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"Too Stubborn to Ever be Governed by Enforced Insanity": Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases

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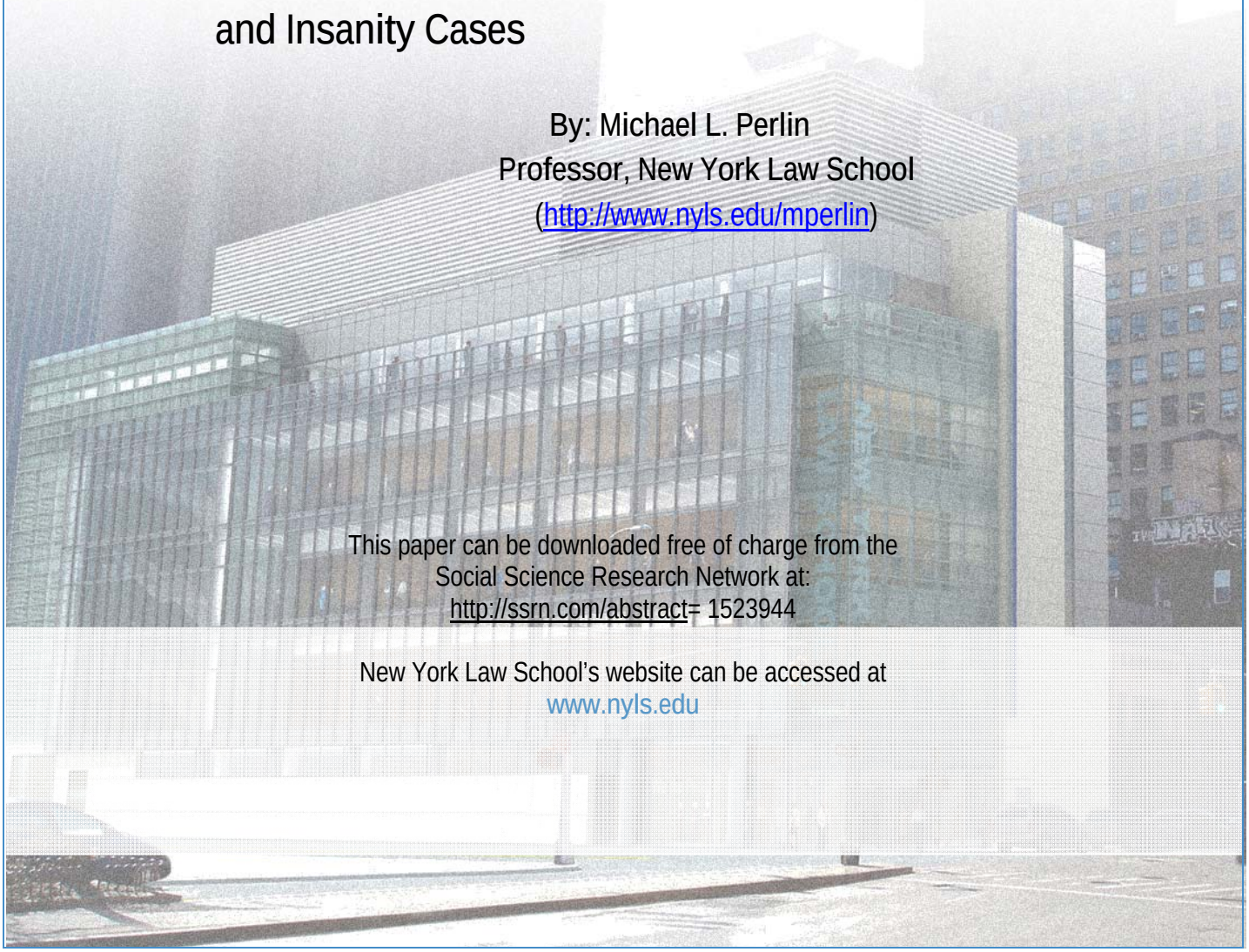

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"Too Stubborn to Ever Be Governed by Enforced Insanity": Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases

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Abstract:

Little attention has been paid to the importance of the relationship between therapeutic jurisprudence (TJ) and the role of criminal defense lawyers in insanity and incompetency-to-stand-trial (IST) cases. That inattention is especially noteworthy in light of the dismal track record of counsel providing services to defendants who are part of this cohort of incompetency-status-raisers and insanity-defense-pleaders . On one hand, this lack of attention is a surprise as TJ scholars have, in recent years, turned their attention to virtually every other aspect of the legal system. On the other hand, it is not a surprise , given the omnipresence of sanism, 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, that infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable, and is based predominantly upon stereotype, myth, superstition, and deindividualization. It is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.

In Part I of this paper, I will examine the literature that seeks to apply TJ principles to the criminal law process in general, drawing mostly on the work of Professor David Wexler. In Part II, I will consider why the lack of attention that I have referred to already is surprising (given TJ's mandate and the fact that many TJ issues are inevitably raised in any insanity or IST case). In Part III, I will then consider why this lack of attention is *not* surprising, given the omnipresence of sanism. In Part IV, I will consider some of the actual counseling issues that might arise in these contexts, and offer some suggestions to lawyers representing clients in cases in which mental status issues may be raised.

I conclude the paper by concluding that we must rigorously apply therapeutic jurisprudence principles to these issues, so as to strip away sanist behavior, pretextual reasoning and teleological decision making from the criminal competency and responsibility processes, so as to enable us to confront the pretextual use of social science data in an open and meaningful way. This gambit would also allow us to address – in a more successful way than has ever yet been done – the problems raised by the omnipresence of ineffective counsel in cases involving defendants with mental disabilities

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Keywords: Therapeutic jurisprudence; counsel; insanity; incompetency; criminal procedure; mental disability

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Introduction

Notwithstanding the fact that therapeutic jurisprudence ("TJ") has expanded its vision far beyond its original focus on mental disability law issues,[1] and notwithstanding the fact that judges and scholars have eagerly embraced TJ concepts and values in matters involving a wide array of legal issues,[2] little attention has been paid to the importance of the relationship between TJ and the role of criminal defense lawyers in insanity and incompetency-to-stand-trial ("IST") cases.[3] Although David Wexler, one of the founders of TJ, has recently turned his attention to an important set of criminal-law based questions,[4] the specific subset of insanity and IST cases has not drawn any recent commentary.

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[1]*See e.g.,* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000) ("PTJ"); JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003) ("JTK").

[2]*See e.g.,* http://www.law.arizona.edu/depts/upr-intj/ *(Cumulative bibliography).*

[3]I have considered the relationship between TJ and the insanity defense in MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 417-38 (1994), but did not focus on the lawyering issues in that context. *See infra* Part III and IV B.

[4]*See* DAVID B. WEXLER, REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (2008); David B. Wexler, *A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law, Research, and Practice,* 7 FLA. COASTAL L. REV. 95 (2005) (Wexler, *Framework)*; David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer,*17 ST. THOMAS L. REV. 743 (2005) (Wexler, *Rehabilitative Role)*; David B. Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law,* 38 CRIM. L. BULL. 205 (2002); The most important and recent critique of Prof. Wexler's approach to these questions, see Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable To Join You, Already (Somewhat Similarly) Engaged,* 48 B.C. L. REV. 539 (2007), does not touch on these issues. For Prof. Wexler's response to Prof. Quinn, *see* 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 (2007) (Wexler, *Not a Party Pooper).* Again, this topic is not discussed in that article either.

This lack of attention is significant, and it is both surprising, and not surprising. It is important because, as I will discuss at greater length, the trial record of defense counsel representing criminal defendants with mental disabilities in general is abysmal.[5] In 1973, Judge David Bazelon referred to certain appointed criminal defense lawyers as "walking violations of the Sixth Amendment"[6]; there is not a shred of evidence that suggests that quality of counsel in insanity or IST cases has improved in any significant way.[7] It is surprising because, as I have already noted, TJ scholars have begun to exhaustively consider (virtually) all aspects of substantive law, of the judging of cases, and of the roles of lawyers in representing clients (thus making this specific omission even more glaring). But, on the other hand, it is *not* surprising because of the omnipresence of sanism – 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 in all aspects of the criminal justice system.[8] And it is not a surprise that this all-pervasive sanism may be at its most pernicious in this subset of cases: ones that

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[5]*See* Michael L. Perlin, *"Life Is In Mirrors, Death Disappears": Giving Life to Atkins*, 33 N. MEX. L. REV. 315, 335 (2003) ("The quality of counsel in providing legal representation to mentally disabled criminal defendants is a disgrace").

[6]David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973).

[7]For earlier considerations, *see e.g.*, Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 58-59; Ingo Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 47 (1987); Henry J. Steadman, *Mental Health Law and the Criminal Offender: Research Directions of the 1990's*, 39 RUTGERS L. REV. 323 (1987).

[8]*See e.g.*, Michael L. Perlin, *"And My Best Friend, My Doctor / Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 750 (2005). See generally text *infra* accompanying notes 45-47.

involve the representation of the "most despised and most morally repugnant" group of individuals in society,"[9] and the type of case that is perhaps the most misunderstood by the general public (and by the legal system as well).[10]

The issue of ineffectiveness of counsel becomes especially pointed when a defendant's trial competency status is raised or when the insanity defense is pled. Confounding the process in these cases is the dispositional phase, since virtually all of these defendants are institutionalized for longer times -- often, *far* longer times -- than had they pled or been found guilty of the underlying charge.[11] This phenomenon persists despite United States Supreme Court decisions that ostensibly limit the amount of time defendants can be detained when they are deemed unlikely to attain competency in the foreseeable future.[12] All of this suggests to me that this should be an area of great interest to TJ scholars; I hope this paper spurs some interest in it. Here, I will speculate as to the reasons for this comparative lack of emphasis, and will offer some ideas that I believe are worthy of future scholarly consideration in this area.

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[9] See Deborah C. Scott et. al., *Monitoring Insanity Acquittees: Connecticut's Psychiatric Security Review Board*, 41 HOSP. & COMMUNITY PSYCHIATRY 980, 982 (1990); Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1379 (1997).

[10] *See generally*, PERLIN, *supra* note 3.

[11] *See e.g.*, Jones v. United States, 463 U.S. 354 (1983).

[12] *See* Jackson v. Indiana, 406 U.S. 715 (1972); *See generally*, Michael L. Perlin, *"Everything's a Little Upside Down, As a Matter of Fact the Wheels Have Stopped" : The Fraudulence of the Incompetency Evaluation Process*, 4 HOUSTON J. HEALTH L. & POL'Y 239 (2004).

In Part I of this paper, I will examine the literature that seeks to apply TJ principles to the criminal law process in general, drawing mostly on the work of Professor David Wexler. In Part II, I will consider why the lack of attention that I have referred to already is surprising (given TJ's mandate and the fact that many TJ issues are inevitably raised in any insanity or IST case). In Part III, I will then consider why this lack of attention is *not* surprising, given the omnipresence of sanism. In Part IV, I will consider some of the actual counseling issues that might arise in these contexts, and offer some suggestions to lawyers representing clients in cases in which mental status issues may be raised. I will then offer some modest conclusions.

The title of this paper comes, in part, from Bob Dylan's brooding and reflective song, *Up To Me*, an outtake from **Blood on the Tracks,** and subsequently released on **Biograph** some eleven years after it was first recorded. The verse from which it comes includes these lines:

> I was just too stubborn to ever be governed by enforced insanity,
>
> Someone had to reach for the risin' star,
>
> I guess it was up to me.[13]

The lyric suggests that even after the imposition of non-responsibility ("enforced insanity"), the protagonist retains some important measure of responsibility ("I guess it was up to me"). As I will discuss subsequently, this is also an issue that arises in cases in which the attorney may enter a plea of NGRI (not guilty by reason of insanity) for a client who is unaware of the implications of that plea, a topic

[13] http://www.bobdylan.com/#/songs/me (Last accessed, August 8, 2009).

certainly within purview of a TJ analysis. This lyric, thus, I think, is perfectly appropriate for use in this paper.

I. TJ and the criminal law

In a recent article, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, Prof. David Wexler one of the fathers of the TJ movement, sets out a blueprint for criminal defense lawyers who want to embrace TJ in their practice:

> In the present article, I will identify the potential rehabilitative role of the attorney from the beginning stages--possible diversion, for example--through sentencing and even beyond--through conditional or unconditional release, and possible efforts to expunge the criminal record. This article has two principal purposes; first, to call for the explicit recognition of a TJ criminal lawyer, and to provide, in a very sketchy manner, an overview of that role; second, to propose an agenda of research and teaching to foster the development of the rehabilitative role of the criminal lawyer.[14]

Although Wexler concedes that "the legal profession alone cannot solve the problem of criminality or rehabilitate persons involved in the criminal justice system," he argues that, nonetheless, "criminal lawyers can make a dent, salvage some lives, work with other professionals and advocate for services and changes in policy."[15]

To this end, he surveys the literature on how criminal defense lawyers can act as "change agents" by developing relationships with their clients premised on trust

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[14]Wexler, *Rehabilitative Role, supra* note 4, at 745.

[15]*Id.* at 745, n. 12.

and respect,[16] and by engaging in what is called "motivational lawyering."[17] Subsequently, when Wexler moves on to a discussion of plea and sentencing considerations,[18] he argues "a genuine acceptance of responsibility--especially if coupled with an apology -- is generally regarded as therapeutically welcome by the victim and as a good first rehabilitative step for the defendant."[19] As I will discuss shortly, this insight (one that appears to apply to much of the criminal law process) does not appear, at first blush, to be one that will have much of an impact on the cases that I am discussing in this paper: cases involving defendants who plead insanity or defendants on whose behalf the incompetency status is raised.[20]

II. It's a surprise

Scholars have begun to apply TJ concepts to practically every question of interest to the legal system, especially in the context of persons with mental disabilities. As I noted in an article that I wrote eight years ago:

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[16]*Id.* at 748, citing Michael D. Clark, *A Change-Focused Approach for Judges,* in JTK, supra note 1, at 137- 148; *see also* Marcus T. Boccaccini et al., *Development and Effects of Client Trust in Criminal Defense Attorneys: Preliminary Examination of the Congruence Model of Trust Development,* 22 BEHAV. SCI. & L. 197 (2004).

[17]*Id.* at 748, citing Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counseling,* 38 CRIM. L. BULL. 225 (2002).

[18]*See also,* on this point, Bruce Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model,* 5 PSYCHOL. PUB. POL'Y & L. 1034 (1999).

[19]Wexler, *Rehabilitative Role, supra* note 4, at 754, citing, inter alia, Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure,* 114 YALE L.J. 85 (2004).

[20]The invocation of the incompetency status is in no way an admission of factual guilt, though it is often treated that way. *See* Perlin, *supra* note 12, at 245, discussed *infra* note 34.

> Recent therapeutic jurisprudence articles and essays have thus considered such matters as the insanity acquittee conditional release hearing, health care of mentally disabled prisoners, the psychotherapist-patient privilege, incompetency labeling, competency decision-making, juror decision-making in malpractice and negligent release litigation, competency to consent to treatment, competency to seek voluntary treatment, standards of psychotherapeutic tort liability, the effect of guilty pleas in sex offender cases, correctional law, health care delivery, "repressed memory" litigation, the impact of scientific discovery on substantive criminal law doctrine, and the competency to be executed.[21]

Importantly, scholars have also begun to consider the relationship between TJ and the actual act of lawyering[22] and the act of judging.[23] Yet, astonishingly, notwithstanding, the "rivers of ink, mountains of printer's lead, [and] forests of paper

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[21]Michael L. Perlin, *For the Misdemeanor Outlaw: The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALABAMA L. REV. 193, 228 (2000) (Perlin, *Outlaw)*; *see also,* 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 2D-3, at 536-38 (2d ed. 1998). On the application of TJ principles to other areas of the law, *see e.g.*, Michael L. Perlin, *A Law of Healing,* 68 U. CIN. L. REV. 407, 408 (2000) (discussing TJ's use in such areas as jury reform, workers' compensation, domestic violence, and labor arbitration).

[22]*See e.g.*, Bruce J.Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills*, 17 ST. THOMAS L. REV. 429 (2005); Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. J. DISP. RESOL. 1 (2006); Dennis P. Stolle, et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering,* 34 CAL. W. L. REV. 15 (1997); Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation,* 37 CAL. W. L. REV. 105, 108 (2000); *see generally*, PTJ, *supra* note 1.

Professor Winick has also written extensively and superbly about the relationship between TJ and the incompetency to stand trial process in general, but has not focused on the specific counsel-related issues that are at the heart of this paper. See e. g., Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571 (1995); Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of Medina v. California and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817 (1993).

[23]*See* JTK, *supra* note 1.

[that] have been expended on [debating the insanity defense],"[24] and notwithstanding the numerical significance of the incompetency status,[25] *this* question has not been discussed at length in the legal literature.[26]

III. It's not a surprise

In 1994, in a book-length treatment of the insanity defense, I urged policy makers "to weigh the therapeutic potential of the different policy choices that are presented at each of [the] points" of the insanity defense system in order to make that system "coherent."[27] In the course of the sub-chapter that I devoted to this question, I considered a range of insanity defense policy issues:

- Is a non-responsibility verdict therapeutic?
- Does the substantive standard matter?
- Do procedural rules matter?
- Should post-acquittal commitment procedures track the traditional involuntary

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[24]Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 516 (1968).

[25]Twenty years ago, it was estimated that there were 25,000 evaluations per year. *See* Bruce Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243, 245 (1987).

[26]For a rare example of a discussion of a collateral issue, *see* Sandy Meng Shan Liu, *Postpartum Psychosis: A Legitimate Defense for Negating Criminal Responsibility?*, 4 SCHOLAR 339, 375-76 (2002):

> In cases of infanticide, the concept of diminished capacity avoids a claim of insanity and potentially reduces charges of murder to manslaughter, resulting in rehabilitative confinement rather than penal incarceration This result most closely fits the rubric of therapeutic jurisprudence by making a legal judgment with an awareness of mental health implications, sentencing difficulties, and the offenders' rehabilitation needs.

[27]PERLIN, *supra* note 3, at 419.

civil commitment model, or is a separate, more restrictive means of determining commitment appropriate?

- Once institutionalized, how should insanity acquittees be treated?, and
- How should insanity acquittees be monitored in community settings?[28]

I was not the first to consider some of these questions,[29] but again, neither my previous work nor the work of others have dealt with the questions I am raising here.

Interestingly, at the end of the book subchapter to which I just referred, I listed other possible questions that were beyond the scope of that work. One of them was "the systemic ways that counsel is assigned to potential insanity pleaders."[30] In the footnote in which I raise that issue, I touch on the topic of this paper (some 15 years later). This is what I wrote then: "Lawyers representing [mentally disabled criminal defendants] often ignore potential mental status defenses, or, in some cases, contradictorily, seek to have the insanity defense imposed on their client over his

[28] *Id.* at 429-36. I then noted that there remained a "menu" of other issues that needed to be considered from a TJ perspective: "the procedural due process requirements needed at the recommitment process, the right of defendants to refuse to enter an insanity plea, the impact of a failed insanity plea on a subsequent sentence, the impact of a successful plea on other legal statutes, and the systemic ways that counsel is assigned to potential insanity pleaders." *Id.* at 436-37.

[29] *See e.g.*, David Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process,* 27 CRIM. L. BULL. 18 (1991); Robert A. Fein, *How the Insanity Acquittal Retards Treatment*, in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 49, 52-55 (David Wexler ed. 1990); Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness,* 1 PSYCHOL. PUB. POL. & L. 534 (1995).

[30] PERLIN, *supra* note 3, at 437.

objections. Such lawyers often succumb to sanist stereotypes and are compliant co-conspirators in pretextual court decisions."[31]

The following examples represent some of the TJ related-issues raised by cases involving criminal defendants pleading the insanity defense or for whom the incompetency status has been raised:

- if a defendant is, in fact, incompetent to stand trial, that means that he does not have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and or a "rational as well as factual understanding of the proceedings against him;"[32] how can TJ principles be invoked in such a case?
- If a defendant is initially found to be incompetent to stand trial, will the lawyer act as most lawyers and consider him to be *de facto* incompetent for the entire proceeding (as a significant percentage of lawyers do act for *any* client who is institutionalized)?[33]
- If a defendant is found to be incompetent to stand trial, will the lawyer assume that he is also guilty of the underlying criminal charge?[34]

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[31] *Id.* at 437 n. 106, citing, in part, Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373, 404-06 (1992).

[32] Dusky v. United States, 362 U.S. 402, 402 (1960). See Perlin, *Outlaw*, *supra* note 21, at 200 (criticizing *Dusky* as "confusing and less than helpful").

[33] *See* Michael L. Perlin, *You Have Discussed Lepers and Crooks: Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 696-97 (2003) ("these lawyers treat their clients as "patients that are sick," quoting BRUCE ARRIGO, PUNISHING THE MENTALLY ILL: A CRITICAL ANALYSIS OF LAW AND PSYCHIATRY 29-30 (2002).

[34] *See* Perlin, *supra* note 12, at 246:

> First, the entire system--implicitly and explicitly -- assumes that the defendant committed the predicate criminal act with which he is charged. Although there is

- What are the issues that a lawyer must consider in addition to the client's mental state in assessing whether or not to invoke an incompetency determination?[35]
- What are the TJ implications for a case in which the incompetency status is not raised by the defendant, but, rather, by the prosecutor or the judge?[36]
- Are there times when TJ principles might mandate not raising the incompetency status (for example, in a case in which the maximum sentence to which the defendant is exposed is six months in a county workhouse but is in a jurisdiction in which IST defendants are regularly housed in maximum security forensic facilities for far longer periods of time than the maximum to which they could be sentenced)?[37]

> nothing in the invocation of the incompetency status that at all concedes factual guilt (as opposed to the entry of a not-guilty-by-reason-of-insanity plea that concedes the commission of the underlying criminal act), it is assumed by all that the defendant did, in fact, commit the crime.

And *see* Perlin, *Outlaw*, *supra* note 21, at 206-07:

> Consider this easy hypothetical. A defendant is charged with crime and is, in fact, factually innocent. Walking to the courthouse for the initial bail hearing, he is hit on the head by a cinder block from ongoing courthouse construction, causing severe organic brain damage. He will be found--most likely--incompetent to stand trial, but such finding in no way should allow us to assume that he is factually "guilty" of the underlying charge.

[35]*See e.g.*, Paul A. Chernoff & William G. Schaffer, *Defending the Mentally Ill: Ethical Quicksand,* 10 AM. CRIM. L. REV. 505 (1972); Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581 (2000).

[36]*See* Perlin, *Outlaw, supra* note 21, at 198 n. 33: "Also, unlike other criminal pleas, [the incomptency status] can be raised sua sponte by the court or the prosecutor." See Drope v. Missouri, 420 U.S. 162 (1975); 18 U.S.C. § 4241 (a) (1994); Hamm v. Jabe, 706 F.2d 765, 767 (6th Cir. 1983); United States v. Warren, 984 F.2d 325, 329 (9th Cir. 1993).

[37]*See generally*, Perlin, *Outlaw, supra* note 21, at 201-07. I pose a variant on this question in MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CASES AND MATERIALS 753 (2d ed. 2005).

- What are the TJ implications of counseling a defendant to plead, or not to plead, the insanity defense?[38]
- Can a defendant who pleads NGRI ever, truly, "take responsibility?"[39]
- Does the fact that the insanity-pleading defendant must concede that he committed the actus reus distort the ongoing lawyer-client relationship?[40]
- To what extent do the ample bodies of case law construing the "ineffectiveness assistance of counsel" standard established by the US Supreme Court in *Strickland v. Washington*[41] even consider the implications of TJ lawyering?[42]
- To what extent does the pervasiveness of sanism make it obligatory for lawyers

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[38]*See e.g.*, Richard J. Bonnie et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48 (1996).

[39]*See* Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 449 (1995):

> The entry of the insanity plea has been seen as evidence of a failure to demonstrate contrition (presumably because the plea entry denied legal responsibility for the offense), and that lack of contrition has been seen as a failure to accept responsibility, thus bringing the defendant out of the ambit of another Guideline ... which provides for a downward departure if the defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."

[40]*See* Jones v. United States, 463 U.S. 354, 363 (1983) ("a verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness.").

[41]466 U.S. 668, 689 (1984) ("whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result").

[42]*See* 4 PERLIN, *supra* note 21, § 8A-4.3, at 60-65 (adequacy of counsel in IST proceedings), and § 9A-7, at 235-41 (adequacy of counsel in insanity cases); § 12-3.6, at 505-10 (adequacy of counsel in death penalty cases involving defendants with mental disabilities) (discussing case law).

in such cases to educate jurors about both sanism and why sanism may be driving their decision-making, and to what extent should lawyers in such cases embark on this educational process using TJ principles?[43]

This is a modest list, but I believe it to be a reasonable starting point.

Having said this, a more important question is raised: why is this the first time, to the best of my knowledge, that any academic has addressed this precise issue? Such questions are nearly impossible to answer, but I believe that a partial explanation for this may be found in what I have already referred to as "sanism."[44]

Again, sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes

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[43]On the sanism of jurors in general, see Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 NOTRE DAME J.L., ETHICS & PUB. POL'Y 239, 242-42(1994); *see also*, Perlin, *supra* note 5, at 335, quoting Denis Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 536 (1998) (stating that "the defense lawyer must educate the jury about mental retardation, its various presentations, and the distinct difference between mental retardation and mental illness").

[44] I am omitting any discussion of "pretextuality" in this paper, as I have previously written about it extensively in the incompetency-to-stand-trial process. See e.g., Perlin, *note* 12; Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 369 (1994); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993) (defining pretextuality as 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. 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, blase judging, and, at times, perjurious and/or corrupt testifying).

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) (Perlin, *Neonaticide)*. On pretextuality in the criminal justice process, *see generally*, MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 205-58 (2000).

of racism, sexism, homophobia, and ethnic bigotry. It infects both our jurisprudence and our lawyering practices.[45] Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense"(OCS)[46] and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.[47]

Some eight years ago, I articulated this view (or other word choice) on sanism and the incompetency-to-stand-trial process:

> Sanism similarly infects incompetency-to-stand-trial jurisprudence in at least four critical ways: (1) courts resolutely adhere to the conviction that defendants regularly malinger and feign incompetency; (2) courts stubbornly refuse to understand the distinction between incompetency to stand trial and insanity, even though the two statuses involve different concepts, different standards, and different points on the "time line"; (3) courts misunderstand the relationship between incompetency and subsequent commitment, and fail to consider the lack of a necessary connection between post-determination institutionalization and appropriate treatment; and (4) courts regularly accept patently inadequate expert testimony in incompetency to stand trial cases.[48]

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[45]*See generally*, PERLIN, *supra* note 43, at 21-58; Perlin, *supra* note 31; Michael L. Perlin, "*Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEG. ISS. 3 (1999).

[46]OCS is a "powerful unconscious animator of legal decision-making," Perlin, *Neonaticide, supra* note 44, at 25; *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) (stating that OCS exemplified by the attitude of "What I know is 'self evident'; it is 'what everybody knows'").

[47]Perlin, *Neonaticide, supra* note 44, at 24-25, citing Perlin, *supra* note 45, at 4-5.

[48]Perlin, *Outlaw, supra* note 21, at 235-36.

Nothing has happened in the intervening years to cause me to change my mind,[49] and these factors help explain the even more pressing need for lawyers to think about the TJ implications of their actions.

In addition, over a decade ago, I stated the following about the relationship between sanism and the insanity defense:

> In short, insanity defense jurisprudence is the jurisprudence of sanism. Like the rest of the criminal trial process, the insanity defense process is riddled by sanist stereotypes and myths. For example:
>
> -reliance on a fixed vision of popular, concrete, visual images of craziness;
>
> -an obsessive fear of feigned mental states;
>
> -a presumed absolute linkage between mental illness and dangerousness; -sanctioning of the death penalty in the case of mentally retarded defendants, some defendants who are "substantially mentally impaired," or defendants who have been found guilty but mentally ill (GBMI);
>
> -the incessant confusion and conflation of substantive mental status tests, and
>
> -the regularity of sanist appeals by prosecutors in insanity defense summations, arguing that insanity defenses are easily faked, that insanity acquittees are often immediately released, and that expert witnesses are readily duped.[50]

Again, I believe that these factors help explain both why TJ principles have largely been absent from lawyering in this area of the law, and the need for the application of these principles.

IV. How lawyers counsel clients in mental status cases

A. The danger of presuming incompetency

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[49] *See* Perlin, *supra* note 12, at 250-51.

[50] Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment,* 82 IOWA L. REV. 1375, 1422 (1997).

One of the likely responses of sanist lawyers in cases such as these is the trivialization of anything a client might say (as to condition, desire for treatment, desire to refuse treatment, etc.), presuming that their clients are incompetent to engage in autonomous decisionmaking about any matter involving treatment, trial strategy, or other important life decisions.[51] This trivialization further infects the lawyer-client relationship in multiple ways that make it less likely that the lawyer's counseling role is truly fulfilled.[52]

This is poisonous in both incompetency and in insanity cases. Lawyers representing individuals with mental disabilities typically reject the notion that their client may be competent to engage in any sort of autonomous decisionmaking (often engaging in what I have characterized, in discussing civil commitment law and representation, as "the not-atypical 'presumption of incompetency' that is all too often de rigeur in these cases."[53] When the incompetency status is raised in a criminal case, it is not unreasonable to expect that many lawyers also impute a blanket incompetency in all aspects of life decisionmaking to such clients ("If he is not competent to stand trial, how can he be competent to participate in decisionmaking about medication?").[54]

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[51]Perlin, *supra* note 33, at 722.

[52]*See generally*, on the TJ role of the defense counsel, Wexler, *Not Such a Party Pooper, supra* note 4, at 598-604.

[53]Michael L. Perlin, *"I Might Need a Good Lawyer, Could Be Your Funeral, My Trial": Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases,* 28 WASH. U. J. L. & POL'Y 241, 262 (2008). *See supra* text accompanying note 33.

54 *Compare* MICHAEL L. PERLIN ET AL, COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION (2008), at 26-63 (competence to stand trial), to *id.* at 148-66

Bruce Winick and his colleagues have suggested that, in view of this reality and in consideration of the negative psychological effects of incompetency labeling, criminal attorneys can help their clients interpret that legal label in a way that "minimizes the risk of adverse psychological consequences."[55] Elsewhere, Winick has urged that "the terminology of incompetency labels should be redesigned to reflect the limited and context-specific nature of individuals' impairment."[56] If these recommendations are to be taken seriously by defense counsel, then there may be some progress made in eroding the level of sanism so often prevalent in the cases under discussion.

B. The implications of an insanity plea

It is no different in insanity cases. Once a defendant argues that he is criminally not responsible for the underlying act, sanist lawyers assume he is "crazy" for all purposes and cannot participate meaningfully in treatment planning or decisionmaking. This approach ignores the reality that the legal category of "insanity" subsumes multiple conditions, and that these categories should not be aggregated unthinkingly by defense counsel. Consider, by way of gross examples, the defendant whose actions are totally planful ("Gd has told me to do this act to save us from the

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(competence to refuse treatment).

[55]BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 63-65 (1997), as quoted in Dennis Stolle et al, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 37 (1997), and *see id:* "the lawyer can tell his or her client that the incompetency determination is merely an opportunity for the client to secure needed treatment and a delay in the proceedings that will enable the client to function more effectively in the attorney-client relationship when the criminal proceedings are resumed".

[56]Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law,* 1 PSYCHOL. PUB. POL'Y & L. 6, 41 (1995).

Klingon empire";"Satan has ordered me to shoot the 7th girl in a purple sweater I see on a sunny day"),[57] the defendant whose actions are utterly incomprehensible to the lay public except as the result of mental illness (a category that subsumes many neonaticide cases and other "empathy outliers"),[58] or the defendant whose explanation of his actions is rendered in what is often called "word salad."[59]

In his article calling for a restructured and limited insanity defense, Professor Christopher Slobogin argues:

> [M]ental disorder should be relevant to criminal culpability only if it supports an excusing condition that, under the subjective approach to criminal liability increasingly accepted today, would be available to a person who is not mentally ill. The three most prominent such conditions would be: (1) a mistaken belief about circumstances that, had they occurred as the person believed, would amount to a legal justification; (2) a mistaken belief that conditions exist that amount to legally recognized duress; and (3) the absence of intent to commit crime (that is, the lack of mens rea, defined subjectively in terms of what the defendant actually knew or was aware of).[60]

Although I disagree with Slobogin's ultimate conclusion about the need to reduce the defense, this categorization underscores the point I wish to make: our aggregating all types of insanity defenses into one grouping, our labeling it all as

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[57]The M'Naghten case is the textbook example of this category. See PERLIN, *supra* note 3, at 78-84.

[58]Perlin, *Neonaticide, supra* note 44, at 3; Perlin, supra note 3, at 193. See generally, Michele Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 8 DEPAUL J. HEALTH CARE L. 3 (2004).

[59]A "confusing jumble of loose associations." *See* Terry Maroney, *Emotional Competence, Rational Understanding, and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1392 n.99 (2006), *quoting* Peter Bachman & Tyrone D. Cannon, *Cognitive and Neuroscience Aspects of Thought Disorder*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 495-96 (Keith J. Holyoak & Robert G. Morrison eds., 2005).

[60]Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1202 (2000).

"crazy behavior," and our subsequent arbitrary dismissal of anything the defendant might have to say, is sanist to the core and equally antithetical to the spirit and purpose of therapeutic jurisprudence.

It is also essential to consider the need for the lawyer to share with the defendant the likelihood that the assertion of the incompetency status or the entry of the insanity plea will likely lead to a far lengthier time of institutionalization than if the defendant is convicted of the underlying crime.[61] I believe that the failure to make this disclosure *in se* meets the *Strickland v. Washington* standard of ineffectiveness of counsel.[62] But beyond this, there is more to consider.

C. Some possible conversations

Think of some of the conversations that a TJ-minded defense lawyer could initiate with clients on whose behalf the incompetency status is raised,[63] or who proffer an insanity defense:[64]

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[61] *See supra* text accompanying notes 11-12.

[62] *See supra* text accompanying notes 41-42.

The Supreme Court recently considered *Strickland* in an insanity defense context, holding that a defendant was not deprived of effective assistance, in prosecution for first-degree murder, when his counsel recommended withdrawing his insanity defense in a case in which that claim "stood almost no chance of success." Knowles v. Mirzayance, 129 S. Ct. 1411, 1420 (2009).

[63] When I presented parts of this paper to the American-Psychology Law Society conference last year, I noted that, in my experience, this was done almost exclusively by defense counsel, and then said jokingly, "except on the TV show *Law and Order*, where the District Attorney character seems to raise it remarkably frequently." At this point, several hands went up, and members of the audience noted their disagreement, pointing out that in their jurisdiction, incompetency was frequently raised by the D.A. I asked where they were from, and all were from Hamilton County, Ohio (Cincinnati). I have yet to hear of this practice being prevalent in any other jurisdiction.

- "That was you at the time of the crime, but you're better now."
- "If you are found incompetent to stand trial, that might make it much easier for some seeking to seize your assets to have you found incompetent for civil purposes as well. We need to discuss that."[65]
- "Let's understand that if we raise the defense, you are likely to hear lots of testimony about how out of it you were then. But that doesn't mean you can't control yourself now or later, or understand what conduct is wrong."
- "If we succeed on this defense, it will lessen your hospital commitment if you see yourself as better and in control, and not as continuing to be ill and irresponsible."[66]

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[64]This inquiry is obviously the most challenging in the rare cases involving "word salad." In a recent article, Professor Maroney notes that discussions in reported decisions involving this disordered thought form are "scarce," Maroney, *supra* note 58, at 1392 n.99, but she notes several cases in which courts characterize the defendant's speech patterns in this way. *See id.*, discussing, inter alia, *Strickland v. Francis*, 738 F.2d 1542, 1544-45 n.3 (11th Cir. 1984) (defendant "exhibited various forms of nonsensical speech, including repeated and acontextual use of the word 'supplemental' evidencing 'a certain disorganization of thought process.'"); *United States v. Hemsi*, 901 F.2d 293, 294-95 (2d Cir. 1990) (noting that the incompetent defendant's testimony was "rambling, confused, irrelevant, or incomprehensible," at one point devolving into "a profane and scatological barrage"). It is beyond the scope of this paper – though certainly worthy of future investigation – to consider the TJ challenges in representing such a client. *See generally*, 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, 613-14 (2006) ("Interviewing and counseling [an oppositional] client can be a real challenge").

[65]*See supra* text accompanying note 35. *See generally*, PERLIN ET AL, *supra* note 54.

[66]My thanks to Bruce Winick for suggesting many of these conversation "ice breakers."

- "If we proceed in this manner (and the defense is successful), there may be an uphill battle for you all the way to convince hospital authorities that you have a right to `have a voice' in your treatment regimen. How can we make it most likely that this will happen?"[67]
- "Are you aware that, when you plead `not guilty by reason of insanity,' that you are conceding that you committed the underlying physical act?"[68]

This sample is not meant to be exclusive, of course. And this will not be an easy task.[69] But it is a start, I think, of a dialogue that must be begun if criminal representation in these cases is to be non-sanist and is to accord with TJ principles, and if the criminal defense lawyer is ever to become, in David Wexler's words a "change agent."[70]

(1) The conversation about drugging

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67 *See infra* Part IV C (1).

68 *Jones,* 463 U.S. at 363. I discuss the implications of this decision in this context in Perlin, *supra* note 12, at 246. For a thorough examination of all the adverse consequences that may flow from the entry of an NGRI plea, *see* Justine A. Dunlap, *What's Competence Got to Do with It: The Right Not to be Acquitted by Reason of Insanity,* 50 OKLA. L. REV. 495, 507-14 (1997). If a defendant does not understand the full range of these consequences, an important question can be raised as to whether the entry of this plea is truly "voluntary."

[69]*See* Wexler & Winick, *supra* note 63, at 613, noting that many clients will be resistant to having such conversations:

> But is the client ready to acknowledge the existence of a problem and willing to participate voluntarily in treatment designed to end it? Not all clients will be. Some will be plagued with denial, rationalization, or minimization - psychological defense mechanisms that will make it difficult to acknowledge that they have a problem or see the appropriateness of engaging in treatment.

[70]Wexler, *Rehabilitative Role, supra* note 4, at 747-48.

There is another conversation that lawyers and defendants need to have in these cases, which revolves around the question of medication. Here is an example of one way a lawyer might approach the matter:

"Let's plan for this. If you do well in treatment, and drugs are likely to seriously diminish your symptoms, you may be discharged earlier. So view the treatment at the hospital as an opportunity. Of course, you may have the right to refuse such medication, but if you choose to do that, you should understand what the consequences might be with regard to the ultimate length of your commitment. Also, the reality is that, even if you do show improvement, judges may be fearful to release you early because of political pressures. So that's something else you need to factor in to your decision."[71]

While this conversation might be a start (and is certainly better than nothing), I do not think it is sufficient in all cases. Consider the complexity of the underlying cluster of legal issues:

- The Supreme Court has made it clear that the most important issue to be considered in a forced-medication forensic case is the patient's "litigational status":[72] Is he currently incompetent to stand trial? Is he proffering an insanity defense? Is he currently incompetent to be executed?[73] Unless/until defense

[71] *See supra* text accompanying note 37.

72 *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. 999, 1019 (2000).

73 *See* Michael L. Perlin, *Recent Criminal Legal Decisions: Implications for Forensic Mental Health Experts*, in FORENSIC PSYCHOLOGY: EMERGING ROLES AND EXPANDING TOPICS 333, 351 (Alan Goldstein ed. 2007): "At least prior to *Sell [v. United States*, 539 U.S. 166 (2003)], the

counsel grasps this, it is certainly not unreasonable to predict that counsel will *not* be sharing with a client all that the client needs to know before coming to an informed decision.

- If a currently-incompetent-to-stand-trial defendant seeks to refuse the imposition of medication while awaiting trial, and assuming he meets the standards articulated in *Sell v. United States*,[74] his decision to refuse medication may result in institutionalization in a maximum security forensic facility for far longer than if he had been convicted of the underlying crime.[75] This is a question that must be confronted.
- Similarly, the Supreme Court's ruling in *Jones v. United States*[76] makes it likely that defendants who invoke this right to refuse will remain institutionalized longer. This is certainly a choice that a defendant may knowingly make, but he must be provided with this information by counsel prior to arriving at this decision.
- Lawyers must also come to grips with the implications of the Supreme Court's

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most critical question in a right-to-refuse evaluation was the defendant's precise 'place' in the criminal justice system"). *See infra* note 74.

74 "[T]he Constitution permits the government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Sell*, 539 U.S, at 179.

75 *See* Perlin, *supra* note 12; Perlin, *Outlaw*, *supra* note 21.

76 463 U.S. 354 (1983). (condoning terms of post-insanity acquittal institutionalization longer than the maximum sentence allowable for the underlying crime, in the case of individuals who are "successful" in their NGRI pleas).

decision in *Riggins v. Nevada,* which held, *on fair trial* grounds, that a competent-to-stand-trial defendant had a right to refuse medication at his trial when he was proffering an insanity defense.[77] *Riggins* focused on the "litigational side-effects" of antipsychotic drugs, and discussed the possibility that the drug use might have compromised "the substance of [the defendant's] trial testimony, his interaction with counsel, [and] his comprehension [at the] trial."[78] But there is also the intriguing question of whether Riggins' appellate victory "could be seen as the triumph of a different kind of sanism: even though the court agreed that the involuntary imposition of medication violated his fair trial rights, it may be that the justices' internal, visual images of a person who 'looked crazy' inspired the decision."[79]

- To some extent, the case law may create for counsel an intolerable "Hobson's choice": if a client is in great psychic pain (with ruinous hallucinations and delusions), and the lawyer suggests that the client take medication, that could have an eventual serious (even deadly) impact on the client.[80] The Supreme

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77 504 U.S. 127 (1992).

78 *Id.* at 138.

79. Perlin, *supra* note 43, at 253. There is no question that Justice Thomas's dissent in *Riggins* is the clearest example of virulent sanism in any judicial opinion in the modern era of mental disability law. *See* Michael L. Perlin, *Decoding Right to Refuse Treatment Law,* 16 INT'L J.L. & PSYCHIATRY 151, 174 (1993); Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence,* 11 BEHAV. SCI. & L. 47, 58-61 (1993).

80 The question of a defendant's right to refuse medication that would make him competent to be executed has been considered – with conflicting results – by state and federal courts (*compare e.g., State v. Perry,* 610 So. 2d 746 (La. 1992) (right to refuse), and *Singleton v. State,* 437 S.E.2d 53, 60-62 (S.C. 1993 (same), *to Singleton v. Norris,* 992 S.W.2d 768 (Ark.

Court's opinion in *Buchanan v. Kentucky*[81] certainly more than hints at the potentiality of this dilemma. More recently, in R*iggins,* by way of example, Justice Thomas, in his dissent, argued that, since the defendant had originally asked for medical assistance (while an inmate, he had "had trouble sleeping" and was "hearing voices"), it could not be said that the state ever "ordered" him to take medication.[82] Had this position prevailed, "would concerned and competent defense lawyers feel as if they were assuming a risk in *ever* seeking psychiatric help for an awaiting-trial defendant?"[83] This issue is a profound one,

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1999) (no such right)). However, the United States Supreme Court has yet to rule on this issue, *see* Michael L. Perlin, *Insanity Is Smashing up Against My Soul: Panetti v. Quarterman and Questions That Won't Go Away*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130890 (last visited, November 11, 2009)**.** Nonetheless, the topic has inspired great debate, especially in the medical and psychological literature. See e.g., Bruce Arrigo & Jeffrey Tasca, *Right to Refuse Treatment, Competency to be Executed, and Therapeutic Jurisprudence: Toward A Systematic Analysis*, 24 L. & PSYCHOL. REV. 1(1999); Alfred Freedman & Abraham Halpern, *The Psychiatrist's Dilemma: A Conflict of Roles in Legal Executions*, 33 AUSTRALIAN & N.Z. J. PSYCHIATRY 629 (1999); Alfred M. Freedman & Abraham L. Halpern, *The Erosion of Ethics and Morality in Medicine: Physician Participation in Legal Executions in the United States,* 41 N.Y.L. SCH. L. REV. 169 (1996); Richard Showalter, *Psychiatric Participation in Capital Sentencing Procedures,* 13 INT'L J.L. & PSYCHIATRY 261 (1990); Alfred M. Freedman & Abraham L. Halpern, *The Psychiatrist's Dilemma: a Conflict of Roles in Legal Executions,* 33 AUSTL. & N.Z. J. PSYCHIATRY 629, 629 (Oct. 1999); Douglas Mossman, *Assessing and Restoring Competency to Be Executed: Should Psychiatrists Participate?*, 5 BEHAV. SCI. & L. 397 (1987); Richard Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics, and the Needs of the Legal System,* 14 LAW & HUM. BEHAV. 67 (1990); Stanley Brodsky, *Professional Ethics and Professional Morality in the Assessment of Competence for Execution: A Reply to Bonnie,* 14 LAW & HUM. BEHAV. 91 (1990); Richard Bonnie, *Grounds for Professional Abstention in Capital Cases: A Reply to Brodsky,* 14 LAW & HUM. BEHAV. 99 (1990).

81 483 U.S. 402 (1987) (no error to admit, in rebuttal of defendant's "extreme emotional disturbance" defense, report prepared following pretrial detainee's request to be treated at state hospital pending trial).

82 *Riggins*, 504 U.S. at 151-52.

83 Perlin, *supra* note 43, at 252.

self-evidently raising extraordinarily difficult ethical issues for defense counsel.

Conclusion

I self-consciously used the word "dilemmas" in the title of this paper,[84] because I think that these are important dilemmas for the entire criminal justice system: for the defendants with mental disabilities who are subject to the court process, for lawyers representing them, for other players in the trial process, and for the public. There has been a remarkable explosion of TJ literature in recent years, but painfully little of it has to do with the questions that I am discussing here. I believe – and this is an intuition that is shaped to some extent by my 38-year career of representing and writing about and thinking about criminal defendants with mental disabilities – that the pervasive sanism of the entire justice system is, in large part, the reason why little attention has been paid to this topic.

In the conclusion of my book-length treatment of the insanity defense, I offered eight recommendations to policymakers as means through which we could seek to ameliorate the "jurisprudential incoherence" of that defense.[85] The seventh of the eight recommendations was this:

> [W]e must rigorously apply therapeutic jurisprudence principles to each aspect of the insanity defense. We need to take what we learn from therapeutic jurisprudence to strip away sanist behavior, pretextual reasoning

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[84]I discuss the dilemma of sanism in the representation of persons with mental disabilities in general in Perlin, *supra* note 33, at 685.

[85]PERLIN, *supra* note 3, at 440.

and teleological decision making from the insanity defense process. This would enable us to confront the pretextual use of social science data in an open and meaningful way.[86]

In that recommendation, I was focusing on the substance of the defense and the procedures that governed insanity defense trials and the insanity acquittee retention process. But I believe we must take my recommendation another step, and apply it to the way that lawyers represent persons in the insanity and incompetency processes (and the ways they represent them before the decision is made to enter into an insanity plea or seek an incompetency adjudication). If we begin to think about the TJ implications of all of this, then I think we will be making important progress in an area that has always remained hidden from the public view.

The title of this paper comes in part from Bob Dylan's song about artistic and personal commitment.[87] Paul Williams argues that, in *Up To Me*, Dylan is accepting responsibility for everything on the **Blood on the Tracks** album, overt or covert, contrived or genuine.[88] A lawyer seeking to reject sanism and to embrace therapeutic jurisprudence in the representation of a mentally disabled criminal defense client must do no less.

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[86] *Id.* at 443.

[87] OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 650 (2004).

[88] PAUL WILLIAMS, BOB DYLAN, PERFORMING ARTIST: 1974-1986, THE MIDDLE YEARS 37 (1994). *Up To Me* was an outtake from **Blood on the Tracks**. See http://www.experiencefestival.com/a/Blood_on_the_Tracks_-_Outtakes_and_alternate_versions/id/617972 (last accessed, November 13, 2009).