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"Your Old Road Is/ Rapidly Agin'": International Human Rights Standards and Their Impact on Forensic Psychologists, the Practice of Forensic Psychology, and the Conditions of Institutionalization of Persons with Mental Disabilities

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"YOUR OLD ROAD IS/ RAPIDLY AGIN'": INTERNATIONAL HUMAN RIGHTS STANDARDS AND THEIR IMPACT ON FORENSIC PSYCHOLOGISTS, THE PRACTICE OF FORENSIC PSYCHOLOGY, AND THE CONDITIONS OF INSTITUTIONALIZATION OF PERSONS WITH MENTAL DISABILITIES

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ABSTRACT

For years, considerations of the relationship between international human rights standards and the work of forensic psychologists have focused on the role of organized psychology in prisoner abuse at Guantanamo Bay and Abu Ghirab. That issue has been widely discussed and debated, and these discussions show no sign of abating. But there has been virtually no attention given to another issue of international human rights, one that grows in importance each year: how the treatment (especially, the institutional treatment) of persons with mental and intellectual disabilities violates international human rights law, and the silence of organized forensic psychology in the face of this mistreatment. This issue has become

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even more pointed in recent years, following the ratification of the United Nations' Convention on the Rights of Persons with Disabilities.

Organized forensic psychology has remained largely silent about the potential significance of this Convention and about how it demands that we rethink the way we institutionalize persons – often in brutal and barbaric conditions – around the world. In many parts of the world, circumstances are bleak: services are provided in segregated settings that cut people off from society, often for life; persons are arbitrarily detained from society and committed to institutions without any modicum of due process; individuals are denied the ability to make choices about their lives when they are put under plenary guardianship; there is a wide-spread denial of appropriate medical care or basic hygiene in psychiatric facilities, individuals are subject to powerful and often-dangerous psychotropic medications without adequate standards, and there is virtually no human rights oversight and enforcement mechanisms to protect against the broad range of institutional abuse. Although there is a robust literature developing – interestingly, mostly in Australia and New Zealand, but little in the US – about how such institutional conditions violate the international human rights of this population, virtually nothing has been written about how organized forensic psychology has been silent about these abuses.

In this paper, I (1) discuss the relevant international human rights law that applies to these questions, (2) examine the current state of conditions in institutions worldwide, (3) argue why forensic psychology needs to become more aggressively involved in this area, and (4) offer some suggestions as to how this situation can be ameliorated.

INTRODUCTION

For years, the focus of how international human rights standards should govern forensic psychology has been organized around psychology's impact on and response to prisoner abuse at Guantanamo Bay and Abu Ghraib.[1] That focus has not been substantially changed as discussions and debates on that issue show no sign of abating.[2] In contrast, scant attention

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1 Kenneth S. Pope, *The Code Not Taken: The Path from Guild Ethics to Torture and Our Continuing Choices*, 57 CANADIAN PSYCHOL. 51 (2016). This is not the first example of such focus. *See*, *e.g.*, Bruce E. Levine, *10 of the Worst Abuses of the Psychiatric and Psychological Professions in American History*, ALTERNET.ORG (Sept. 24, 2015, 1:31 PM GMT), http://www.alternet.org/news-amp-politics/10-worst-abuses-psychiatric-and-psychological-professions-american-history; *see also*, E.W., *How America's Psychologists Ended up Endorsing Torture*, ECONOMIST (July 28, 2015), http://www.economist.com/blogs/democracyinamerica/2015/07/terror-torture-and-psychology.

"Forensic psychology" is defined broadly in the SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY (AM. PSYCHOLOGICAL ASS'N 2013) [hereinafter SPECIALTY GUIDELINES] as "professional practice by psychologists, within any subdiscipline of psychology (e.g., clinical, developmental, social, experimental) when [] engaged regularly as [forensic psychologists]." Comm. on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 LAW & HUM. BEHAV. 655, 656-57 (1991) [hereinafter *Specialty Guidelines*].

Specifically, the SPECIALTY GUIDELINES elaborate that forensic psychology means "all forms of professional psychological conduct when acting, with definable foreknowledge, as a psychological expert on explicitly psycholegal issues, in direct assistance to courts, parties to legal proceedings, correctional and forensic mental health facilities, and administrative, judicial and legislative agencies acting in an adjudicative capacity." *Id.* at 657.

"Organized psychology" is generally meant to reflect the positions of the American Psychological Association ("APA"). *See*, *e.g.*, Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 VILL. L. REV. 1569, 1579 (1992). On organized psychology's role in judicial policy-making in general, *see*, *e.g.*, Charles R. Tremper, *Organized Psychology's Efforts to Influence Judicial Policy-Making*, 42 AM. PSYCHOLOGIST 496 (1987).

This paper will focus on (1) those who work in correctional and psychiatric institutions (both forensic and civil), (2) those who give testimony in forensic cases, and (3) those who do research on topics that relate to the work of forensic psychologists.

2 *E.g.*, Ivan Greenberg, *From Surveillance to Torture: The Evolution of US Interrogation Policies During the War on Terror*, 28 SECURITY J. 165 (2015); *John Bohannon, Torture Report Prompts APA Apology: Admitting it Colluded with U.S. Psychologists Group to Change Policies, Leadership*, 349 SCIENCE 221 (2015); Roy Eidelson, Heart of Darkness: Observations on a Torture Notebook, PSYCHOL. TODAY (Jan. 04, 2017), https://www.psychologytoday.com/blog/dangerous-ideas/201701/heart-darkness-observations-torture-notebook; Roy Eidelson, Psychologists Are Facing Consequences for Helping With Torture. It's Not Enough., WASH. POST (Oct. 13, 2017), https://www.washingtonpost.com/outlook/psychologists-are-facing-consequences-for-helping-with-torture-its-not-enough/2017/10/13/2756b734-ad14-11e7-9e58-e6288544af98_story.html?utm_term=.e9f17acc7291; Greg Miller, *CIA Documents Expose Internal Agency Feud over Psychologists Leading Interrogation Program*, WASH. POST (Jan. 19, 2017), https://www.washingtonpost.com/world/national-security/cia-documents-expose-internal-agency-feud-over-psychologists-leading-interrogation-program/2017/01/18/a73bd722-dd85-11e6-918c-99ede3c8cafa_story.html?pushid=breaking-news_1484838323&tid=notifi_push_breaking-news&utm_term=.c653e9523030.

See generally David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823 (2012).

Two of the psychologists in question are currently on trial as part of litigation stemming from these

has been paid to potential international human rights violations of persons with mental or intellectual disabilities at forensic institutions,[3] and this silence of organized forensic psychology facing this mistreatment is equally disturbing. In light of the ratification of the United Nations Convention on the Rights of Persons with Disabilities ("CRPD"),[4] the problem is more pointed that organized forensic psychology still largely remains silent about how this significant Convention demands rethinking the humanitarian principles that must control the ways we seek to institutionalize persons around the world.[5] In reality, circumstances in many parts of the world are bleak: services are provided in segregated settings that cut people off from society, often for life;[6] persons are arbitrarily detained from society and

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activities. *See*, *e.g.*, Carol Rosenberg, *Torture Lawsuit Against Two Psychologists Delays CIA Waterboarders' Guantánamo Testimony*, MIAMI HERALD (Aug. 4, 2017, 9:24 PM), http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article165607327.html. It is certainly likely that this debate will be reinvigorated by the statements of the new President that he supports the enhanced use of waterboarding. *See*, *e.g.*, Jeremy Diamond, *Donald Trump Touts Waterboarding, Stokes Immigration Fears in Border State*, CNN.COM (last updated Oct. 31, 2016, 12:29 PM), http://www.cnn.com/2016/10/30/politics/donald-trump-hillary-clinton-immigration-criticism ("These savages are chopping off heads, drowning people. This is medieval times and then we can't do waterboarding? 'It's far too tough,'" [Donald] Trump said, mocking critics of the technique used by the CIA in interrogations of terror suspects under President George W. Bush's post-9/11 administration). *See also*, James E. Mitchell, *Sorry, Mad Dog, Waterboarding Works*, WALL ST. J. (last updated Dec. 9, 2016, 8:29 AM), http://www.wsj.com/articles/sorry-mad-dog-waterboarding-works-1481242339 (author had been contracted by the Central Intelligence Agency to help put together what became its "enhanced-interrogation program"); Jenna Johnson, *Trump Says 'Torture Works,' Backs Waterboarding and 'Much Worse,'* WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.849e79618497.

In 2015, the APA officially "apologize[d] for this stain on our collective integrity." *See* KENNETH S. POPE, FIVE STEPS TO STRENGTHEN ETHICS IN ORGANIZATIONS AND INDIVIDUALS: EFFECTIVE STRATEGIES INFORMED BY RESEARCH AND HISTORY 11 (2018).

3 *E.g.*, 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 (2015); Michael L. Perlin & Alison J. Lynch, *"The Distant Ships of Liberty": Why Criminology Needs to Take Seriously International Human Rights Laws that Apply to Persons with Disabilities* (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692109; Michael L. Perlin, *International Human Rights and Institutional Forensic Psychiatry: The Core Issues*, *in* THE USE OF COERCIVE MEASURES IN FORENSIC PSYCHIATRIC CARE - LEGAL, ETHICAL AND PRACTICAL CHALLENGES 9 (Birgit Völlm & Norbert Nedopil eds., 2016).

4 *See* MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD (Ronald Roesch ed., 2012). President Obama signed the Convention in 2009, but the Senate failed to ratify it. Nonetheless, signatories must refrain from acts which would defeat the Convention's purposes. *See infra* note 44.

5 Some argue that the CRPD bars all involuntary institutionalization. For a discussion, *see* George Szmukler et al., *Mental Health Law and the UN Convention on the Rights of Persons with Disabilities*, 37 INT'L J. L. & PSYCHIATRY 245 (2014).

6 *See* Michael L. Perlin, "*Their Promises of Paradise": Will Olmstead v. L.C. Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?*, 37 HOUS. L. REV.

committed to institutions without any modicum of due process;[7] individuals are denied the ability to make choices about their lives when they are put under plenary guardianship, also often known as "civil death";[8] there is a wide-spread denial of appropriate medical care or basic hygiene in psychiatric facilities,[9] individuals are subject to powerful and often dangerous psychotropic medications without adequate standards,[10] and there is almost no human rights oversight or enforcement mechanisms to protect against the broad range of institutional abuse.[11] Although there is a robust literature developing–mostly in Australia and New Zealand–on how such institutional conditions violate the international human rights of this population,[12] organized forensic psychology has virtually been silent about these abuses in the United States.

999, 1005 (2000) ("The history of psychiatric institutions in the United States has been one of institutional segregation").

7 *See* Michael L. Perlin, *An Internet-Based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economies*, 40 FORDHAM INT'L L.J. 435, 447 (2007)

> (… Internationally, there is a shameful history of human rights abuses in psychiatric institutions: the provision of services in a segregated setting that cuts people off from society, often for life; the arbitrary detention from society that takes place when people are committed to institutions without due process; the denial of people's ability to make choices about their lives when they are put under plenary guardianship; the denial of appropriate medical care or basic hygiene in psychiatric facilities; the practice of subjecting people to powerful and dangerous psychotropic medications without adequate standards; and the lack of human rights oversight and enforcement mechanisms to protect against the broad range of abuses in institutions.)

8 *See*, *e.g.*, Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159, 1162-63 (2013) (discussing Oliver Lewis, *New Project on Reforming Guardianship in Russia*, MENTAL DISABILITY ADVOCACY CTR. (Aug. 11, 2009), http://bit.ly/Xd7qR3).

9 *See* Michael L. Perlin & Meredith R. Schriver, *"You That Hide Behind Walls": The Relationship between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients*, *in* AM. UNIV. CTR. FOR HUMAN RIGHTS & HUMANITARIAN LAW, TORTURE AND ILL-TREATMENT IN HEALTH- CARE SETTINGS: REFLECTIONS ON THE SPECIAL RAPPORTEUR ON TORTURE'S 2013 THEMATIC REPORT, 195, 203 (2013) [hereinafter TORTURE AND ILL-TREATMENT].

10 *See* Juan E. Mendez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Rep. on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 6, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

11 *See generally* Perlin & Schriver, *supra* note 3; Perlin, *supra* note 3; Perlin & Schriver, *supra* note 9. As I discuss below, I believe that is imperative that, in many cases, forensic psychologists consider the impact of institutional conditions on their ultimate conclusions. *See infra* text accompanying note 141.

12 *See*, *e.g.*, Tony Ward & Astrid Birgden, *Human Rights and Correctional Clinical Practice*, 12 AGGRESSION & VIOLENT BEHAV. 628, 629 (2007); Astrid Birgden & Michael L. Perlin, *"Tolling for the Luckless, the Abandoned and Forsaked": Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 231 (2008); Kris Gledhill, *Human Rights Instruments and Mental Health Law: The English Experience of the Incorporation of the European Convention on Human Rights*, 34 SYRACUSE J. INT'L L. & COM. 359 (2007).

This article will first briefly introduce the controversy enveloped in organized psychology for the past fifteen years. Part I discusses the relevant international human rights law that applies to violations against persons with mental and intellectual disabilities. Part II examines the current state of conditions in mental health institutions worldwide. Part III argues why forensic psychology needs to become more aggressively involved in countering international human rights violations at these institutions. Part IV explains the significance of understanding sanism and pretextuality in dealing with the underlying presumptions of forensic psychologists' behaviors and explains how the principles of therapeutic jurisprudence can ameliorate the situation. Part V concludes the article by advocating for changes in forensic psychology to embrace international human rights mandates.

The title of this article comes from Bob Dylan's anthemic early song, *The Times They Are A-Changing*, characterized by the critic Howard Soames as "a rallying call ... as America raced through momentous changes,"[13] and by the critic Robert Shelton as "a timeless dialogue between those restrained by old ways and those daring something new."[14] In this song, Dylan challenged everyone–parents, politicians, and citizens–to "get out of the new [road] if [they] can't lend [a] hand" because "[t]he [old] order is rapidly fadin.'"[15] And in the same couplet, he sings, "[The] old road is rapidly agin.'"[16] He had that absolutely right in 1963–in the time of the glory of the American civil rights movement–when he wrote that song.[17] But I think his admonition is just as valid for us today.

13 HOWARD SOUNES, DOWN THE HIGHWAY: THE LIFE OF BOB DYLAN 145 (2001).

14 ROBERT SHELTON, NO DIRECTION HOME: THE LIFE AND MUSIC OF BOB DYLAN (Da Capo ed. 1997). *See also*, Michael L. Perlin, *The Times They Are A-Changin,' in* ENCOUNTERS WITH BOB DYLAN: IF YOU SEE HIM, SAY HELLO 29 (Tracy Johnson ed., 2000).

15 Bob Dylan, *The Times They Are A-Changin,'* BOB DYLAN, http://www.bobdylan.com/songs/times-they-are-changin/ (last visited Oct. 20, 2017).

16 *Id.*

17 Sadly, Dylan has not sung it since August 14, 2009. *See id.*, I have not seen him sing it in person since November 13, 2002. *See* Michael Perlin, *Reviews*, BOBLINKS.COM, http://boblinks.com/111302r.html (last visited Oct. 20, 2017).

I. THE RELEVANT INTERNATIONAL HUMAN RIGHTS LAW[18]

A. Recent Developments in International Human Rights Standard's Impact on Forensic Psychology

The attention to behavioral standards of forensic psychologists and forensic psychiatrists has been rising dramatically in recent years. This new attention mostly flows from revelations of the Bush Administration's sanctioning torture at prison camps in Guantanamo Bay and Abu Ghraib.[19] This led to a spirited debate on the application of international human rights to what some psychologists and psychiatrists have done in the context of armed conflict. In the words of Kenneth Pope, in his recent "Member of the Year" address to the Canadian Psychological Association: "the torture controversy and the choices that led up to it provide a grim inventory of guild ethics, willful ignorance, denial, and discrediting critics."[20]

The American Psychological Association's ("APA") failure to mandate that psychologists adhere to international human rights standards[21] has been sharply criticized.[22] Among these critics is the NGO Physicians for Human Rights ("PHR"). "PHR was founded on the idea that physicians, scientists, and other health professionals possess unique skills that lend significant credibility to the investigation and documentation of human rights abuses[;] [it uses its] specialized expertise … to advocate for persecuted health workers, prevent torture, document mass atrocities, and hold those who violate human rights accountable."[23] Along with other NGOs such as

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18 Portions of this section draw on Perlin & Lynch, *supra* note 3, and Perlin, *supra* note 3.

19 *See*, *e.g.*, SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005); THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL REPORTS OF THE INDEPENDENT PANEL AND THE PENTAGON ON THE SHOCKING PRISONER ABUSE IN IRAQ (Steven Strasser ed., 2004); STEVEN H. MILES, OATH BETRAYED: AMERICA'S TORTURE DOCTORS (2nd ed., 2009). Apparently, forensic psychologists *did* participate at Guantanamo Bay. *See* Stephen Soldz, *Healers or Interrogators: Psychology and the United States Torture Regime*, 18 PSYCHOANALYTIC DIALOGUES 592, 592-600 (2008). They have been accused of prisoner abuse in other cases involving national security matters. *See* Jeffrey Kaye, *Former Top Navy Psychologist Involved in Pre-9/11 Prisoner Abuse Case*, PUB. REC. (July 24, 2009), http://pubrecord.org/special-to-the-public-record/2722/former-psychologist-involved-pre-911/. For a comprehensive explanation of what *is* torture in this context, *see* INT'L REHABILITATION COUNCIL FOR TORTURE VICTIMS, *What We Do/Torture Rehabilitation*, http://www.irct.org/what-is-torture/defining-torture.aspx (last visited Oct. 19, 2017).

20 Pope, s*upra* note 1, at 56.

21 AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON PSYCHOLOGICAL ETHICS AND NATIONAL SECURITY 9 (2005), http://www.apa.org/pubs/info/reports/pens.pdf.

22 See Cyrus Ahalt et al., *Examining the Role of Healthcare Professionals in the Use of Solitary Confinement*, BRIT. MED. J., Oct. 24, 2017, at j4657 ("The APA's misplaced loyalty to the state directly undermined the health and human rights of patients at Guantanamo Bay").

23 PHYSICIANS FOR HUM. RTS., *About PHR*, http://physiciansforhumanrights.org/about/ (last

Amnesty International, PHR sent an open letter to APA about what it termed APA's "'grievous mismanagement of this issue'; APA's 'providing ethical cover for psychologists' participation in detainee abuse; [and] APA's handling of the detainee interrogation issue creating 'the greatest ethical crisis' in the profession's history and making a 'terrible stain on the reputation of American psychology.'"[24] Then, in 2015, PHR subsequently sent a letter to the APA leadership, encouraging the association to adopt a ban on psychologists' participation in interrogations and any activities that do not comply with obligations under the U.N. Convention against Torture—to which the U.S. is a signatory[25]—including the use of sleep deprivation, prolonged isolation, and sensory deprivation.[26]

It is important to underscore that "torture" goes beyond prototypical notions of physical abuse and includes psychological abuse as well.[27] In this context, it is also important to note in some jurisdictions–especially, but not solely, in Eastern and Central Europe and China, and some in the United States–the existence of a sorry and shoddy history of mental health professionals complying with governmental officials seeking to suppress political dissenters.[28] So this should not be seen as merely a one-time aberration.[29]

This all leads to a critical question: should international human rights law only function to prevent politically motivated torture in forensic psychology and forensic psychiatry, or should international human rights law have a boarder mandate that governs forensic psychologists and psychiatrists' general behaviors in all contexts?

I speak often to psychiatrists, psychologists, and criminologists about international human rights law and its relationship to mental disability law,

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visited Oct.20, 2017).

24 Kenneth S. Pope, *Are the American Psychological Association's Detainee Interrogation Policies Ethical and Effective?: Key Claims, Documents, and Results*, 219 ZEITSCHRIFT FÜR PSYCHOLOGIE 150, 153 (2011).

25 *See* Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

26 PHYSICIANS FOR HUM. RTS., *PHR Urges Ban on Psychologists' Participation in Interrogations: Toronto Meeting Provides Opportunity for Key Ethics Reforms* (Aug. 5, 2015), http://physiciansforhumanrights.org/press/press-releases/phr-urges-ban-on-psychologists-participation-in-interrogations.html.

27 *See generally* THE TRAUMA OF PSYCHOLOGICAL TORTURE (Almerindo E. Ojeda ed., 1st ed., 2008); Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT'L. REV. RED CROSS 591 (2007).

28 *See*, *e.g.*, Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent*, 39 ISR. L. REV. 69, 71-81 (2006).

29 *Id.*

and remained stunned by the few audience members in the United States who are familiar with this relationship, and the even fewer who are familiar with the UN Convention on the Rights of Persons with Disabilities. This differs sharply from my experiences abroad: whether I am lecturing in a nation with a developed economy or a developing economy, virtually every audience member is familiar with this body of law.[30]

Why is this? The reason may be as benignly simple as the fragmentation of scholarly research agendas (that, simply, different cohorts of scholars have chosen to write about the different aspects of this connection), an explanation that appears to be supported by the astonishing paucity of available legal literature in this area. Or, perhaps it is as darkly complex as the reality that this topic is just not of much interest to the main cohorts of individuals whom we most logically might expect to embrace it: international human rights activists, academically-focused forensic psychologists and forensic psychiatrists, and mental disability law scholars. In this context, it is necessary to recall that it was not until January 2002 that Amnesty International acknowledged, albeit grudgingly, that violations of international human rights law in the cases of persons institutionalized in psychiatric facilities *were* international human rights violations.[31] I am

30 In recent years, I have turned my scholarly and pedagogic attention toward the relationship between international human rights law and mental disability law. I have lectured on this topic frequently both in the United States and abroad. I have also created a course on the topic that I have taught in full at New York Law School, at the Institute of Human Rights at Abo Akademi University in Turku, Finland, at the Global Law Institute of Haifa University in Israel, at Bond University in the Gold Coast, Australia, and, in part, at universities in Taiwan, Indonesia, Uganda, and New Zealand. This course is now available as a web-based course through the Global Institute of Forensic Research. Further, I have published a casebook in this area, *see* MICHAEL L. PERLIN ET AL., INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: CASES AND MATERIALS (Michael L. Perlin ed., 1st ed. 2006), have written multiple law review articles and book chapters, *see*, *e.g.*, Perlin & Schriver, *supra* note 9; Michael L. Perlin & Alison J. Lynch, *"Love is Just a Four-Letter Word": Sexuality, International Human Rights, and Therapeutic Jurisprudence*, 1 J. CAN. J. COMP. & CONTEMP. L. 9 (2015); 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 (2014); 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); Michael L. Perlin, *Understanding the Intersection between International Human Rights and Mental Disability Law: The Role of Dignity*, *in* THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191 (Bruce A. Arrigo & Heather Y. Bersot, eds. 2014), and an expository book, *see* PERLIN, *supra* note 4. I have also focused on the relationship between international human rights law and mental disability law in advocacy training work that I have done, literally, on every continent where there is an organized body of law. *See* Michael L. Perlin, *An Internet-Based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economies*, 30 FORDHAM INT'L L.J. 435 (2007) [hereinafter Perlin, *Social Change*]; Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT'L L. & COM 333, 334 n.8 (2007) [hereinafter Perlin, *Universal Factors*].

31 *See*, *e.g.*, Krassimir Kanev, *State, Human Rights, and Mental Health in Bulgaria*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 435, 444 n. 21 (2002). I discuss the implications of this in Michael L. Perlin & Éva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, *in* MENTAL

forced to conclude that the question at the heart of this article—the relationship between international human rights standards and the institutional work of forensic psychologists and forensic psychiatrists (especially, but certainly not exclusively, the work that takes place in the psychiatric institutions of civil law nations)—is one that is essentially ignored by academics, both as a topic of scholarly discourse, and as a topic of classroom study.[32]

I find this pathetic. I also find it baffling, given the shameful history of human rights abuses in psychiatric institutions on every continent.[33] A series of reports issued over the past twenty years by Mental Disabilities Rights International ("MDRI," now Disabilities Rights International, "DRI") and the Mental Disability Advocacy Centre ("MDAC") excoriating the governments of numerous Central and Eastern European and Central and South American nations[34] have drawn scholars and policymakers to these issues,[35] and have even had an impact on the political process of European Union accession.[36] Furthermore, there has even been *some*

HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 80, 82 (Michael Dudley et al. eds., 2012). *See also*, Theresa Degener, *Disability Rights Are Human Rights*, OPEN SOCIETY FOUNDATIONS (May 9, 2014), https://www.opensocietyfoundations.org/voices/disability-rights-are-human-rights.

32 On the relationship between international human rights law and mental disability law in general, *see*, *e.g.*, Eric Rosenthal & Leonard S. Rubenstein, *International Human Rights Advocacy Under the "Principles for the Protection of Persons with Mental Illness,"* 16 INT'L J.L. & PSYCHIATRY 257 (1993); Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 469, 527-31 (2002).

33 *See*, *e.g.*, PERLIN ET AL., *supra* note 31, ch. 1; Perlin, *supra* note 28; Michael L. Perlin, *"Chimes of Freedom:" International Human Rights and Institutional Mental Disability Law*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 423, 424 (2002); Perlin, *Social Change*, *supra* note 30, at 447.

34 For early reports *see*, *e.g.*, MENTAL DISABILITY RIGHTS INT'L, HUMAN RIGHTS AND MENTAL HEALTH: URUGUAY (1995) (hereinafter MDRI URUGUAY REPORT); MENTAL DISABILITY RIGHTS INT'L, HUMAN RIGHTS AND MENTAL HEALTH: HUNGARY (1997) (hereinafter MDRI HUNGARY REPORT); MENTAL DISABILITY RIGHTS INT'L, HUMAN RIGHTS AND MENTAL HEALTH: MEXICO (2000) (hereinafter MDRI MEXICO REPORT); MENTAL DISABILITY RIGHTS INT'L, NOT ON THE AGENDA: HUMAN RIGHTS OF PEOPLE WITH MENTAL DISABILITIES IN KOSOVO (2003) (hereinafter MDRI KOSOVO REPORT); Oliver Lewis, *Mental Disability Law in Central and Eastern Europe: Paper, Practice, Promise*, 8 J. MENTAL HEALTH L. 293 (2002).

35 *See*, *e.g.*, Sheila Wildeman, *Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on The Rights of Persons with Disabilities*, 41 J.L. MED. & ETHICS 48, 66 n.75 (2013); Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. U.L. REV. 527, 561 n.139 (2009); Michael Ashley Stein, *China and Disability Rights*, 33 LOY. L.A. INT'L & COMP. L. REV. 7, 17 n.74 (2010); Debra Benko & Brittany Benowitz, *The Application of Universal Human Rights Law to People with Mental Disabilities*, 9 HUM. RTS. BRIEF 9, 36; Vandana Peterson, *Understanding Disability Under the Convention on the Rights of Persons with Disabilities and its Impact on International Refugee and Asylum Law*, 42 GA. J. INT'L & COMP. L. 687 (2014).

36 In the Czech Republic, researchers—led by officials of the MDAC—found "cases of individuals, including young children, kept in cage beds for practically the entire day—every day—except when they needed to use the toilet." MENTAL DISABILITY ADVOCACY CENTER, PRESS RELEASE, MDAC CALLS FOR CAGE BED BAN IN CZECH REPUBLIC, PRAGUE AND BUDAPEST (November 24, 2003), *reprinted in*

coverage in the mainstream media.[37]

So, ignorance on the part of forensic mental health professionals can no longer be—if it ever were—an acceptable excuse. Moreover, I expect that the widespread professional disregard of this issue depressingly and banally results from what I call *sanism* and *pretextuality*.[38] This, though, does not solve the problem; it merely identifies the cause. And we will blind ourselves if we fail to acknowledge the ways that sanism and pretextuality have served as potent counterweights to the application of human rights law to all institutional mental disability law.[39]

B. The meaning of human rights

What are human rights?[40] The University of Minnesota-based Human Rights Resource Center provides a simple definition: "[h]uman rights are the rights a person has simply because he or she is a human being."[41] In its Preamble, the Universal Declaration of Human Rights proclaims that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[42] The World Health Organization adds to the description by stating that human rights consist of the basic entitlement accorded to

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PERLIN ET AL., *supra* note 30, at 867. These practices were subsequently decried by a member of the European Parliament who demanded abandonment of the use of such beds as a prerequisite for the Czech Republic's admission to the European Union. *Id.* (quoting Member of Parliament John Bowls).

37 *See*, *e.g.*, Craig S. Smith, *Abuse of Mentally Ill Is Reported in Turkey*, N.Y. TIMES (Sept. 28, 2005), http://www.nytimes.com/2005/09/28/world/europe/abuse-of-mentally-ill-is-reported-in-turkey.html; Craig S. Smith, *Romania's Orphans Face Widespread Abuse, Study Finds*, N.Y. TIMES (May 10, 2006), http://www.nytimes.com/2006/05/10/world/europe/10iht-romania.html.

38 "Sanism" is an irrational prejudice in many ways like racism, sexism, or homophobia. "Pretextuality" defines how courts accept testimonial dishonesty by expert witnesses. *See infra* text accompanying notes 102-14 (defining and explaining terms). I have written about how these factors contaminate the relationship between mental disability law and international human rights law in 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 N. ILL. U. L. REV. 483, 487 (2009).

39 *See*, *e.g.*, PERLIN, *supra* note 4, at 33-37; Perlin, *supra* note 28, at 89-91.

Beyond the scope of this article is an inquiry into the ways in which certain state-employed forensic psychologists regularly testify in support of "ethnic adjustments" to IQ scores so as to make defendants with intellectual disabilities eligible for the death-penalty violate international human rights law. *See* Michael L. Perlin, *"Your Corrupt Ways Had Finally Made You Blind": Prosecutorial Misconduct and the Use of "Ethnic Adjustments" in Death Penalty Cases of Defendants with Intellectual Disabilities*, 65 AM. U. L. REV. 1437 (2016) [hereinafter Perlin, *Your Corrupt Ways*] (discussing this issue in the context of domestic constitutional law).

40 *See generally* PERLIN ET AL., *supra* note 30, ch. 3.

41 UNIV. OF MINN. HUMAN RIGHTS RES. CTR., *What Are Human Rights?*, HUMAN RIGHTS HERE AND NOW: CELEBRATING THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/whatare.htm (last visited Oct. 20, 2017).

42 G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948).

every human being. These rights include the right to health, education, shelter, employment, property, food, freedom of expression, and movement.[43]

Consider the Convention on the Rights of Persons with Disabilities ("CRPD").[44] The CRPD "is regarded as having finally empowered the 'world's largest minority' to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection."[45] This Convention is the most revolutionary international human rights document ever applied to persons with disabilities.[46] The CRPD furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in almost every aspect of life.[47] It firmly endorses a social model of disability, which is a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law.[48] "The Convention responds to traditional models, situates disability within a social model framework, and sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities."[49] It provides a framework for ensuring that mental health

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43 *See*, *e.g.*, World Health Assembly Res. 23.41, 15th plen. mtg. (May 21, 1970), *reprinted in* 1 WORLD HEALTH ORGANIZATION, HANDBOOK OF RESOLUTIONS AND DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD 501 (1973); G.A. Res. 217A (III), Universal Declaration of Human Rights, art. 13, 25, 26 (Dec. 10, 1984). *See also*, *e.g.*, John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1745 (2009).

44 Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (CRPD). The following section largely draws on material in 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, 273-74 (2014), and Perlin, *supra* note 8, at 1173-74. "Although the United States has not ratified the CRPD, 'a state's obligations under it are controlled by the Vienna Convention of the Law of Treaties[,] which requires signatories 'to refrain from acts which would defeat [the Disability Convention's] object and purpose.'" Henry A. Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 362-63 (2011).

45 Perlin & Alison J. Lynch, *All His Sexless Patients*, *supra* note 44, at 273-74 (2014). *See also*, Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 4 (2008). *See*, *e.g.*, Louise Arbour, High Commissioner for Human Rights, Oral Statement at Special Event: Convention on the Rights of Persons with Disabilities and Its Optional Protocol 26 March 2007, Human Rights Council, United Nations, http://www.un.org/esa/socdev/enable/docshrc.htm (last visited Oct. 20, 2017). *See generally* Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 134-37 (2012).

46 *See* Perlin & Szeli, *supra* note 31; PERLIN, *supra* note 4, at 3-21.

47 *See*, *e.g.*, Perlin, *supra* note 38, 492-93.

48 *See generally* Michael L. Perlin, *"Abandoned Love": The Impact of Wyatt v. Stickney on the Intersection between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 138-41 (2011).

49 Janet E. Lord & Michael A. Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L.J. 249, 256 (2009). For additional research

laws "fully recognise the rights of those with mental illness."[50] There is no question that the Convention has "ushered in a new era of disability rights policy."[51]

This Convention demands that we reconsider the issues discussed in this article.[52] In light of Convention articles mandating, *inter alia*, "respect for inherent dignity,"[53] and the elimination of discrimination in all matters related to interpersonal relationships,[54] it is time for a radical change of perspective and attitude in how society views the institutionalization of persons with disabilities.[55] The CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities.[56] It not only clarifies that States should not

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on how the CRPD fits within a social framework, *see* Janet E. Lord et al., *Lessons From the Experience of U.N. Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance*, 38 J.L. MED. & ETHICS 564, 568-69 (2010); H. Archibald Kaiser, *Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State*, 17 HEALTH L.J. 139, 163-64 (2009); Ronald McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections* (Sydney Law School Research Paper No. 10/30, Mar. 5, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1563883.

50 Bernadette McSherry, *International Trends in Mental Health Laws: Introduction*, 26 LAW CONTEXT: A SOCIO-LEGAL J. 1, 8 (2008).

51 Paul Harpur, *Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 VAL. U. L. REV. 1271, 1295 (2011). On how

international human rights courts and commissions have begun to use international human rights standards in cases brought on behalf of institutionalized persons with mental disabilities, *see*, *e.g.*, Matter of Victor Rosario Congo, Case 11.427, Inter-Am. Comm'n H.R., Report No. 12/971, OEA/Ser/L/VII.102, doc. 36 (1999), discussed, *inter alia,* in Perlin, S*ocial Change, supra* note 30, at 447-48; Purohit and Moore v. The Gambia, Comm. No. 241/01, Decision, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.] (2003), http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf, discussed, *inter alia*, in Perlin, *supra* note 48, at 137. *See also*, Lance Gable et al., *Mental Health and Due Process in the Americas: Protecting the Human Rights of Persons Involuntarily Admitted to and Detained in Psychiatric Institutions*, 18 PAN. AM. J. PUB. HEALTH 366 (2005); Alison A. Hillman, *Human Rights and Deinstitutionalization: A Success Story in the Americas*, 18 PAN. AM. J. PUB. HEALTH 374 (2005); Jonathan Bindman et al., *The Human Rights Act and Mental Health Legislation*, 182 BRITISH. J. PSYCHIATRY 91 (2003).

52 *See generally* Perlin & Lynch, *supra* note 3.

53 CRPD, *supra* note 44, art. 3. On how dignity is the first "fundamental axiom[]" upon which the Convention is premised, *see* Raymond Lang, *The United Nations Convention on the Right and Dignities for Persons with Disabilities: A Panacea for Ending Disability Discrimination?*, 3 ALTER EUR. J. DISABILITY 266, 273 (2009).

54 CRPD, *supra* note 44, art. 23.

55 Beyond the scope of this article is an inquiry into the extent to which cases articulating the constitutional rights of persons in psychiatric institutions (and facilities for persons with intellectual disabilities) in the United States comply with the CRPD and other international human rights conventions. *See*, *e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982).

56 *See generally* 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) (hereinafter Perlin, *Promoting Social Change*). *See also*, Michael L. Perlin et al., *Creating a "Building a Disability Rights Information Center for Asia and the Pacific Clinic": Of Pedagogy and Social Justice*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. 1 (2015); Michael L. Perlin & Mehgan Gallagher, *Why a Disability Rights Tribunal Must be Premised on*

discriminate against persons with disabilities, but also sets out explicitly the many steps that States must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.[57]

This leads to the next question: how does this all affect what forensic psychologists, moving forward, should do?

II. CONDITIONS IN PSYCHIATRIC INSTITUTIONS WORLDWIDE

The practice of mental disability law in many parts of the world today reveals a pattern and practice of ongoing abuses that is "reminiscent of the state of American mental health facilities thirty-five or more years ago."[58] Early institutional rights cases in the United States revealed persistent and pervasive mistreatment of persons with mental disabilities.[59] As recently as 1958, state hospitals were characterized by the President of the APA as "bankrupt beyond remedy."[60] Three years later, a witness testified at a Congressional hearing that "[s]ome [state hospital] physicians I interviewed frankly admitted that the animals of nearby piggeries were better housed, fed and treated than many of the patients on their wards."[61] When the Chairman of the Legal Action Committee of the National Association of Retarded Children (now "The Arc.") characterized the Pennhurst State

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Therapeutic Jurisprudence Principles, 10 PSYCHOL. INJ. & L. 244 (2017).

57 On the changes that ratifying states need to make in their domestic involuntary civil commitment laws to comply with Convention mandates, *see* 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 COLUMBIA. J. L. & SOC. PROBS. 393 (2011). *See also*, István Hoffman & György Könczei, *Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 LOY. L.A. INT'L & COMP. L. REV. 143 (2010) (on the application of the CRPD to capacity issues); Kathryn D. DeMarco, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on The Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523 (2012) (on the application of the CRPD to solitary confinement in correctional institutions).

58 Bruce Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 537, 538 (2004).

59 *See*, *e.g.*, Perlin, *Universal Factors, supra* note 30, at 335; MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, ch. 7 (3d ed. 2016); Perlin, *supra* note 48, at 121-22.

60 Harry Solomon, *Presidential Address: The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY 1, 7 (1958).

61 *Constitutional Rights of the Mentally Ill: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 1st Sess., 40-42 (1961) (statement of Albert Deutsch).

School[62] as "Dachau, without ovens,"[63] there was never any accusation of exaggeration.

This is not solely a domestic problem but one that exists worldwide. Consider the following, some examples of which I have previously characterized as "stupefying":[64]

1. Studies conducted at two Argentinean forensic wards showed unlivable conditions where individuals were housed in small, extremely overcrowded cells by approximately 75%, with no running water or toilets. Many were denied routine medical care, a basic human right for all individuals regardless of legal status, and some were subjected to unwanted sexual practices and rape. In extreme cases, there were no appropriate treatment facilities in which to release the patients, and some were housed in the facility for over twenty years, receiving no medication or other treatment.[65]

2. Prison facilities in England revealed a number of discrepancies, including "the lack of treatment facilities, lack of a clear legal framework for treating prisoners with severe mental illness, inadequately designed prison health care wings, and considerable delays in hospital transfers."[66]

3. Convicted prisoners from a Budapest prison were used to "keep an eye on" patients housed in the nation's only high security forensic psychiatric institution. Many of the patients in the institution were deemed "high suicide risk." One can opine that the prisoners tasked with this responsibility were not given adequate training in the treatment of those with mental illnesses or disabilities, especially those in such vulnerable conditions,

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62 *See*, *e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (holding Developmental Disabilities Bill of Rights Act, 42 U.S.C. § 6010, was merely a federal/state grant program and that neither the right to treatment nor the least restrictive alternative sections of the bill of rights were enforceable in private action); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (holding Eleventh Amendment bars federal relief in a right-to-community service case due to federalism concerns).

63 LEOPOLD LIPPMANN & I. IGNANCY GOLDBERG, RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATION FOR EXCEPTIONAL CHILDREN 17 (1973).

64 Perlin, *Universal Factors*, *supra* note 30, at 354; *see also*, Perlin, *A Change is Going to Come*, *supra* note 38, at 492.

65 MENTAL DISABILITY RTS. INT'L ("MDRI"), RUINED LIVES: SEGREGATION FROM SOCIETY IN ARGENTINA'S PSYCHIATRIC ASYLUMS; A REPORT ON HUMAN RIGHTS AND MENTAL HEALTH IN ARGENTINA (2007).

66 Tim Exworthy et al., *Asserting Prisoners' Right to Health: Progressing beyond Equivalence*, 63 PSYCHIATRIC SERV. 270 (2012).

begging the question of how appropriate care could be rendered.[67]

4. In Kyrgyzstan, there are no statutory provisions to deal with cases of persons who are potentially incompetent to stand trial. As a result, persons with severe mental illness who are charged with crime have no opportunity to be treated in an effort to improve their condition so as to become competent to stand trial.[68]

5. Many institutions use prolonged confinement as a way of managing or disciplining individuals deemed dangerous. Tamms Correctional Center in Illinois, for example, held a prisoner with a well-documented history of schizophrenia in solitary for nearly six years.[69] While solitary conditions can be psychologically harmful to any individual, they are particularly damaging to one with a mental disability. In fact, a federal judge once equated putting mentally ill prisoners in isolated confinement with "putting an asthmatic in a place with little air…"[70]

6. Albanian law requires that individuals with mental disabilities who have been charged with criminal offenses be housed in prison units and must comply by all prison rules. Some were institutionalized for five years before their conditions were re-evaluated.[71]

Conditions in forensic facilities[72] thus continue to "violate the 'decencies

67 Perlin, *"A Change is Gonna Come," supra* note 38, at 492.

68 MENTAL DISABILITY ADVOC. CTR., MENTAL HEALTH LAW OF THE KYRGYZ REPUBLIC AND ITS IMPLEMENTATION § 4.2.1 (2004), http://mdac.info/sites/mdac.info/files/English_Mental%20Health%20Law%20of%20the%20Kyrgyz%20Republic%20and%20its%20implementation.pdf.

69 HUM. RTS. WATCH, MENTAL ILLNESS, HUMAN RIGHTS, AND US PRISONS: HUMAN RIGHTS WATCH STATEMENT FOR THE RECORD TO THE SENATE JUDICIARY COMMITTEE SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW (Sept. 22, 2009), http://www.hrw.org/news/2009/09/22/mental-illness-human-rights-and-us-prisons.

70 Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

71 Perlin, "*A Change is Gonna Come*," *supra* note 38, at 492 n.49 (citing Harvey Weinstein et al., *Protecting the Mentally Disabled*, CARNEGIE COUNCIL (May 6, 2001), https://www.carnegiecouncil.org/publications/archive/dialogue/2_06/online_exclusive/654/:pf_printable/Template=print?version=1457021888).

72 Forensic facilities include predominantly those whose residents are primarily those awaiting competency to stand trial evaluations, those who have been found incompetent to stand trial and are awaiting restoration, those permanently incompetent to stand trial, those awaiting evaluations as to their sanity, and those who have been found not guilty by reason of insanity. *See*, *e.g.*, Michael L. Perlin,

of civilized conduct',"[73] and highlight the dire need for intervention on behalf of those with a mental disability who are subjected to such treatment. This marginalized and often forgotten population continues to be neglected by the very individuals who should be working the most assiduously to end such injustices.[74]

In some parts of the world, these conditions are fatalistically accepted. By way of example, there is a belief that "the right of a psychiatric patient to receive modern treatment to alleviate suffering is not something within the capacity of most African countries."[75] For example, Uruguayan researchers were told by hospital officials that informing patients about their treatment would be logistically difficult and would actually worsen the patients' conditions.[76] Although the Iron Curtain has long ago fallen, "in some countries, prosecutors still enjoy the Stalin-esque power to order detention in a psychiatric institution without prior medical opinion."[77]

The literature is robust, and, when read in its entirety, demonstrates certain universal factors in the treatment of those institutionalized because of mental disability: (1) a lack of comprehensive legislation (in some nations, of *any* legislation) to govern the commitment and treatment of persons with mental disabilities;[78] (2) a lack of independent counsel made available to persons facing commitment and those institutionalized;[79] (3) a

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"*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, 485 (2008).

73 Perlin, "*A Change is Gonna Come*," *supra* note 38, at 491.

74 *See generally* Perlin & Schriver, *supra* note 9, at 212 ("Articles written by those who self-identify with the 'psychiatric survivor movement' largely ignore this population as well. So, even within the world of those who focus broadly on these human rights issues, this population has remained invisible").

75 A. Alem, *Human Rights and Psychiatric Care in Africa with Particular Reference to the Ethiopian Situation*, 101 ACTA PSYCHIATRICA SCANDINAVICA 93, 94 (2000), as quoted in Jennifer Fischer, *A Comparative Look at the Right To Refuse Treatment for Involuntarily Hospitalized Persons with a Mental Illness*, 29 HASTINGS INT'L & COMP. L. REV. 153, 183 (2005).

76 MDRI URUGUAY REPORT, *supra* note 34, at 20, as quoted in Fischer, *supra* note 75, at 183-84.

77 Lewis, *supra* note 34, at 295, as quoted in Fischer, *supra* note 75, at 185; *see generally* Perlin, *supra* note 28. This state behavior is emphatically *not* just "a thing of the past." *See*, *e.g.*, Peter Finn, *In Russia, Psychiatry Is, Again a Tool Against Dissent*, WASH. POST (Sept. 30, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/09/29/AR2006092901592_pf.html.

78 *See*, *e.g.*, Fischer, *supra* note 75, at 183; Alicia Ely Yamin, *Not Just a Tragedy: Access to Medications as a Right Under International Law*, 21 B.U. INT'L L.J. 325, (2003). Gerard Quinn, *Civil Commitment and the Right to Treatment Under the European Convention on Human Rights*, 5 HARV. HUM. RTS. J. 1 (1992); Johan Legemaate, *Involuntary Admission to a Psychiatric Hospital*: *Recent European Developments*, 2 EUR. J. HEALTH L. 15 (1995).

79 *See*, *e.g.*, Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527 (2004); Rodney J. Uphoff, *Why In-House Live Client Clinics Won't Work in Romania: Confessions of a Clinician Educator*, 6 CLINICAL L. REV. 315 (1999); Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. S83 (2000); Lewis, *supra* note 34, at 295-96.

failure to provide humane care to institutionalized persons;[80] (4) a lack of coherent and integrated community programs as an alternative to institutional care;[81] and (5) a failure to provide humane services to forensic patients (those whose involvement in the mental health system was triggered by involvement in the criminal justice system).[82]

What are the implications of all of this for forensic mental health professionals and the forensic mental health professions? To answer this, I will first consider the standards of practice as set out by ethical codes of the APA and the American Academy of Psychiatry and Law.[83]

III. FORENSIC PSYCHOLOGY'S AND FORENSIC PSYCHIATRY'S NEED TO BE MORE INVOLVED IN THESE ISSUES[84]

The APA first published an ethical code in 1953.[85] Since then, it has been regularly revised, and the most recent version was published in 2002.[86] In this version, the principle of "Justice" is included in the "General Principles" section:

> Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their

80 *See*, *e.g.*, Perlin, *Universal Factors*, *supra* note 30, at 343-49, discussing, *inter alia,* findings reported in AMNESTY INT'L, ROMANIA: MEMORANDUM TO THE GOVERNMENT CONCERNING INPATIENT PSYCHIATRIC TREATMENT (2004), http://www.amnesty.eu/static/documents/MemorandumPDF.pdf.

81 *See*, *e.g.*, Eric Rosenthal & Arlene S. Kanter, *The Right to Community Integration for People With Disabilities Under United States and International Law*, *in* DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES 309 (Mary Lou Breslin & Silvia Yee eds., 2002); MDRI KOSOVO REPORT, *supra* note 34; Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819 (2015).

82 *See*, *e.g.*, MDRI MEXICO REPORT, *supra* note 34; Perlin, *supra* note 3; Perlin & Schriver, *supra* note 9.

83 For a convenient compendium of all relevant U.S.-based ethical codes, *see* Kenneth S. Pope, *Ethical Standards & Practice Guidelines for Assessment, Therapy, Counseling, & Forensic Practice*, KSPOPE.COM, *http://www.kspope.com/ethcodes/index.php*.

84 This section draws, in part, on Michael L. Perlin, *"With Faces Hidden While the Walls Were Tightening": Applying International Human Rights Standards to Forensic Psychology*, US-CHINA LAW REVIEW, Oct. 2010, at 1, 4–5.

85 *See generally* ETHICAL STANDARDS OF PSYCHOLOGISTS (AM. PSYCHOL. ASS'N 1953).

86 *See* ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (AM. PSYCHOLOGICAL ASS'N 2002) (amended 2016), http://www.apa.org/ethics/code/ethics-code-2017.pdf [hereinafter ETHICAL PRINCIPLES or EPPCC].

expertise do not lead to or condone unjust practices.[87]

This raises a question we cannot escape: to what extent is this "fairness and justice" principle truly met internationally?[88]

In an effort to "improve the quality of forensic psychological services offered to individual clients and the legal system and thereby to enhance forensic psychology as a discipline and profession,"[89] the Committee on Ethical Guidelines for Forensic Psychologists of the APA issued *Specialty Guidelines for Forensic Psychologists* ("*Specialty Guidelines*") to serve, in part, as "an aspirational model for psychologists acting as experts for [and working in relationship with] the judicial system."[90] The articulated goals of these guidelines are these:

> … to improve the quality of forensic psychological services; enhance the practice and facilitate the systematic development of forensic psychology; encourage a high level of quality in professional practice; and encourage forensic practitioners to acknowledge and respect the rights of those they serve. These *Guidelines* are intended for use by psychologists when engaged in the practice of forensic psychology as described below and may also provide guidance on professional conduct to the legal system, and other organizations and professions.[91]

These guidelines cover a wide range of behaviors. For example, the guidelines on "Competence" require that:

> Forensic psychologists have an obligation to present to the court, regarding the specific matters to which they will testify, the boundaries of their competence, the factual bases (knowledge, skill, experience, training, and education) for their qualification as an expert, and the relevance of those factual bases to their qualification

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87 *Id.* at at 4. For an important typology of the different sorts of biases demonstrated by expert witnesses, *see generally* Ansar M. Haroun & Grant H. Morris, *Weaving a Tangled Web: The Deceptions of Psychiatrists*, 10 J. CONTEMP. LEGAL ISSUES 227 (1999). I characterize this as "a blueprint for understanding the pretextual basis of much expert testimony" in 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, 27–28 (1999).

88 For the most recent ethical guidelines for forensic psychiatrists, *see* ETHICS GUIDELINES FOR THE PRACTICE OF FORENSIC PSYCHIATRY (AM. ACAD. OF PSYCHIATRY & LAW 2005), http://www.aapl.org/docs/pdf/ETHICSGDLNS.pdf [hereinafter AAPL GUIDELINES].

89 *Specialty Guidelines*, *supra* note 1, at 655.

90 Alexis Krulish Dowling, *Post-Atkins Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 809 (2003).

91 SPECIALTY GUIDELINES, *supra* note 1.

as an expert on the specific matters at issue.[92]

Guidelines on "Relationships" mandate that:

> Forensic psychologists have an obligation to ensure that prospective clients are informed of their legal rights with respect to the anticipated forensic service, of the purposes of any evaluation, of the nature of procedures to be employed, of the intended uses of any product of their services, and of the party who has retained the forensic psychologist.[93]

Finally, in the "Public and Professional Communications" section, the guidelines emphasize that forensic psychologists must be "aware that their own professional observations, inferences, and conclusions must be distinguished from legal facts, opinions, and conclusions."[94]

The Preamble of the far-briefer Guidelines of the American Academy of Psychiatry and Law ("AAPL Guidelines") stresses that "[forensic psychiatrists] should be bound by underlying ethical principles of respect for persons, honesty, justice, and social responsibility,"[95] and, subsequently, mandates that "[r]espect for the individual's right of privacy and the maintenance of confidentiality should be major concerns when performing forensic evaluations."[96] These guidelines, however, are in no way as detailed or as comprehensive as those drafted by AAPL's psychological counterparts.

In a careful and comprehensive analysis of the forensic mental health assessment procedures, Professor Kirk Heilbrun has identified twenty-nine principles of forensic mental health assessment that he grouped according to whether they were "established" or "emerging."[97] Heilbrun provides us with a carefully established body of proscriptive and prescriptive rules, and it can be said with confidence that these rules apply to all forensic psychologists who are doing such assessments. The empirical question, though, is not answered: do forensic psychologists and psychiatrists follow

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92 *Specialty Guidelines*, *supra* note 1, at 658. Dr. Harold Hall questions whether it is possible "for psychologists to perform adversarial evaluations and adhere to the Guidelines, EPPCC and the revised testing standards?" E-mail from Dr. Harold Hall to Michael L. Perlin, Professor Emeritus of Law, New York Law School (Sept. 14, 2016) (on file with author). He believes that they can, presuming "mandatory adherence" to the Guidelines, the EPPCC and the revised standards. *Id.*

93 *Specialty Guidelines*, *supra* note 1, at 659.

94 *Id.* at 665.

95 AAPL GUIDELINES, *supra* note 88, at 1.

96 *Id.*

97 Kirk Heilbrun et al., *Pragmatic Psychology, Forensic Mental Health Assessment, and the Case of Thomas Johnson*, 10 PSYCHOL. PUB. POL'Y & L. 31, 33 (2004); *see* KIRK HEILBRUN, PRINCIPLES OF FORENSIC MENTAL HEALTH ASSESSMENT, at vii (Ronald Roesch et al. eds., 2001).

these rules in actual practice? And if no, why not? I believe the reasons for a negative answer (as in so many other areas of law, policy and behavior) can be found in what I refer to as "sanism" and "pretextuality."[98] It is *particularly* nettlesome to see this sanism and pretextuality in practicing forensic psychologists. If there is any cohort that *should* be sanism-and pretextuality-free, it should be forensic mental health professionals. Sadly, that has not been the case.[99]

I am not entirely pessimistic, however. I believe the solution—or at least a *partial* solution—can be found in the principles of therapeutic jurisprudence.[100]

IV. SANISM, PRETEXTUALITY, AND THERAPEUTIC JURISPRUDENCE

For the past twenty-five years, I have been writing incessantly about the malignant impact of *sanism* and of *pretextuality*: the two corrosive factors that contaminate all mental disability law. What do these phrases mean? 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."[101] It infects both our jurisprudence and our lawyering practices.[102] Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and de-individualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" ("OCS")[103]

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98 *See infra* notes 102-09 and accompanying text (defining and explaining terms "sanism" and "pretextuality").

99 On sanism in forensic practice in general, *see*, *e.g.*, Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 226-28, 234-36 (2000) [hereinafter Perlin, *Misdeameanor Outlaw*]; Michael L. Perlin, *"They're an Illusion to Me Now": Forensic Ethics, Sanism and Pretextuality*, *in* PSYCHOLOGY AND LAW: BRIDGING THE GAP 245–249 (David Canter & Rita Žukauskienė eds., 2008) [hereinafter Perlin, *Illusion to Me*]. Forensic psychologists who are employed by state institutions often exhibit sanism in their paternalism in their dealings with patients, refusing to acknowledge that they must be presumed to be competent to engage in autonomous decision making. *See*, *e.g.*, 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).

100 On how therapeutic jurisprudence can be a tool to remediate the "willful blindness" often exhibited by both the mental health system and the judiciary in related contexts, *see* Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623, 629–30 (1993).

101 Perlin, *Misdemeanor Outlaw*, *supra* note 99, at 226–27.

102 *See generally* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 21–58 (2000); Michael L. Perlin, *On "Sanism,"* 46 S.M.U. L. REV. 373 (1992).

103 OCS is a "powerful unconscious animator of legal decision making." 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, 25 (2003); *see* Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737 (1988)

and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.[104]

Pretextuality defines the ways in which courts "accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decisionmaking, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends."[105] This pretextuality is poisonous. It "infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying."[106]

All aspects of mental disability law are pervaded by sanism and by pretextuality, whether the specific presenting topic is involuntary civil commitment law, right to refuse treatment law, the sexual rights of persons with mental disabilities, or any aspect of the criminal trial process.[107] Together, I believe they help explain the contamination of scholarly discourse and of lawyering practices alike.[108] Unless and until we come to grips with these concepts—and their stranglehold on mental disability law development—any efforts at truly understanding this area of the law, or at understanding the relationship between law and psychology, are doomed to failure.[109]

In other works, I have tackled the question of the relationship between sanism and ethics of the forensic mental health professions (specifically, psychology and psychiatry) in the context of clinical evaluations and court testimony.[110] In that context, I argued that, to a great extent, sanism is a disease of *attitudes*.[111] We generalize about persons with mental disabilities,

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(OCS exemplified by the attitude of "[w]hat I know is 'self-evident'; it is 'what everybody knows'").

104 Perlin, *supra* note 103, at 24–25.

105 *Id.* at 25. For a stark example of this in the context of capital punishment, *see generally* Perlin, *Your Corrupt Ways*, *supra* note 39.

106 Perlin, *supra* note 103, at 25.

107 *Id.*

108 *Id.* at 26.

109 *Id.* at 26–27.

110 *See generally* Perlin, *Misdemeanor Outlaw*, *supra* note 99; Perlin, *Illusion to Me*, *supra* note 99. I have also considered this question directly in radically different substantive contexts in, *inter alia*, Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1996), in Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J. L. & HEALTH 15 (1993), and in 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 HOUS. J. HEALTH L. & POL'Y 239 (2004).

111 Perlin, *On "Sanism," supra* note 102, at 377–78; Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111, 117-120 (1991). For a more recent reconsideration, *see generally* Michael L. Perlin, *"My Sense of Humanity Has Gone Down the Drain":*

stereotype them, typify them, and "slot" their behavior, and by focusing on alleged "'differentness,' we deny their basic humanity and their shared physical, emotional, and spiritual needs."[112] When we engage in this generalization, we are doing two things:

> [W]e are distancing ourselves from mentally disabled persons—the "them" —and we are simultaneously trying to construct an impregnable borderline between "us" and "them," both to protect ourselves and to dehumanize what Sander Gilman calls "the Other." The label of "sickness" reassures us that "the Other" —seen as "both ill and infectious, both damaged and damaging" not like us and further animates our "keen . . . desire to separate 'us' and 'them.'"[113]

There is no longer any question that such attitudes infect decision-making by judges and by jurors:[114] on what grounds should we assume that they are somehow strangely absent in the reports and testimony of experts?

Personal bias appears to be "inescapable", unless and until we come to grip with its underlying causes.[115] Dr. Joel Dvoskin has perceptively noted, in this context: "[j]udgments about groups of people can only lead to stigma and discrimination, while judgments about individuals if based on reason and information, can lead to better treatment outcomes and increased safety for the individuals and their communities." [116]

The roots of sanism are deep. From the beginning of recorded history, mental illness has been inextricably linked to sin, evil, God's punishment, crime, and demons.[117] Evil spirits were commonly relied upon to explain

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Stereotypes, Stigma and Sanism, *in* STEREOTYPES AND HUMAN RIGHTS LAW 95–117 (Eva Brems & Alexandra Timmer eds., 2016).

112 Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 537 (1993).

113 *See* Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them"*, 31 LOY. L.A. L. REV. 775, 787 (1998) (discussing SANDER L. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS 130 (1985)).

114 *See generally* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994).

115 Ellen Chun, Book Note, *Falling Between the Cracks*, 17 B.C. THIRD WORLD L.J. 395, 408 (1997) (discussing Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 630 (1993)). On the possible linkages between intellectual disability and sin, *see*, *e.g.*, Eman Gaad, *Cross-Cultural Perspectives on the Effect of Cultural Attitudes Towards Inclusion for Children with Intellectual Disabilities*, 8 INT'L J. INCLUSIVE EDUC. 311 (2004); Sushila Edwardraj et al., *Perceptions about Intellectual Disability: A Qualitative Study from Vellore, South India*, 54 J. INTELL. DISABILITY RES. 736 (2010); Ram Lakhan & Manoi Sharma, *Knowledge, Attitudes and Practices (KAP) Survey of Families Toward Their Children with Intellectual Disability in Barwani, India*, 21 ASIA PAC. DISABILITY REHAB. J. 101 (2010).

116 Hava B. Villaverde, *Racism in the Insanity Defense*, 50 U. MIAMI L. REV. 209, 246 (1995).

117 *See*, *e.g.*, JOHN BIGGS, JR., THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE 26-27 (1967) (explaining that insanity was tied to sin, and a special class of priests were the only people capable of ridding the sinner of his demonic possession); WOLF WOLFENSBERGER ET AL., THE

abnormal behavior.[118] The "face of madness has haunted the imagination of Western man." [119] People with mental illness were considered beasts; a person who lost his capacity to reason was seen as having lost his claim "to be treated as a human being."[120]

It goes without saying that this is depressing on multiple levels. Fortunately, I believe there is a remedy that we can embrace. That is one of the most important legal theoretical developments of the past twenty-five plus years—the creation and dynamic growth of therapeutic jurisprudence ("TJ").[121]

Therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation. As a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.[122] Therapeutic jurisprudence asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential without subordinating due process principles.[123] David Wexler clearly identifies how the inherent

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PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES 12-25 (1972) (noting that mental retardation [now, intellectual disability] has often been regarded as the result of sin and God's punishment). *See generally* JUDITH S. NEAMAN, SUGGESTION OF THE DEVIL: THE ORIGINS OF MADNESS (1975).

118 *See*, *e.g.*, Richard Gardner, *Mind over Matter?: The Historical Search for Meaningful Parity Between Mental and Physical Health Care Coverage*, 49 EMORY L.J. 675, 677 (2000) (stating that "[t]reatment for mental illnesses ranged from exorcism to even more bizarre and often inhumane practices, such as torture or the removal of portions of the skull to allow evil spirits to escape").

119 MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 15 (Richard Howard trans., 1965).

120 Perlin, *On "Sanism," supra* note 102, at 388, citing, *inter alia*, BIGGS, *supra* note 117; WALTER BROMBERG, FROM SHAMAN TO PSYCHOTHERAPIST: A HISTORY OF THE TREATMENT OF MENTAL ILLNESS 63-64 (1975); MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 64-65 (1984); NEAMAN, *supra* note 117, at 31, 50, and 144.

121 The following section is partially adapted from 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). It also distills the work the author has done on this topic for the past two decades plus, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, *supra* note 100.

122 *See*, *e.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); PERLIN & CUCOLO, *supra* note 59, § 2-6. Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 32-33 (1992). *See also*, Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009); Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, *in* DISPUTES AND DILEMMAS IN HEALTH LAW 91 (Ian Freckelton & Kerry Petersen eds., 2006) (for a discussion from a transnational perspective).

123 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 Policing Rape*, 20 J. GENDER, RACE & JUSTICE 431, 434 (2017); 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*

tension of this inquiry must be resolved: the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[124] "[A]n inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[125]

Using TJ, we "look at law as it actually impacts people's lives"[126] and assess law's influence on emotional life and psychological well-being.[127] One governing TJ principle is that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness."[128] One of the central principles of therapeutic jurisprudence thus is a commitment to dignity. [129] Therapeutic jurisprudence allows us to gain "a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."[130] It has been described as "a sea-change in ethical thinking about the role of law…a movement towards a more distinctly relational approach to the practice of law…which emphasises psychological wellness over adversarial

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to Refuse Treatment Cases, 42 SAN DIEGO L. REV. 735, 751 (2005). On how therapeutic jurisprudence "might be a redemptive tool in efforts to combat sanism, as a means of 'strip[ping] bare the law's sanist façade,'" *see* 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, 591 (2008) [hereinafter Perlin, *Mirror*].

124 David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & LAW 17, 21 (1993). *See also*, *e.g.*, David Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENT. PSYCHOL. 179 (1996).

125 Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000) (emphases omitted); Perlin, *supra* note 113, at 782.

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

127 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., 2006) [hereinafter PRACTICING THERAPEUTIC JURISPRUDENCE].

128 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).

129 *See* BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005). *See generally* Jonathan Simon & Stephen A. Rosenbaum, *Defying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIAMI L. REV. 1 (2015).

130 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 towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully. Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 127, at 465.

triumphalism."[131] In doing this, it supports an ethic of care.[132]

With regard to the three prime ingredients of a therapeutic experience, "three Vs": voice, validation and voluntariness.[133] Professor Amy Ronner argues: what "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.[134]

After studying the 3Vs in the context of, *inter alia*, forced drugging of incompetent patients,[135] "scarlet letter" punishments,[136] preventing sex offender recidivism,[137] competence to engage in voluntary sexual interaction,[138] granting individuals with mental disability autonomy in legal

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131 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). The use of the phrase dates to CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

132 *See*, e.g., Winick & Wexler, *supra* note 131, 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 131.

133 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 130, at 588.

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

135 Perlin & Schriver, *supra* note 3, at 401-02.

136 Michael L. Perlin & Naomi Westein, *"Friend to the Martyr, a Friend to the Woman of Shame": Thinking About The Law, Shame and Humiliation*, 24 SO. CAL. REV. L. & SOC'L JUST. 1 (2014).

137 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, 41-42 (2012); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION (2017).

138 Perlin & Lynch, *supra* note 3, at 278-79; MICHAEL L. PERLIN & ALISON J. LYNCH, SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER? (2016).

decision making,[139] and access to problem-solving courts,[140] I concluded that the adoption of the therapeutic jurisprudence principles set forth above would promote the "true therapeutic process" argued by Professor Ronner. The questions are then: do the behavior of the APA and the continuing inaction of forensic psychologists comport with TJ principles? Does it enhance the likelihood that persons in psychiatric institutions—especially *forensic* institutions—will be validated, have voice, or feel as if they are acting voluntarily? What, then, can and should forensic psychologists do to remediate this situation? I believe that the answer encompasses requirements on both forensic witnesses and forensic researchers. And the application of international human rights law here—specifically, the CRPD—is entirely consonant with TJ values.[141]

I add here a personal note. I litigated for thirteen years before I became a law professor—as a Deputy Public Defender and the Director of the New Jersey Division of Mental Health Advocacy. I spent many years as a law professor, directing a clinic in which our students represented persons with mental and physical disabilities. I have also served as a consultant in many forensic cases. In these contexts, I have dealt with dozens and dozens of expert witnesses in matters involving the rights of persons with mental disabilities in individual and class action cases.[142] I have also done countless

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139 Perlin & Weinstein, *supra* note 99.

140 Michael L. Perlin, *"John Brown Went Off to War": Considering Veterans Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445, 455-56 (2013); Alison J. Lynch & Michael L. Perlin, *"Life's Hurried Tangled Road": A Therapeutic Jurisprudence Analysis of Why Dedicated Counsel Must Be Assigned to Represent Persons with Mental Disabilities in Community Settings*, 35 BEHAV. SCI. & L. 353 (2017)); Perlin & Gallagher, *supra* note 56; *See also*, Heather Ellis Cucolo & Michael L. Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185, 243 (2013).

141 *See* PERLIN, *supra* note 4, at 215 ("The Convention on the Rights of Persons with Disabilities . . . is a document that resonates with TJ values"). On the relationship between international human rights and therapeutic jurisprudence in general, *see* Winick, *supra* note 58, at 572: "the remedy for the abuses in the mental health system of Hungary and other Eastern European nations is a healthy dose of international human rights law and therapeutic jurisprudence." In a manuscript in progress, I am exploring the relationship between the CRPD, therapeutic jurisprudence and trauma. *See* Mehgan Gallagher & Michael L. Perlin, *"The Pain I Rise Above": How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities* (on file with author). I also believe the application of international human rights law in this context is entirely consonant with *procedural justice* values. *See* Perlin, *supra* note 8, at 1188. "Procedural justice" asserts that "people's evaluations of the resolution of a dispute (including matters resolved by the judicial system) are influenced more by their perception of the fairness of the process employed than by their belief regarding whether the 'right' outcome was reached." Thomas L. Hafemeister et al., *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 200 (2012). On procedural justice in the context of mental disability law, *see*, *e.g.*, Sumner J. Sydeman et al., *Procedural Justice in the Context of Civil Commitment: A Critique of Tyler's Analysis*, 3 PSYCHOL. PUB. POL'Y & L. 207, 216 n.49 (1997).

142 As a Deputy Public Defender in New Jersey, I filed a class action suit *Dixon v. Cahill*, No. L30977/y-71 P.W. (N.J. Super. Ct. Law Div. 1973), *reprinted in* PERLIN & CUCOLO, *supra* note 59, §

site-visits to psychiatric institutions and to institutions for persons with intellectual disabilities domestically and internationally.[143] I have taught forensic psychologists and psychiatrists in my multiple mental disability law courses at New York Law School for over thirty years, and continue to teach them now through continuing education programs.[144] I believe these experiences have given me a relatively comprehensive picture of what psychiatric institutions are like, and how forensic mental health professionals in these facilities work. Beginning with the baseline that "human rights—including the underlying value of autonomy—should inform correctional practice and forensic psychology,"[145] these experiences have led me to three major conclusions.

First, I believe that witnesses must take seriously the conditions of the institutions they visit, even if the sole purpose of their visit is to assess committability, competency or insanity. Beyond these examples, I believe that this must be done whether the institution is a civil psychiatric facility, a forensic facility, a jail, or a prison. In coming to their expert conclusions about whether an individual meets the statutory standards for commitment, or whether the individual is competent to stand trial, or whether the individual meets the standards for insanity, or whether the mental status should be raised as a potential mitigating factor in a death penalty case, the witness must consider the impact that institutional conditions have on her ultimate conclusion, and—in the appropriate situation—must address these squarely in her report. My experiences have demonstrated to me that what currently is done by psychologists is insufficient. I thus offer a list of means (by no means exclusive) by which forensic psychologists might ameliorate this state of affairs in a proper way: [146]

19-8 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972) (applying Due Process Clause to incompetent-to-stand-trial defendants)), resulting in a ruling that the indefinite incarceration of individuals in the Vroom Building (NJ's maximum security facility for the "criminally insane" violated *Jackson,* and ordered individual hearings for each inmate. The courts ultimately found that 185 of the 225 patients in that facility were illegally detained). *See* Michael L. Perlin, *"May He Stay Forever Young": Robert Sadoff and the History of Mental Health Law*, 33 J. AM. ACAD. PSYCHIATRY & L. 236, 236-37 (2005).

143 Perlin, *"A Change is Gonna Come," supra* note 38, at 485.

144 *See*, *e.g.*, CONCEPT PROF'L TRAINING, *CONCEPT Offers New Course by Michael Perlin and Heather Cucolo*, http://www.concept-ce.com/concept-welcomes-new-collaboration-with-mental-disability-law-and-policy-associates (last visited Oct. 20, 2017); GLOB. INST. OF FORENSIC RESEARCH, *Who We Are*, https://www.gifrinc.com (last visited Oct. 20, 2017). I also present regularly at the Practical Applications in Forensic Psychiatry Grand Rounds Seminar, University of Pennsylvania, Department of Psychiatry, and at the Forensic Fellowship Program, Albert Einstein College of Medicine.

145 Michael S. King, *New Directions in the Courts' Response to Drug and Alcohol Related Legal Problems: Interdisciplinary Collaboration and Collaboration with Defendants*, 6 PHX. L. REV. 917, 925 (2003) (citing Ward & Birgden, *supra* note 12, and Birgden & Perlin, *supra* note 12).

146 By way of example, for a compendium of proposed principles that provide guidance to correctional system administrators to enable forensic disability clients' access to available rehabilitation

- Attend trainings on international human rights law and policy;
- Stay abreast of international and regional court interpretations of human rights norms;
- Visit institutional facilities that are largely in compliance with such norms to get a sense as to what institutional behavioral changes are feasible;
- Create "best practice manuals"[147] for approaches to treating patients in accordance with human rights;
- Become active "whistleblowers"[148] and report human rights violations to the relevant human rights commissions and NGOs;
- Authentically hold each other accountable to take responsibility for human rights violations;
- Advocate for better outpatient services to provide for the sort of less restrictive treatment alternatives that international law demands;[149] and
- Self-assess so as to best insure that sanism and pretextuality do not unduly influence the treatment of forensic patients, and incorporate principles of therapeutic jurisprudence into their daily institutional work, keeping in mind professor Ronner's "three Vs" of voice, validation and voluntariness.[150]

Second, forensic psychologists should follow the lead of lawyers and

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programs, *see* Astrid Birgden, *Enabling the Disabled: A Proposed Framework to Reduce Discrimination Against Forensic Disability Clients Requiring Access to Programs in Prison*, 42 MITCHELL HAMLINE L. REV. 637, 694-96 (2016).

147 *See*, *e.g.*, Risa E. Kaufman, *State and Local Commissions as Sites for Domestic Human Rights Implementation*, *in* HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 89, 101-04 (Shareen Hertel & Kathryn Libal eds., 2011).

148 In a related context, *see* James Thuo Gathii, *Defining the Relationship between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 150 (2009), discussing how the United Nations Convention against Corruption requires that states enact whistleblower laws to ensure the protection of those who come forward and expose governmental corruption. The failure to enact such laws leaves "witnesses and victims unprotected [, which] encourages corrupt practices and impunity, and discourages witnesses from fulfilling a public responsibility." *Id.* at 150 n.87. On how economically and politically disenfranchised groups—and forensic patients are classic examples of such disenfranchised groups—disproportionately suffer from the effects of corruption, *see Id.* at 148.

149 *See*, *e.g.*, *In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 854 (Sur. Ct. 2012) (holding that substantive due process requirement of adherence to principal of least restrictive alternative applied to guardianships sought for mentally persons, relying in part on the language of the CRPD), discussed in Perlin &. Schriver, *supra* note 3, at 387-88.

150 *See supra* text accompanying notes 133-134.

provide *pro bono* services[151] to NGOs, disability rights organizations, and other offices that provide legal representation to these populations in systemic law reform litigation, both domestically and internationally. They should also make their services available to groups doing other sorts of institutional law reform.[152]

Third, researchers should bore down and focus on the conditions of confinement of forensic patients. Consider the range of issues crying out for greater consideration:

- Evaluation of the proposition that it is more cost-effective for governments to provide for outpatient services rather than keep people unnecessarily institutionalized;
- Evaluation of the proposition that treating people in accordance with the principles espoused by therapeutic jurisprudence—focusing again on Professor Ronner's "three Vs" of voice, validation and voluntariness[153]—will lead to greater treatment adherence on the part of patients, whether they have been committed voluntarily or involuntarily;
- Analysis of the extent to which state and local departments of mental health adhere to U.S. constitutional and statutory law (in the context both of the Americans with Disabilities Act[154] and the Supreme Court's "integration mandate" decision of *Olmstead v. L.C.*[155]) and international human rights law (in the context of the CRPD)[156] in providing restoration to competency to stand trial and post-insanity acquittal treatment services in the community, rather than in maximum security forensic hospitals;[157] and
- Consideration of the extent to which certain forensic decision-

151 This includes (but is not limited to) the evaluations of indigent patients, working with lawyers to help them understand psychological nuance, and the conducting of site-visits in institutions.

152 *See*, *e.g.*, Perlin, *Promoting Social Change*, *supra* note 56; Perlin & Gallagher, *supra* note 56; Perlin et al., *supra* note 56; Michael L. Perlin & Yoshikazu Ikehara, *Creation of a Disability Rights Tribunal for Asia and the Pacific: Its Impact on China?* (2011), (New York Law School Legal Studies, Research Paper Series 10/11 #19), http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1744196.

153 *See* Ronner, *supra* note 134, at 94-95.

154 42 U.S.C. §§ 12101 *et seq*. (2009).

155 527 U.S. 581 (1999). *See generally* Perlin, *supra* note 6; Samuel Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012).

156 *See supra* text accompanying notes 44-56.

157 *See* Perlin, *Misdemeanor Outlaw*, *supra* note 99, for an outline of this argument.

> making reflects the implicit bias[158] of xenophobia in its refusal to acknowledge the relevance of international human rights law to institutional decision-making. [159]

I am aware that this is no easy task. Psychologists may be pressured by correctional organizations to engage in practices that violate the APA Ethics Code, in inflicting physical or psychological harm on an offender in the quest to meet organizational requirements for safety and community protection (a schemata in which the organization is the client and the offender is a means to an ends). In such circumstances, the psychologist will have to choose between ethical action (refusing to comply and reporting) or unethical inaction (complying and failing to report).[160] But I believe that international human rights laws demand a different response.

V. CONCLUSION: A CHALLENGE

The revelations of what happened in Guantanamo Bay and Abu Ghraib led to a sober and careful examination by organized psychology (and psychiatry) into the role of mental health professionals in certain military operations. The *denouement* of these revelations led to inquiries into the relationship between what some psychologists and psychiatrists did and international human rights standards. Activists, advocates and scholars have, in recent years, been bringing their focus to bear on the relationship between international human rights and how individuals are treated in psychiatric institutions around the world. Ethical codes mandate that forensic psychologists and forensic psychiatrists behave to ensure that they maximize the values of "fairness and justice" in their dealings with clients.[161] Complicating this entire state of affairs is the contaminating influence of the way that *sanism* and *pretextuality* affect professionals' dealings with persons with mental disabilities.

I titled this subsection of my paper "A challenge," because I believe that all of this *does* present a challenge to concerned psychologists and psychiatrists whose professional work is connected to what goes on in the

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158 *See*, *e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CAL. L. REV. 1359 (2012).

159 My special thanks to Mehgan Gallagher, Debbie Dorfman and Naomi Weinstein for many of the thoughts and suggestions in this section of the paper.

160 Astrid Birgden, *The American Psychological Association's Misuse of the Role of Psychologist-as-Organizational-Consultant to Torture: Where Was the "Bright Line" Position?*, *in* THE WILEY INTERNATIONAL HANDBOOK OF CORRECTIONAL PSYCHOLOGY (D. Polaschek, A. Day & C. Hollin eds., 2017) (forthcoming).

161 ETHICAL PRINCIPLES, *supra* note 86, at 4.

legal system. It is a challenge because we must remain vigilant in light of the shock-the-conscience state of so many institutions around the world,[162] and because it is essential that mental health professionals involve themselves in efforts to rectify the violations of international human rights law that are omnipresent in so many of those institutions, especially in those cases where being passive about those violations also violates ethical codes. The disclosures of what happened at Guantanamo Bay and Abu Ghraib have opened a window that will not, and cannot, be closed.[163]

But, I believe we can learn from our mistakes, and take that knowledge and apply it to the issue that is the centerpiece of this paper: the need for organized psychology—especially forensic psychology—to embrace international human rights requirements applicable to the institutionalization of persons with mental disabilities, especially forensic patients.[164] In doing so, organized psychology will take a major step in "strip[ping] bare the sanist façade"[165] of the institutions.

The critic Paul Williams calls *The Times They Are A-Changin'* a song that is "generous, evangelical, eager to share the truth with the whole world."[166] The line that I chose to begin the title of this paper—*"Your Old Road Is/ Rapidly Agin'"*—was a challenge by the then twenty-two-year-old Dylan to authority figures at all levels of society, a challenge he issued in 1963, at one of the most tumultuous times of American history. We face a time of challenge and tumult now. I believe that if we heed Dylan's challenge, we will be taking a major step in the right direction down a new road.

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162 *See* Perlin, "*A Change is Gonna Come*," *supra* note 38, at 491. The phrase comes from the Supreme Court's decision in Rochin v. California, 342 U.S. 165, 172-73 (1952).

163 For a rare scholarly work that cites to the therapeutic jurisprudence literature in this context, *see* Jordan J. Paust, *The Bush-Cheney Legacy: Serial Torture and Forced Disappearance in Manifest Violation of Global Human Rights Law*, 18 BARRY L. REV. 61, 62 n.2 (2012).

164 It is also essential that this be done within the context of therapeutic jurisprudence. *See* Birgden & Perlin, *supra* note 12 (noting how little attention has been paid to the impact of therapeutic jurisprudence on questions of international human rights law and the role of forensic psychologists).

165 Perlin, *Mirror*, *supra* note 123.

166 PAUL WILLIAMS, BOB DYLAN, PERFORMING ARTIST, 1960-1973: THE EARLY YEARS 93 (2004).