsel	37
4 International Human Rights Law	51
5 Mental Health Courts	63
6 Alternative Jurisprudences	79
7 Contextualizing Dignity	99
PART III THE SUBSTANTIVE AREAS	
8 Competencies	109
9 The Insanity Defense	165
10 Sentencing	193
11 Conclusion	217
<i>Index</i>	<i>241</i>

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Preface

I was a Public Defender (PD) for just three years, some 40 years ago, but, in many ways, those were the years that defined the rest of my career, both structurally and philosophically. After that job, I became the first director of the NJ Public Advocate's Division of Mental Health Advocacy, a statewide, state-funded law office that represented individuals with psychiatric disabilities in individual and law reform actions. I then became a professor at New York Law School, where I have been teaching mental disability law since 1985, and where I now supervise 13 separate courses in the school's online mental disability law program, and where I also direct the International Mental Disability Law Reform Project in the law school's Justice Action Center. I lecture and write frequently about all aspects of mental disability law, often with respect to questions of criminal law and procedure. My PD experiences have informed and guided all of this work, and they are never far from my mind.

One of my primary responsibilities as a PD was the representation of persons in New Jersey's Vroom Building, the "maximum security facility for the criminally insane" (persons awaiting incompetency-to-stand-trial evaluations, persons found incompetent to stand trial, and persons who had been found not guilty by reason of insanity). I represented these individuals on their applications for writs of *habeas corpus*, and, as I have written previously, "the cases were—to be charitable—charades."¹ With the bravado of the 27 year-old lawyer that I was, I filed suit on their behalf to seek enforcement of the Supreme Court's mandate, in *Jackson v. Indiana*,² that had held that a person who was not likely to regain his competency to stand trial could not be detained indefinitely in such a facility. The publicity that followed that case³ is what led directly to the creation of the NJ Division of Mental Health Advocacy, and inexorably guided the rest of my career.

1 Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth": *Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEG. ISS. 3, 7 (1999).

2 406 U.S.715 (1972).

3 See *Dixon v. Cahill*, No. L30977/y-71 P.W. (N.J. Super. Ct. Law Div. 1973), reprinted in 5 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 14-7, at 119–21 (2d ed. 2002) (mandating *Jackson* hearings for all Vroom Building residents). After the entry of the consent decree in *Dixon*, the trial judge appointed me to individually represent each member of the class. Approximately 215 of the class members had previously been found incompetent to stand trial. See Michael L. Perlin, "For the Misdemeanor Outlaw": *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALABAMA L. REV. 193, 207 n.94 (2000).

I discuss how my friend and mentor, Dr. Robert Sadoff, inspired me to file this suit in Michael L. Perlin, "May He Stay Forever Young": *Robert Sadoff and the History of Mental*

But there is more to my PD days. I have also written about my experiences in court representing my clients, when “I had grown accustomed to asides, snickers and comments from judges, to ‘eyerolling’ from my adversaries, to running monologue commentaries by bailiffs and court clerks (all about my clients’ ‘oddness’).”⁴ It was clear to me that, as far as many prosecutors and some judges went, when a defendant with a serious mental disability appeared in court—whether or not there was a question as to the incompetency status or the insanity defense—the courtroom became (and these are the words of a former research assistant describing a like court in NYC in the late 2000s), a “due process-free zone.” Most often (there were important exceptions, of course), no one took the case, my client, or the disposition of the matter seriously.⁵ After all, my client was seen as “crazy,” “a nut case,” “bonkers,” “touched,” or other similarly pejorative descriptive adjectives. The attitude was “why go through all the bother of making believe that the process really mattered?” when, no matter how the case was ultimately resolved, my client would ultimately wind up for life in a psychiatric institution (either civil or criminal).

I recall vividly—and this was more than 35 years ago—when I prepared to conduct a *voir dire* of a state’s expert witness (someone who had testified previously in hundreds of cases) and brought in to court a stack of treatises in order to challenge his credentials. The trial judge was floored. “Mr. Perlin, what in the world do you think you are doing?” Reluctantly, he let me do the cross-examination.⁶

This, as I have written before, all illuminated to me the way that the legal system was riddled with *sanism* and with *pretextuality*.⁷ And these insights have informed the bulk of my scholarly work for over 20 years.⁸ But it was much more than that. These experiences clarified to me a reality that is at the heart of this book: that persons with mental disabilities were, by and large, robbed of their dignity when they entered the criminal justice system.⁹

Health Law, 33 J. AMER. ACAD. PSYCHIATRY & L. 236, 236–37 (2005). For this and for so much else, I am forever indebted to Bob.

4 Perlin, *supra* note 1, at 9.

5 See Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 695 (2003) (discussing how some lawyers “take less seriously case outcomes that are adverse to their clients [with mental disabilities]”).

6 The judge allowed the witness to testify, of course, but there was no question in my mind that, down the road, he evaluated the witness’s testimony much more carefully than had I never launched this challenge.

7 See generally MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000). I discuss these concepts extensively *infra* Chapter 2.

8 For my first articles on these concepts, see Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of Ordinary Common Sense, Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131 (1991); Michael L. Perlin, *On Sanism*, 46 SMU L. REV. 373 (1992); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993).

9 See *infra* Chapter 7. “There is perhaps no more solid foundation for human rights than a widespread awakening to the human dignity that resides in every one of us.” Soka Gakkai

I was not naïve. I knew from the start that a white-collar corporate criminal defendant or a politician defendant would often be treated much more civilly (sometimes, even deferentially) than the defendants that made up the bulk of my “regular” PD caseload: economically impoverished, inner city youth. But in comparing how *those* clients of mine were treated to the ways that my clients with mental disabilities were treated, the contrasts jumped out. The latter were mostly treated with no dignity at all.

Since I became a professor, I have regularly taught courses in Criminal Law and Criminal Procedure, and have supervised students in judicial externships and in placements in PD and District Attorneys’ offices. I talk to my students about their work, and with some important exceptions,¹⁰ very little has changed in the four decades since I first entered an appearance in a criminal case. That, of course, saddens me deeply.

I thus decided to write this book about the need for dignity in the criminal trial process in cases involving defendants with mental disabilities. Although, for reasons of space, I have limited my substantive topics to three aspects of criminal law and procedure —insanity,¹¹ incompetency¹² and sentencing¹³—I believe that my findings, conclusions and recommendations will also apply to all other aspects of this process as it relates to this population.¹⁴ I say this because I believe that the perspectives that I have chosen to focus upon are of universal significance to this population. In this work, I write about *counsel*,¹⁵ about *international human rights law*,¹⁶ about *mental health courts*,¹⁷ and about *alternative jurisprudences*.¹⁸ I believe that careful examinations of each of these gives us building blocks that will allow us to reconstruct our criminal justice system in a way in which dignity is privileged, not subordinated.

- The quality of counsel afforded this population is often shamelessly subpar; and what is even more of a shame is that courts often do not care.¹⁹ If a defendant’s lawyer is sanist,²⁰ why should we expect much more from other

International, Buddhism and Human Dignity (accessible at <http://www.sgi.org/buddhism/buddhist-concepts/buddhism-and-human-dignity.html>, last accessed, October 9, 2012).

10 Those who work in mental health courts, see *infra* Chapter 5, come back with very different stories.

11 See *infra* Chapter 8.

12 See *infra* Chapter 9.

13 See *infra* Chapter 10.

14 I write about this separately in connection with defendants with mental disabilities who face the death penalty in MICHAEL L. PERLIN, *MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES* (2013).

15 See *infra* Chapter 3.

16 See *infra* Chapter 4.

17 See *infra* Chapter 5.

18 See *infra* Chapter 6.

19 In one of my last cases before I became a professor, I “second sat” the case of *Strickland v. Washington*, 466 U.S. 668, 668 (1984) (establishing effectiveness of counsel standards).

20 See generally PERLIN, *supra* note 3.

players in the system?²¹ Only an overhaul—a complete overhaul—of our expectations of counsel representing this population will allow a system of dignity to flourish.

- I travel the world doing human rights work on behalf of persons institutionalized because of mental disabilities. If I go to Finland, if I go to Israel, if I go to Uganda, if I go to Taiwan, if I go to Uruguay, if I go to Indonesia, most of my audience is familiar with the United Nations Convention on the Rights of Persons with Disabilities.²² When I speak in the US (to rooms of lawyers, of forensic mental health professionals, of citizens generally concerned about world issues) and I raise the topic of the Convention, I am met mostly with blank stares. This Convention is a blueprint for the creation of a dignified system; we ignore it with impunity.²³
- In 1997, I received a phone call from a woman I did not know. “Hi, Professor Perlin,” she said. “My name is Ginger Lerner-Wren, and I am a judge in Fort Lauderdale. I’ve just been asked by my assignment judge to head a new mental health court, and I want to make sure that it promotes therapeutic jurisprudence, honors defendants’ civil liberties, and values human rights protections. Can I chat with you for a while?” We talked (and subsequently have become good friends), and Judge Lerner-Wren has gone on to preside over what is arguably the best mental health court in the nation.²⁴ There are now more than 300 of these courts with varying mandates and varying jurisdictional limitations. But I believe, when they are modeled after Judge Lerner-Wren’s court (and the courts of several

21 See, e.g., Michael L. Perlin, “*I Might Need a Good Lawyer, Could Be Your Funeral, My Trial*”: A Global Perspective on the Right to Counsel in Civil Commitment Cases, and Its Implications for Clinical Legal Education, 28 WASH. U. J. L. & SOC’L POL’Y 241 (2008).

22 See, e.g., MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD (2011); Michael L. Perlin, “*A Change Is Gonna Come*”: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law, 29 NO. ILL. U. L. REV. 483 (2009).

23 President Obama signed the CRPD three years ago, see Michelle Diamant, *Obama Urges Senate To Ratify Disability Treaty* (May 18, 2012), accessible at <http://www.disabilitycoop.com/2012/05/18/Obama-Urges-Senate-Treaty/15654/>, but the Senate failed to ratify on December 4, 2012 for lack of a “super majority” of votes. The Democratic leadership has promised to bring the Convention up again for ratification in 2013. See <http://usidc.org/index.cfm/crpdupdates>. Although the United States has not ratified the CRPD, “a state’s obligations under it are controlled by the Vienna Convention of the Law of Treaties[,] which requires signatories ‘to refrain from acts which would defeat [the Disability Convention’s] object and purpose.’” 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).

24 For her views, see Ginger Lerner-Wren, *Mental Health Courts: Serving Justice and Promoting Recovery*, 19 ANNALS HEALTH L. 577 (2010).

other trailblazers in this area),²⁵ such courts offer the best opportunity for insuring meaningful dignity for the population in question.²⁶

- My good friends, David Wexler and the late Bruce Winick, conceived of the idea of therapeutic jurisprudence (TJ) as an alternative way of thinking about the law and the legal system, envisioning the law as a potential “therapeutic agent.”²⁷ I quickly became a “fellow traveler,” and, in 1993, ran a TJ conference at New York Law School that led to the first law journal symposium ever on this topic.²⁸ TJ has blossomed and expanded since that times in ways that I don’t think David and Bruce could have imagined when they first articulated TJ’s principles, and, with each expansion, its role as a dignity-promoter grows. Similarly, the insights of procedural justice (PJ) and of restorative justice (RJ) (many flowing from the research and papers of Tom Tyler²⁹ and John Braithwaite)³⁰ showed us that individuals with mental disabilities, like all other citizens, are affected by such process values as participation, dignity, and trust, and that there were ways that the legal system could be restructured to avoid stigma, the heart of sanism. I believe that the insights of TJ, PJ and RJ all must be taken seriously if we are to find new and creative ways to enhance dignity.

So, I have written this book in an effort to underscore what can be done and what needs to be done if we are to create a system that provides the sort of dignity that recognizes that people “possess an intrinsic worth that should be recognized and respected.”³¹ In 1995, I wrote an article about the Colin Ferguson trial³² and

25 See *infra* Chapter 5.

26 In a recent email, Judge Lerner-Wren characterized the objective of her court in this manner: “To bring persons with mental disabilities in the criminal law system out from the shadows and into a place of judicial prominence.” (email from Ginger Lerner-Wren to Michael Perlin, October 8, 2012, on file with author).

27 See, e.g., THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990). For a description of the thought processes that led Professors Wexler and Winick to develop this idea, see David Wexler & Bruce Winick, *Preface*, in ESSAYS IN THERAPEUTIC JURISPRUDENCE i, ix–xiv (David B. Wexler & Bruce Winick eds, 1991), describing the preliminary conversations in the development of TJ that took place on the beach, at law professors’ meetings in cafes, and during morning jogs.

28 See Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623, 623 n. a (1993).

29 See, e.g., Tom Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992).

30 See, e.g., JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (2002).

31 Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009).

32 Ferguson was a criminal defendant with serious mental illness who was charged with, and ultimately convicted of, multiple murders on a commuter railroad trail on Long Island, NY, in 1993, and who represented himself *pro se* at his trial. See Michael L. Perlin,

titled it, in part, “Dignity Was the First to Leave.”³³ There was no dignity in Ferguson’s trial, and there have been many other less famous and less politically consequential cases that, similarly, have been without dignity. But all of these cases matter—to the defendants before the court, to their victims (alleged and actual), to the judicial system and, necessarily, to all of us. And that is why I have written this book.

There are many thanks to offer: to David Wexler for inspiring me to follow the TJ path,³⁴ to Ginger Lerner-Wren for creating the court that she did, to Eva Szeli for showing me exactly how important international human rights were to this entire inquiry, to Evelin Lindner and Linda Hartling—the core of the Human Dignity and Humiliation Studies Network (on whose Global Advisory Board I have sat for several years)—who have taught me so much about the meaning and importance of dignity, and have been such an inspiration for all I have done in this area of law and policy, and to my colleagues teaching in the NYLS online mental disability law program (especially, Eva, Heather Ellis Cucolo, Pam Cohen, Rick Friedman, Patrick Reilly, Henry Dlugacz and Debbie Dorfman) for their encouragement and support. I want to especially acknowledge my research assistant, Alison Lynch, for her outstanding work, her good humor and her helpful insights into all of the topics I cover here. She has done a brilliant job and I am in her debt. Anna Blaine, a lawyer-librarian in the New York Law School library, has done an outstanding job of finding me whatever I needed, seemingly in minutes. I also want to thank my current and former Deans and Associate Deans at New York Law School—Rick Matasar, Carol Buckler, Steve Ellmann, Jethro Lieberman, Anthony Crowell and Deborah Archer—for supporting the sabbatical that has given me the opportunity and the time to write this book.

I dedicate this book to my wife Linda and my children, Julie and Alex. They are my joy, my heart, my soul, my life. Two years ago, Alex started his legal career as a Public Defender in Trenton, NJ, where I began my career 41 years ago. Six months ago, he relocated to Brooklyn and joined the staff of the Brooklyn Defender Service. My hopes are that the judges in the courtrooms in which he represents his clients provide them—and, again, all of us—with the dignity to which they are entitled.

Michael L. Perlin
New York City
March 16, 2013

“*Dignity Was the First to Leave*”: *Godinez v. Moran, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996).

33 The title comes from Bob Dylan’s song “Dignity.” See Michael L. Perlin, *Tangled Up In Law : The Jurisprudence of Bob Dylan*, 38 FORD. URB. L.J. 1395, 1397 (2011), explaining the thought process that led me to use this as the article title.

34 I so regret that Bruce Winick is no longer with us for me to thank here.

Chapter 1

Introduction

The relationship between mental disability and the criminal justice system is complex, and it serves as a screen upon which society projects bundles of attitudes, emotions and feelings about responsibility, free will, autonomy, choice, public safety and the meaning and purpose of punishment.¹ Too often, it serves as an escape valve through which society's prejudices and stereotypes overwhelm our commitment to fairness and justice.² Too often, it creates an atmosphere in which society winks its collective eye at known-to-be-false expert testimony, teleologically offered to meet an approved social end.³ Twenty-five years ago, I characterized the relationship between the judicial process and persons with mental disabilities as a "doctrinal abyss";⁴ the reality is that all too little has changed in the intervening two and a half decades.⁵

1 See *Virgin Islands v. Fredericks*, 578 F.2d 927, 937 (3d Cir.1978) (Adams, J., dissenting) ("the insanity defense [is] a screen upon which the community ... project[s] its visions of criminal justice.").

2 Cf. Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 628–29 (1989–90) ("punishment is clearly a socially sanctioned safety valve through which we express community condemnation of wrongdoers, especially the wrongdoers we fear the most").

3 See, e.g., Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 653–58 (1993) (Perlin, *Pretexts*) (on how the desire for specific social ends "animate[s] the entire incompetency to stand trial system"). On the teleology of decisionmakers in cases involving the application of the death penalty to persons with mental disabilities, see Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence*, 8 NOTRE DAME J. L., ETHICS & PUB. POL. 239, 262–65 (1994) (Perlin, *Sanist Jurors*).

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

5 I spent 13 years as a lawyer representing persons with mental disabilities (3 years as the Deputy Public Defender in charge of the Mercer County (Trenton) NJ Office of the Public Defender, 8 years as the director of the NJ Division of Mental Health Advocacy, and 2 years as Special Counsel to the NJ Public Advocate), and have taught mental disability law and criminal law and procedure courses at New York Law School since 1984. I expect that I am the only law professor in the nation (and most likely, the world) who teaches and/ or supervises *thirteen* different courses in the mental disability law subject matter area. See e.g., Michael L. Perlin, *"They Keep It All Hid": The Ghettoization of Mental Disability Law and Its Implications for Legal Education*, 54 ST. LOUIS U. L. J. 857 (2010).

I have written about these issues before, in a series of law review articles and in full-length books on (1) the insanity defense,⁶ (2) the ways that what I call “sanism” and “pretextuality” permeate and infect the entire legal process,⁷ (3) the relationship between international human rights and mental disability law,⁸ and (4) the relationship between mental disability law and the death penalty.⁹ Here, I widen my range to include the entire criminal justice system as it affects persons with mental disabilities.

Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. It permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, expert and lay witnesses. Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law and all aspects of the criminal process.¹⁰

Pretextuality defines the ways in which courts accept testimonial dishonesty (either implicitly or explicitly) and engage similarly in dishonest (and frequently meretricious) decision-making. It is especially poisonous where witnesses, especially expert witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends.”¹¹ This pretextuality infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.¹² It continues to this day.¹³

In this volume, I am broadening my substantive focus to consider multiple substantive criminal law topics, and my theoretical focus to move beyond the

6 MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1994).

7 See MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000).

8 MICHAEL L. PERLIN, *INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD* (2011).

9 MICHAEL L. PERLIN, *MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES* (2013).

10 See, e.g., Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 *CLINICAL L. REV.* 683, 684 (2003) (Perlin, *Lepers*); PERLIN, *supra* note 7, at 21–58; see *infra* Chapter 2.

11 Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of “Ordinary Common Sense,” Heuristic Reasoning, and Cognitive Dissonance*, 19 *BULL. AM. ACAD. PSYCHIATRY & L.* 131, 135 (1991).

12 See generally, PERLIN, *supra* note 7.

13 See, e.g., William H. Fisher & Thomas Grisso, *Commentary: Civil Commitment Statutes—40 Years of Circumvention*, 38 *J. AM. ACAD. PSYCHIATRY & L.* 365, 368 (2010) (discussing how trial judges have regularly “stretched and circumvented” civil commitment law). On how these laws are applied differentially in cases involving individuals simply facing civil commitment and those facing civil commitment following a finding of incompetency to stand trial, see Gwen Levitt et al., *Civil Commitment Outcomes of Incompetent Defendants*, 38 *J. AM. ACAD. PSYCHIATRY & L.* 349 (2010).

attitudinal factors that I have already discussed extensively.¹⁴ I have chosen to do this because my teaching, my writing, and my involvement in the public sector over the past 25 years have led me to focus on several additional principles that, I think, require greater scrutiny.

- It is meaningless (perhaps fatuous) to engage in any sort of serious discussion of these issues without looking carefully at issues of adequacy

14 I have, by way of example, explored the relationships between sanism and pretextuality in matters involving, inter alia, competency to stand trial, e.g., Michael L. Perlin, “*Everything’s a Little Upside Down, As a Matter of Fact the Wheels Have Stopped*”: *The Fraudulence of the Incompetency Evaluation Process*, 4 HOUSTON J. HEALTH L. & POL’Y 239 (2004) (Perlin, *Evaluation Process*); Perlin, *Pretexts*, supra note 3; sexual autonomy, e.g., Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 NYU REV. L. & SOC’L CHANGE 302 (1993–94); Michael L. Perlin, “*Everybody Is Making Love/Or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 U. WASH. L. REV. 481 (2008); the right to refuse treatment, e.g., Michael L. Perlin, “*And My Best Friend, My Doctor / Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735 (2005) (Perlin, *Role and Significance of Counsel*); Michael L. Perlin & Deborah A. Dorfman, “*Is It More Than Dodging Lions and Wastin’ Time?*”: *Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCHOLOGY, PUB. POL’Y & L. 114 (1996); “autonomous decision-making,” e.g., Michael L. Perlin, “*Make Promises by the Hour*”: *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947 (1997); the Americans with Disabilities Act, e.g., Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J. L. & HEALTH 15 (1993–94); competency to plead guilty or waive counsel, e.g., Michael L. Perlin, “*Dignity Was the First to Leave*”: *Godinez v. Moran, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996) (Perlin, *Dignity*); jury decision-making in death penalty cases, e.g., Perlin, *Sanist Jurors*, supra note 3; special education, e.g., Michael L. Perlin, “*Simplify You, Classify You*”: *Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607 (2009); international human rights law, e.g., Michael L. Perlin, *Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the UN Convention On The Rights Of Persons With Disabilities*, 44 GEO. WASH. INT’L L. REV. 1 (2012) (Perlin, *Promoting Social Change*); forensic ethics, e.g., Michael L. Perlin, “*They’re An Illusion To Me Now*”: *Forensic Ethics, Sanism and Pretextuality*, in PSYCHOLOGY, CRIME AND LAW: BRIDGING THE GAP 239 (David Canter & Rita Zukauskien eds, 2008); the use of neuroimaging evidence in the criminal trial process, e.g., Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885 (2009); “*Good and Bad, I Defined These Terms, Quite Clear No Doubt Somehow*”: *Neuroimaging and Competency to be Executed after Panetti*, 28 BEHAV. SCI. & L. 621 (2010); and the bar’s attitude towards counsel with mental disabilities, e.g., Michael L. Perlin, “*Baby, Look Inside Your Mirror*”: *The Legal Profession’s Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589 (2008) (Perlin, *Mirror*).

of counsel in the specific context of the representation of persons with mental disabilities.¹⁵

- It is essential that we begin to think seriously about the impact of international human rights law, specifically, the recently ratified United Nations Convention on the Rights of Persons with Disabilities (CRPD),¹⁶ on the issues in question.¹⁷

15 See, e.g., Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBS. 161 (Summer 1982); Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992); Perlin, *Lepers*, *supra* note 10; Perlin, *Role and Significance of Counsel*, *supra* note 12; Perlin, *Promoting Social Change*, *supra* note 14; Perlin, *Mirror*, *supra* note 14; Michael L. Perlin, “Too Stubborn To Ever Be Governed By Enforced Insanity”: Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases (Perlin, *Too Stubborn*) 33 INT’L J. L. & PSYCHIATRY 475 (2010). On counsel issues in the context of defendants with mental disabilities facing the death penalty, see PERLIN, *supra* note 9, at 123–38. On counsel issues in the civil commitment context in an international perspective, see Michael L. Perlin, “I Might Need a Good Lawyer, Could Be Your Funeral, My Trial”: A Global Perspective on the Right to Counsel in Civil Commitment Cases, and Its Implications for Clinical Legal Education, 28 WASH. U. J. L. & SOC’L POL’Y 241 (2008) (Perlin, *Your Funeral, My Trial*).

16 G.A. Res. A/61/611 (2006).

17 See generally, PERLIN, *supra* note 8; MICHAEL L. PERLIN ET AL., INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: CASES AND MATERIALS (2006); see also, e.g., Perlin, *Promoting Social Change*, *supra* note 14; Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT’L L. & COMMERCE 333 (2007) (Perlin, *Universal Factors*); Perlin, *Your Funeral, My Trial*, *supra*, note 13; Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 98 (Michael Dudley ed., 2012); Michael L. Perlin, “Through the Wild Cathedral Evening”: Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities, 13 TEX. J. ON CIV. LIBS. & CIV. RTS. 413 (2008); Michael L. Perlin & Valerie McClain, “Where Souls Are Forgotten”: Cultural Competencies, Forensic Evaluations and International Human Rights, 15 PSYCHOL., PUB. POL’Y & L. 257 (2009); Michael L. Perlin & Henry A. Dlugacz, “It’s Doom Alone That Counts”: Can International Human Rights Law Be An Effective Source of Rights in Correctional Conditions Litigation?, 27 BEHAV. SCI. & L. 675 (2009); Astrid Birgden & Michael L. Perlin, “Tolling for the Luckless, the Abandoned and Forsaken”: Community Safety, Therapeutic Jurisprudence and International Human Rights Law As Applied to Prisoners and Detainees, 13 LEG. & CRIMINOL. PSYCHOLOGY 231 (2008) (Birgden & Perlin, *Tolling*); Astrid Birgden & Michael L. Perlin, “Where The Home In The Valley Meets The Damp Dirty Prison”: A Human Rights Perspective On Therapeutic Jurisprudence And The Role Of Forensic Psychologists In Correctional Settings, 14 AGGRESSION & VIOLENT BEHAVIOR 256 (2009) (Birgden & Perlin, *Home in the Valley*).

- It is time to restructure the dialogue about mental health courts,¹⁸ and to begin to (1) consider whether the development of such courts will finally allow us to move away from society's predominantly currently-held position that mental illness reflects "a defect of morality or will,"¹⁹ and (2) take seriously the potential ameliorative impact of such courts on the ultimate disposition of all cases involving criminal defendants with mental disabilities.²⁰
- It is necessary to consider the impact of therapeutic jurisprudence,²¹

18 See, e.g., 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 (Bernadette McSherry & Ian Freckelton, eds, 2013) (in press) (Perlin, *Gates*); Michael L. Perlin, "John Brown Went Off to War": *Considering Veterans' Courts as Problem-Solving Courts*, – NOVA L. REV. – (2013) (in press); Michael L. Perlin, "The Judge, He Cast His Robe Aside": *Mental Health Courts, Dignity and Due Process*, – J. MENT. HEALTH L. & POL'Y – (2013) (in press); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, §1-2.4, at 11–12 n.254.2 (2012 Cum. Supp.); Allison D. Redlich et al., *The Second Generation of Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 527 (2005); Matthew J. D'Emic, *The Promise of Mental Health Courts*, 22 CRIM. JUST. 24 (Fall 2007); Gregory L. Acquaviva, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971 (2006); Carol Fidler, *Building Trust And Managing Risk: A Look At A Felony Mental Health Court*, 11 PSYCHOL., PUB. POL'Y, & L. 587 (2005).

19 Amanda C. Pustilnik, *Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, 96 J. CRIM. L. & CRIMINOLOGY 217, 263 (2005).

20 See, e.g., Bruce Winick & Susan Stefan, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507, 516 (2005) (on how mental health courts can give litigants a "sense of voice and validation"). On the significance of "voice and validation" in this inquiry in general, See, e.g., Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLIN. L. REV. 605, 619 (2006); Amy Ronner, *Songs Of Validation, Voice, And Voluntary Participation: Therapeutic Jurisprudence, Miranda And Juveniles*, 71 U. CIN. L. REV. 89 (2002).

21 See generally, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990); ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds, 1991); LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds, 1996); THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (Bruce B. Winick ed., 1998). I have considered TJ frequently in my articles and book chapters as well. See, e.g., PERLIN, *supra* note 6, at 417–38; PERLIN, *supra* note 7, at 261–72; PERLIN, *supra* note 8, at 203–19; PERLIN, *supra* note 8, Chapter 2; Perlin, *Too Stubborn*, *supra* note 15; Birgden & Perlin, *Tolling*, *supra* note 17; Birgden & Perlin, *Home in the Valley*, *supra* note 17; Perlin, *Gates*, *supra* note 18; Michael L. Perlin, *Considering Pathological Altruism in the Law from Therapeutic Jurisprudence and Neuroscience Perspectives*, in PATHOLOGICAL ALTRUISM 156 (Barbara Oakley et al. eds, 2011); Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Commitment: Kendra's Law as Case Study*, 9 PSYCHOL. PUB. POL'Y & L. 183 (2003); Keri K. Gould & Michael L. Perlin "Johnny's in the Basement/Mixing Up His Medicine": *Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE U. L. REV. 339 (2000);

procedural justice²² and restorative justice²³ (what I will call “alternative jurisprudences”)²⁴ on these issues.²⁵

This is emphatically *not* to say that I am abandoning my focus on the impact of sanism and pretextuality (or my collateral considerations of the impact of false “ordinary common sense” (OCS)²⁶ and the use of cognitive-simplifying heuristic devices²⁷ on this body of the law) in our thinking about these issues. On the contrary, I think it is essential that we take these concepts even more seriously than ever. Rather, I am suggesting that we must add new perspectives to our inquiry: a counsel-adequacy-based perspective, an international human rights-

Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 369 (1994); Michael L. Perlin, Keri Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOLOGY, PUB. POL’Y & L. 80 (1995); Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993); Michael L. Perlin, *Therapeutic Jurisprudence: A Multi-Professional Perspective*, in MENTAL HEALTH LAW AND PRACTICE THROUGH THE LIFE CYCLE 76 (Simon Verdun-Jones ed., 1994).

22 See generally, E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 61–92 (1988); Amy Ronner, *The Crucible, Harvard’s Secret Court, and Homophobic Witch Hunts*, 73 BROOK. L. REV. 217, 238–40 (2007).

23 See, e.g., Mark S. Umbreit, *Holding Juvenile Offenders Accountable: A Restorative Justice Perspective*, 46 JUV. & FAM. CT. J. 31 (1995); JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* (2002); *RESTORATIVE JUSTICE & CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS* (Andrew von Hirsch et al. eds, 2003).

24 For a discussion of other additional and related jurisprudential perspectives whose common goal is “a more comprehensive, humane and psychologically optimal way of handling legal matters,” see Ian Freckleton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: the Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 578 (2008), quoting *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 106 (Bruce J. Winick & David B. Wexler eds, 2003); see also, Susan Daicoff, *Growing Pains: The Integration vs. Specialization Question for Therapeutic Jurisprudence and Other Comprehensive Law Approaches*, 30 T. JEFFERSON L. REV. 551, 552–53 (2008); Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L.J. 1, 1–3 (2006).

25 See PERLIN, *supra* note 7, at 259–304; Perlin, *Too Stubborn*, *supra* note 15; Birgden & Perlin, *Tolling*, *supra* note 14; Birgden & Perlin, *Home in the Valley*, *supra* note 14.

26 See, e.g., Michael L. Perlin, “*She Breaks Just Like a Little Girl*”: *Neonaticide, The Insanity Defense, and the Irrelevance of Ordinary Common Sense*, 10 WM. & MARY J. WOMEN & L. 1, 26–28 (2003) (Perlin, *Neonaticide*); Michael L. Perlin, *Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990) (Perlin, *Psychodynamics*).

27 See, e.g., PERLIN, *supra* note 7, at 21–58; Perlin, *Lepers*, *supra* note 8, at 710–11.

based perspective, a mental health courts-based perspective and a comprehensive “alternative jurisprudences”-based perspective.²⁸

It is also essential that we consider the importance of *dignity* to this entire area of law and policy. Human rights are necessary for all individuals—human rights violations occur when persons are treated as objects or as a means to others’ ends.²⁹ All citizens—including ones who are institutionalized, whether in jails, prisons, facilities for persons with intellectual disabilities, or psychiatric facilities—have enforceable human rights.³⁰ Professor Aaron Dhir has written, “Degrading living conditions, coerced ‘treatment,’ scientific experimentation, seclusion, restraints—the list of violations to the dignity and autonomy of those diagnosed with mental disabilities is both long and egregious.”³¹ So are a failure to provide adequate and effective counsel and honor human rights an affront to the dignity that must be the bedrock of our legal system.³² Importantly, perceptions of systemic fairness are driven, in large part, by “the degree to which people judge that they are treated with dignity and respect.”³³ The words of a federal district court judge from nearly 40 years ago still ring true: “[i]f there is to be the reality of a fair trial, both in fact and in appearance, it must be conducted in an atmosphere of respect, order, decorum and dignity befitting its importance both to the prosecution and the defense.”³⁴ Each of the chapters in this book must be read through this lens of dignity.

I hope that, by adding these perspectives to this project, I will offer a blueprint for policy development, further scholarly inquiries, and, optimally, social change. I hope

28 Professor David Wexler, one of the founders of the “therapeutic jurisprudence” (TJ) school, has recently published a major work on the relationship between TJ and criminal law; see DAVID B. WEXLER, *REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE* (2008); see also, David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005). The late Professor Bruce Winick, TJ’s other founder, has written extensively about these issues as well; see, e.g., 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 (1999); Winick & Wexler, *supra* note 17; Bruce Winick, *Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of Riggins v. Nevada*, 10 N.Y.L. SCH. J. HUM. RTS. 637 (1993).

29 Tony Ward & Astrid Birgden, *Accountability And Dignity: Ethical Issues In Forensic And Correctional Practice*, 14 AGGRESSION & VIOLENT BEHAV. 227 (2009); PERLIN, *supra* note 8; PERLIN, *supra* note 9.

30 Perlin & Dlugacz, *supra* note 14; Birgden & Perlin, *Tolling*, *supra* note 14; Birgden & Perlin, *Home in the Valley*, *supra* note 14.

31 Aaron A. Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J INT’L L. 181, 182 (2005).

32 See Perlin, *Evaluation Process*, *supra* note 14, at 251.

33 Michael L. Perlin, *A Law of Healing*, 68 U CIN. L. REV. 407, 415 (2000), quoting Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 442 (1992).

34 In re Cohen, 370 F. Supp. 1166, 1174 (S.D.N.Y. 1973).