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“WHERE THE WINDS HIT HEAVY ON THE BORDERLINE”:* MENTAL DISABILITY LAW, THEORY AND PRACTICE, “US” AND “THEM”

*Michael L. Perlin***

A few years ago, I began to use Bob Dylan titles and lyrics as the embarkation point for all my article and book titles.¹ I decided to do this in large part because it is clear to me that Dylan's utterly idiosyncratic “take” on the world provides us with a never-ending supply of metaphors for an analysis of any aspect of mental disability law.

Among the lyrics that I have drawn on is a line from Dylan's brilliant song *Idiot Wind* that I used as the epigrammatic beginning of an article forthcoming in the *Iowa Law Review*: “*The Borderline Which Separated You From Me*”: *The Insanity Defense, the Authori-*

* Bob Dylan, *Girl of the North County*, in BOB DYLAN, LYRICS, 1962-1985, at 54 (1985).

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1. See, e.g., MICHAEL L. PERLIN, “ON THE WATERS OF OBLIVION”: SANISM, PRETEXTUALITY, AND THE DEVELOPMENT OF MENTAL DISABILITY LAW JURISPRUDENCE (forthcoming 1998); Michael L. Perlin, “Dignity was the First to Leave”: *Godinez v. Moran*, *Colin Ferguson*, and the Trial of Mentally Disabled Criminal Defendants, 14 BEHAV. SCI. & L. 61 (1996); Michael L. Perlin, “The Executioner's Face Is Always Well-Hidden”: *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201 (1996); Michael L. Perlin, “I'll Give You Shelter from the Storm”: *Privilege, Confidentiality, and Confessions of Crime*, 29 LOY. L.A. L. REV. 1699 (1996); Michael L. Perlin & Deborah A. Dorfman, *Is It More Than “Dodging Lions and Wastin' Time”? Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCHOL. PUB. POL'Y & L. 114 (1996); Michael L. Perlin, “Make Promises by the Hour”: *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947 (1997); Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1996); Michael L. Perlin, “No Direction Home”: *The Law and Criminal Defendants with Mental Disabilities*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 605 (1996); Michael L. Perlin, “There's No Success Like Failure/And Failure's No Success at All”: *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. (forthcoming 1998).

*tarian Spirit, the Fear of Faking, and the Culture of Punishment.*² So when Jan Costello asked me to keynote this Symposium, I thought immediately about that title, about other "borderlines," and, not coincidentally, about other Dylan lyrics about borderlines. I did this because I believe that the entire subject matter of this Symposium—the different perspectives that professors, practitioners and mental health professionals have toward important questions of mental disability law—is about borderlines: the borderline between mental disability law and other areas of criminal, civil, and constitutional law; the borderline between theory and practice; and, most importantly, the borderline between "us" and "them." In each case, the borders are blurred or fuzzy. But, paradoxically, the blurrier and fuzzier they are, the more important it is for us to attempt to try to draw them clearly, cleanly, and absolutely.

The line that I used for the *Iowa Law Review* title reads in its entirety:

"I been double-crossed now for the very last time and now
I'm finally free,

I kissed goodbye the howling beast on the borderline which
separated you from me."³

I used the borderline metaphor in that context because I was convinced that,

to a significant percentage of the American public, the insanity defense is a "howling beast" that *has* "double-crossed" efforts at the implementation of a sane (irony intended) criminal justice system. It is one from which many of us wish we were "finally free." And, most importantly, it sits at the "borderline which separates you from me." For I am convinced, to a majority of the American public, the debate over the insanity defense is a debate over that "borderline." Our ambivalence over that borderline. Our need for that borderline. Our wish to deny that borderline. And until we understand *that* and come to grips with *that*, our efforts to understand the defense are doomed to failure.⁴

In preparing that article, it became clear to me that "it [was] im-

2. 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 (forthcoming 1998).

3. Bob Dylan, *Idiot Wind*, in BOB DYLAN, LYRICS, 1962-1985, at 368 (1985).

4. Perlin, *supra* note 2 (manuscript at 7).

portant to us—as individuals and as members of a larger community—to know that there is a ‘borderline’ separating ‘you from me.’ Or, at the least, to *believe* that there is.”⁵ The insanity defense has confounded us in our attempts to do this:

On one hand, the insanity defense appears to establish such a borderline (between those of us who are found to be criminally responsible for our acts and those of us who are not). But, on the other hand, a significant portion of society believes that the insanity defense actually *blurs* the borderline between good and evil, between “good guys” and “bad guys.”⁶

Certainly, the debate that raged recently over the Unabomber case, as reflected specifically in the sub-debate over the relationship between mental illness and insanity, reflected this conundrum.

To remediate this blurring and our discomfort with it, we resort to a “dogged, banal reliance on [a series of behavioral myths and pretexts that] . . . allow us—*encourage* us—to willfully blind ourselves to behavioral, scientific, cultural and empirical realities. We do this to preserve the illusion of a ‘borderline’ between ‘you and me.’”⁷ I concluded that the “evanescence of this borderline becomes, in the end, the reason why, after centuries, our insanity defense jurisprudence continues to operate as it always has—out of consciousness.”⁸

I now propose that the issue of the borderline goes far beyond the insanity defense and the mental health law/criminal law intersection. It controls and colors all aspects of mental disability law, the relationships between lawyers, academics, and mental health professionals, and all of our thinking about persons with mental disabilities. I thus chose another Dylan borderline lyric—“where the winds hit heavy on the borderline”⁹—to serve as the beginning of my title for this paper. For the “winds of confusion” here truly do “hit heavy” on many “borderlines.”

I will briefly consider the three sets of borderlines that I have already mentioned: the borderline between mental disability law and other areas of the law; the borderline between theory and practice; and, most important, the borderline between “us” and “them.” This Symposium is divided into four major sections: the Americans with

5. *Id.* (manuscript at 55).

6. *Id.*

7. *Id.* (manuscript at 56).

8. *Id.*

9. Bob Dylan, *Girl of the North County*, in DYLAN, *supra* note 3, at 54.

Disabilities Act (ADA), Sexually Dangerous Predator Laws, juvenile issues, and therapeutic jurisprudence. If we think about each of these, we will see that these areas of the law and of interpretation reflect the three sets of borderlines.

Try this projective test on a friend or professional colleague. Say "the ADA" and see what they come back with. Chances are it will be "ramps" or "wheelchairs." Try "sexual predators," and the response will be "Megan's Law." If you say minors and health care, the answer will be "abortion consent." And if you mention "therapeutic jurisprudence," all you will get is a "huh?" On the other hand, if you were to say "mental health law" to a universe of similar friends or colleagues, you could be sure that an overwhelming majority would say, without hesitation, "the insanity defense." This response will likely arise, regardless of the fact that this defense is successfully pled in only one-fourth of one percent of all felony cases¹⁰ and is contested in only about one-tenth of that minute universe.¹¹ The vividness of a handful of high-profile, TV talk-show friendly, sensationalistic cases gives the illusion—and it is only an illusion—that mental health law is coterminous with insanity defense law. Nearly twenty years ago, Henry Steadman and Joseph Cocozza asked survey respondents to list criminally insane persons.¹² Although forty-two percent of the participants named at least one individual in response to this inquiry, none of those listed had been found not guilty by reason of insanity.¹³

In reality, the relationship between mental health law and the three substantive areas that you will be hearing about is a complicated one, and one that blurs borderlines. I will limit my remarks here just to the ADA, but the same variables apply to the other substantive areas of the law that will be discussed in this Symposium.

By its terms, the ADA applies to persons with mental disabilities, including those with mental illnesses.¹⁴

Yet, very little of the final statute, the legislative history, or

10. See MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 108 (1994) (reporting on research of Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331 (1991)).

11. See *id.* at 112-13 (reporting on research of Jeffrey L. Rogers et al., *Insanity Defense: Contested or Conceded?*, 141 AM. J. PSYCHIATRY 885 (1984)).

12. See Henry J. Steadman & Joseph J. Cocozza, *Selective Reporting and the Public's Misconceptions of the Criminally Insane*, 41 PUB. OPINION Q. 523 (1977-1978).

13. See *id.* at 527-28.

14. See Perlin, "Make Promises by the Hour," *supra* note 1, at 950.

floor debate focused on the "grotesque" history of discrimination and mistreatment suffered by such individuals; the crushing economic, social, and psychological burdens borne by such persons in their day-to-day lives; the conditions faced by such persons when institutionalized in public facilities, or when discharged from such facilities to lives of misery on our cities' streets without adequate transitional mental health, medical or social services; or the pernicious legal effects that flow from the badge of mental disability.¹⁵

At first blush, little in the first generation of ADA cases reflects efforts to remediate this "grotesque history" or deals frontally with these "social and psychological burdens."¹⁶ Most of the reported case law appears to deal with employment questions not unlike questions faced in cases of employees with heart disease, malignancies, or lower back pain.¹⁷ Yet, when some of these cases are read more carefully, some of the borderline fuzziness begins to emerge.

Courts have denied relief to plaintiffs on the following grounds: tardiness and laziness are not disabilities;¹⁸ an "ability to get along with others" is not a "major life activity" covered by the Act;¹⁹ individuals are not protected from the "general stresses of the workplace";²⁰ persons who become easily angered or have a "low threshold of tolerance" are not covered by the Act;²¹ neither a prior diagnosis of major depression nor a less-than-four-month psychological impairment was enough to establish disability at the time of the plaintiff's employment;²² and a depressed employee could not perform her es-

15. Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 24 (1993-1994) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring); *id.* at 461 (Marshall, J., concurring in part and dissenting in part)).

16. MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 6.44A, at 310-11 (1989 & Cum. Supp. 1997).

17. See *id.* at 329-30 n.473.43(d)(1) (Cum. Supp. 1997) (citations omitted).

18. See *Thomas v. General Motors Corp.*, No. 96-2283, 1996 WL 583386, at *1 (7th Cir. 1996); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995).

19. *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997).

20. *Martin v. General Mills*, No. 95-C2846, 1996 WL 648721, at *7 (N.D. Ill. 1996); see *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 526-27 (7th Cir. 1996).

21. *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437, 1446 (D. Kan. 1996).

22. See *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351 (9th Cir. 1996) (involving a plaintiff with a less than four month impairment); *Bacon v. Great Plains Mfg., Inc.*, 958 F. Supp. 523 (D. Kan. 1997) (involving a plaintiff with major depression); *Schwartz v. COMEX*, No. 96 CIV.3386 LAP, 1997 WL 187353 (S.D.N.Y. 1997) (involving a plaintiff with paranoid thought disorder).

sential job functions.²³

In short, the borderlines of coverage and applicability of the ADA are blurry and, the closer we look, the relationship between the Act's application to persons with mental disabilities becomes a more complicated question. This complexity is replicated no matter what substantive area of mental disability law we choose to study.

Susan Stefan and Melinda Bird's presentations make this point perfectly. Professor Stefan underscores that, although the ADA has been a "fairly successful" litigational tool in Title II public entity cases,²⁴ that is likely because the "borderlines" in this set of cases are clear: the plaintiffs in such cases are institutionalized, and thus there can be no doubt as to the Act's applicability.²⁵ On the other hand, in the employment cases—which form the heart of her remarks—the "borderlines are not at all clear," and, as a result, "in . . . every kind of psychiatric disability Title I ADA case, [the plaintiff] is losing."²⁶ One of the reasons why plaintiffs lose these cases is because "courts reflexively assume that the workplace conditions which preclude people with psychiatric disabilities from successful employment are inherent and necessary to the workplace."²⁷

Melinda Bird looks at the ADA from a very different perspective: its potential use in institutional litigation, especially as a means of enforcing what she refers to as the "integration mandate."²⁸ But even here she notes that courts are afraid to characterize some of the litigation as seeking "de-institutionalization," although that is evidently its goal.²⁹ Here again, I believe it is because the public's conflation of "de-institutionalization" and "homelessness"—another disastrous borderline blurring³⁰—has so frightened judges that they can

23. See *EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997) (regarding a job that involved monitoring medication levels of residents in a facility for persons with severe developmental and behavioral disorders); *Burke v. Virginia*, 938 F. Supp. 320 (E.D. Va. 1996) (regarding an employee who could not perform the job of a correction officer because attention deficit disorder was not considered "disabled" under the ADA).

24. Susan Stefan, Remarks at the Mental Disability Law Symposium 3 (November 15, 1997) (transcript on file with *Loyola of Los Angeles Law Review*).

25. See *id.*

26. *Id.*

27. *Id.* at 12.

28. Melinda Bird, *The Integration Mandate of the ADA and the Problem of De-Institutionalization*, 31 LOY. L.A. L. REV. 847, 848 (1998).

29. See *id.* at 850-51.

30. See, e.g., Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63 (1991).

only mandate relief if it can be categorized under some other, less threatening rubric.

Let me move to another fuzzy borderline: the borderline between theory and practice. The pages of the law reviews reverberate with lengthy pieces worrying about the gap between the two.³¹ Law school professors, or so the story goes, sneer at practitioners with undisguised contempt, born of an insufferable elitism. Practitioners, on the other hand, scorn professors as insulated theoreticians, far removed from the real world, spinning incomprehensible and dense theories in an insular jargon.³² Mental health professionals often find both approaches nihilistic and destructive, resulting in the subordination of the needs of mentally disabled persons either to "woolly-haired" talk of civil rights or to high-end theories that ignore "real world" problems.³³ And never the twain shall meet.

A few writers—mostly clinical law professors caught in the crossfire between the two different "law" worlds and academic/forensic psychologists and psychiatrists writing for "crossover" journals—have gamely suggested that there can be an accommodation between theory and practice,³⁴ but this appears to be more aspi-

31. As of February 20, 1998, a simple "TI(THEORY & PRACTICE)" search in Westlaw's LRI database revealed a universe of 587 articles with these two words in the title.

32. See, e.g., Geoffrey C. Hazard, Jr., "Practice" in *Law and Other Professions*, 39 ARIZ. L. REV. 387, 388 (1997).

[T]here is a correlative change in the relationship between the professions and the professional schools. Whereas the professional schools had been the vehicle for carrying on the tradition of received learning and art in the professions, they have become vehicles for specialized research and experimentation that intensifies the centrifugal intellectual forces being felt in practice. As a result, at the same time that practitioners of the profession face increasing difficulty in talking with each other, they find it even more difficult to talk with anyone in the academy except the dean and other fund-raisers.

Id.

33. See, e.g., Michael L. Perlin, *Book Review*, 8 N.Y.L. SCH. J. HUM. RTS. 557, 559-60 (1991) (reviewing ANN BRADEN JOHNSON, *OUT OF BEDLAM: THE TRUTH ABOUT DEINSTITUTIONALIZATION* (1990)).

34. See, e.g., Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Stephen L. Golding, *Mental Health Professionals and the Courts: The Ethics of Expertise*, 13 INT'L J.L. & PSYCHIATRY 281 (1990); Joel Haycock, *Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301 (1994); Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 369 (1994); C. Robert Showalter, *Psychiatric Participation in Capital Sentencing Procedures: Ethical Considerations*, 13 INT'L J.L. & PSYCHIATRY 261 (1990).

ration than reality for most of the law.

But it should not be merely an ideal for mental health law. For it is here that the borderline between theory and practice is a fuzzy and blurry one. And it is here that theoreticians *must* grasp the dynamics of practice, that practitioners *must* think carefully about theory, and mental health professionals *must* understand how both of these affect what they do and why they must do it. There is no way to understand this area of the law without an *a priori* acknowledgement that the lines between theory and practice converge and overlap.

The final set of presentations in this Symposium speaks to this reality. The most important and exciting new insights into mental disability law jurisprudence of the last two decades have come from the development—primarily by David Wexler and Bruce Winick—of the construct of “therapeutic jurisprudence” (“TJ”), a new model by which we can assess the ultimate impact of case law and legislation that affect persons with mental disabilities. TJ studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures, and lawyers’ roles may have either therapeutic or antitherapeutic consequences. It also questions whether such rules, procedures, and roles can or should be reshaped to enhance their therapeutic potential, while not subordinating due process principles.³⁵ While these are fresh, stimulating, and provocative ideas, at least three caveats need to be added to any therapeutic jurisprudence analysis.

First, and most importantly, it is clear that an inquiry into therapeutic outcomes does *not* mean that therapeutic concerns “trump” civil rights and civil liberties. David Wexler underscores this in a recent manuscript: the law’s use of “mental health information to improve therapeutic functioning [cannot] imping[e] upon justice concerns.”³⁶ Therapeutic jurisprudence does not, cannot, and must not

35. See, e.g., *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1996); PERLIN, *supra* note 16, § 1.05A (Cum. Supp. 1997); *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (David B. Wexler ed., 1990); DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (1997); *Bibliography of Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 915 (1993); David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179 (1996); David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992); David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL’Y & L. 220 (1995).

36. David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions*

mean, in Nicholas Kittrie's famous phrase, a return to the "therapeutic state."³⁷ Consideration of therapeutic jurisprudence issues cannot be used as an excuse to return to the 1950s when courts were comfortable simply with a hands-off policy toward mental hospitals and their residents.³⁸

Second, familiarity with TJ cannot be limited to the worlds of the small circle of law professors and academic mental health professionals writing in this area.³⁹ If therapeutic jurisprudence is to be meaningful, there must be a concentrated outreach to members of the practicing bar, to frequent forensic witnesses, and to clinicians.⁴⁰

of Legal Scholarship, 11 BEHAV. SCI. & L. 17, 21 (1993); see David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 762 (1993).

37. NICHOLAS N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* 39-44 (1971).

38. See generally PERLIN, *supra* note 16, § 1.03 (discussing the implications of "hands off" policy for subsequent mental disabilities law developments). For examples of standard articulations of the doctrine, see *Banning v. Looney*, 213 F.2d 771, 771 (10th Cir. 1954), and *Siegel v. Ragen*, 180 F.2d 785, 788 (7th Cir. 1950). Justice Thomas's dissent in *Helling v. McKinney*, 509 U.S. 25, 37 (1993), in which he questions the constitutional underpinnings of the doctrine articulated in *Estelle v. Gamble*, 429 U.S. 97 (1976), regarding the right of incarcerated prisoners to medical care, appears to long wistfully for a return to this jurisprudence.

39. In addition to the work of Professors Winick and Wexler, see sources cited *supra* note 35, many other important papers have been published recently. See, e.g., Keri A. Gould, *A Therapeutic Jurisprudence Analysis of Competency Evaluation Requests: The Defense Attorney's Dilemma*, 18 INT'L J.L. & PSYCHIATRY 83 (1995); Norman G. Poythress & Stanley L. Brodsky, *In the Wake of a Negligent Release Law Suit: An Investigation of Professional Consequences and Institutional Impact on a State Psychiatric Hospital*, 16 LAW & HUM. BEHAV. 155 (1992); Robert F. Schopp, *The Psychotherapist's Duty to Protect the Public: The Appropriate Standard and the Foundation in Legal Theory and Empirical Premises*, 70 NEB. L. REV. 327 (1991); Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409 (1992).

40. But see Deborah A. Dorfman, *Effectively Implementing Title I of the Americans with Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis*, 8 J.L. & HEALTH 105 (1993); Deborah A. Dorfman, *Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 805 (1993) (Dorfman is a litigator representing persons with mental disabilities); Ira Packer, *The Court Clinic in Massachusetts: A Therapeutic Approach vs. A Rights-Oriented Approach*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 291 (1994) (discussing the implications of TJ for court clinic process); Michael L. Perlin & Keri K. Gould, "Johnny's in the Basement/Mixing Up His Medicine": *Therapeutic Jurisprudence and Clinical Teaching* (1997) (manuscript awaiting submission, on file with the authors); Robert L. Sadoff, *Therapeutic Jurisprudence: A View from a Forensic Psychiatrist*, 10 B.Y.L. SCH. J. HUM. RTS. 825 (1993).

Most importantly, therapeutic jurisprudence must consider—per John Petrila’s perceptive observations⁴¹—the perspective of clients and consumers of mental health services. Those of us who write in this field can and must learn from them. In this way, those who are involved in, or are the subjects of, litigation that deals with mentally disabled individuals can share their insights into how the therapeutic, anti-therapeutic, or a-therapeutic aspects of the justice system actually play out. In another recent paper, Joel Haycock speaks to this directly: “[T]he success of therapeutic jurisprudence will depend in part on the degree to which it *empowers* the objects of therapeutic and judicial attention.”⁴² This is a challenge that therapeutic jurisprudence can and must meet.

In short, the borderline between theory and practice here is an indeterminate one. Therapeutic jurisprudence is an available and effective tool through which we can best repel the “winds” that “blow heavy” at the “borderline” and come to a richer and deeper understanding of the questions before us.

The TJ papers in this Symposium offer a fresh approach to the theory/practice borderline. Professors Stephen Behnke and Elyn Saks consider the ways that the law “can promote the mental health and well-being of individuals who struggle with significant psychological and behavioral difficulties,”⁴³ focusing specifically and thoughtfully on the nature of the treater/patient relationship and the way the law affects that relationship. They then examine that relationship in the context of potentially suicidal borderline patients. Professors Behnke and Saks articulate a series of “lessons” in TJ and look with special care at the borderline between “best therapeutic outcome” and autonomy,⁴⁴ concluding that TJ scholars “are simply going to have to address themselves to normative questions more if their theory is going to be viable.”⁴⁵ Finally, Dr. David Stone applies

41. See John Petrila, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 877 (1993) (book review). Petrila criticizes therapeutic jurisprudence’s methodology for its failure to explicitly incorporate the perspective of both the voluntary and involuntary consumer of mental health services in crafting a therapeutic jurisprudence perspective. See *id.* at 881-82.

42. Haycock, *supra* note 34, at 317 (emphasis added).

43. Stephen H. Behnke & Elyn R. Saks, *Therapeutic Jurisprudence: Informed Consent as a Clinical Indication for the Chronically Suicidal Patient with Borderline Personality Disorder*, 31 LOY. L.A. L. REV. 945, 946 (1998).

44. See *id.* at 963-67.

45. Stephen H. Behnke & Elyn R. Saks, Remarks at the Mental Disability Law Symposium 23 (November 15, 1997) (transcript on file with *Loyola of Los*

therapeutic jurisprudential principles to a study of what happens when courts order patients released at a probable cause hearing soon after their initial hospitalization. These patients, he argues, are often released prematurely on legal grounds, robbing them of needed psychiatric treatment,⁴⁶ and, as a result of their premature release, they take far longer to involve themselves in voluntary post-discharge outpatient treatment.⁴⁷ His research is provocative and suggests a connection between legal standards and therapeutic outcomes. Again, Wexler's caveats as to the limits of therapeutic jurisprudence⁴⁸ must be reconsidered carefully in light of Stone's research into this borderline.

Finally, there is the most important borderline of all: the borderline between "us" and "them," between the sane and the insane, the "crazy" and the "normal." In my earlier *Borderline* article, speaking only of the insanity defense, I argued:

Neither our legal system nor our individual psyches has the tensile strength required to accept the tensions and ambiguities inherent on a maturely functioning insanity defense system—one in which that "borderline" is inevitably so deeply blurred. Simply put, we cannot deal with the fact that insanity-pleading defendants may be more *like* us than *not* like us, and we thus develop elaborate mechanisms (legal and psychological) to distance ourselves from them and from that unacceptable reality.⁴⁹

I believe that this conflict transcends the relatively narrow universe of insanity defense cases and that it applies to—indeed, explains—the entire universe of mental disability law cases.

Reflect for a minute on some of the myths that have developed about persons with mental disabilities:⁵⁰

1. Mentally ill individuals are "different," and, perhaps, less than human. They are erratic, deviant, morally weak, unattractive, sexually uncontrollable, emotionally unstable, lazy, superstitious, ignorant, and demonstrate a primitive morality. They lack the capacity to show love or affection. They smell different from "normal" individuals and are somehow worth less.

Angeles Law Review).

46. See David C. Stone, M.D., *Hollywood on the Screen and on the Streets: The Cuckoo's Nest of LPS*, 31 *LOY. L.A. L. REV.* 983, 986 (1998).

47. See *id.* at 990.

48. See *supra* text accompanying note 36.

49. Perlin, *supra* note 2 (manuscript at 56).

50. See Michael L. Perlin, *On "Sanism,"* 46 *SMU L. REV.* 373, 393-97 (1992).

2. Most mentally ill individuals are dangerous and frightening. At worst, they are invariably more dangerous than non-mentally ill persons. Experts can accurately identify such dangerousness.⁵¹ At best, the mentally disabled are simple and content, like children.

3. Mentally ill individuals are presumptively incompetent to participate in "normal" activities, to make autonomous decisions about their lives—especially in areas involving medical care—and to participate in the political arena.

4. If a person in treatment for mental disability declines to take prescribed antipsychotic medication, that decision is an excellent predictor of (1) future dangerousness and (2) the need for involuntary institutionalization.

5. Mental illness can be easily identified by lay persons and matches up closely to popular media depictions. It comports with our "common sense" notion of "crazy behavior."⁵²

6. It is—and should be—socially acceptable to use pejorative labels to describe and single out the mentally ill. This singling out is not problematic in the way that the use of other pejorative labels to describe women, blacks, Jews, or gays might be.

7. Mentally ill individuals should be segregated in large, distant institutions; their presence threatens the economic and social stability of residential communities.⁵³

8. The mentally disabled person charged with a crime is presumptively the most dangerous potential offender, as well as the most morally repugnant one. The insanity defense is used frequently and improperly as a way for such individuals to "beat the rap"; insanity tests are so lenient that virtually any mentally ill offender gets a "free ticket" through which to evade criminal and personal responsibility. The insanity defense should be considered only when the mentally ill person demonstrates "objective" evidence of mental illness.

51. See Saul J. Faerstein, M.D., *Sexually Dangerous Predators and Post-Prison Commitment Laws*, 31 LOY. L.A. L. REV. 895, 898-99 (1998).

52. See Stefan, *supra* note 24, at 7.

[J]udges don't understand the nature of psychiatric disability at all, and [their] interpretation of the term "disability" of what it means to be disabled precludes almost any claim of psychiatric disability from being considered a disability [This] doesn't happen in the physical disability arena. Judges interpret disability as static, unchanging and consistent across situations and noncontextual.

Id.

On the disease/disorder/abnormality conundrum, see Faerstein, *supra* note 51, at 897-98.

53. See Bird, *supra* note 28, at 847-48 (discussing the way that many persons with disabilities remain segregated in large institutions).

9. Mentally disabled individuals simply do not try hard enough. They give in to their basest instincts too easily and do not exercise appropriate self-restraint.

10. If do-gooder, activist attorneys had not meddled in the lives of the mentally disabled, such individuals would be in institutions where they belong, and all of us would be better off. In fact, there is no reason for courts to involve themselves at all in mental disability cases.

What do these myths have in common? In each instance, we are doing two things: we 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."⁵⁴ The label of "sickness" reassures us that "the Other"—seen as "both ill and infectious, both damaged and damaging"⁵⁵—is not like us⁵⁶ and further animates our "keen . . . desire to separate 'us' and 'them.'"⁵⁷

I use the word "protect" self-consciously. We exaggerate the danger of all mentally ill persons to remove any ambiguity about whether a specific mentally ill person may be dangerous, confounding mental illness with dangerousness in a variety of ways that simply do not comport with any of the best available research.⁵⁸ We distance ourselves from persons with mental disabilities so as to protect our

54. CHRISTOPHER HARDING & RICHARD W. IRELAND, PUNISHMENT: RHETORIC, RULE, AND PRACTICE 105 (1989).

55. SANDER L. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS 130 (1985).

56. See Perlín, *supra* note 50, at 389 & nn.113-16. For a discussion on how our perception of individuals as members of outsider groups affects criminal justice policies, see Jonathan Kelley & John Braithwaite, *Public Opinion and the Death Penalty in Australia*, 7 JUST. Q. 529 (1990).

Gilman adds:

[T]he most elementally frightening possibility is the loss of control over the self, and loss of control is associated with loss of language and thought perhaps even more than with physical illness. Often associated with violence (including aggressive sexual acts), the mad are perceived as the antithesis to the control and reason that define the self. Again, what is perceived is in large part a projection: for within everyone's fantasy life there exists . . . an incipient madness that we control with more or less success.

GILMAN, *supra* note 55, at 23-24.

57. HARDING & IRELAND, *supra* note 54, at 105.

58. See generally John Monahan, *Clinical and Actuarial Predictions of Violence*, in 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 7-2.2.1 (David Faigman et al. eds., 1997) (reviewing and discussing the scientific and technical literature pertaining to the prediction of individual violent behavior).

self-image that no one will think that *they* are like *us*.

Besides demonizing persons with mental disabilities, we also do something else: we infantilize them. In a recent book manuscript, I had these thoughts on the way we construct the sexuality of persons with mental disabilities:⁵⁹

This list of questions should underscore the point that this topic is, indeed, a complex one. Its complexity is further increased (and made more difficult) by society's generally irrational attitudes towards mentally disabled persons. Despite the passage of the ADA and two decades of litigation on behalf of institutionalized mentally disabled persons (substantially geared to inquire simply into whether mental patients are being treated "as human beings"),⁶⁰ society tends to either infantilize such persons (denying the reality that they may retain the same sort of sexual urges, desires and needs the rest of us have and generally act on)⁶¹ or, paradoxically, to demonize them (expressing fear of their hypersexuality and the correlative need of protections and limitations to best stop them from acting on these primitive urges).⁶²

59. See PERLIN, "ON THE WATERS OF OBLIVION," *supra* note 1 (manuscript at ch. 3E, at 11-12, on file with the author); see generally Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517 (1993-1994) (discussing the many complexities clinicians, line workers, administrators, advocates, and attorneys face in dealing with the sexuality of persons with mental disabilities).

60. *Falter v. Veterans' Admin.*, 502 F. Supp. 1178, 1185 (D.N.J. 1980). On the impact of legal change on attitudinal change, see Emily Campbell & Alan J. Tomkins, *Gender, Race, Grades, and Law Review Membership as Factors in Law Firm Hiring Decisions: An Empirical Study*, 18 J. CONTEMP. L. 211, 250 n.122 (1992) (reporting on empirical evidence suggesting that, in the years since the passage of race-based civil rights legislation, "racial attitudes and stereotypes among white Americans have become more tolerant"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1650 (1985) ("Where discrimination is not legally or socially approved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly.").

61. See Perlin, *supra* note 50, at 394 (discussing sanist myth that "[a]t the best, the mentally disabled are simple and content, like children"); see also Mary Romano, *Sex and Disability*, in *DISABLED PERSONS AS SECOND-CLASS CITIZENS* 64 (M. Eisenberg ed., 1982).

62. PERLIN, "ON THE WATERS OF OBLIVION," *supra* note 1 (manuscript at ch. 3E, at 12); see also GILMAN, *supra* note 55, at 24-25, 142-48, 162 (discussing how society views certain racial and religious minority groups in the same way); Perlin, *supra* note 50, at 394 (discussing the sanist myth that "mentally ill individuals . . . are invariably more dangerous than non-mentally ill persons").

We all do this. Jurors and judges do it. Lawyers do it. Scholars and therapists do it. We are, in short, desperate to erect an impenetrable borderline between "us" and "them." And our incoherent, irrational, sloppy jurisprudence reflects precisely these frantic efforts. The two other substantive topics discussed in this Symposium—juveniles and sex offenders—are examples of this infantilization and this demonization. Mentally disabled juveniles are denied autonomy in decision making, and are given far fewer procedural rights than mentally disabled adults;⁶³ sex offenders have replaced insanity acquittees as the "most despised" group of individuals in our society⁶⁴ and are constructed as "monsters" so that we can more easily dehumanize them.⁶⁵ The characterization of such persons as "*mentally disordered* sex offenders" makes this dehumanization far easier for all of us.

The articles and presentations discussing juvenile issues reflect these dichotomizations. Professor Jan Costello carefully contrasts the abortion rights cases—premised on the concept of a "de facto competent" minor⁶⁶—with the mental disability rights cases—in which the statutory presumption of competency⁶⁷ is frequently disregarded in "real life"⁶⁸—and in so doing demonstrates our profound social discomfort over certain children with mental disabilities being granted any autonomy in decision making. Professor James Ellis's

63. See generally *Parham v. J.R.*, 442 U.S. 584, 584 (1979) (discussing parental control over minors and the states' ability to control that relationship).

64. Successful insanity defendants have traditionally been perceived as perhaps the "most despised" and most "morally repugnant" group of individuals in society. See Deborah C. Scott et al., *Monitoring Insanity Acquittes: Connecticut's Psychiatric Security Review Board*, 41 HOSP. & COMMUNITY PSYCHIATRY 980, 982 (1990). However, sex offenders now seem to suffer that distinction. See Tara L. Wayt, Note, *Megan's Law: A Violation of the Right to Privacy*, 6 TEMP. POL. & CIV. RTS. L. REV. 139, 151 n.110 (1997) ("It is not in dispute that sex offenders, especially child molesters, are one of the most despised groups of people in our society.") see generally Perlin, "*There's No Success Like Failure*," *supra* note 1 (manuscript at 2-3).

65. Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 296 (1995) ("Certain categories of sex offenders, notably those who prey on young children, are considered veritable monsters.").

66. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976).

67. See, e.g., *Rivers v. Katz*, 504 N.Y.S.2d 74, 79 (1986) (construing N.Y. MENTAL HYG. LAW § 33.01 (McKinney 1986)).

68. See Jan C. Costello, *Making Kids Take Their Medicine: The Privacy and Due Process Rights of De Facto Competent Minors*, 31 LOY. L.A. L. REV. 907, 908-14 (1998).

Article returns to the Supreme Court's decision in *Parham v. J.R.*⁶⁹ that upheld a commitment scheme granting juveniles far fewer procedural due process rights than adults facing commitment.⁷⁰ Ellis focuses on an issue rarely examined in this context: the dilemma of the mentally disabled juvenile who may need mental health intervention but not total institutionalization.⁷¹ The Supreme Court's cold response to arguments in support of a constitutionally-based "least restrictive alternative" doctrine in the mental disability law area⁷² demonstrates, yet again, our social dis-ease at the blurring of a borderline that makes "them"—the juveniles with mental disabilities—more like "us"—persons who do not need total institutionalization.

Finally, James Preis looks at another kind of borderline: the one between our articulated social dogmas that argue that children should not be warehoused in psychiatric facilities, and the social reality in which such warehousing continues.⁷³ Again, our discomfort with the "other"—and with the reality that the borderline between "us" and "them" may be more evanescent than we are willing to allow ourselves to believe—interferes with the adoption and promulgation of coherent social policies.

Why is it this way? Why is it so important to create these borderlines? Why is it so important for us to see this area of the law as a bundle of discrete, independent packages unrelated to other areas of the law? Why is it so important for theoreticians and practitioners to stake out independent territory? And why is it so important for us to distance ourselves from persons with mental disabilities—the "other?"

I have worked, taught, thought, and written about this area for more than a quarter of a century. In this time I have concluded that two overarching issues dominate and overwhelm the subject matter:

69. 442 U.S. 584 (1979).

70. *See id.* at 604.

71. *See* James W. Ellis, *Some Observations on the Juvenile Commitment Cases: Reconceptualizing What the Child Has at Stake*, 31 LOY. L.A. L. REV. 929 (1998).

72. *See generally* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (articulating a "reasonably nonrestrictive confinement conditions" standard); *cf.* Riggins v. Nevada, 504 U.S. 127, 135 (1992) (using a "less intrusive alternatives" analysis in a case involving fair trial rights of a competent insanity defendant seeking to resist the involuntary imposition of antipsychotic medication).

73. *See* James Preis, *Advocacy for the Mental Health Needs of Children in California*, 31 LOY. L.A. L. REV. 937 (1998); *see also* Bird, *supra* note 28 (discussing deinstitutionalization and the integration mandate).

mental disability law is *sanist*,⁷⁴ and mental disability law is *pretextual*.⁷⁵ I am further convinced, beyond any doubt, that it is impossible to truly understand anything about mental disability law—the doctrine, the debate, the discourse, the decisions, or the dissents—without first coming to grips with this reality. And, I am equally convinced that the apparent contradictions, internal inconsistencies, and cognitive dissonances of mental disability law cannot be understood without understanding the power and pervasiveness of these concepts.

What do I mean by these terms? Simply put, "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.⁷⁶ It infects both our jurisprudence and our lawyering practices.⁷⁷ Sanism is largely invisible and 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" and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.⁷⁸ In her discussion of

74. See, e.g., Perlin, *supra* note 50, at 374; Perlin, *supra* note 15, at 21; 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, 241 (1994); Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47, 49 (1993).

75. See, e.g., Perlin, *supra* note 34, at 373; Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 132 (1991); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 627 (1993).

76. The classic treatment is GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (Anchor Books 1958). For an important, new, and different perspective, see ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* (1996).

77. To the best of my knowledge, the phrase "sanism" was coined by Dr. Morton Birnbaum. See Morton Birnbaum, *The Right to Treatment: Some Comments on Its Development*, in MEDICAL, MORAL AND LEGAL ISSUES IN MENTAL HEALTH CARE 97, 106-07 (Frank J. Ayd, Jr. ed., 1974); see also *Koe v. Califano*, 573 F.2d 761, 764 n.12 (2d Cir. 1978) (stating that "[c]ounsel characterizes this attitude as 'sanism,' and urges that it afflicts the entire legal system."); Perlin, *supra* note 30, at 92-93 (discussing Birnbaum's insights). Dr. Birnbaum is universally regarded as having first developed and articulated the constitutional basis of the right-to-treatment doctrine for institutionalized mental patients. See PERLIN, *supra* note 16, § 4.03, at 8-13 (discussing Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960)).

78. See, e.g., PERLIN, *supra* note 10.

Justice Thomas's opinion in *Kansas v. Hendricks*,⁷⁹ Professor Keri Gould notes—accurately, in my opinion—that Justice Clarence Thomas is the most consistently sanist judge on the Supreme Court.⁸⁰

"Pretextuality" means that courts accept, either implicitly or explicitly, testimonial dishonesty and engage similarly in dishonest, frequently meretricious, decision making. This occurs specifically where witnesses, especially *expert* witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends."⁸¹ 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 or corrupt testifying. The articles of Rowan Klein and Professor Gould both argue persuasively that *Hendricks* is a pretextual decision, that the purported promise of treatment to the defendant, a "sexually violent predator," was a sham—an empty promise.⁸² Certainly, the borderline between "mental patient" and prisoner is blurred in *Hendricks* beyond any other case in contemporary constitutional litigation.⁸³

These two concepts have controlled, and continue to control, modern mental disability law. Just as importantly, perhaps *more* importantly, they continue to exert this control invisibly. This invisibility means that the most important aspects of mental disability law—not just the law "in the books," but, more importantly, the law in action and practice—remains hidden from public discussions about mental disability law.⁸⁴

It is these concepts that help explain *why* the "winds hit heavy on the borderline," to return to my original metaphor. The law's sanism and the law's pretextuality cause us to feverishly seek to create impregnable borderlines. Yet, if we look closely and reflectively at the issues before us, we realize that these borderlines do not exist, ex-

79. 117 S. Ct. 2072 (1997); see, e.g., Perlin, "There's No Success Like Failure," *supra* note 1.

80. See Keri K. Gould, *If It's a Duck and Dangerous—Permanently Clip Its Wings or Treat It Till It Can Fly?: A Therapeutic Perspective on Difficult Decisions, Short-Sighted Solutions and Violent Sexual Predators After Kansas v. Hendricks*, 31 LOY. L.A. L. REV. 859, 868-72 (1998).

81. Charles M. Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 840 (1974); see Perlin, *Morality and Pretextuality*, *supra* note 75, at 133.

82. See Gould, *supra* note 80, at 868-72; Rowan K. Klein, *Colloquium Remarks*, 31 LOY. L.A. L. REV. 883, 883-88 (1998).

83. See Klein, *supra* note 82 at 883-87.

84. See, e.g., PERLIN, "ON THE WATERS OF OBLIVION," *supra* note 1.

cept, perhaps, in our psyches. When you read the remainder of this Symposium, think about these borderlines, and think about sanism and pretextuality. It is these phenomena that encourage us to willfully blind ourselves to behavioral, scientific, cultural, and empirical realities, so as to preserve the illusion of a "borderline" between "you and me."⁸⁵ And it is these phenomena that make our jurisprudence in this area so stupefyingly incoherent.

85. Perlin, *supra* note 2 (manuscript at 56).

