"YOU MIGHT HAVE DRUGS AT YOUR COMMAND": RECONSIDERING THE FORCED DRUGGING OF INCOMPETENT PRE-TRIAL DETAINEES FROM THE PERSPECTIVES OF INTERNATIONAL HUMAN RIGHTS AND INCOME INEQUALITY

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INTRODUCTION

Ever since the Supreme Court's 2003 decision in *Sell v. United States*,[1] there has been a cottage industry of commentary on the question of whether the state can medicate an incompetent defendant for the purpose of making him or her competent to stand trial.[2] *Sell*, however, was not the first important case to deal with this question—the now, mostly-lost-in-the-dustbin-of-legal-history case of *United States v. Charters*[3] set out virtually every important legal argument over a decade before *Sell*; the U.S. Capitol shooting case of *United States v. Weston*[4] assured that casual watchers of Action News broadcasts would have some idea as to the scope of the underlying issues, and, of course, the Supreme Court's radically different decisions in *Washington v. Harper*[5]—on the refusal rights of prisoners—and of *Riggins v. Nevada*[6]—on the refusal rights of competent insanity pleaders—assured that this question would be a staple on law school exams in perpetuity.

Moreover, there have been multiple cases interpreting *Sell* broadly and narrowly, both in the context of medication issues and in the context of other treatments.[7] Because of the vagueness of certain terminology, questions such as what a "serious" crime is,[8] what "substantially" meant to the Court in *Sell*,[9] and how the

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[1] 539 U.S. 166 (2003).

[2] *See* 4 MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 8A-4.2c(1), 21, 29 n.369.43, 30 n.369.53, § 8A-4.2d, 30–31 n.372 (2d ed. Cum. Supp. 2014).

[3] *See* 829 F.2d 479, 490 (4th Cir. 1987), *rev'd*, 863 F.2d 302 (4th Cir. 1988) (en banc).

[4] 255 F.3d 873, 876 (D.C. Cir. 2001).

[5] 494 U.S. 210, 236 (1990).

[6] 504 U.S. 127, 137–38 (1992).

[7] *See, e.g.,* PERLIN & CUCOLO, *supra* note 2, at 27–29 n. 369.41 (citations omitted).

[8] Professor Christopher Slobogin believes it means "any" felony. *See* Christopher Slobogin, *Sell's Conundrums: The Right of Incompetent Defendants to Refuse Anti-Psychotic Medication,* 89 WASH. U. L. REV. 1523, 1539 (2012); *cf.* Brandy M. Rapp, *Sell v. United States: Involuntary Administration of Antipsychotic Medication to Criminal Defendants*, 38 U. RICH. L. REV. 1047, 1071 (2004) (criticizing the Court for failing to define and clarify key terms that potentially could result in inappropriate administration of drugs with irreversible harmful side effects). *But see* David M. Siegel, *Involuntary Psychotropic Medication to Competence: No Longer an Easy Sell*, 12 MICH. ST. U. J. MED. & L. 1, 8 (2008) (discussing cases deemed "not serious", including possession of firearms by a person previously committed to a mental health institute and illegal reentry to the United States).

least intrusive alternative doctrine was supposed to be applied in such cases[10] have all been considered by later federal and state courts, with the predictable range of decisions.

These issues have been discussed and reconsidered in multiple arenas from the scholarly literature—both legal and behavioral—to professional conferences and to law school classes and other academic settings. Two seemingly unrelated issues, however, have been the subject of virtually no consideration at all, and we are raising both of these so as to jog readers into thinking about these questions when they reflect on *Sell*'s limits and its potential reach. One of these relates to a topic that one of us (MLP) has been writing about and talking about extensively in recent years: that of the application of international human rights law to the forensic process in all its aspects, especially the potential impact of the United Nations' Convention on the Rights of Persons with Disabilities ("CRPD").[11] The other is a topic that, to the best of our knowledge, *no one* has written about. One of us (MLP) discusses it yearly with students in his Criminal Procedure: Adjudication course, but there is still nothing in the literature about it: what happens when a wealthy person, able to make bail on any bailable crime, is in the community pending trial, and becomes incompetent to stand trial (or even, perhaps, was always incompetent)? We know the impact of bail on subsequent convictions and lengths of sentence;[12] yet, there is—again, to the

[9] Thus, Robert Cochrane and his colleagues note that "substantially likely" was not defined in *Sell*, but they draw on cases in other areas of the law to conclude that, most likely, it is akin to "clear and convincing evidence." *See* Robert Cochrane et al., *The* Sell *Effect: Involuntary Medication Treatment Is a "Clear and Convincing" Success,* 37 LAW & HUM. BEHAV. 107, 107 (2013), relying on, *inter alia*, United States v. Gomes, 289 F.3d 71, 82 (2d Cir. 2002), *vacated in light of* Sell v. United States, 539 U.S. 166 (2003).

[10] *See, e.g.*, Dina E. Klepner, Sell v. United States: *Is the Supreme Court Giving a Dose of Bad Medicine?: The Constitutionality of the Right to Forcibly Medicate Mentally Ill Defendants for Purposes of Trial Competence*, 32 PEPP. L. REV. 727, 749 (2005) (stating that a less intrusive manner would be a court order supported with contempt sanctions); *id.* at n.169 (suggesting other alternatives including verbal psychotherapy and behavior modification techniques).

[11] Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006). *See generally* MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD 143–59 (2012).

[12] *See, e.g.*, United States v. Gallo, 653 F. Supp. 320, 338 (E.D.N.Y. 1986) (**"**Even where all other factors are held constant, studies indicate that detention increases the chances of harsher and longer sentences.**"**); State v. Johnson, 294 A.2d 245, 251 n.6 (N.J. 1972) (**"**[A]n accused who has been detained in jail

best of our knowledge—nothing on this question whatsoever. We discuss both of these, and also look at the second issue through the filter of therapeutic jurisprudence.

The title of this paper draws on Bob Dylan's song *Gotta Serve Somebody*, from *Slow Train Coming*, the first album of his gospel/born again period. The lyric I am using comes from this verse:

> You might be a rock 'n' roll addict prancing on the stage
> You might have drugs at your command, women in a cage
> You may be a businessman or some high-degree thief
> They may call you Doctor or they may call you Chief
>
> But you're gonna have to serve somebody, yes indeed
> You're gonna have to serve somebody
> Well, it may be the devil or it may be the Lord
> But you're gonna have to serve somebody[13]

According to Michael Gray, one of the most prominent of Dylan scholars, the song urges that "moral shiftiness be renounced in favour of clear-sightedness about a clear and unavoidable choice."[14] Defendants who are incompetent to stand trial often are deprived of their rights to make such "clear" choices, though the consequences are often "unavoidable."

I. THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW

We must begin with a consideration of the Convention on the Rights of Persons with Disabilities (CRPD).[15] Although the United States has signed, but not yet ratified, this Convention,[16] it is necessary that we take this Convention seriously in all matters that relate to the intersection of international human

between his arraignment and the final adjudication of his case is more likely to receive a criminal conviction or jail sentence than an accused who has been free on bail.**"**). *See generally* Anne Rankin, *The Effect of Pretrial Detention,* 39 N.Y.U. L. REV. 641, 641–43, 655 (1964) (showing a connection between continuous detention and unfavorable outcomes, such as conviction).

[13] BOB DYLAN, *Gotta Serve Somebody*, *on* SLOW TRAIN COMING (Columbia Records 1979) (lyrics *available at* http://www.bobdylan.com/us/songs/gotta-serve-somebody).

[14] MICHAEL GRAY, THE BOB DYLAN ENCYCLOPEDIA 272 (2008).

[15] *See* G.A. Res. 61/106, *supra* note 11, ¶ 2.

[16] *Convention and Optional Protocol Signatures and Ratifications,* UNITED NATIONS, http://www.un.org/disabilities/countries.asp?navid=17&pid=166 (last visited Feb. 5, 2015).

rights law and criminal procedure.

There is no question that the CRPD is the most revolutionary international human rights document ever created that applies to persons with disabilities.[17] It furthers the human rights approach to disability—endorsing a social model and repudiating a purely medical model—and recognizes the right of people with disabilities to equality in nearly every aspect of life.[18] Although little attention has been paid to its potential impact on forensic patients,[19] we believe it is essential that there be a new focus notwithstanding the fact that virtually no consideration of the Convention's application to this population yet appears in the literature.[20]

The state of the law as it relates to persons with disabilities must be radically reconsidered, especially in regards to forensic populations.[21] Within the context of its human rights approach, the Disability Convention firmly endorses a social model of disability and re-conceptualizes mental health rights as disability rights—a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law.[22] "The

[17] *See generally* PERLIN, *supra* note 11, at 4–5, 16–19; Michael L. Perlin & Éva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, *in* MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 80, 85 (Michael Dudley et al. eds. 2008); Michael L. Perlin,*"A Change Is Gonna Come:" The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. U. L. REV. 483, 484 (2009).

[18] *See, e.g.,* Aaron A. Dhir, *Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities,* 41 STAN. J. INT'L. L. 181, 191, 193, 196 (2005).

[19] *But see* Michael L. Perlin & Meredith R. Schriver, *"You That Hide Behind Walls:" The Relationship Between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients*, *in* TORTURE IN HEALTH-CARE SETTINGS: REFLECTIONS ON THE SPECIAL RAPPORTEUR ON TORTURE'S 2013 THEMATIC REPORT 195, 216 (2013); Michael L. Perlin & Alison Lynch, *"Toiling in the Danger and in the Morals of Despair:" Risk, Security, Danger, the Constitution, and the Clinician's Dilemma*, 26 STAN. L. & POL'Y REV. (forthcoming 2015).

[20] Perlin & Schriver, *supra* note 19, at 201–02.

[21] *See generally* Perlin, *supra* note 17, at 489 (noting that the involvement of stakeholders, i.e. consumers and users of psychiatric services, is critical to developing disability rights).

[22] Phil Fennell, *Human Rights, Bioethics, and Mental Disorder,* 27 MED. & L. 95, 106–07 (2008). *See generally* Michael L. Perlin, "*Abandoned Love:" The Impact of* Wyatt v. Stickney *on the Intersection between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 139 (2011).

Convention . . . sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities."[23] It provides a framework for ensuring that mental health laws "fully recognise the rights of those with mental illnesses[,]"[24] and mandates *prescriptive* rights in addition to proscriptive rights.[25] There is no question that it "has ushered in a new era of disability rights policy."[26]

Furthermore, the Convention describes disability as a condition arising from "interaction with various barriers [that] may hinder . . . [an individual's] full and effective participation in society on an equal basis with others" instead of inherent limitations,[27] and extends existing human rights to take into account the specific rights experiences of persons with disabilities.[28] It calls for "respect for inherent dignity"[29] and "non-discrimination."[30] Subsequent articles declare "freedom from torture or cruel, inhuman or degrading treatment or

[23] Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L.J. 249, 256 (2009); *see also* Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections* (The Univ. of Sydney, Sydney L. School 2010), *available at* http://ssrn.com/abstract=1563883.

[24] Bernadette McSherry, *International Trends in Mental Health Laws: Introduction,* 26 LAW IN CONTEXT 1, 8 (2008).

[25] Prescriptive rights require certain conduct, whereas proscriptive rights forbid particular behavior. Edward J. Imwinkelried, *Expert Testimony by Ethicists: What Should be The Norm?,* 33 J.L. MED. & ETHICS 198, 200 (2005); *see* Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 920 (1994) (noting the significance of the inclusion of proscriptive and prescriptive rights in human rights treaties in general); Michael L. Perlin, *The Significance of the Convention on the Rights of Persons with Disabilities – And Why It Demands the Creation of an Asian/Pacific Disability Rights Tribunal,* ANNUAL REPORT OF THE KANAGAWA UNIVERSITY INSTITUTE FOR LEGAL STUDIES (2014) (manuscript at 9), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512846&download=yes (explaining the significance of both proscriptive and prescriptive rights in the CRPD context in specific).

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

[27] G.A. Res. 61/106, *supra* note 11, art. 1, pmbl., ¶ e; PERLIN, *supra* note 11, at 144.

[28] PERLIN, *supra* note 11, at 144; Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 515 (2008).

[29] G.A. Res. 61/106, *supra* note 11, art. 3(a).

[30] *Id.* at art. 3(b).

punishment,"[31] "freedom from exploitation, violence and abuse,"[32] and a right to protection of the "integrity of the person."[33]

Although the United States has not yet ratified the CRPD, President Obama signed the Convention over five years ago.[34] Under such circumstances, "a state's obligations under it are controlled by the Vienna Convention of the Law of Treaties . . . which requires signatories 'to refrain from acts which would defeat the Disability Convention's object and purpose.'"[35] Domestic courts in New York have thus cited the CRPD approvingly in cases involving guardianship matters.[36] In one such case, Surrogate Judge Kristen Booth Glen, noted that the CRPD was entitled to "'persuasive weight' in interpreting our own laws and constitutional protections."[37]

Importantly, other international human rights law documents

[31] *Id.* at art. 15.

[32] *Id.* at art. 16.

[33] *Id.* at art. 17.

[34] *See* Michelle Diament, *Obama Urges Senate to Ratify Disability Treaty*, DISABILITY SCOOP (May 18, 2012), http://www.disabilityscoop.com/2012/05/18/Obama-Urges-Senate-Treaty/15654/. The Senate failed to ratify the CRPD on December 4, 2012, for lack of a super-majority of votes. *See The Convention on the Rights of Persons with Disabilities,* U.S. INT'L COUNCIL ON DISABILITIES, http://usicd.org/index.cfm/crpd (last visited Mar. 3, 2015). The Democratic leadership promised to bring the Convention up again for ratification in 2013. *See* Michael L. Perlin, *"Yonder Stands Your Orphan with His Gun": The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes,* 46 TEX. TECH L. REV. 301, 305 n.19 (2013).

[35] *See In re* Mark C.H., 906 N.Y.S.2d 419, 433 (Sur. Ct. 2010) (citing Vienna Convention on the Law of Treatises art. 18, May 23, 1969, 1155 U.N.T.S. 331), as discussed in Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 362–63 (2011).

[36] *See, e.g.*, *Mark C.H.*, 906 N.Y.S.2d at 435 (holding due process required that the guardianship appointment be subject to a requirement of periodic reporting and review); *In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 854 (Sur. Ct. 2012) (holding that substantive due process requirement of adherence to principal of least restrictive alternative applied to guardianships sought for mentally persons). There is nothing new or radical about the use of international human rights law in U.S. courts. *See generally* Michael W. Lewis & Peter Margulies*, Interpretations of IHL in Tribunals of the United States,* in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES (Jinks et al. eds., 2014) (demonstrating how U.S. courts have been interpreting international human rights law ever since the nation was founded).

[37] *Dameris L.*, 956 N.Y.S.2d at 855; *see* Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law,* 117 PENN ST. L. REV. 1159, 1178 n.97 (2013) (discussing *Dameris L.* in this context).

have also been considered by domestic courts.[38] In *Lareau v. Manson,*[39] a federal district court cited to the United Nations Standard Minimum Rules for the Treatment of Prisoners standards in cases involving the "double bunking" of inmates;[40] on the other hand, in *Flores v. Southern Peru Copper Corp.,* the Second Circuit found that the United Nations' Convention on the Rights of the Child (CRC) did not convey a private right of action to plaintiffs as a matter of law.[41] In at least one case, however, while noting that the non-ratified Convention was not binding on U.S. courts, the Massachusetts Supreme Judicial Court "read the entire text of the convention, . . .[and in an adoption case] conclude[d] that the outcome of the proceedings in [that] case [were] completely in accord with principles expressed therein."[42]

Professor Christopher Slobogin has written carefully of the potential impact of this Convention on the population with whom we are concerned: persons currently incompetent to stand trial.[43] In a recent paper (awaiting publication), he sets out the standard state of the law on both criminal responsibility and incompetency, and then says, in what will be startling to some, "[t]he Convention on the Rights of Persons with Disability (CRPD) directs signatory States to undo all of this."[44] He notes that Article 14 of the CRPD states that "the existence of a disability shall in no case justify a deprivation of liberty,"[45] and that Article 12 provides that States "shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."[46]

These are, Slobogin notes, "radical provisions."[47] He explains that, as the official commentary to Article 14 states, under the

[38] *See, e.g.*, Flores v. Southern Peru Copper Corp., 414 F.3d 233, 257–58 (2d Cir. 2003); Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980), *aff'd in part & rev'd in part*, 651 F.2d 96 (2d Cir. 1981).

[39] *Lareau*, 507 F. Supp. at 1177.

[40] *Id.* at 1178 n.9.

[41] *See Flores*, 414 F.3d at 258–59.

[42] *In re* Adoption of Peggy, 767 N.E.2d 29, 38 (Mass. 2002).

[43] Christopher Slobogin, *Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disability on the Insanity Defense, Civil Commitment, and Competency Law* (Vanderbilt Law Sch. Int'l J. L. & Psychiatry, Working Paper No. 14-23, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461279.

[44] *Id.* at 1 (citation omitted).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 1–2.

CRPD, "detention is 'unlawful' when it 'is grounded in the combination between mental or intellectual disability and other elements such as dangerousness or care and treatment.'"[48] "[S]ince such measures are partly justified by the person's disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability prescribed by article 14.'"[49] "[E]qual[ly] dramatic[ally]," he adds, the official commentary to article 12 states that any law that "'allows the interdiction or declaration of incapacity of persons on the basis of their mental, intellectual or sensory impairment and the attribution to a guardian of the legal capacity to act on their behalf conflicts with the recognition of legal capacity of persons with disabilities enshrined in article 12.'"[50] The commentary to that article calls for the abolition of laws that violate "'the human right to legal capacity of persons with disabilities,' it also endorses 'legal recognition of supported decision-making, as the process whereby a person with a disability is enabled to make and communicate decisions with respect to personal or legal matters.'"[51]

In short, Slobogin concludes:

> [U]nder the CRPD, mental disability per se should play no role in laws that deprive people of liberty (or of property or any other significant interest). Preventive detention and involuntary treatment rules must be drafted so as to apply to everyone. People with impaired decision-making abilities are to be assisted in, not prevented from, making decisions, and if the decisions they make violate a criminal law, they are to pay the consequences to the extent everyone else does.[52]

Recently, in an article considering the role of mediation in guardianship following the CRPD, Professor Jennifer L. Wright

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[48] *Id.* at 2 (quoting Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities, ¶ 48, UN Doc. A/HRC/10/48 (Jan. 26, 2009) [hereinafter OHCHR Thematic Report 2009]).

[49] Slobogin, *supra* note 43, at 2 (quoting OHCHR Thematic Report 2009, *supra* note 48, at ¶ 48).

[50] Slobogin, *supra* note 43, at 2 (quoting OHCHR Thematic Report 2009 *supra* note 48, at ¶ 45).

[51] Slobogin, *supra* note 43, at 2 (quoting OHCHR Thematic Report 2009 *supra* note 48, at ¶ 45).

[52] Slobogin, *supra* note 43, at 3.

underscored that the Committee's General Comment "rejected substitute decision-making in any situation other than as a last recourse when the disabled person's will and preferences simply cannot be determined, despite intensive efforts."[53] And, even more recently, the United Nations Committee on the Rights of Persons with Disabilities, an arm of the UN Office of the High Commissioner on Human Rights, interpreted Article 14 to—astoundingly, in our eyes—in this manner:

> *Detention of persons unfit to plead in criminal justice systems.* The committee has established that declarations of unfitness to stand trial and the detention of persons based on that declaration is contrary to article 14 of the convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.[54]

How does all this relate to the issue at hand? These commentaries appear to counsel against *any* use of involuntary medication for the purposes of making defendants competent to stand trial, especially if there may be a question as to whether the incompetency status as we know it remains valid. We believe—and Slobogin believes—that it does (although it now appears that an arm of the United Nations believes that it does not), but the question of whether involuntarily medicating a forensic patient[55] violates, in the words of the CRPD, the "integrity of the person"[56] is, under any circumstances, an important one that we must take seriously.

II. ON INCOME INEQUALITY

Let us shift gears now and move on to the other topic we wish to explore: the extent to which our entire corpus of incompetency to stand trial/involuntary medication law is, basically, a law that

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[53] Jennifer Wright, *Making Mediation Work in Guardianship Proceedings: Protecting and Enhancing the Voice, Rights, and Well-Being of Elders*, J. INT'L AGING L. & POL'Y (forthcoming 2014), *available at* \http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477111.

[54] Statement on Article 14 of the Convention on the Rights of Persons with Disabilities, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER (Sept. 2014), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E.

[55] *See generally* Perlin & Schriver, *supra* note 19, at 203–04 (describing the history of neglect, abuse, and improper forced treatments, such as "excessive electroshock therapy," that forensic patients have had to endure).

[56] A/Res/61/106, *supra* note 11, art. 17.

applies only to the economically impoverished.

All cases in this area of the law take for granted—indeed, it is never even discussed—that the defendant is in custody awaiting trial and that, most likely, he has been transferred from a jail to a maximum security forensic mental health facility.[57] No one has ever seriously challenged Professor Bruce Winick's assertion that "the incompetency-to-stand-trial process has become a back-door route to the mental hospital."[58] We have found no reported case—nor have we even heard of an *unreported* case—in which a *Sell* application to involuntarily medicate (or pre-*Sell,* a *Charters* application, or any similar case-based application)—was sought in a case in which the defendant was on bail.[59] What happens, then, when a defendant who is awaiting trial is not detained, but is living within the community after making bail and the question of competency arises?

As noted above, the *Sell* Court developed a four-pronged test to determine whether the medication could be administered without the individual's consent.[60] Aside from the medication having to be "medically appropriate" and "substantially unlikely to have side

[57] Notwithstanding the Supreme Court's decision over forty years ago in *Jackson v. Indiana*, establishing time limits on a defendant's presumptive stay in a maximum security hospital if he is not likely to regain his competence to stand trial in the foreseeable future, in many jurisdictions, *all* defendants thought to be incompetent to stand trial—no matter how trivial the underlying charge—are mandatorily housed in such maximum security facilities, and the issue of bail is often never raised. Jackson v. Indiana, 406 U.S. 715, 738 (1972). *See* Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities,* 52 ALA. L. REV. 193, 201 (2000) ("As a matter of practice, defendants awaiting evaluations to determine their competency to stand trial have regularly been sent to maximum security forensic hospitals, regardless of the underlying criminal charge, even though such hospitalization is often not necessary or may even be counter-productive.").

[58] 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, 591 n.102 (1995).

[59] The only roughly parallel case is *United States v. Colon from* 2003. There, a defendant's *conditions of release* on bail required that he be released to a psychiatric hospital to receive antipsychotic medications, and the court found that he posed a threat to society. *United States v. Colon,* No. 03 MAG 1328(LMS), 2003 WL 21730603, at *2 (S.D.N.Y. July 21, 2003). The court in *Colon, however,* found it unnecessary to administer the *Sell* test when the defendant was found to be a danger to himself or others. *Id.* at *4. *See also* Kelly Hilgers & Paula Ramer, *Forced Medication of Defendants to Achieve Trial Competency: An Update on the Law after Sell*, 17 GEO. J. LEGAL ETHICS 813, 817–18 (2004) (for a discussion about *Colon*).

[60] Sell v. United States*,* 539 U.S. 166, 180–81 (2003).

effects that may undermine the fairness of the trial," the court must also decide whether the restoration of competency is necessary to further state interests, and whether it could be done via alternative, less intrusive measures.[61] Not insignificantly, *Sell* followed by only four years the Supreme Court's decision in *Olmstead*,[62] applying the principle of the least restrictive alternative to psychiatric hospitalization.[63] There, the Court ruled that people with mental disabilities had a qualified right to community treatment.[64] Moreover, treatment plans were to be developed in the most integrated way possible, meaning that community-based treatment, if the individual could (whether independently or with help) live within his or her own community, was the best course of action and would, ultimately, foster a therapeutic approach that first considered the dignity and integrity of each individual.[65]

What implications does this have for the question at hand? It should come as no surprise that detainment and incarceration can cause or exacerbate adverse mental health symptoms.[66] Loss of readily available access to a familial or community-based support system, loss of freedom, and the lack of appropriate treatment are some of the concerns that arise from being detained in such unforgiving and hostile settings.[67] In addition to

[61] *Id.* at 179–81.

[62] Olmstead v. L.C. by Zimring, 527 U.S. 581, 599, 607 (1999).

[63] *See id.* at 599, 605–06; *e.g.*, 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, 1003 (2000).

[64] *Olmstead,* 527 U.S. at 607. According to the Court, "[u]njustified isolation . . . is properly regarded as discrimination based on disability[,]" and thus states were ordered to maintain "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings[.]" *Id.* at 597, 605–06. The Supreme Court has also found that the Americans with Disabilities Act applies to prisons. *See* Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 209–10 (1998).

[65] *See generally* Michael L. Perlin, *"I Ain't Gonna Work on Maggie's Farm No More*": *Institutional Segregation, Community Treatment, the ADA, and the Promise of* Olmstead v. L.C., 17 T.M. COOLEY L. REV. 53, 77–78 (2000) (describing Supreme Court Justices' opinions on community-based treatment and treatment of the mentally disabled in general).

[66] HUMAN RIGHTS WATCH, MENTAL ILLNESS, HUMAN RIGHTS, AND US PRISONS: HUMAN RIGHTS WATCH STATEMENT FOR THE RECORD TO THE SENATE JUDICIARY COMMITTEE SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW 3–4 (2009), *available at* http://www.hrw.org/news/2009/09/22/mental-illness-human-rights-and-us-prisons.

[67] *See, e.g.*, Aimee Meyer, *A Legal Resource for the International Human Rights Community: Column: International Updates – North America,* 18 HUM.

providing better quality of treatment, less restrictive alternatives relieve the added stressors of incarceration, and detainment, as they focus primarily on the individual's health and well-being while promoting community integration; the individual can still work, maintain housing, collect benefits, be close to family, and collaborate with his or her attorney.[68] Diversion programs and alternative-to-incarceration options have further added to progress and awareness in this area.[69] For example, the creation of mental health courts have—depending on their individual circumstances and charges—given some defendants with a mental illness or disability the opportunity to address their mental health needs in the context of their current court cases in attempts of both resolving the instant cases while providing the necessary treatment so as to offer the best opportunity to help stop the revolving door phenomenon that exists for many caught between the criminal justice system and the community.[70]

While this is a start in re-conceptualizing the way mental illness is seen within the context of the criminal justice system, more work needs to be done. People with mental illnesses and disorders are held longer in pre-trial detention than those not so labeled.[71] According to the Council of State Governments' Justice Center, the average length of stay for inmates at New York City's Department of Corrections is sixty-one days but almost double

RTS. BR. 30, 30 (2011); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 498 (2006). Generally, the best treatments available can be found in community-based settings. James R. P. Ogloff et al., *Mental Health Services In Jails and Prisons: Legal, Clinical, and Policy Issues,* 18 LAW & PSYCHOL. REV. 109, 131 (1994).

[68] *See* JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 13 (2012).

[69] *See, e.g.,* Amy Carter, *Fixing Florida's Mental Health Courts: Addressing the Needs of the Mentally Ill by Moving Away from Criminalization to Investing in Community Mental Health,* 10 J.L. SOC'Y 1, 18–19 (2009).

[70] *See, e.g.,* Michael L. Perlin, "*The Judge, He Cast His Robe Aside": Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL'Y J. 1, 9–13 (2013); Michael L. Perlin, *"There Are No Trials Inside the Gates of Eden": Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, *in* COERCIVE CARE: LAW AND POLICY 193, 206 (Bernadette McSherry & Ian Freckelton eds., 2013).

[71] THE COUNCIL OF STATES GOVERNMENTS JUSTICE CENTER, IMPROVING OUTCOMES FOR PEOPLE WITH MENTAL ILLNESSES INVOLVED WITH NEW YORK CITY'S CRIMINAL COURT AND CORRECTION SYSTEMS 3 (2012), *available at* http://csgjusticecenter.org/wp-content/uploads/2013/05/CTBNYC-Court-Jail_7-cc.pdf.

that (112 days) for those with a mental illness.[72] Moreover, those with a mental illness are less likely to obtain bail, and remain detained an average of five times longer while waiting for bail to be made than their counterparts.[73]

It is also important to consider the power of sanism and pretextuality in this entire inquiry. Sanism is "an irrational prejudice of the same quality and character as other irrational prejudices that cause, and are reflected in, prevailing social attitudes such as racism, sexism, homophobia, and ethnic bigotry . . . [.]"[74] Its corrosive effects have warped all aspects of the criminal process.[75] "'Pretextuality' means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage in similarly dishonest (frequently meretricious) decision-making, specifically where witnesses, especially *expert* witnesses, show a 'high propensity to purposely distort their testimony in order to achieve desired ends.'"[76] These factors have "poisoned and corrupted" all of mental disability law,[77] and we must keep this in mind when we approach the issue of mental health as it relates to incompetency and bail.

How does this relate to the instant matter? Almost all criminal charges are bailable.[78] Certainly, virtually all non-homicide, non-terrorism-related charges are. Interestingly, one of the factors to be considered in a forced drugging analysis under *Sell* is whether

[72] *Id.*

[73] *Id.*

[74] Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 259 (2014). *See generally*, Michael L. Perlin, "*Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did,* 10 J. CONTEMP. LEGAL ISSUES 3, 3–4 (1999) (discussing how sanism permeates all mental disability law).

[75] *See, e.g.,* 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, 259 (2008).

[76] Michael L. Perlin, *"Things Have Changed" Looking at Non-Institutional Mental Disability Law Through The Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 536 (2003) (quoting Charles Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 840 (1974).

[77] 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, 17 (2003).

[78] *See* Kurt X. Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L. REV. 399, 403–09 (1996) (for a helpful comparative history).

the crime is "serious,"[79] so the *Sell* court clearly "got" the fact that involuntary medication might be sought in the full range of criminal cases. Yet, none of the cases construing *Sell* involve defendants in the community.[80]

We have known for 50 years—since Anne Rankin's groundbreaking study[81]—the importance of bail decisions in ultimate jury verdicts and, in the cases of convictions, on the length of sentence.[82] By way of example, pretrial detention may falsely connote of guilt to jurors, which may ultimately, albeit it at times subconsciously, sway their opinion of the defendant, leading to a greater likelihood of conviction.[83] This, combined with sanism and pretextuality, has the potential to be devastating to the defendant.[84]

As discussed earlier, jail settings, in and of themselves, pose a unique set of risk factors not found in lesser restrictive settings.[85] Jail environments exacerbate existing mental health problems

[79] *See* PERLIN & CUCOLO, *supra* note 2, § 8A-4.2c(1), at 25, 25 n. 369.53; sources cited *supra* note 8; *see also, e.g.*, United States v. White, 620 F.3d 401, 404, 410 (4th Cir. 2010) (nonviolent crimes of conspiracy, credit card fraud, and identity theft were "serious" under *Sell*); United States v. Schloming, 2006 U.S. Dist. LEXIS 28919, at *12 (D.N.J. 2006); PERLIN & CUCOLO, *supra* note 2, § 8A-4.2c(1), at 25 (noting how *Schloming* court "carefully teased out the meanings of the different factors in Sell[ ] . . . . [and] looked carefully at each of the *Sell* criteria," including the admonition that the crime must be "serious").

[80] *See* PERLIN & CUCOLO, *supra* note 2, § 8A-4.2c(1), at 27–30 n.369.41–369.58 (citing cases and articles applying *Sell*).

[81] *See* Rankin, *supra* note 12, at 641, 655. Her work continues to be cited today. *See, e.g.,* Carrie Leonetti, *When the Emperor has no Clothes II: A Proposal for a More Serious Look at "The Weight of the Evidence,"* 7 N.Y.U. J.L. & LIBERTY 84, 124 n.127 (2013); Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1355 n.42 (2014).

[82] *See* Wiseman, *supra* note 81, at 1355 (citing Douglas J. Klein, *The Pretrial Detention "Crisis:" The Causes and the Cure,* 52 J. URB. & CONTEMP. L. 281, 293 (1997)) (noting how trend discovered by Rankin "has continued").

[83] JUSTICE POLICY INSTITUTE, *supra* note 68, at 13.

[84] The overwhelming majority of pretrial detainees with low-level offenses plead guilty to avoid continued jail time and/or potentially longer sentences. In New York City alone, 99.6% of misdemeanor pleas end in guilty pleas. HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 31 (2010), *available at* http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf. Those able to make bail, however, may feel less pressure to plead out as they are free pretrial. "The desire to end the ordeal of the pretrial process—particularly pretrial detention—pressures defendants to plead guilty and give up their right to trial." *Id.*

[85] *See, e.g.,* Michael Winerip & Michael Schwirtz, *Rikers: Where Mental Illness Meets Brutality in Jail,* N.Y. TIMES, July 14, 2014, at A1.

and cause new ones to manifest.[86] Studies have shown that over half of jail inmates have been diagnosed with a mental illness or are receiving treatment for mental health-related issues.[87] Jail staff workers often have no education or training in the appropriate treatment of detainees with a mental illness, and thus may respond with aggressive measures that ultimately exacerbate symptoms of their conditions.[88] Many individuals with a mental illness are disciplined or placed in solitary confinement, rather than being afforded adequate treatment.[89] A person who has made bail, however, has more opportunities to obtain treatment and assist in his or her defense.

But there is nothing in the literature or the case law on the specific issue one of the authors (MLP) raise in this paper. Here is a hypothetical MLP regularly poses to his Criminal Procedure-Adjudication classes when discussing the topic of bail: imagine if a multimillionaire real estate magnate were indicted and charged with a serious criminal offense, and also had a major mental illness, and easily made bail. And let's hypothesize further that it became clear that, when that magnate came to court for pretrial appearances, that his mental illness might reasonably affect his competency to stand trial. His lawyer would most likely tell the judge that his client was seeing a psychiatrist on "the street," and was under his care. And now let's hypothesize that that psychiatrist prescribed medication for the magnate that he didn't want to take. He could very likely pay his bill, walk out of the office, and visit another psychiatrist to see whether he was any happier with his prescription. Or maybe, he didn't want to take drugs at all. Maybe he wanted to try cognitive behavior therapy. In any event, there would be no connection via which the state could mandate *which* medication that the defendant would receive.

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[86] *See U.S.: Number of Mentally Ill in Prisons Quadrupled*, HUM. RTS. WATCH (Sept. 6, 2006), http://www.hrw.org/news/2006/09/05/us-number-mentally-ill-prisons-quadrupled.

[87] *Id. See generally* Michael L. Perlin, *"Wisdom Is Thrown into Jail:" Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness,* 17 MICH. ST. U. J. MED. & L. 343, 343–45 (2012) (discussing the staggering percentage of people with mental illness in prison and the inadequate treatment these institutions provide).

[88] Winerip & Schwirtz, *supra* note 85, at A1.

[89] *See, e.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 328–29, 348 (2006); Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 104–05 (2010).

The courts have made it clear that we cannot have one set of laws for the rich and one for the poor.[90] Anatole France's famous line—that the law "in . . . [its] majestic equality . . . forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread"[91]—has been frequently cited.[92] Yet, we echo the actions that France denounced in cases involving the drugging of incompetent defendants without ever considering the discrimination inherent in such decisions.[93] The bail system has been criticized for decades as a means of punishing economic inequality and enforcing class and race discrimination, repudiating the goal of an unbiased and fair criminal justice system.[94] Those who are detained while awaiting trial and unable to make bail face a unique set of circumstances when (or if) they do reach a trial stage of their case. As previously discussed, juries may presume heightened dangerousness for one who is detained, using that false notion against the individual. One who is in jail also may not have clothing available to him or her, and could show up to their trial in jail-assigned clothes. Jumpsuits or worn clothing could be misinterpreted as a client being disheveled or, again, invoke a subconscious feeling of guilt.[95]

The Supreme Court's jurisprudence on the medication refusal rights of forensic patients—those convicted of crime, those at trial pleading the insanity defense, and those awaiting trial—is doctrinally inconsistent, in large part, because of the totemic significance to the Court of the defendant's *status* in the criminal

[90] *See, e.g.,* Sadhbh Walshe, *America's Bail System: One Law for the Rich, Another for Poor*, GUARDIAN (Feb. 14, 2013), http://www.theguardian.com/commentisfree/2013/feb/14/america-bail-system-law-rich-poor (showing New York state's Chief Judge drawing attention to this issue).

[91] ANATOLE FRANCE, THE RED LILY 95 (1894).

[92] *See, e.g.,* People v. Rafalowitz, 993 N.Y.S.2d 645, 645 (Nassau Cty. Dist. Ct. 2014); Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 935 (2013) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 459 (3d ed. 1874)) (Thomas Cooley's repetition of John Locke's statement that legislators "'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.").

[93] It goes without saying that, given racial income disparities, this policy has a disparate impact on persons of color. *See* HUMAN RIGHTS WATCH, *supra* note 84, at 47; *see also* Perlin, *supra* note 34, at 311 (describing the racial disproportionality present in juvenile detention facilities).

[94] JUSTICE POLICY INSTITUTE, *supra* note 68, at 13.

[95] *Id.*

justice system. We have referred to this previously as "litigational side-effects."[96] It is irrelevant to a person's blood biochemistry if he has been convicted, is at trial or is currently not fit to be tried; yet, the law on each of these is radically different.[97] Any sense that this might partially make—since convicts are presumed to give up some of their civil rights upon conviction,[98] since prison security needs may trump civil liberties,[99] since a competent person at trial is presumed innocent (even where the plea of insanity concedes the commission of the *actus reus*)[100]—disappears in the fact setting we are discussing here. Let us also turn to therapeutic jurisprudence and consider what that school of thought may have to offer us.

III. FROM THE PERSPECTIVE OF THERAPEUTIC JURISPRUDENCE[101]

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence.[102] Initially employed in cases involving individuals with mental disabilities, but subsequently

[96] Perlin, *supra* note 63, at 1019. On "litigational side-effects" in other areas of the law, *see, e.g.*, Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623, 635–36 (1993) (discussing this concept in the context of a "seemingly-benign anti-child abuse law").

[97] *Compare* 2 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, §§ 3B-8.2, 3B8.3 (2d ed. 1999) (discussing *Harper* and *Riggins*), *with* PERLIN & CUCOLO, *supra* note 2, § 8A-4.2c(1), at 20–29 (discussing *Sell*). *Harper, Riggins* and the pre-*Sell* case of United States v. Charters, 829 F.2d 479, 490 (4th Cir. 1987), *rev'd & remanded en banc,* 863 F.2d 302 (4th Cir. 1988), are compared and contrasted in PERLIN, *supra,* at § 3B-8.4.

[98] *See* Washington v. Harper, 494 U.S. 210, 220–21 (1990).

[99] *Compare id.* at 223–24, *with id.* at 258 (Stevens, J., dissenting) ("I continue to believe that 'even the inmate retains an unalienable interest in liberty-at the very minimum the right to be treated with dignity-which the Constitution may never ignore[.]'" (quoting Meachum v. Fano, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting)).

[100] *See, e.g.,* Riggins v. Nevada*,* 504 U.S. 127,135 (1992) ("Pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners") (citing Bell v. Wolfish, 441 U.S. 520, 545 (1979)).

[101] Perlin, *supra* note 37, at 1183; Perlin & Lynch, *supra* note 19, at 37.

[102] Perlin, *supra* note 34, at 330. *See generally* DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 14 (1990); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 8 (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 18 (2008); PERLIN, *supra* note 2, § 2D-3, at 534–41. Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence,* 16 LAW & HUM. BEHAV. 27, 32–33 (1992).

expanded far beyond that narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.[103] The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[104] There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: "the law's use of 'mental health information to improve therapeutic functioning cannot impinge upon justice concerns.'"[105] As one of us (MLP) has written elsewhere, "an inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[106]

Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives"[107] and focuses on the law's influence on emotional life and psychological well-being.[108] It suggests that "law should value psychological health, should strive to avoid

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[103] *See* Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, *in* DISPUTES AND DILEMMAS IN HEALTH LAW 91, 97 (Ian Freckelton & Kate Peterson eds., 2006) (for a transnational perspective); *see also* Michael L. Perlin, "*His Brain Has Been Mismanaged With Great Skill": How Will Jurors Respond To Neuroimaging Testimony In Insanity Defense Cases?*, 42 AKRON L. REV 885, 912 (2009); Perlin, *supra* note 34, at 330.

[104] Michael L. Perlin, "*Everybody Is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia,* 83 WASH. L. REV. 481, 510 n.139 (2008); Perlin, *supra* note 34, at 330. On how therapeutic jurisprudence "might be a redemptive tool in efforts to combat sanism, as a means of 'strip[ping] bare the law's sanist façade,'" *see* Michael L. Perlin, *"Baby, Look Inside Your Mirror": The Legal Profession's Willful And Sanist Blindness To Lawyers With Mental Disabilities*, 69 U. PITT. L. REV. 589, 591 (2008) (quoting MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 301 (2000)); *see also* Ian Freckelton*, Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence,* 30 T. JEFFERSON L. REV. 575, 585 (2008); Bernard P. Perlmutter, *George's Story: Voice and Transformation through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n.111 (2005).

[105] Michael L. Perlin, "*Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them",* 31 LOY. L.A. L. REV. 775, 782 (1998).

[106] Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Perlin, *supra* note 105, at 782.

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

[108] David B. Wexler*, Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies, in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45, 45 (Dennis P. Stolle et al. eds., 2006).

imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness."[109]

Therapeutic jurisprudence "is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."[110] It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[111] In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as "a sea-change in ethical thinking about the role of law a movement towards a more distinctly relational approach to the practice of law which emphasises psychological wellness over adversarial triumphalism."[112] That is, therapeutic jurisprudence supports an ethic of care.[113]

One of the central principles of therapeutic jurisprudence is a commitment to dignity.[114] Professor Amy Ronner describes the "three Vs": voice, validation and voluntariness,[115] arguing:

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary

[109] Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment, in* INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

[110] Freckelton, *supra* note 104, at 577.

[111] Perlin, supra note 34, at 332.

[112] *Id.*

[113] *See, e.g.,* Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006); David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering,* 48 B.C. L. REV. 597, 599 (2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006).

[114] Perlin, *supra* note 34, at 333.

[115] Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

> participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.[116]

The question to be posed here is this: to what extent do our pretrial drugging practices comport with TJ principles? To what extent do they comply with Professor Ronner's aspirations that the "3 V's"—voluntariness, voice and validation[117]—be present in all matters? Forcing involuntary medication cuts against the very concept of therapeutic jurisprudence,[118] and certainly violates "the 3 Vs" articulated by Professor Ronner, and loses sight of the person's integrity.[119] Importantly, this notion of personal integrity is also protected by the CRPD.[120]

No citations are needed to support the assertion that a dual track system—one for rich persons and one for poor persons—violates the tenets of therapeutic jurisprudence. The fact of seeking to refuse medication in a jail setting can exacerbate the danger of the jail environment in and of itself. Jail inmates relatively tell advocates that, although they might be amenable to medication within the community, they resist taking medication because it could make them more vulnerable and targeted within

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[116] Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002).

[117] Perlin, *supra* note 34, at 333.

[118] *See* Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption*?, 1 PSYCHOL. PUB. POL'Y & L. 80, 110–11 (1995):

> The right to refuse treatment has a strong therapeutic jurisprudence component. Although public attention has been focused primarily on what is often seen as the antitherapeutic aspect of this right, we believe that there are significant benefits here as well: due process rights for the mentally disabled, better checks on doctors and clinical staff to ensure that medication and other treatment are not being administered as a means of punishment or convenience, and improved protection from administration of inappropriate medications or medications causing severe side effects, among others.

[119] *See, e.g.*, Steele v. Hamilton Cnty. Cmty. Mental Health Bd., 736 N.E.2d 10, 15 (Ohio 2000) ("The right to refuse medical treatment is a fundamental right in our country, where personal security, bodily integrity, and autonomy are cherished liberties.").

[120] *See, e.g.,* Perlin, *supra* note 34, at 305.

a correctional facility.[121] Those with a mental illness or disability tend to be more likely to experience acts of abuse and violence—by both other inmates and correctional officers, placing them in harm's way.[122] Given that side-effects of antipsychotic medication may make them less aware of their surroundings, more sluggish and apathetic[123] (and thus less able to defend themselves), defendants, naturally, want to keep themselves as safe as possible while in a jail setting.

A dual track system robs a significant percentage of criminal defendants of their "voice." While bailed defendants have the right to exercise "voluntary" choice in deciding whether to take drugs or, if they do decide to, what drugs to take, such voluntariness is entirely missing in the cases of economically disadvantaged defendants who cannot afford bail. And in that context, there is no validation at all of their wishes. In short, our current scheme utterly violates therapeutic jurisprudence principles.

How can this be remedied? First, we need to acknowledge that this reality exists. Second, we need to radically rethink the

[121] Personal communications with Meredith Schriver, M.A.

[122] DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 5 (2006).

[123] *See* 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, 749 n.92 (2005):

> The Supreme Court has explicitly linked the possibility of side effects to the rationale for Constitutional due process protections in right to refuse cases. *See* Washington v. Harper, 494 U.S. 210, 229–30 (1990) ("It is also true that the drugs can have serious, even fatal, side effects tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs is irreversible in some cases, and is characterized by involuntary, uncontrollable movements of various muscles, especially around the face."); Riggins v. Nevada, 504 U.S. 127, 137 (1992) ("It was suggested that the dosage administered to the defendant was within the toxic range, and could make him 'uptight' or make him suffer from drowsiness or confusion. It is clearly possible that such side effects had an impact upon not just defendants' outward appearance, but also the content of his testimony, his ability to follow the proceedings, or the substance of his communication with counsel."); Sell v. United States, 539 U.S. 166, 185 (2003) ("Whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence.").

concept of "least restrictive alternative" in the *Sell* context.[124] We believe that courts must consider what alternatives would be available *if a defendant were in the community,* and weigh these alternatives as part of any *Sell* assessment.[125] Third, courts must acknowledge that the Americans with Disabilities Act[126] requires a consideration of potential pre-trial alternatives in the case of currently-incompetent criminal defendants. As long as many states demand that such defendants be housed in maximum security facilities—no matter how serious or trivial their criminal charges—it is unlikely that there will be any meaningful change in the *status quo*. Just as a rule that all incompetent to stand trial defendants must be housed in such facilities violates the ADA, so does a dual track system that establishes significant limitations on the right of some defendants to refuse treatment (or to be given a meaningful voice in the selection of their own treatment) but imposes no such restrictions on another cohort (those that can afford bail). Finally, our current practices fly in the face of therapeutic jurisprudence principles.

CONCLUSION

We have sought to focus on two seemingly-unrelated issues that have potentially huge impacts on the IST/forced drugging process: the application of international human rights law and the impact of economic inequality. There is little or nothing in the legal literature on either topic, but we believe that we must turn our attention to both if we are to make significant progress in understanding the litigational side-effects of the *Sell* decision, and recognizing the future impact of international human rights law—especially in the context of the CRPD—on this area of law and policy. *Sell* has spawned a cottage industry of scholarly commentary, and has been cited in 557 reported cases.[127] We

[124] *See* Sell v. United States, 539 U.S. 166, 181 (2003); *In re* Guardianship of Dameris L., 956 N.Y.S. 2d 848, 853 (Sur. Ct. 2012).

[125] *See generally Sell*, 539 U.S. at 181 (noting that less intrusive measures must be considered before involuntary treatment); Olmstead v. L.C. by Zimring, 527 U.S. 581, 606 (1999) (finding a right to community treatment where it is feasible).

[126] *See generally* Michael L. Perlin, "*Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization,* 46 DEPAUL L. REV. 947, 950, 955, 973 (1997) (noting the interplay between the ADA and involuntary medication issues).

[127] Per a WestlawNext search conducted October 9, 2014.

believe, though, that it is time for us to consider both of the factors discussed in this paper from the perspectives of human rights, due process, civil liberties and therapeutic jurisprudence.

Writing about Bob Dylan in the context of the civil rights movement, Charles Hughes has concluded that *Gotta Serve Somebody*, the song from which the first part of the title is taken, "foregrounds themes of personal choice and responsibility."[128] If we begin to take more seriously the themes of international human rights law and income equality, then, perhaps, in the substantive context of this paper, these "personal choices" will finally be honored.

[128] Charles Hughes, *Allowed to Be Free: Bob Dylan and the Civil Rights Movement*, *in* HIGHWAY 61 REVISITED: BOB DYLAN'S ROAD FROM MINNESOTA TO THE WORLD 43, 55 (Colleen J. Sheehy & Thomas Swiss eds., 2009).