

**“YONDER STANDS YOUR ORPHAN WITH HIS  
GUN”: THE INTERNATIONAL HUMAN RIGHTS  
AND THERAPEUTIC JURISPRUDENCE  
IMPLICATIONS OF JUVENILE PUNISHMENT  
SCHEMES**

*Professor Michael L. Perlin\**

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\* Director, International Mental Disability Law Reform Project; Director, Online Mental Disability Law Program. The author wishes to thank Alison Lynch for her excellent research assistance.

## I. INTRODUCTION

In the last decade, the United States Supreme Court has ruled that the death penalty, a life sentence without the possibility of parole (LWOP), and mandatory LWOP for homicide convictions violate the Eighth Amendment in the cases of juvenile defendants.<sup>1</sup> These decisions were premised, in large part, on findings that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,”<sup>2</sup> and that those findings both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his “deficiencies will be reformed.”<sup>3</sup>

The Court’s rulings in these cases—*Roper*, *Graham*, and *Miller*—have, by and large, been welcomed by juvenile justice advocates<sup>4</sup> as “game-changing” landmarks,<sup>5</sup> and as reflecting “a positive result for juvenile

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1. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (ruling on mandatory life without parole for homicide); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (ruling on life without parole for crimes other than homicide); *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (ruling on the death penalty).

2. *Graham*, 130 S. Ct. at 2026; see, e.g., Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 83 (2013) (“[J]uveniles rely on areas of the brain . . . associated with risky behavior”). Scholars are preliminarily considering the implications of neuroscientific developments on these questions. See, e.g., Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 737 (2005). Language such as that used by the Supreme Court in these decisions has led one commentator to characterize the Court’s approach as evidencing a “tectonic shift” in its juvenile criminal justice jurisprudence. See Michael Anderson, *The Eighth Amendment and Juvenile LWOP: Applying the Tison Standard to Juvenile Peripheral Accomplices*, \_\_\_\_ MISS. L.J. \_\_\_\_ (forthcoming 2013); Robert G. Schwartz, *Age-Appropriate Charging and Sentencing*, 27 CRIM. JUST., no. 3, 2012 at 49, 49; see also Warren Binford, *Criminal Capacity and the Teenage Brain: Insights from Neurological Research*, 14 DYNAMICS OF YOUTH JUST. & THE CONVENTION ON THE RTS. OF CHILD IN S. AFR. (Dec. 2012), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=2209505](http://papers.ssm.com/sol3/papers.cfm?abstract_id=2209505); Sean C. McGarvey, *Juvenile Justice and Mental Health: Innovation in the Laboratory of Human Behavior*, 53 JURIMETRICS J. 97, 97 (2012).

3. *Miller*, 132 S. Ct. at 2464–65; *Graham*, 130 S. Ct. at 2027 (quoting *Roper*, 543 U.S. at 570) (internal quotation marks omitted).

4. See, e.g., Elisa Poncz, *Rethinking Child Advocacy After Roper v. Simmons: “Kids Are Just Different” and “Kids Are Like Adults” Advocacy Strategies*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 273, 273 (2007) (“The Supreme Court’s *Roper v. Simmons* decision in 2005 was a victory for child advocates.”); Alison Siegler & Barry Sullivan, “‘Death is Different’ No Longer”: *Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 329 (2010) (“The decision had immediate and profound effects . . .”).

5. Michelle Marquis, *Graham v. Florida: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 288 (2011); see John “Evan” Gibbs, *Jurisprudential Juxtaposition: Application of Graham v. Florida to Adult Sentences*, 38 FLA. ST. U. L. REV. 957, 957 (2011). They also have gained the support of the psychiatric and mental health communities, many members of which filed amicus briefs in support of the appellants in the cases decided by the Court. See Colgan, *supra* note 2, at 82–85, 85 n.52. For a sampling of the relevant literature, see, e.g., David A. Shapiro, *What’s Beneath the Graham Cracker?: The Potential Impact of Comparative Law on the Future of Juvenile Justice Reform After Graham v. Florida*, 24 PACE INT’L L. REV. 119, 119–23 (2012); Leslie Patrice Wallace, “*And I Don’t Know Why It Is That You Threw Your Life Away*”: *Abolishing Life Without Parole, the Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 38 (2010); see generally

justice.”<sup>6</sup> None of these changes, however, speaks directly to the case of the juvenile with mental illness or intellectual disabilities who is incarcerated in either an adult or juvenile facility for a lesser crime, or for a less severe sentence than LWOP. Such incarceration, in many instances, violates international human rights law and may violate the Eighth Amendment as well.

In its juvenile death penalty and LWOP cases, the Supreme Court stressed that international law supported its decisions. Consider Justice Kennedy’s language for the majority in *Roper*:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court’s decision in *Trop* [*v. Dulles*, 356 U.S. 86 (1958)], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments.” 356 U.S., at 102–03 (plurality opinion) (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime”); *see also Atkins*, *supra*, at 317, n. 21 (recognizing that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”); *Thompson* [*v. Oklahoma*, 487 U.S. 815 (1988)], 830–31, and n. 31 [(1988)] (plurality opinion) (noting the abolition of the juvenile death penalty “by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,” and observing that “[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual”) . . . .<sup>7</sup>

After *Roper* was decided, scholars and advocates were quick to point out that this rationale would apply equally to LWOP sentences for

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Tera Agyepong, *Children Left Behind Bars: Sullivan, Graham, and Juvenile Life Without Parole Sentences*, 9 NW. U. J. INT’L HUM. RTS. 83 (2010) (stating that LWOP is one of the harshest sentences one can receive, and that there is no proof that this sentence will deter future criminal conduct); Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151 (2005) (explaining that a juvenile’s lack of mental capacity, compared to that of an adult, should bar him from being tried in criminal court).

6. Brianne Ogilvie, Comment, *Is Life Unfair? What’s Next for Juveniles After Roper v. Simmons*, 60 BAYLOR L. REV. 293, 294 (2008); *see generally* Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51 (2012) (articulating a blueprint for the expansive implementation of *Graham*).

7. *Roper*, 543 U.S. at 575–78 (citations omitted); *see* Tobias Bräutigam, *Comparative Law and the US Supreme Court: Roper v. Simmons and the Quest for Theory*, 16 FINNISH YEARBOOK OF INT’L L. 261, 261 (2005) (explaining that “comparative law had its day in court” in *Roper*); Shapiro, *supra* note 5, at 130 (stating that the court used international law for its “persuasive power”).

juveniles.<sup>8</sup> In one post-*Graham* analysis—concluding that the *Graham* decision must “compel system-wide adherence and attention to its principles of difference and its expressed commitment to affording youth offenders a second chance at freedom, citizenship, and life”—the author stressed that “compliance with *Graham* would entail a far more transformative project than simply revising sentencing rules.”<sup>9</sup> Another post-*Graham* analysis focused on the Court’s “greater willingness to consider international human rights standards and practices when assessing sentencing practices within the United States.”<sup>10</sup> An article written after *Miller* speculated that “the *Miller* and *Graham* decisions may suggest a new willingness to expand the Eighth Amendment doctrine.”<sup>11</sup>

Again, in the wake of *Roper*, commentators argued that LWOP in murder cases violated international human rights (IHR) standards.<sup>12</sup> In the wake of *Graham*, commentators argued that LWOP in *any* case violated such standards.<sup>13</sup> Although the Supreme Court, in these decisions, *has* endorsed such positions, it has not yet had the opportunity to consider the IHR implications of either (1) the routine housing of juveniles in adult jails and prisons<sup>14</sup> or (2) the disproportionate number of incarcerated juveniles—

8. See, e.g., Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 983 (2008) (stating that a “LWOP sentence condemns a child to die in prison”); Shapiro, *supra* note 5, at 134–38 (illustrating the maximum sentences in juvenile cases in other nations); Vincent G. Lévy, Comment, *Enforcing International Norms in the United States After Roper v. Simmons: The Case of Juvenile Offenders Sentenced to Life Without Parole*, 45 COLUM. J. TRANSNAT’L L. 262, 262 (2006).

9. Aaron Sussman, *The Paradox of Graham v. Florida and the Juvenile Justice System*, 37 VT. L. REV. 381, 391, 412 (2012).

10. Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581, 599 (2012) (arguing that “three strikes” laws, as applied to juveniles, were unconstitutional following *Graham*).

11. Sara Taylor, Comment, *Unlocking the Gates of Desolation Row*, 59 UCLA L. REV. 1810, 1817–18 (2012). There was no mention of international law in *Miller*. See Jonathan Levy, *The Case of the Missing Argument: The Mysterious Disappearance of International Law from Juvenile Sentencing in Miller v. Alabama*, 132 S. Ct. 2455 (2012), 36 HARV. J.L. & PUB. POL’Y 355, 355–56 (2013); see generally Douglas A. Berman, *Graham and Miller and the Eighth Amendment’s Uncertain Future*, 27 CRIM. JUST., Winter 2013, at 19, 19–20 (explaining that these cases may have irrevocably altered Eighth Amendment jurisprudence).

12. See, e.g., Corina D. Gerety, *Roper v. Simmons and the Role of International Laws, Practices and Opinions in United States Capital Punishment Jurisprudence*, 4 CHINESE J. INT’L L. 565, 565 (2005); Lévy, *supra* note 8, at 269–72; see generally Marina Ann Magnuson, *Taking Lives: How the United States Has Violated the International Covenant of Civil and Political Rights by Sentencing Juveniles to Life Without Parole*, 14 U.C. DAVIS. J. JUV. L. & POL’Y 163 (2010) (explaining that adults and juveniles should be treated differently in terms of sentencing to prevent further breach of international law).

13. Leonardo P. Caselli, Case Note, *Criminal Law—One Small Step for Juveniles, One Giant Leap for Juvenile Justice; Graham v. Florida*, 130 S. Ct. 2011 (2010), 11 WYO. L. REV. 269, 293 (2011).

14. See Beth Caldwell, *Punishment v. Restoration: A Comparative Analysis of Juvenile Delinquency Law in the United States and Mexico*, 20 CARDOZO J. INT’L & COMP. L. 105, 132 (2011) (“The United States incarcerates 10,000 children in adult jails and prisons every day.”).

both in juvenile and in adult correctional facilities—with mental disabilities.<sup>15</sup>

In 2008, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) was ratified.<sup>16</sup> The Disability Convention “furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most aspects of life,”<sup>17</sup> calling for “[r]espect for inherent dignity” and “[n]on-discrimination.” Subsequent articles declare “freedom from torture or cruel, inhuman or degrading treatment or punishment,” “freedom from exploitation, violence and abuse,” and a right to protection of the “integrity of the person.”<sup>18</sup>

The Supreme Court has not yet had the occasion to consider the significance of the CRPD.<sup>19</sup> In *Graham*, however, the Court *did* note that LWOP violated the United Nations (UN) Convention on the Rights of the Child (CRC), a convention signed by every UN member except for the United States and Somalia.<sup>20</sup> So, failure to ratify in no way stops the Court from considering the CRPD in subsequent litigation.<sup>21</sup>

15. See, e.g., Simone S. Hicks, Note, *Behind Prison Walls: The Failing Treatment Choice for Mentally Ill Minority Youth*, 39 HOFSTRA L. REV. 979, 982–83 (2011) (stating that it has been estimated that 50%–75% of all incarcerated juveniles have mental disabilities); see generally *infra* Part II (discussing the alarming number of incarcerated juveniles with mental disabilities).

16. Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007); Press Release, United Nations, With 20 Ratifications, Landmark Disability Treaty Set to Enter into Force on 3 May (Apr. 3, 2008), available at <http://www.un.org/News/Press/docs/2008/hr4941.doc.htm> (discussing the twentieth ratification of the convention); *Chapter IV Human Rights: Convention on the Rights of Persons with Disabilities*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-15&chapter=4&lang=en) (last viewed Sept. 1, 2013); see generally MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD 143–68 (2012) (stating that the ratification of the CRPD had a significant impact on the rights of persons with disabilities); Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF, Winter 2007, at 37, 44 (discussing the positive outlook of the reform for people with disabilities and encouraging the United States to ratify the Disability Convention); 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 (2009) (discussing the implications the ratification of the CRPD will likely have on the United States).

17. Michel L. Perlin, “Abandoned Love”: *The Impact of Wyatt v. Stickney on the Intersection Between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 138–39 (2011); 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, 184 (2005).

18. *Convention on the Rights of Persons with Disabilities*, UN.ORG, <http://www.un.org/disabilities/convention/conventionfull.shtml> (last visited Sept. 16, 2013).

19. See Michelle Diamant, *Obama Urges Senate to Ratify Disability Treaty*, DISABILITY SCOOP (May 18, 2012), <http://www.disabilityscoop.com/2012/05/18/Obama-Urges-Senate-Treaty/15654/> (reporting that President Obama signed the CRPD three years ago). The Senate failed to ratify the CRPD on December 4, 2012, for lack of a supermajority of votes. See U.S. INT’L COUNCIL ON DISABILITIES, <http://usidc.org/index.cfm> (last visited Sept. 16, 2013). The Democratic leadership has promised to bring the Convention up again for ratification in 2013. *Id.*

20. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010). The *Graham* Court stated:

This Article will explore the relationship between the incarceration of juveniles with mental disabilities and international human rights law, especially the CRPD, and will conclude that our current system of warehousing juveniles with mental illnesses in juvenile detention facilities and reformatories and in prisons following pre-adjudication transfers violates international human rights law, including, but not limited to, the CRC and the CRPD. This Article will first consider the data available as to the mental statuses of incarcerated juveniles, with special attention to issues of race and gender.<sup>22</sup> It will next consider the conditions of confinement faced by such juveniles, looking at how jails and detention facilities are increasingly relied upon to provide mental health services—albeit meager and often counterproductive—and how this reliance has created a deficiency that is exacerbated by current transfer and waiver policies.<sup>23</sup> It will then review the important international human rights documents that apply to the questions under discussion.<sup>24</sup> Finally, it will consider all of these issues through the prism of therapeutic jurisprudence, with an eye towards some specific remedies that might, optimally, ameliorate the situation with which we are faced.<sup>25</sup> In this context, I will also look at

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We also note, as petitioner and his *amici* emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the imposition of ‘life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.

*Id.* The Court in *Roper v. Simmons* cited the same section, and added:

Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U.N.T.S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, *supra*, at 1194); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990) (entered into force Nov. 29, 1999) (same).

*Roper v. Simmons*, 543 U.S. 551, 576 (2005).

21. See, e.g., *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848, 854 (N.Y. Cnty. Sur. Ct. 2012) (relying upon the CRPD after the failed ratification vote); *In re Mark C.H.*, 906 N.Y.S.2d 419, 433–34 (N.Y. Cnty. Sur. Ct. 2010) (relying upon the CRPD before the ratification vote); see David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. (forthcoming 2013) (discussing how and why states should execute international law conventions); see also Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159 (2013) (discussing the implications of these cases); see generally Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93 (2012) (authored by the trial judge in the *Dameris L.* and *Mark C.H.* cases); Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265 (2001) (providing a historical overview of state courts’ roles in interpreting international law).

22. See *infra* Part II.

23. See *infra* Part III.

24. See *infra* Part IV.

25. See *infra* Part V.

issues raised by considerations of the quality of counsel made available to such juveniles.<sup>26</sup>

The title of this article is drawn, in part, from Bob Dylan’s epic song, *It’s All Over Now, Baby Blue*. The first verse includes the key language:

You must leave now, take what you need, you think will last  
 But whatever you wish to keep, you better grab it fast  
 Yonder stands your orphan with his gun  
 Crying like a fire in the sun  
 Look out the saints are comin’ through  
 And it’s all over now, Baby Blue.<sup>27</sup>

The song—capturing the sadness of one “with tears that would burn a hole within the largest star”<sup>28</sup>—tells us that we must be willing to “jettison . . . [our] own identity.”<sup>29</sup> My sense is that it is the perfect description of what I am discussing in this paper.

## II. THE MENTAL STATUS OF INCARCERATED JUVENILES

### A. Introduction

As the evidence demonstrates, the number of incarcerated juveniles with mental disorders is alarming and is disproportionate to the juvenile population as a whole. This disproportion is exacerbated when controlled for race, gender, or family stability. Finally, this population of incarcerated juveniles is inflated by the failure of the criminal justice system to properly apply the laws that govern determinations of incompetency status, the insanity defense, and *Miranda* waivers for this population.

### B. Juveniles in Detention Facilities, Jails, and Prisons<sup>30</sup>

“Youths in the justice system are at high risk for mental health problems that may have contributed to illegal behavior.”<sup>31</sup> The research of

26. See *infra* Part V.C.

27. BOB DYLAN, *It’s All Over Now Baby Blue*, on BRINGING IT BACK HOME (Columbia Records 1965).

28. TIM RILEY, *HARD RAIN: A DYLAN COMMENTARY* 108 (1992).

29. MIKE MARQUSEE, *CHIMES OF FREEDOM: THE POLITICS OF BOB DYLAN’S ART* 128 (2003). Ironically, the same social factors originally led to the creation of institutions for orphans and for juvenile delinquents. See, e.g., Carl A. Auerbach, *Is Government the Problem or the Solution?*, 33 SAN DIEGO L. REV. 495, 500–01 (1996); see also Peter J. Galie & Christopher Bopst, *Anything Goes: A History of New York’s Gift and Loan Clauses*, 75 ALB. L. REV. 2005, 2021–22 (2011–2012) (discussing New York Constitution of 1894, art. VIII, § 14 as an example of the granting of this authority).

30. See generally Erica van der Sloot & Robert Vermeiren, *Forensic Child and Adolescent Psychiatry*, in IACAPAP TEXTBOOK OF CHILD AND ADOLESCENT MENTAL HEALTH ch. J-3 (Joseph M. Rey ed., 2012), available at [iacapap.org/iacapap-textbook-of-child-and-adolescent-metal-health](http://iacapap.org/iacapap-textbook-of-child-and-adolescent-metal-health) (providing a helpful overview of all issues).

Dr. Linda Teplin and her colleagues reveal that nearly 60% of male juvenile detainees and more than two-thirds of female detainees meet diagnostic criteria for one or more psychiatric disorders, and that these findings may underestimate the true prevalence of these disorders—in part, because of commonly underreported symptoms and impairments, especially in cases of disruptive behavioral disorders.<sup>32</sup> If undetected learning disabilities are included, the prevalence rate climbs to at least 80%.<sup>33</sup> Juveniles with intellectual disabilities may be overrepresented in such facilities by a factor of five.<sup>34</sup> Prevalence rates for affective disorders range from 30% to 75% in the various studies;<sup>35</sup> nearly half suffered from severe or moderate depression.<sup>36</sup> A Chicago study revealed that 79.7% of detained juveniles were found to have at least one mental disorder, a percentage characterized

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31. Gail A. Wasserman et al., *The Voice DISC-IV with Incarcerated Male Youths: Prevalence of Disorder*, 41 J. AM. ACAD. CHILD & ADOLESCENTS PSYCHIATRY 314, 314 (2002).

32. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES OF GEN. PSYCHIATRY 1113, 1137 (2002). Other surveys agree. See, e.g., THOMAS GRISSO, DOUBLE JEOPARDY 9–10 (2004) (discussing three studies finding disorders present in the 60%–70% range); Richard E. Redding, *Barriers to Meeting the Mental Health Needs of Juvenile Offenders*, 19 DEV. MENTAL HEALTH L., no. 1, 1999 at 1, 1 (77%–93% of juveniles “have mental health problems”); Lois A. Weithorn, *Envisioning Second-Order Change in America’s Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1350 n.191 (2005) (citing research studies). At the least, researchers found such disorder present in “almost half of the juveniles” studied. Deborah Katz Levi, *State v. Mohi, State Sanctioned Abuse?*, 10 J.L. & FAM. STUD. 173, 185 (2007) (citing Cynthia M. Conward, *Where Have All the Children Gone?: A Look at Incarcerated Youth in America*, 27 WM. MITCHELL L. REV. 2435, 2448 (2001)); see also Linda A. Teplin et al., *Detecting Mental Disorder in Juvenile Detainees: Who Receives Services*, 95 AM. J. PUB. HEALTH 1773 (2005) (discussing the difficulties frequently encountered in determining mental disorders in this population); Jennifer Wareham & Denise Paquette Boots, *The Link Between Mental Health Problems and Youth Violence in Adolescence: A Multilevel Test of DSM-Oriented Problems*, 39 CRIM. JUST. & BEHAV. 1003 (2012) (discussing the relationship between mental disorder and violent behavior among youths); see generally PATRICIA PURITZ & MARY ANN SCALI, U.S. DEP’T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY REPORT (1998), available at [www.ncjrs.gov/pdffiles/164727.pdf](http://www.ncjrs.gov/pdffiles/164727.pdf).

33. Michael L. Perlin, “Simplify You, Classify You”: *Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 625 (2009). Beyond the scope of this Article are the circumstances specific to juveniles with substance abuse disorders. The research clearly demonstrates that juveniles with a substance use disorder, with or without co-occurring disorders, were at greater risk for escalations in offense seriousness over time. See, e.g., Olivier Collins et al., *Psychiatric Disorder in Detained Male Adolescents as Risk Factor for Serious Recidivism*, 56 LA REVUE CANADIENNE DE PSYCHIATRIE 44 (2011); Machteld Hoeve et al., *The Influence of Mental Health Disorders on Severity of Reoffending in Juveniles*, 40 CRIM. JUST. & BEHAV. 289 (2013).

34. Trent D. Nelson, Comment, *Congressional Attention Needed for the “Stay-Put” Provision of the Individuals With Disabilities Education Act*, 1997 BYU EDUC. & L.J. 49, 58 n.61 (1997).

35. THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES 32 (1998) (citing research reported in R. Otto et al., *Prevalence of Mental Disorders Among Youth in the Juvenile Justice System, in RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTH IN THE JUVENILE JUSTICE SYSTEM* 8 (J. Cocozza ed., 1992)).

36. Jessica Ann Garascia, Note, *The Price We Are Willing to Pay for Punitive Justice in the Juvenile Detention System: Mentally Ill Delinquents and Their Disproportionate Share of the Burden*, 80 IND. L.J. 489, 505 (2005).



by one researcher as “staggering.”<sup>37</sup> At the lower end, there is no dispute that in any studied cohort, at least 20% of these disorders involve a “serious mental illness.”<sup>38</sup>

Such juveniles also have higher rates of physical injuries.<sup>39</sup> Seventy percent of juveniles being held in juvenile facilities “for mental health purposes” in California have made suicide attempts.<sup>40</sup> In at least one state system, over half of incarcerated juveniles meet the full or partial criteria for Post Traumatic Stress Disorder (PTSD).<sup>41</sup>

These statistics should not be a surprise, given what we know about prevalence rates in adults in jail and prison settings. It is estimated that 15% of male adults in prisons and jails have a mental illness, as do 31% of female adults,<sup>42</sup> a rate of two to four times that of the general population.<sup>43</sup>

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37. Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 33, 40 (Thomas Grisso & Robert G. Schwartz eds., 2000).

38. Liesel J. Danjczek, Comment, *The Mentally Ill Offender Treatment and Crime Reduction Act and Its Inappropriate Non-Violent Offender Limitation*, 24 *J. CONTEMP. HEALTH L. & POL’Y* 69, 76–77 (2007); see also Kasey Corbit, Note, *Inadequate and Inappropriate Mental Health Treatment and Minority Overrepresentation in the Juvenile Justice System*, 3 *HASTINGS RACE & POVERTY L.J.* 75, 83 (2005).

39. Theresa A. Hughes, *Juvenile Delinquent Rehabilitation: Placement of Juveniles Beyond Their Communities as a Detriment to Inner-City Youths*, 36 *NEW ENG. L. REV.* 153, 164 (2001). Juveniles housed in adult prisons have a significantly higher suicide risk than those in all-juvenile facilities. Jennifer L. Boothby, *Contemporary United States Corrections, Mental Health, and Social Policy*, in *CORRECTIONS, MENTAL HEALTH, AND SOCIAL POLICY: INTERNATIONAL PERSPECTIVES* 41, 44 (Robert K. Ax & Thomas J. Fagan eds., 2007). This data becomes especially important in the context of what we know about the outcomes of transfer and waiver decisions. See *infra* text accompanying notes 100–13.

40. Corbit, *supra* note 38, at 82; see Albert R. Roberts & Kimberley Bender, *Overcoming Sisyphus: Effective Prediction of Mental Health Disorders and Recidivism Among Delinquents*, 70 *FED. PROBATION* 19, 19–20; see generally John M. Memory, *Juvenile Suicides in Secure Detention Facilities: Correction of Published Rates*, 13 *DEATH STUDIES* 455 (1989) (providing an earlier archival study).

41. See JULIAN D. FORD ET AL., NAT’L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, *TRAUMA AMONG YOUTH IN THE JUVENILE JUSTICE SYSTEM: CRITICAL ISSUES AND NEW DIRECTIONS* 1 (2007); see also Michael L. Perlin, “*John Brown Went Off to War*”: *Considering Veterans’ Courts as Problem-Solving Courts*, 38 *NOVA L. REV.* (forthcoming 2013) (describing the role PTSD plays in the criminal justice system).

42. Jason Schnittker et al., *Out and Down: Incarceration and Psychiatric Disorders*, 53 *J. HEALTH & SOC. BEHAV.* 448, 451–54 (2012) (explaining the strong causal relationship between incarceration and major depressive disorder and bipolar disorder); Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 *PSYCHIATRIC SERVICES* 761 (2009).

43. See Linda A. Teplin, *The Prevalence of Severe Mental Disorder Among Male Urban Jail Detainees: Comparison with the Epidemiologic Catchment Area Program*, 80 *AM. J. PUB. HEALTH* 663, 664–65 (1990); see also Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 *HARV. C.R.-C.L. L. REV.* 391, 391–95 (2006); William E. Narrow et al., *Revised Prevalence Estimates of Mental Disorders in the United States*, 59 *ARCHIVES OF GEN. PSYCHIATRY* 115, 118–22 (2002); Michael L. Perlin, “*Wisdom Is Thrown into Jail*”: *Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, 18 *MICH. ST. U. J.L. & MED.* (forthcoming 2013) (manuscript at 5 n.12) (discussing the implications of these findings); Christina Canales, Note, *Prisons: The New Mental Health System*, 44 *CONN. L. REV.* 1725 (2012); sources cited *supra* note 42; see generally Jacqueline Buffington-Vollum, *Mental Illness and the Criminal Justice System*, in *FLAWED*

There is little doubt that, just as (depending on where one lives) Rikers Island, the Cook County House of Detention, or the Los Angeles County Jail could be characterized as the “nation’s largest mental institution”;<sup>44</sup> policymakers are aware “that the juvenile justice system is becoming a de facto dumping ground for youth with mental health issues.”<sup>45</sup>

### C. Issues of Gender

As noted earlier, the disorder rate for female detainees and inmates is significantly higher than for males,<sup>46</sup> and thus, females demonstrate an “elevated risk” for psychiatric disorders.<sup>47</sup> Significantly more females (56.5%) than males (45.9%) met criteria for *two* or more psychiatric and related disorders,<sup>48</sup> and females have a significantly higher prevalence of PTSD.<sup>49</sup>

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CRIMINAL JUSTICE POLICIES: AT THE INTERSECTION OF THE MEDIA, PUBLIC FEAR, AND LEGISLATIVE RESPONSE 221, 230–31 (Frances P. Reddington & Gene Bonham, Jr. eds., 2012).

44. See, e.g., Gregory L. Acquaviva, Comment, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 978 (2006) (observing that, “in 1992, the Los Angeles County jail became the nation’s largest mental institution, with Cook County Jail, Illinois, and Riker’s Island, New York, as second and third respectively” (footnote omitted)). Judges concur with this finding. See Stephen S. Goss, *Mental Health Court Programs in Rural and Nonaffluent Jurisdictions*, 33 CRIM. JUST. REV. 405, 405 (2008) (“Our jails have become the de facto mental health treatment centers for many persons . . .”).

45. Garascia, *supra* note 36, at 504 (citing Joseph J. Cocozza & Kathleen R. Skowrya, *Youth with Mental Health Disorders: Issues and Emerging Responses*, 7 JUV. JUST., Apr. 2000, at 3, 5); see also Aubrey L. Cunningham, Comment, *Toward a System of Least Restrictive Care: Brown v. Plata and the Eighth Amendment Right to Adequate Mental Health Care for the Incarcerated*, 56 HOW. L.J. 253, 273 (2012).

46. See Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, *supra* note 32, at 1138 (“Females had higher rates than males of many psychiatric disorders, including major depressive episode[s] and] some anxiety disorders . . .”).

47. See Gail A. Wasserman et al., *Gender Difference in Psychiatric Disorders at Juvenile Probation Intake*, 95 AM. J. PUB. HEALTH 131, 135–36 (2005) (discussing a sampling of individuals studied at probation intake); see also Stephane M. Shepherd et al., *Gender and Ethnicity in Juvenile Risk Assessment*, 40 CRIM. JUST. & BEHAV. 388 (2013).

48. This included major depressive, dysthymic, manic, psychotic, panic, separation anxiety, overanxious, generalized anxiety, obsessive-compulsive, ADHD, conduct, oppositional defiant, alcohol, marijuana, and other substance disorders. See Garascia, *supra* note 36, at 506 (citing Karen M. Abram et al., *Comorbid Psychiatric Disorders in Youth in Juvenile Detention*, 60 ARCHIVES GEN. PSYCHIATRY 1097, 1099 (2003)); see also Gina Vincent et al., *Sex and Race Differences in Mental Health Symptoms in Juvenile Justice: The MAYSI-2 National Meta-Analysis*, 47 J. AM. ACAD. CHILD & ADOLESC. PSYCHIATRY 282 (2008) (showing that sexual differences in mental health symptoms of youth in the juvenile justice system are “even larger” than statistics imply).

49. FORD ET AL., *supra* note 41, at 2 (finding a 49% prevalence rate for girls, as compared to 32% for boys).

#### *D. Issues of Race*

The “disproportionate minority representation” in juvenile detention facilities<sup>50</sup> has especially pernicious impacts on the questions addressed here, and minority youth are also “disproportionately represented among youth with mental health issues.”<sup>51</sup> This must be considered in the context of data showing that “minority youth are more likely than whites to be arrested and detained for the same charges, twice as likely to be held in secure pretrial confinement, and once securely detained, are confined for longer periods of time than white youth.”<sup>52</sup> Although there is some evidence that, for certain disorders, there are higher prevalence rates among non-Hispanic white youths,<sup>53</sup> at the least, two-thirds of black youths and 70% of Hispanic youths present significant psychiatric disorders.<sup>54</sup> “The significant levels of unmet mental health needs” are particularly significant in this cohort.<sup>55</sup>

#### *E. Impact of Broken Homes*

There is no question that the impact of stressors such as broken homes contributes significantly to incidences of juvenile delinquency.<sup>56</sup> “The United States Office of the Surgeon General has identified ‘broken homes’ and ‘separation from parents’ as risk factors for juvenile delinquency”;<sup>57</sup> this recognition indicates the propensity of children from broken homes to

50. Tamar R. Birkhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 448 (2008); see also Shepherd et al., *supra* note 47; Corbit, *supra* note 38, at 77 (stating “minority youth are only one-third of the U.S. adolescent population, yet they account for two-thirds of incarcerated adolescents”); see generally Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013) (highlighting the disparity among incarcerated individuals that are part of minority groups).

51. Hicks, *supra* note 15, at 982.

52. Conward, *supra* note 32, at 2454.

53. See Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, *supra* note 32, at 1138.

54. GRISSO, FORENSIC EVALUATION OF JUVENILES, *supra* note 35, at 10.

55. Henning, *supra* note 50, at 451; see Debra Srebnik et al., *Help-Seeking Pathways for Children and Adolescents*, 4 J. EMOTIONAL & BEHAV. DISORDERS 210 (1996) (describing how the unmet needs of juveniles differ from those of adults).

56. See, e.g., DAVID P. FARRINGTON & BRANDON C. WELSH, SAVING CHILDREN FROM A LIFE OF CRIME: EARLY RISK FACTORS AND EFFECTIVE INTERVENTIONS 68–69 (2007). Astonishingly, a survey has revealed that 20% of parents of children with serious mental disorders have been told by authorities that they must relinquish custody to either the child welfare system or juvenile justice system in an effort to obtain intensive mental health services for their children. Scott Nolen, *Adolescent Mental Health and Justice for Juveniles*, 7 WHITTIER J. CHILD. & FAM. ADVOC. 189, 224 (2008).

57. Cara A. Gardner, Recent Development, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile’s Right to a Parent, Guardian, or Custodian During a Police Interrogation After State v. Oglesby*, 86 N.C. L. REV. 1685, 1696 (2008) (quoting MICHAEL SHADER, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, RISK FACTORS FOR DELINQUENCY: AN OVERVIEW 4 (2001), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/frd030127.pdf>).

commit violent acts significantly more frequently than those who do not have such backgrounds.<sup>58</sup> By way of example, an Australian study showed “that children were ten to fifteen percent more likely to commit crimes” if they came from “broken homes” than from “intact families.”<sup>59</sup> Male delinquents are significantly more likely to come from broken homes than male youths in the general population.<sup>60</sup>

*F. Relationship with Substantive and Procedural Criminal Law*

In a recent article, I discussed how the past thirty years have seen a cluster of changes to criminal procedure (via statute and judicial decisions, both leading to changes in practice) that, “in the aggregate, make the use of an insanity defense or the raising of a mental status issue a much less attractive option to the defendant than ever before.”<sup>61</sup> As part of my inquiry into this topic, I considered

- The narrowing of the insanity defense;
- The constitutional sanctioning of lengths of commitment for insanity acquittees that are far longer than the maximum sentences for the underlying charged offenses;
- Supreme Court decisions making it less likely that jurors will accept the insanity defense;
- The extended sentences faced by defendants who unsuccessfully raise the insanity defense; and
- The failure of most states to comply with the now forty-year-old mandate of *Jackson v. Indiana*, barring, on paper at least, the indeterminate commitment in maximum security forensic facilities of defendants who are not likely to regain their competency to stand trial in the foreseeable future.<sup>62</sup>

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58. SHADER, *supra* note 57, at 2.

59. Kenneth S. Mitchell-Phillips Sr., *Five Steps to a Healthy Divorce: A More Supportive Legal Approach to Post-Divorce High-Conflict Relationships*, 6 WHITTIER J. CHILD & FAM. ADVOC. 147, 160 (2006) (quoting PAT JOBES, *THE USE OF MULTIPLE SOCIAL SERVICES AMONG CHRONICALLY OFFENDING YOUTH* 6 (2004), available at <http://www.criminologyresearchcounsel.gov.au/reports2004-08-jobes.pdf>).

60. Cary Heck & Anthony Walsh, *The Effects of Maltreatment and Family Structure on Minor and Serious Delinquency*, 44 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 178, 184 (2000); see generally Lynn D. Wardle, *The Fall of Marital Family Stability and the Rise of Juvenile Delinquency*, 10 J.L. & FAM. STUD. 83, 93–94 (2007).

61. Perlin, “*Wisdom Is Thrown into Jail*”: *Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, *supra* note 43, manuscript at 21.

62. *Jackson v. Indiana*, 406 U.S. 715, 729–30 (1972); Perlin, “*Wisdom Is Thrown into Jail*”: *Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, *supra* note 43, manuscript at 8–9.

When we look collaterally at these issues in the context of juveniles with mental disabilities charged with crimes, some evidence emerges. It is clear that the criminal justice system has *not* made substantial efforts to clarify the application of incompetency status to juveniles awaiting trial,<sup>63</sup> a question that, according to Professor Thomas Grisso, remains “almost entirely unexplored and unspecified in most jurisdictions.”<sup>64</sup> In other research, Professor Grisso and his colleagues have found that juveniles under the age of fifteen tended to perform at a level of impairment consistent with that of adults who have been found incompetent to stand trial.<sup>65</sup> In some states, determinations of juveniles’ competencies are *precluded* by the prohibition of “mental health evaluations prior to the entry of delinquency adjudications.”<sup>66</sup> In others, however, courts have mandated appropriate treatment for juveniles found incompetent to stand trial,<sup>67</sup> but “[I]ittle is known about the nature of [the] treatment” such juveniles actually receive.<sup>68</sup>

Further, not all states allow juveniles to raise the insanity defense,<sup>69</sup> an issue of significant importance as “evidence continues to accumulate that the juvenile justice system is generally failing in its primary, articulated

63. GRISSO, DOUBLE JEOPARDY, *supra* note 32, at 168–70, 176 (discussing research reported in Ann Tobey, Thomas Grisso & Robert Schwartz, *Youths’ Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE*, *supra* note 37, at 225, Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE*, *supra* note 37, at 73, and Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL’Y & L. 353 (2001)).

64. GRISSO, DOUBLE JEOPARDY, *supra* note 32, at 170. Professor Grisso and a colleague, working with the National Youth Screening and Assessment Project, have crafted model statutes to be used in the determination of competency to stand trial in juvenile proceedings, but there is no evidence that any states have adopted their sound suggestions. *See generally* KIMBERLY LARSON & THOMAS GRISSO, *DEVELOPING STATUTES FOR COMPETENCY TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS* (2011), *available at* <http://modelsforchange.net/publications/330> (providing an example of statutory language to aid states in determining whether a juvenile is competent to stand trial).

65. Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003).

66. MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 8A-6.1, at 84 (2d ed. 2002 & Supp. 2012); *see* Mary Sue Backus, *Achieving Fundamental Fairness for Oklahoma’s Juveniles: The Role for Competency in Juvenile Proceedings*, 65 OKLA. L. REV. 41 (2012) (analyzing Oklahoma’s policies for evaluating the competency of juveniles before trial).

67. *See, e.g.*, T.L. v. State, 670 So. 2d 172, 174 (Fla. Dist. Ct. App. 1996).

68. GRISSO, DOUBLE JEOPARDY, *supra* note 32, at 170; *see* Annette Christy et al., *Juveniles Evaluated Incompetent to Proceed: Characteristics and Quality of Mental Health Professionals’ Evaluations*, 35 PROF. PSYCHOL.: RES. & PRAC. 380, 386–87 (2004) (discussing the quality of expert evaluations in cases in which concerns exist regarding a juvenile’s competency to stand trial); Jodi L. Viljoen et al., *Defense Attorneys’ Concerns About the Competence of Adolescent Defendants*, 28 BEHAV. SCI. & L. 630 (2010) (explaining the role of counsel when concerns are raised about a juvenile’s competence to stand trial).

69. *See* 4 PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL*, *supra* note 66, § 9A-9.1, at 246; *see, e.g.*, *In re C. W. M.*, 407 A.2d 617, 623–24 (D.C. 1979); *Commonwealth v. Chatman*, 538 S.E.2d 304, 308–09 (Va. 2000).

rehabilitative goals.”<sup>70</sup> Again, Professor Grisso points out that “most juvenile justice jurisdictions have never seen an insanity defense . . . . Either the relevance of the insanity defense has not been discovered by the juvenile court, or it has simply been deemed unnecessary.”<sup>71</sup>

Another issue that must be considered is how *Miranda* waiver must be contextualized in cases involving juveniles.<sup>72</sup> Again, Professor Grisso’s research is essential:

As a class, juveniles of ages 14 and below demonstrate incompetence to waive their rights to silence and legal counsel. This conclusion is generally supported across measures of both understanding and perception in our studies, and in relation to both absolute and relative (adult norm) standards.

As a class, juveniles of ages 15 and 16 who have IQ scores of 80 or below lack the requisite competence to waive their rights to silence and counsel.

About one-third to one-half of juveniles 15 and 16 years of age with IQ scores above 80 lack the requisite competence to waive their rights when competence is defined by absolute standards (that is, the satisfaction of scoring criteria for adequate understanding). As a class, however, this group demonstrates a level of understanding and perception similar to that of 17–21-year-old adults for whom the competence to waive rights is presumed in law.<sup>73</sup>

This evidence—later supported by independent empirical studies<sup>74</sup> that remain “uncontroverted”<sup>75</sup>—led Professor Grisso to call for a *per se*

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70. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 66, § 9A-9.1, at 246 n.761.

71. GRISSO, FORENSIC EVALUATION OF JUVENILES, *supra* note 35, at 174.

72. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402–03 (2011) (holding that a child’s age must be taken into account for *Miranda* purposes as long as the officer knew the child’s age or the child’s age would have been apparent to a reasonable officer); see generally Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper*, GRAHAM & J.D.B., 11 CONN. PUB. INT. L.J. 297, 306–12 (2012); Lourdes M. Rosado, *Outside the Police Station: Dealing with the Potential for Self-Incrimination in Juvenile Court*, 38 WASH. U. J.L. & POL’Y 177, 192–200 (2012) (discussing the special risks inherent in juvenile self-incrimination).

73. Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL’Y 109, 138–39 (2012) (quoting THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 193–94 (1981) (internal quotation marks omitted)).

74. See Barry C. Feld, *Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 28 (2006); see also Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC’Y REV. 1, 6–20 (2013) (updating Professor Feld’s research on interrogation of juveniles).

75. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 631 (2002).

exclusionary rule for *Miranda* waivers by juveniles.<sup>76</sup> And, as Professor Mary Berkheiser has perceptively noted, the evidence is “particularly disturbing when viewed in light of the disproportionate number of juveniles adjudicated delinquent who have been diagnosed as learning disabled.”<sup>77</sup>

When taken together, the evidence as to incompetency, insanity and *Miranda* waivers paints a troubling picture. Because the criminal justice system ignores the fact that juveniles may not be competent to stand trial and the fact that they may not be criminally responsible, their opportunities for diversion to mental health facilities are diminished.<sup>78</sup> Because the system, in large part, shuts its eyes to the meaninglessness of *Miranda* waivers (and subsequently countenances the conviction of confessing juveniles), even more juveniles wind up in long-term detention facilities.<sup>79</sup> When added to the data reported on above, the results are especially toxic.<sup>80</sup>

### III. CONDITIONS OF CONFINEMENT

#### A. Introduction

Given the bleak picture just painted, it is necessary to consider a cohort of related questions whose significance is magnified by data as to the relationship between mental disorder and juvenile incarceration.<sup>81</sup> In this section, I will consider the conditions of confinement in the juvenile detention system in general, and will look more specifically at the ways in which the treatment interventions offered may be anti-therapeutic, at the implications of reliance on jails and prisons as mental health facilities, and at the impact of transfer and waiver rules on this population.<sup>82</sup>

#### B. Conditions in General

Over thirty years ago, Jane Knitzer, one of the nation’s most prominent children’s advocates, reported that the needs of children with mental disorders in the juvenile justice system were largely neglected and

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76. Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1143–51, 1160–66 (1980); see Henning, *supra* note 50, at 441 (discussing the susceptibility of adolescents to confess falsely).

77. Berkheiser, *supra* note 75, at 630 (citing Steven A. Greenburg, *Learning Disabled Juveniles & Miranda Rights—What Constitutes Voluntary, Knowing, & Intelligent Waiver*, 21 GOLDEN GATE U. L. REV. 487, 490 (1991)); see generally Perlin, “Simply You, Classify You”: *Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, *supra* note 33, at 625–29 (discussing evidence that learning-disabled juveniles represent a disproportionate number of people in the juvenile justice system).

78. See *supra* notes 64–66 and accompanying text.

79. See *supra* notes 72–75 and accompanying text.

80. See *supra* notes 33–41 and accompanying text.

81. See *supra* notes 71, 78 and accompanying text.

82. See *infra* Part III.B–D.

ignored,<sup>83</sup> a judgment echoed a decade later by Joseph Coccozza, who noted ruefully that “the situation had not changed.”<sup>84</sup> Revisiting this issue a decade ago, Mark Soler concluded that, by and large, the entire range of problems—poor assessment, meager treatment, inadequate training, and dangerous institutions—still remained.<sup>85</sup>

None of the research reported upon in the past decade gives us any hope that there has been any significant amelioration. “[M]ost states are barely able to ensure the physical safety of their juvenile inmates”;<sup>86</sup> “inhumane conditions of confinement . . . and inadequate rehabilitative services” are still common.<sup>87</sup> “[P]unishment, retribution, and a tolerance of harsh conditions of confinement” are still the indicia of most juvenile justice detention facilities.<sup>88</sup> Little has changed in the fourteen years since Professor Barry Feld concluded that “[c]riminological research, judicial opinions, and investigative studies report staff beatings of inmates, the use of medications for social control purposes, extensive reliance on solitary confinement, and a virtual absence of meaningful rehabilitative programs.”<sup>89</sup>

Some of the data is nearly unbelievable. Professor Douglas Abrams reported on findings at the Oakley Training School and the Columbia Training School, both in Mississippi:

The Justice Department found that children at Oakley and Columbia were hog-tied, pole-shackled, locked in mechanical restraints and isolation units, and routinely assaulted by staff. . . . Pole-shackled children had

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83. JANE KNITZER & LYNN OLSON, UNCLAIMED CHILDREN: THE FAILURE OF PUBLIC RESPONSIBILITY TO CHILDREN AND ADOLESCENTS IN NEED OF MENTAL HEALTH SERVICES 42–49 (1982).

84. Joseph Coccozza, *Introduction*, in RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTH IN THE JUVENILE JUSTICE SYSTEM, *supra* note 35, at 1.

85. Mark Soler, *Health Issues for Adolescents in the Justice System*, 31 J. ADOLESCENT HEALTH 321, 321–24 (2002). These conditions, inexplicably, receive little attention. *See* MATTHEW B. ROBINSON, MEDIA COVERAGE OF CRIME AND CRIMINAL JUSTICE 312–15 (2011). A major and exhaustive study of media coverage of crime and criminal justice makes no mention *whatsoever* of conditions in juvenile detention facilities. *See id.* at 185–217. Perhaps, though, this should not be that inexplicable. *See also* William Drakeford et al., *An Examination of Disability Issues in Introductory Juvenile and Criminal Justice Textbooks*, 16 J. CRIM. JUST. EDUC. 280, 288 (2005) (finding that a review of all texts used in criminal justice courses revealed “very little information related to the prevalence of disabilities in the juvenile or criminal justice system”).

86. Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51, 55 (2012).

87. Jennifer K. Pokempner et al., *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 570–71 (2012).

88. Sussman, *supra* note 9, at 389.

89. Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 378–79 (1999) (citation omitted); *see also* Caldwell, *Punishment v. Restoration: A Comparative Analysis of Juvenile Delinquency Law in the United States and Mexico*, *supra* note 14, at 134.



their hands and legs handcuffed around a utility pole for hours while other youths performed military drills around them.

Oakley and Columbia staff also regularly sprayed children with potentially lethal oleoresin capiscum (OC) pepper spray as punishment for minor infractions when no safety risks existed. . . .

The Justice Department found that guards sometimes stripped suicidal girls naked and hog-tied them in Columbia’s “dark room,” where they were held for three days to a week. The room was a locked, windowless isolation cell with nothing but a drain in the floor through which the girls urinated and defecated but which they could not flush. . . . Staff sometimes used restraint chairs for punishment, sometimes hog-tied the girls, and sometimes used OC spray on them for minor misbehavior. The girls were often denied water, personal hygiene items, bathroom facilities, and sufficient mental health care, even though many of the girls suffered from forms of mental disorders, particularly separation anxiety disorder.

Girls reported being forced to eat their own vomit if they threw up while exercising in the hot sun. Youths recommitted to Oakley were taken to an isolation room and punched and slapped by staff as punishment. Staff confirmed that one counselor choked a boy, and another boy reported that a staff member had shoved his head into a toilet. . . .

At both institutions, youths with mental health conditions received only “haphazard and cursory” treatment, and many youths were denied the psychiatric medications they had previously taken. Rather than receiving counseling, rehabilitative treatment, and education, suicidal youths were kept, sometimes naked, on the concrete floor of bare isolation cells with no mattresses during the day. Justice Department consultants observed a thirteen-year-old boy sitting in the restraint chair near the control room at Oakley, reportedly to prevent self-mutilation. Family members had severely sexually abused the boy, who had been in several psychiatric hospitals. As described in the report:

No staff approached him, and he was not allowed to attend school or receive programming, counseling, or medication. . . . Just before our arrival, he had been locked naked in his empty cell. His cell smelled of urine, and we observed torn pieces of toilet paper on the concrete floor that he had been using as a pillow.<sup>90</sup>

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90. Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1046–48 (2005) (final alteration in original) (footnotes omitted) (quoting Letter from Ralph F. Boyd, Jr., Assistant Att’y Gen., U.S. Dep’t of Justice, to the Hon. Ronnie Muzgrove, Governor of Miss. 10 (June 19, 2003)); see also Emily Chiang, *No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond*, 60 BUFF. L. REV. 615, 642 n.129 (2012) (discussing Complaint for Injunctive and Declaratory Relief ¶¶ 1, 17, 20–32, J.H. *ex rel.* Gray v. Hinds Cnty., Miss., No. 3:11-cv-327-DPJ-FKB, 2011 WL 3047667 (S.D. Miss. July 25, 2011)); R. Daniel Okonkwo & Dylan Nicole De Kervor, *There Are Two Sides to Every Story: Collaboration Between Advocates and Defenders in Achieving Systematic Juvenile Justice Reform*, 15 U. PA. J.L. & SOC. CHANGE 435, 446–47 (2012) (discussing similar conditions in Louisiana facilities); Charlyn Bohland, Comment, *No Longer a Child: Juvenile Incarceration in America*, 39 CAP. U.L. REV. 193, 210–16 (2011) (discussing similar conditions in Ohio and Texas facilities).

Professor Beth Caldwell's observation that "[c]onditions of confinement in juvenile detention facilities are troubling from a human rights perspective as well" must be considered in light of data such as that reported by Professor Abrams.<sup>91</sup>

### C. Anti-Therapeutic Medical Interventions

What treatment that is offered is often anti-therapeutic. Professor Angela Burton's comprehensive review documents how juveniles are overly medicated through the use of "indiscriminate and unchecked" psychotropic medications.<sup>92</sup> Professor Abrams reports on a juvenile judge in Florida complaining that some of the incarcerated youths who appeared before him in court seemed to be "sort of in a semicoma."<sup>93</sup> Thomas Grisso underscores the issue: "Providing . . . clinical treatment that does not have a clear necessity, purpose, and potential benefit incurs risks of harm without adequate justification."<sup>94</sup>

Professor Thomas Hafemeister has called for the implementation of an affirmative right to mental health treatment for all detained juvenile offenders,<sup>95</sup> but it is clear that this has not happened in the near-decade since he articulated the foundations of this right.<sup>96</sup> A significant number of incarcerated juveniles simply receive no mental health treatment.<sup>97</sup> In many

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91. Caldwell, *Punishment v. Restoration: A Comparative Analysis of Juvenile Delinquency Law in the United States and Mexico*, *supra* note 14, at 134; *see generally infra* Part IV.

92. Angela Olivia Burton, "They Use It Like Candy": *How The Prescription of Psychotropic Drugs to State-Involved Children Violates International Law*, 35 *BROOK. J. INT'L L.* 453, 512 (2010); *see also* Sussman, *supra* note 9, at 401; Ashley A. Norton, Note, *The Captive Mind: Antipsychotics as Chemical Restraint in Juvenile Detention*, 29 *J. CONTEMP. HEALTH L. & POL'Y* 152, 153–54 (2012); *see generally infra* Part IV (discussing the international human rights implications of these practices). On racial disparities in drug use in the related context of foster care, *see* Susan dosReis et al., *Antipsychotic Treatment Among Youth in Foster Care*, 128 *PEDIATRICS* 1459 (2011).

93. Abrams, *supra* note 90, at 1011–12 (quoting Megan O'Matz, *Young Offenders' Antidepressant Use Draws Concern: After an FDA Warning About Suicides, Some Fear Overmedication in the Juvenile-Justice System*, *ORLANDO SENTINEL*, June 22, 2004, at B5, *available at* [http://articles.orlando.sentinel.com/2004-06-22/news/04-06220043\\_1\\_department-of-juvenile-justice-antidepressants](http://articles.orlando.sentinel.com/2004-06-22/news/04-06220043_1_department-of-juvenile-justice-antidepressants)) (internal quotation marks omitted).

94. GRISSO, *FORENSIC EVALUATION OF JUVENILES*, *supra* note 35, at 130.

95. *See* Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 *VA. J. SOC. POL'Y & L.* 61, 61–62 (2004).

96. *State v. Angilau*, 245 P.3d 745, 756 (Utah 2011) (holding that a juvenile has no fundamental right to treatment in the juvenile system); *see generally* JAMES AUSTIN ET AL., U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE ASSISTANCE, *JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 11–35* (2000), *available at* <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf> (providing a comprehensive survey of early litigation).

97. *See* David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 *AM. J.L. & MED.* 503, 565 (2006); *see also* Andres J. Pumariega et al., *Mental Health and Incarcerated Youth II: Service Utilization*, 8 *J. CHILD & FAM. STUD.* 205, 205–08 (1999); Joan Thomas et al., *The Availability of Behavioral Health Services for Youth in the Juvenile Justice System*, 11 *J. AM. PSYCHIATRIC NURSES ASS'N* 156, 156–57 (2005).

jurisdictions, there is no mental health screening at all.<sup>98</sup> The majority of juvenile detention centers have retained juveniles with mental disabilities “because there was nowhere else for them to go.”<sup>99</sup> But again, the juvenile justice system has become “a de facto dumping ground for youth with mental health issues,”<sup>100</sup> a problem exacerbated by the reality that the mental health service and treatment needs of juveniles will grow while they are incarcerated.<sup>101</sup>

#### D. Transfers

All of this is exacerbated by our juvenile waiver and transfer policies, policies that have “profound” consequences.<sup>102</sup> In all states, special proceedings are available to transfer youth under the usual age threshold from juvenile to criminal court.<sup>103</sup> Judicial transfers require a hearing and findings as to the juvenile’s “dangerousness” and “amenability to treatment.”<sup>104</sup> Statutory exclusion transfers and prosecutorial discretion transfers rarely include any consideration of the juvenile’s psychological characteristics or mental state.<sup>105</sup> Such transfers are often pretextual.<sup>106</sup>

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98. See Sussman, *supra* note 9, at 400 (“Many juvenile justice facilities routinely fail to conduct the necessary mental health screenings, even when such screenings are mandated by state law. Over half of youth offenders are in facilities that do not screen all residents; 64% of facilities do not use standardized mental health assessments; and very few facilities adapt their assessments to the variation in needs accompanying increased system penetration or screen for trauma-related symptoms. And when mental health screenings are conducted, it is often ‘in a haphazard fashion or by untrained staff.’” (quoting RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 24 (2011)) (footnotes omitted)).

99. Colleen Burns, *Access to Mental Health Services for Juvenile Detainees*, 18 ANNALS HEALTH L. ADVANCE DIRECTIVE 150, 151 (2009); see also Nolen, *supra* note 56, at 222–24.

100. Garascia, *supra* note 36, at 504; see also Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 2 (2011) (discussing how *Graham* might support a finding of a right to rehabilitation in the juvenile justice system).

101. Compare Sussman, *supra* note 9, at 395, with *Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) (“[I]t would be consistent with the Court’s reasoning today to include within the ‘minimally adequate training required by the Constitution,’ such training as is reasonably necessary to prevent a person’s pre-existing self-care skills from deteriorating because of his commitment.” (citation omitted)); see also PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 66, § 3A-9.9, at 106–08 (discussing the significance of the concurring opinion in *Youngberg*).

102. MARY ALICE CONROY & DANIEL C. MURRIE, FORENSIC ASSESSMENT OF VIOLENCE RISK: A GUIDE FOR RISK ASSESSMENT AND RISK MANAGEMENT 233 (2007).

103. See David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13, 13 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter THE CHANGING BORDERS].

104. GRISSO, FORENSIC EVALUATION OF JUVENILES, *supra* note 35, at 192. Although judicial waiver is generally less problematic than prosecutorially initiated waiver, judicial waiver “can have the same constitutional concerns as statutory or prosecutorial waiver.” See Jennifer Park, *Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Juvenile Waiver Policies*, 76 GEO. WASH. L. REV. 786, 802 (2008).

105. GRISSO, FORENSIC EVALUATION OF JUVENILES, *supra* note 35, at 192–93; see also Vanessa L. Kolbe, *A Cloudy Crystal Ball: Concerns Regarding the Use of Juvenile Psychopathy Scores in Judicial*

There is little question that these policies were implemented and expanded as part of the “get tough” policies of the punitive juvenile justice system.<sup>107</sup> The principal focus of waivers based on prosecutorial discretion and automatic transfer emphasizes the *crime* committed to the near exclusion of consideration of the *juvenile* who transgresses.<sup>108</sup> And there is little question, again quoting Grisso, that “transferring youths with mental disorders to the criminal justice system is almost certain to provide some volume of cases in which the justice system fails to provide treatment in the interest of long-range public safety.”<sup>109</sup>

The most comprehensive aggregate analysis of transfer policies yields three findings:

First, transfer appears to be counterproductive: transferred youths are more likely to reoffend, and to reoffend more quickly and more often, than those retained in the juvenile justice system. In addition, research suggests that the differential effects of criminal and juvenile justice processing are not dependent on sentence type or sentence length. That is, the mere fact that juveniles have been convicted in criminal rather than juvenile court increases the likelihood that they will reoffend. Finally, the risk of reoffending is aggravated when a sentence of incarceration is imposed.<sup>110</sup>

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*Waiver Hearings*, 26 DEV. IN MENTAL HEALTH L. 1 (2007); Richard E. Redding, *Juvenile Offenders in Criminal Court and Adult Prison: Legal, Psychological, and Behavioral Outcomes*, 50 JUV. & FAM. CT. J., no. 1, 1999 at 1, 2–3 (providing an overview of various states’ laws regarding juveniles eligible to be sentenced to adult jails and prisons).

106. See Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 330 (1999). For earlier studies concluding that transfers were often done for “cosmetic purposes to create the impression or illusion that juvenile court is enforcing a ‘get tough’ policy,” see CLEMENS BARTOLLAS & STUART J. MILLER, *JUVENILE JUSTICE IN AMERICA* 214 (2d ed. 1998). There are profound issues of racial disparity. See Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 121 n.39 (2007). An Illinois study found that African-Americans comprise 15% of the state’s juvenile population, but 85.5% of the juveniles transferred to adult court. *Id.* I discuss the pretextuality of much of our mental disability law and policy in, *inter alia*, MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000).

107. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, *supra* note 89, at 345, 361.

108. See Barry C. Feld, *Juvenile Transfer*, 3 CRIMINOLOGY & PUB. POL’Y 599, 602 (2004); see, e.g., Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 306 (2008) (“[T]he decision to waive a juvenile to adult court is often based as much on the attributes of the offender as it is on the attributes of the offense.”). Remarkably, no state has yet reexamined its transfer and waiver policy in the context of racial and ethnic disparities. See Mark Soler, *Missed Opportunity: Waiver, Race, Data, and Policy Reform*, 71 LA. L. REV. 17, 17 (2010).

109. GRISSO, *FORENSIC EVALUATION OF JUVENILES*, *supra* note 35, at 196. On how *Graham* might support a challenge to the constitutionality of transfer laws, see Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 103 (2010).

110. Donna Bishop & Charles Frazier, *Consequences of Transfer*, in *THE CHANGING BORDERS*, *supra* note 103, at 261 (citation omitted) (referencing, *inter alia*, Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent*

Consider these empirical findings: Juveniles incarcerated in adult institutions are “5 times more likely to be sexually assaulted, twice as likely to be beaten by staff, and 50% more likely to be attacked with a weapon than youth in juvenile facilities.”<sup>111</sup> These conditions may be especially damaging for youths with mental disorders, who are almost eight times more likely to commit suicide in adult jails than in juvenile institutions.<sup>112</sup>

In short, conditions faced by juveniles in detention and incarceration in adult facilities are dangerous, damaging, and life-threatening.<sup>113</sup>

#### IV. INTERNATIONAL HUMAN RIGHTS LAW

##### A. Introduction

There is a rich body of literature that discusses the intersection between international human rights law and the Supreme Court’s death penalty and LWOP decisions as they apply to juveniles.<sup>114</sup> Most—but not all—focus on the CRC, and specifically, Article 37, which states:

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*Felony Offenders*, 18 LAW & POL’Y 77 (1996), and Jeffrey Fagan, *Separating the Men From the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, in SERIOUS, VIOLENT, CHRONIC JUVENILE OFFENDERS: A SOURCEBOOK 238, 245 (James C. Howell et al. eds., 1995)). Also, the justice system “systematically waives juveniles of uncertain competency to adult court for prosecution.” Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 716 (1988) (citing, *inter alia*, Deborah K. Cooper, *Juveniles’ Understanding of Trial-Related Information: Are They Competent Defendants?*, 15 BEHAV. SCI. & L. 167, 168–69, 177–78 (1997), and Kirk Heilbrun et al., *A National Survey of U.S. Statutes on Juvenile Transfer: Implications for Policy and Practice*, 15 BEHAV. SCI. & L. 125, 145 (1997)).

111. Patrick Geary, Note, *Juvenile Mental Health Courts and Therapeutic Jurisprudence: Facing the Challenges Posed by Youth with Mental Disabilities in the Juvenile Justice System*, 5 YALE J. HEALTH POL’Y, L. & ETHICS 671, 700 (2005) (quoting Soler, *supra* note 85, at 326) (internal quotation marks omitted).

112. *Id.*; see also Sussman, *supra* note 9, at 400 (“Only 31% of youth offenders are in facilities that require this screening to be done by mental health professionals.” (quoting ANDREA J. SEDLAK & KARLA S. MCPHERSON, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, YOUTH’S NEEDS AND SERVICES: FINDINGS FROM THE SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT 3 (2010), available at [www.ncjrs.gov/pdffiles1/ojdp/227728.pdf](http://www.ncjrs.gov/pdffiles1/ojdp/227728.pdf))).

113. See Beth Caldwell, *Appealing to Empathy: Counsel’s Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 393 (2012) (discussing how *Roper* and *Graham* constitutionally obligate counsel to present mitigating evidence in cases in which juveniles are tried in adult courts).

114. See, e.g., Elizabeth Cepparulo, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better Than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225 (2006); Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457 (2012); Stephen C. McCaffrey, *There’s a Whole World Out There: Justice Kennedy’s Use of International Sources*, 44 MCGEORGE L. REV. 201 (2013); Kyra Nicole Millich, *Juvenile Justice: An Appeal to Join the Civilized World*, 35 CHAMPION 36 (2011); Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER RACE & JUST. 281 (2012); Shapiro, *supra* note 5.

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age[.]<sup>115</sup>

I will discuss that body of literature briefly in this section, but will focus predominantly on the potential impact of the United Nations CRPD.<sup>116</sup> To this point in time, there has been discussion in neither the case law, nor the literature about the CRPD in this context, but I believe, given the picture I have sought to paint in Parts I and II of this Article, it is a document to which we must turn our attention if we are to think seriously about possible remedies for the current state of affairs in which, as one student author began the title of her Note, “The United States Stands Alone.”<sup>117</sup>

### B. Human Rights in General in This Context<sup>118</sup>

Offenders have enforceable human rights.<sup>119</sup> For instance, individual rights of offenders are safeguarded against “cruel, inhuman or degrading treatment or punishment”;<sup>120</sup> prisoners should be treated with humanity and dignity and should be provided with reformation and social rehabilitation;<sup>121</sup> individuals are guaranteed the right to the “highest attainable standard of

115. *United Nations Convention on the Rights of the Child* art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468–70 (entered into force Sept. 2, 1990), available at <http://www.ovcsupport.net/s/library.php?ld=123>.

116. See *Convention on the Rights of Persons with Disabilities*, *supra* note 18.

117. See Lisa S. Yun, Note, *The United States Stands Alone: An International Consensus Against Juvenile Life Without Parole Sentences*, 20 S. CAL. INTERDISC. L.J. 727, 727 (2011).

118. This section is largely adapted from Michael L. Perlin & Valerie McClain, “Where Souls Are Forgotten”: *Cultural Competencies, Forensic Evaluations, and International Human Rights*, 15 PSYCHOL. PUB. POL’Y & L. 257 (2009).

119. See, e.g., Astrid Birgden & Michael L. Perlin, “Tolling for the Luckless, the Abandoned and Forsaken”: *Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 231 (2008); Astrid Birgden & Michael L. Perlin, “Where the Home in the Valley Meets the Damp Dirty Prison”: *A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings*, 14 AGGRESSION & VIOLENT BEHAV. 256 (2009); Michael L. Perlin & Henry A. Dlugacz, “It’s Doom Alone That Counts”: *Can International Human Rights Law Be an Effective Source of Rights in Correctional Conditions Litigation?*, 27 BEHAV. SCI. & L. 675 (2009); see also Robert Kinscherff & Thomas Grisso, *Human Rights Violations and Standard 1.02: Intersections with Human Rights Law and Applications in Juvenile Capital Cases*, 23 ETHICS & BEHAV. 71 (2013) (discussing the relationship between international human rights standards and the ethical code of psychologists in this context).

120. UNITED NATIONS INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 19, 1966, 1972 U.N.T.S. 172 [hereinafter ICCPR], available at <http://treaties.un.org/doc/Publication/UNTS/volume%20999/volume-999-1-14668-English.pdf>.

121. *Id.* at art. 10.

physical and mental health”;<sup>122</sup> individuals are guaranteed respect for human rights and fundamental freedoms in forensic and correctional systems;<sup>123</sup> and prisoners should be treated in a humane manner and with dignity.<sup>124</sup> It goes without saying—or, at least, it *should* go without saying—that these rights apply to juveniles, as well as to adults.

### C. The CRC and Other International Human Rights Documents

I begin with what may surprise those who are new to this area of law and policy. As noted earlier, every nation in the world—except for the United States and Somalia—has ratified the CRC, forbidding juvenile execution and LWOP for juveniles.<sup>125</sup> Importantly, as noted in the introduction to this paper, the Supreme Court’s decisions in *Roper* and in *Graham* both, nonetheless, squarely implicate international human rights law in the context of death penalty and LWOP issues.

*Roper*, by way of example, explains how both international treaties and international practice support the majority’s position in banning the juvenile death penalty.<sup>126</sup> The Court noted that besides the CRC, there exist parallel prohibitions in the International Covenant on Civil and Political Rights,<sup>127</sup> the Inter-American Convention on Human Rights,<sup>128</sup> and the African Charter on the Rights and Welfare of the Child.<sup>129</sup> In addition, the Court looked at international practice, noting that only seven countries other than the United States have executed juvenile offenders since 1990,<sup>130</sup> and that, since that time, “each of these countries has either abolished capital

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122. UNITED NATIONS INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, DEC. 16, 1966, 993 U.N.T.S. 3, at art. 12 [hereinafter ICESCR], available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%201/Chapter%20IV/IV-3.en.pdf>.

123. Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-First Century, G.A. Res.44/49, 92, U.N. GAOR, 55th Sess. A/RES/55/59 (Jan. 17, 2001).

124. United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, 91 U.N. Doc. A/RES/93/173 (Dec. 9, 1988); see generally Birgden & Perlin, “Where the Home in the Valley Meets the Damp Dirty Prison”: A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings, *supra* note 119; Perlin & Dlugacz, *supra* note 119.

125. See *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

126. There is no question in my mind that Jason Chandler is right when he notes that “*Roper* has become a lightning rod in the foreign law debate.” See Jason Chandler, Note, *Foreign Law—A Friend of the Court: An Argument for Prudent Use of International Law in Domestic, Human Rights Related Constitutional Decisions*, 34 SUFFOLK TRANSNAT’L L. REV. 117, 126 (2011).

127. *Roper*, 543 U.S. at 576 (referring to Art. 6(5), 999 U.N.T.S., at 175, which prohibits capital punishment for anyone under eighteen at the time of the offense, and was signed and ratified by the United States, subject to a reservation regarding Article 6(5)).

128. *Id.* (referring to the Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 146 (entered into force July 19, 1978)).

129. *Id.* (referring to Art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990) (entered into force Nov. 29, 1999)).

130. *Id.* at 577. The nations are Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. *Id.*

punishment for juveniles or made public disavowal of the practice.”<sup>131</sup> It stressed that international opinion was not controlling, but merely confirmatory,<sup>132</sup> and concluded on this point that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>133</sup>

Later, in *Graham*, the Court re-emphasized this point:

There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But “[t]he climate of international opinion concerning the acceptability of a particular punishment” is also “not irrelevant.”<sup>134</sup>

Again, in *Graham*, the Court returned to Article 37 of the CRC for support.<sup>135</sup>

In the years since *Roper*,<sup>136</sup> scholars have argued that international law should also be applied to other aspects of the juvenile correctional and detention system, as well as the criminal justice system, with regard to

131. *Id.*

132. See Linda M. Keller, *Using International Human Rights Law in US Courts: Lessons from the Campaign Against the Juvenile Death Penalty*, in WHAT IS RIGHT FOR CHILDREN? THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 83, 91 (Martha Albertson Fineman & Karen Worthington eds., 2009).

133. *Roper*, 543 U.S. at 578. The majority opinion was trivialized and mocked by Justice Scalia in his dissent, in which he rejected the notion that international law or opinion was relevant at all to the question before the Court. See *id.* at 622–28.

134. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010) (quoting *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982)) (internal quotation marks omitted).

135. *Id.* at 2034. On the near-universal rejection of LWOP in other nations, see Agyepong, *supra* note 5, at 83. See, by way of example, the criminal code of Sierra Leone, as discussed in Danielle Fritz, Note, *Child Pirates from Somalia: A Call for the International Community to Support the Further Development of Juvenile Justice Systems in Puntland and Somaliland*, 44 CASE W. RES. J. INT’L L. 891, 908 n.114 (2012) (“Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before this court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights, in particular the rights of the child.” (quoting Statute of the Special Court for Sierra Leone, art. 7 ¶ 1, Jan. 16, 2002, 2178 U.N.T.S. 137)).

136. Some scholars also wrote about this question in the years before *Roper*. See, e.g., Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 570 n.5 (1997) (considering conditions in which juveniles are housed in adult correctional facilities).



matters ranging from statutory rape laws,<sup>137</sup> to standards in juvenile detention facilities,<sup>138</sup> to issues of disparate gender treatment,<sup>139</sup> to the conditions to which juveniles are subject in adult correctional institutions,<sup>140</sup> and to the misuse of psychotropic medications in juvenile facilities.<sup>141</sup> Most of this literature looks carefully at the CRC,<sup>142</sup> other international treaties, conventions, and rules are also considered.<sup>143</sup> But, to date, none has looked at the CRPD.<sup>144</sup>

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137. See, e.g., Lisa Pearlstein, Note, *Walking the Tightrope of Statutory Rape Law: Using International Legal Standards to Serve the Best Interests of Juvenile Offenders and Victims*, 47 AM. CRIM. L. REV. 109 (2010).

138. See, e.g., Jelani Jefferson & John W. Head, *In Whose “Best Interests”?*—An International and Comparative Assessment of US Rules on Sentencing of Juveniles, 1 HUM. RTS. & GLOBALIZATION L. REV. 89 (2007–2008); Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79 (2008); Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J. L. & SOC. CHANGE 285 (2012); Yun, *supra* note 117, at 735–36.

139. See, e.g., Christina Okereke, Note, *The Abuse of Girls in U.S. Juvenile Detention Facilities: Why the United States Should Ratify the Convention on the Rights of the Child and Establish a National Ombudsman for Children’s Rights*, 30 FORDHAM INT’L L.J. 1709 (2007).

140. See, e.g., Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445 (2012).

141. See Burton, *supra* note 92.

142. See, e.g., Millich, *supra* note 114, at 37; Moriearty & Carson, *supra* note 114, at 299; Chandler, *supra* note 126, at 117 n.2; Okereke, *supra* note 139, at 1710–13.

143. See, e.g., Burton, *supra* note 92, at 468–71; Levick et al., *supra* note 138, at 318; David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 FORDHAM INT’L L.J. 445, 452–54 (2012). Professors Jefferson and Head discuss a wide range of international human rights law documents in this context, including, in addition to the ICCPR and the JDL, the International Covenant on Economic, Social and Cultural Rights, the Inter-American Convention on Human Rights, the African Charter on the Rights and Welfare of the Child, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”), and the UN Guidelines for the Prevention of Juvenile Delinquency (commonly called the “Riyadh Guidelines”). Jefferson & Head, *supra* note 138, at 101–02, 111–16.

144. There has traditionally been robust literature about the relationship between adult correctional facilities and international human rights law. See, e.g., Alvin J. Bronstein & Jenni Gainsborough, *The International Context of U.S. Prison Reform: Using International Human Rights Laws and Standards for U.S. Prison Reform*, 24 PACE L. REV. 811, 814–15 (2004); Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 405–10 (2006); Sara A. Rodriguez, *The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 61, 62 (2007). However, in an article that I co-authored in 2009, I noted that there had heretofore “been no scholarly literature on the question of the implications of the CRPD on the state of prisoners’ rights law in a U.S. domestic context.” See Perlin & Dlugacz, *supra* note 119, at 677. Since that time, several scholars have raised that issue in the context of adults. See, e.g., Janet E. Lord, *Shared Understanding or Consensus-Masked Disagreement? The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities*, 33 LOY. L.A. INT’L & COMP. L. REV. 27, 59–64 (2010); Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, The Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL’Y & L. 281, 313–16 (2010); Kathryn D. DeMarco, Note, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on the Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523, 541–44 (2012). But only one article has discussed both juvenile detention issues and the CRPD, and that article did not discuss them in the same context. See Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN ST. L. REV. 1051, 1063–65 (2011). On the related question of the implications of the

### D. The CRPD<sup>145</sup>

#### 1. Introduction<sup>146</sup>

The CRPD “is regarded as having finally empowered the ‘world’s largest minority’ to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection.”<sup>147</sup> This Convention is the most revolutionary international human rights document that applies to persons with disabilities ever created.<sup>148</sup> As noted in its Introduction, the Disability Convention “furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in” almost every aspect of life.<sup>149</sup> It firmly endorses a social model of disability—a clear and direct repudiation of the medical model that traditionally was part and parcel of mental disability law.<sup>150</sup> “The Convention responds to traditional models, situates disability within a social model framework and sketches the full range of human rights that apply to all human beings, all with a

restorative justice model for juvenile justice with regard to international human rights, see Violet Odala, *The Spectrum for Child Justice in the International Human Rights Framework: From “Reclaiming the Delinquent Child” to Restorative Justice*, 27 AM. U. INT’L L. REV. 543 (2012).

145. See PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD, *supra* note 16, at 143–59; Michael L. Perlin & Èva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 98 (Michael Dudley et al eds., 2012); 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*, *supra* note 16.

146. 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 (Bernadette McSherry & Ian Freckelton eds., 2013) (describing generally the CRPD); Michael L. Perlin, *Understanding the Intersection Between International Human Rights and Mental Disability Law: The Role of Dignity*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191 (Bruce Arrigo & Heather Bersot eds., 2013).

147. Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 4 n.17 (2008) (footnotes omitted) (“See, for example, statements made by the High Commissioner for Human Rights, Louise Arbour, and the Permanent Representative of New Zealand and Chair of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Ambassador Don Mackay, at a Special Event on the Convention on Rights of Persons with Disabilities, convened by the UN Human Rights Council.”).

148. 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*, *supra* note 16, at 3–21 (stating “disability was seen only as a medical problem of the individual requiring a treatment or cure”); Perlin & Szeli, *supra* note 145.

149. Michael Perlin, “Abandoned Love”: *The Impact of Wyatt v. Stickney on the Intersection Between International Human Rights and Domestic Mental Disability Law*, *supra* note 17, at 139 (2011); see *supra* text accompanying notes 17–23; e.g., Dhir, *supra* note 17.

150. See Perlin, “Abandoned Love”: *The Impact of Wyatt v. Stickney on the Intersection Between International Human Rights and Domestic Mental Disability Law*, *supra* note 17 at 139.

particular application to the lives of persons with disabilities.”<sup>151</sup> It provides a framework for ensuring that mental health laws “fully recognize the rights of those with mental illness.”<sup>152</sup> There is no question that it “has ushered in a new era of disability rights policy.”<sup>153</sup>

It describes disability as a condition arising from “interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others” instead of inherent limitations,<sup>154</sup> reconceptualizes mental health rights as disability rights,<sup>155</sup> and “extends existing human rights to take into account the specific rights experience of persons with disabilit[ies].”<sup>156</sup> Again, as noted in the Introduction,<sup>157</sup> it calls for “[r]espect for inherent dignity”<sup>158</sup> and “[n]on-discrimination.”<sup>159</sup> Subsequent articles declare “[f]reedom from torture or cruel, inhuman or degrading treatment or punishment,”<sup>160</sup> “[f]reedom from exploitation, violence and abuse,”<sup>161</sup> and a right to protection of the “integrity of the person.”<sup>162</sup>

The CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities. It not only clarifies that states should not discriminate against persons with disabilities, but it also explicitly sets out the many steps that states must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.<sup>163</sup> One of the most

151. 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, e.g., H. Archibald Kaiser, *Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State*, 17 HEALTH L.J. 139, 162 (2009); Janet E. Lord, David Suozzi & Allyn L. Taylor, *Lessons from the Experience of U.N. Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance*, 38 J.L. MED. & ETHICS 564 (2010); see also Ronald McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections* (2010), available at <http://ssrn.com/Abstract=1563883>.

152. Bernadette McSherry, *International Trends in Mental Health Laws: Introduction*, 26 LAW IN CONTEXT, Dec. 2008, at 1, 8.

153. 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).

154. *Convention on the Rights of Persons with Disabilities*, *supra* note 18, art. 1 and pmb1., ¶ E.

155. Phil Fennell, *Human Rights, Bioethics, and Mental Disorder*, 27 MED. & L. 95, 106–07 (2008).

156. Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 494 (2008); see PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD, *supra* note 16, at 143–58.

157. See *supra* text accompanying notes 19–23.

158. *Convention on the Rights of Persons with Disabilities*, *supra* note 18, art. 17.

159. *Id.* art. 3(B).

160. *Id.* art. 15.

161. *Id.* art. 16.

162. *Id.* art. 17.

163. See Bryan Y. Lee, *The U.N. Convention on the Rights of Persons with Disabilities and Its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities*, 44 COLUM. J.L. & SOC’L PROBS. 393 (2011) (discussing the changes that ratifying states need to make in their domestic involuntary civil commitment laws to comply with Convention mandates); see also István Hoffman & György Könczei, *Legal Regulations Relating to the Passive and Active Legal Capacity of*

critical issues in seeking to bring life to international human rights law in a mental disability-law context is the right to adequate and dedicated counsel. The CRPD mandates that “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”<sup>164</sup> Elsewhere, the convention commands “[t]he extent to which this Article is honored in signatory nations will have a major impact on the extent to which this entire Convention affects persons with mental disabilities.”<sup>165</sup> If, and only if, there is a mechanism for the appointment of dedicated counsel can this dream become a reality.<sup>166</sup>

The ratification of the CRPD marks the most important development ever seen in institutional human rights law for persons with mental disabilities. The CRPD is detailed, comprehensive, integrated, and the result of a careful drafting process. It seeks to reverse the results of centuries of oppressive behavior and attitudes that have stigmatized persons with disabilities. Its goal is clear: to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms of all persons with disabilities and to promote respect for their inherent dignity.<sup>167</sup> Whether this will actually happen is still far from a settled matter.

## 2. *The Key Articles*

Article 7 of the CRPD sets out the basic law that applies to children:

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and

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*Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 LOY. L.A. INT'L & COMP. L. REV. 143 (2010) (discussing the application of the CRPD to capacity issues); DeMarco, *supra* note 144 (discussing the application of the CRPD to solitary confinement in correctional institutions).

164. See 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, 252–53 (2008) (quoting *Convention on the Rights of Persons with Disabilities*, *supra* note 18, art. 12) (internal quotation marks omitted).

165. *Id.* at 253.

166. See Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Book Review: Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658 (2010) (book review) (discussing the significance of “cause lawyers” in the development of mental disability law in the United States).

167. *Convention on the Rights of Persons with Disabilities*, *supra* note 18, art. 1.

maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.<sup>168</sup>

In a later article—one that focuses on “[f]reedom from exploitation, violence and abuse”—this requirement is added: “States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.”<sup>169</sup>

Subsequently, the CRPD also requires that States Parties shall “[p]rovide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children . . . .”<sup>170</sup> It also, as part of its command for access to justice, requires that “States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”<sup>171</sup> In an important article about the relationship of the CRPD to prison conditions, Janet Lord also focuses on Article 15, the right to “freedom from torture or cruel, inhuman or degrading treatment or punishment.”<sup>172</sup> Lord notes that “conditions within prisons and other institutional settings have long been the subject of scrutiny by disability organizations.”<sup>173</sup> In another important piece, Beth Ribet considers how the CRPD acknowledges “the disproportionate vulnerability of people with disabilities to violence, and conceives of this problem as within the terrain of disability human rights,”<sup>174</sup> looking, *inter alia*, at Article 15 as well.

### 3. *Juveniles in Detention and the CRPD*

Think again about what was discussed in Parts I and II of this Article. At least two-thirds of all incarcerated juveniles have a mental disorder.<sup>175</sup> The disorder rate for female detainees and inmates is significantly higher than for males.<sup>176</sup> Minorities are “disproportionately” locked up in juvenile

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168. *Id.* art. 7.

169. *Id.* art. 16(5).

170. *Id.* art. 25(b).

171. *Id.* art. 13(2).

172. *Id.* art. 15.

173. Lord, *supra* note 144, at 69.

174. Ribet, *supra* note 144, at 315.

175. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, *supra* note 32, at 1137; see sources cited *supra* note 32.

176. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, *supra* note 32, at 1138 (“Females had higher rates than males of many psychiatric disorders, including major depressive episode[s] and some anxiety disorders.”).

detention facilities.<sup>177</sup> In institutions, staff beatings of inmates, the use of medications for social control purposes, extensive reliance on solitary confinement, and a virtual absence of meaningful rehabilitative programs are all common.<sup>178</sup> Much of the “treatment” that is offered is per se anti-therapeutic.<sup>179</sup> Worst of all, juveniles who are incarcerated in adult prisons following the transfer or waiver process are far more likely to be sexually assaulted or beaten by staff,<sup>180</sup> and these conditions are exacerbated in the cases of youths with mental disorders.<sup>181</sup>

## V. THERAPEUTIC JURISPRUDENCE<sup>182</sup>

### A. Introduction

One of the most important theoretical legal developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (sometimes “TJ”).<sup>183</sup> Initially employed in cases involving individuals with mental disabilities, but subsequently 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 can have therapeutic or anti-therapeutic consequences.<sup>184</sup> The ultimate aim of therapeutic jurisprudence is to

177. Birkhead, *supra* note 50, at 448; Corbit, *supra* note 38, at 76.

178. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, *supra* note 89, at 378–79; *see also* Caldwell, *Punishment v. Restoration: A Comparative Analysis of Juvenile Delinquency Law in the United States and Mexico*, *supra* note 14, at 134.

179. *See, e.g.*, Abrams, *supra* note 90, at 1011–12; Burton, *supra* note 92, at 512.

180. Soler, *supra* note 85, at 323, 327; Geary, *supra* note 111, at 700; *see also* Levick et al., *supra* note 138, at 307; Wood, *supra* note 140, at 1453.

181. Geary, *supra* note 111, at 700.

182. *See generally* Perlin, “John Brown Went Off to War”: Considering Veterans’ Courts as Problem-Solving Courts, *supra* note 41; Perlin, “Striking for the Guardians and Protectors of the Mind”: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law, *supra* note 21, at 1176–79 (discussing the impact that the Convention on the Rights of Persons with Mental Disabilities will have on international human rights law); 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, *supra* note 146 (discussing the relation of human rights and dignity in mental health law).

183. *See* David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 *TOURO L. REV.* 17, 18 (2008). 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, 27, 32–33 (1992); *see generally* DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990) (examining therapeutic aspects of the law through various methods); DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (1996) (discussing therapeutic jurisprudence through several articles); BRUCE J. WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL* (2005) (offering a new model of commitment that balances protecting legal rights and meeting clinical needs).

184. *See* Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in *DISPUTES AND DILEMMAS IN HEALTH LAW* 91 (Ian Freckelton & Kerry Petersen eds., 2006) (for a

determine whether legal “rules, procedures, and [lawyer] roles can or should be reshaped so as to enhance their therapeutic potential while not subordinating due process principles.”<sup>185</sup> 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.”<sup>186</sup> As I have written elsewhere, “[A]n inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”<sup>187</sup>

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives” and “focuses on the law’s [influence] on emotional life and psychological well-being.”<sup>188</sup> It suggests that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness.”<sup>189</sup> Therapeutic jurisprudence understands that, “when attorneys fail to

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transnational perspective); 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).

185. 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, 751 (2005); 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, 509 (2008); Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 719 (2003). 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 Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585–86 (2008); 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 PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL*, *supra* note 106, at 301); see also 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) (citing Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, *supra*). 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. See Michael L. Perlin, *On “Sanism”*, 46 SMU L. REV. 373, 374–75 (1992).

186. David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); see also, e.g., David Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTATIVE PSYCHOL. 179, 182 (1996) (explaining that their right to refuse treatment encourages therapists to respect the dignity and autonomy of patients).

187. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, “*Where the Winds Hit Heavy on the Borderline*”: *Mental Disability Law, Theory and Practice*, “*Us*” and “*Them*”, 31 LOYOLA L.A. L. REV. 775, 782 (1998).

188. Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009); David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis P. Stolle et al. eds., 2000) [hereinafter *LAW AS A HELPING PROFESSION*].

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

acknowledge their clients' negative emotional reactions to the judicial process, the clients are inclined to regard the lawyer as indifferent and a part of a criminal system bent on punishment."<sup>190</sup> By way of example, therapeutic jurisprudence "aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage."<sup>191</sup>

In recent years, scholars have considered a vast range of topics through a therapeutic jurisprudence lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law.<sup>192</sup> As Ian Freckelton has noted, "it is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."<sup>193</sup> 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.<sup>194</sup> These alternative approaches optimize the psychological well-being of individuals, relationships, and communities dealing with a legal matter, and acknowledge concerns beyond strict legal rights, duties, and obligations. 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."<sup>195</sup> That is, therapeutic jurisprudence supports an ethic of care.<sup>196</sup>

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190. Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 59 (2010).

191. Claire B. Steinberger, *Persistence and Change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 LAW & PSYCHOL. REV. 55, 65 (2003). Christopher Slobogin wrote the most thoughtful, sympathetic critique of therapeutic jurisprudence. See generally Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193 (1995) (finding and examining problems confronting therapeutic jurisprudence).

192. See 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, 537 (2002–2003).

193. Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, *supra* note 185, at 576.

194. Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in LAW AS A HELPING PROFESSION, *supra* note 188, at 465.

195. Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J. MED. & L. 328, 329–30 (2001); see also Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 341, 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006). The use of the phrase was coined by Carol Gilligan. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (discussing how men and women make decisions about morality).

196. 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); Brookbanks, *supra* note 195; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate*



One of the central principles of therapeutic jurisprudence is a commitment to dignity.<sup>197</sup> Professor Amy Ronner describes “the three Vs”: voice, validation, and voluntariness,<sup>198</sup> 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 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 pronouncement 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.<sup>199</sup>

The question to be addressed here is this: Given the system of juvenile punishment that is currently in place, is it remotely possible that Professor Ronner’s vision—of voice, voluntariness, and validation—will be fulfilled?

### *B. The Juvenile System*

Could there be *any* system that is less consonant with Professor Ronner’s values,<sup>200</sup> less consonant with the ethos and *esprit* of therapeutic jurisprudence than the current system of incarcerating juveniles, especially those with mental disabilities? There is no evidence whatsoever that anything about the system is “voluntary.” Professor Burton’s article about the overuse and the misuse of antipsychotic medications<sup>201</sup> illuminates how one discrete area of mental disability law—one that generally, at least on

(Many of) Professor Quinn’s *Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Winick & Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, *supra* note 195, at 605–07.

197. See BRUCE J. WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL* 161 (2005).

198. 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) (internal quotation marks omitted); see also Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, *supra* note 185, at 587–88 (discussing the importance of voice).

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

200. See Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, *supra* note 199, at 102–13 (discussing how the *Miranda* waiver system fails under therapeutic jurisprudence standards).

201. See Burton, *supra* note 92.

paper, acknowledges that there are critical differences between the voluntary and involuntary administration of such medications,<sup>202</sup> and one in which, in both civil and forensic mental disability law, comprehensive and elaborate constitutional doctrines of right-to-refuse medication have been articulated<sup>203</sup>—has had virtually no impact whatsoever on what is regularly done in juvenile facilities.

There is no evidence that juveniles have any “voice” in their treatment or as to the conditions of their confinement. There is no evidence that juveniles in this system are “validated” in any way. The “shock[] the conscience”<sup>204</sup> level of conditions reported in Professor Abrams’s article<sup>205</sup>—conditions that sound Gulag-like in their level of repression—are as anti-therapeutic as one could conjure.

Subjecting juveniles with mental disabilities to sexual assaults,<sup>206</sup> environments that spike suicide rates,<sup>207</sup> and incarceration with adults<sup>208</sup> speaks to conditions that, again, are anti-therapeutic per se,<sup>209</sup> and reflect the reality that, by and large, there has been very little penetration of therapeutic jurisprudence concepts and principles into the “on the ground” practice of juvenile justice in a criminal law setting. Certainly, the incompetency and insanity procedures—as applied to juveniles—do not provide this.<sup>210</sup>

Certainly, there are examples of court systems that have made use of the theories and practices of therapeutic jurisprudence in “attempts to

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202. See PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, *supra* note 66, ch. 3B, at 153–385.

203. See also Michael L. Perlin, “*They Keep It All Hid*”: *The Ghettoization of Mental Disability Law and Its Implications for Legal Education*, 54 ST. LOUIS U. L.J. 857, 857–59 nn.2–3 (2010) (discussing mental disability law and the lack of impact it has had on procedures conducted in juvenile facilities). Compare, e.g., *Sell v. United States*, 539 U.S. 166, 177–80 (2003) (discussing doctrines relating to persons incompetent to stand trial), with *Riggins v. Nevada*, 504 U.S. 127, 134–36 (1992) (discussing doctrines relating to competent insanity pleaders), and *Washington v. Harper*, 494 U.S. 210, 213–18 (1990) (discussing doctrines relating to prisoner cases), and *Rivers v. Katz*, 495 N.E.2d 337, 341–44 (N.Y. 1986) (discussing doctrines relating to civil cases).

204. See *Rochin v. California*, 342 U.S. 165, 172 (1952) (finding that a forced stomach pumping procedure to retract pills swallowed by a defendant “shocks the conscience,” and thus, violates due process).

205. See Abrams, *supra* note 90, at 1046–49.

206. See Geary, *supra* note 111, at 700.

207. See Corbit, *supra* note 38, at 82.

208. See Geary, *supra* note 111, at 700.

209. See generally Birgden & Perlin, “*Tolling for the Luckless, the Abandoned and Forsaken*”: *Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists*, *supra* note 119; Birgden & Perlin, “*Where the Home in the Valley Meets the Damp Dirty Prison*”: *A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings*, *supra* note 119 (discussing the relationship between therapeutic jurisprudence and correctional systems in general).

210. See *supra* text accompanying notes 56–74.

balance punishment, prevention, and adjudication.”<sup>211</sup> Therapeutic jurisprudence’s use of positive reinforcement in the juvenile parole revocation process is a “basic psychological principle that should be imported into the legal system.”<sup>212</sup> Scholars and clinicians have urged that a comprehensive approach in dealing with juveniles with mental illness in this context—a pathway from an assessment center, to a detention center with treatment planning, to a mental health court, to a court order for community-based services—would best “allow the juvenile courts to embrace the tenets of therapeutic jurisprudence.”<sup>213</sup>

And there have been some scholarly explorations. In a thoughtful article, Professor Grisso and Richard Barnum apply therapeutic jurisprudence concepts to the juvenile competence-to-stand-trial process.<sup>214</sup> Professor Bruce Winick and Judge Ginger Lerner-Wren have articulated the therapeutic jurisprudence foundations of a right to counsel on behalf of juveniles facing civil commitment.<sup>215</sup> Other scholars have incorporated therapeutic jurisprudence precepts into articles and essays on a full range of issues dealing with juvenile detention and juvenile justice.<sup>216</sup> But these are, by and large, exceptions, and by no means do they dominate the discourse in this area of law and policy.

In three recent books, I have explored the relationships between therapeutic jurisprudence and international human rights, between therapeutic jurisprudence and the death penalty, and between therapeutic jurisprudence and criminal procedure.<sup>217</sup> In these works, I concluded that it was impossible to make any meaningful headway in the resolution of the difficult, seemingly intractable issues that have emerged in all of these areas

211. See Marsha B. Freeman, *Florida Collaborative Family Law: The Good, the Bad, and the (Hopefully) Getting Better*, 11 FLA. COASTAL L. REV. 237, 253 (2010); see also Nolen, *supra* note 56, at 210–18 (discussing the therapeutic jurisprudence basis of special drug courts for juveniles).

212. Jennifer Marie Sanchez, *Therapeutic Jurisprudence and Due Process in the Juvenile Parole Revocation Process: An Arizona Illustration*, 7 FLA. COASTAL L. REV. 111, 119 (2005).

213. Gene Griffin & Michael J. Jenuwine, *Using Therapeutic Jurisprudence to Bridge the Juvenile Justice and Mental Health Systems*, 71 U. CIN. L. REV. 65, 86 (2002); see Buffington-Vollum, *supra* note 43, at 242 (discussing the failure to provide diversion programs); see also Geary, *supra* note 111, at 693–706 (characterizing this plan as “effective” and providing recommendations for juvenile mental health detention systems that are consonant with therapeutic jurisprudence values).

214. Richard Barnum & Thomas Grisso, *Competence to Stand Trial in Juvenile Court in Massachusetts: Issues of Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 321, 321–24 (1994).

215. Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel?: A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115, 115–18 (2002). The Florida courts followed their advice. See Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 804 So.2d 1206 (Fla. 2001).

216. See A.J. Stephani, *Symposium: Therapeutic Jurisprudence and Children*, 71 U. CIN. L. REV. 13, 15 n.8 (2002).

217. MICHAEL L. PERLIN, *A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW* (2013); PERLIN, *INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD*, *supra* note 16; MICHAEL L. PERLIN, *MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES* (2013).

of the law without carefully considering the therapeutic jurisprudence implications of the actions of judges, legislators, lawyers, and other policymakers.<sup>218</sup> The same arguments could be made in any therapeutic jurisprudence analysis of the questions I am addressing in this paper.

### C. *The Special Issues Related to Counsel*

Another issue to be considered through the therapeutic jurisprudence lens is the appointment of counsel to the cohort of juveniles in question.<sup>219</sup> Professor Grisso is clear that “[i]f there is a single most important obligation of the system for protecting the legal interests of youths with mental disorders, it is *the obligation to provide them with competent defense attorneys . . .*”<sup>220</sup>

These issues are especially exacerbated in juvenile cases where the person facing institutionalization rarely, if ever, has the funds to retain a lawyer of his or her own choice. The disparity between quality of counsel in jurisdictions in which there is an organized public defender system and in which there is none is well known.<sup>221</sup> Certainly, the quality of representation available to juveniles in jurisdictions without such a system fails miserably under any therapeutic jurisprudence metric. The issues are

218. See generally PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW, *supra* note 217, at 217–39; PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD, *supra* note 16, at 203–18 (exploring the relationship between therapeutic jurisprudence and international human rights); PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES, *supra* note 217, at 147–55.

219. See Donald N. Duquette & Julian Darwell, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L. Q. 87, 88–122 (2012) (discussing questions related to the appointment of counsel to juveniles in the family law system); see also David Katner, *Revising Legal Ethics in Delinquency Cases by Consulting with Juveniles’ Parents*, 79 UMKC L. REV. 595, 595–632 (2011) (discussing the related issue of the ethical implications of consulting with the parents of a juvenile in delinquency proceedings).

220. THOMAS GRISSO, DOUBLE JEOPARDY, *supra* note 32, at 177; see also Gary Crippen, *Can the Courts Fairly Account for the Diminished Competence and Culpability of Juveniles? A Judge’s Perspective*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 37, at 403, 408–09; Shana Conklin, Note, *Juveniles Locked in Limbo: Why Pretrial Detention Implicates a Fundamental Right*, 96 MINN. L. REV. 2150, 2150–81 (2012) (discussing how pretrial detention implicates fundamental rights); Amy Webbink, Note, *Access Denied: Incarcerated Juveniles and Their Right of Access to Courts*, 7 WM. MARY BILL RTS. J. 613, 613–42 (1999) (discussing the question of the need of incarcerated juveniles for counsel in matters related to their conditions).

221. See Junius Allison, *Relationship Between the Office of the Public Defender and the Assigned Counsel System*, 10 VAL. U. L. REV. 399, 399–422 (1976) (discussing an earlier perspective); Thomas H. Cohen, *Who’s Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1876474](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1876474) (discussing how defendants with assigned counsel receive less favorable outcomes compared to their counterparts with public defenders; the author is a statistician, with the United States Bureau of Justice Statistics).

also similarly exacerbated because of juveniles’ unique developmental status.<sup>222</sup>

In my discussion of the CRPD above,<sup>223</sup> I focused on issues related to the right to counsel.<sup>224</sup> Again, in both books and law review articles, I have stressed the importance of access to dedicated and organized counsel systems if the CRPD is to be more than a “paper victory” for persons with disabilities.<sup>225</sup> Professor Ronner and Judge Juan Ramirez characterize the right to counsel as “the core of therapeutic jurisprudence,”<sup>226</sup> and I have previously argued that “[t]he failure to assign adequate counsel bespeaks . . . a failure to consider the implications of therapeutic jurisprudence.”<sup>227</sup> But virtually none of the scholarly literature or commentary applies to the plight of the incarcerated juvenile with mental disabilities. It is time we focus on this population.

## VI. CONCLUSION

Juvenile punishment and incarceration schemes are morally bereft. They subject the most at-risk population to unspeakably brutal conditions, they ignore the ubiquity of mental disabilities in this population, and they provide few meaningful diversion programs. These calamities are exacerbated when questions of race, gender, and family cohesion are the subject of focus. Our policies of transfer and waiver and the way that the criminal justice system treats questions of incompetency, insanity, and *Miranda* waiver further exacerbate the situation.<sup>228</sup> Our policies violate international law, deny individuals the dignity which they are due, and turn their backs on the precepts of therapeutic jurisprudence. In an article

222. See Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 205 (2007) (discussing impact of juveniles’ “cognitive disadvantages”).

223. See *supra* text accompanying notes 163–67.

224. See, e.g., PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD, *supra* note 16, at 159–67.

225. See Michael L. Perlin, “What’s Good is Bad, What’s Bad is Good, You’ll Find Out When You Reach the Top, You’re on the Bottom”: Are the Americans with Disabilities Act (and *Olmstead v. L.C.*) Anything More Than “Idiot Wind?”, 35 U. MICH. J.L. REFORM 235, 246 (2002) (“Mental disability law is strewn with examples of ‘paper victories.’” (quoting Michael Lottman, *Paper Victories and Hard Realities*, in PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED 93 (Valerie J. Bradley & Gary J. Clarke eds., 1976))).

226. Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 119 (2004).

227. 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, *supra* note 185, at 750; see also Perlmutter, *supra* note 185, at 579 n.53 (citing sources that consider other juvenile justice questions from therapeutic jurisprudence perspectives).

228. Many thoughtful recommendations have been made, but there has been, in many jurisdictions, absolutely no positive response. See, e.g., Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483, 538–41 (2009).

critiquing the incompetency-to-stand-trial process, I characterized mental disability law in this context as a “fraud and charade.”<sup>229</sup> I would apply the same, precise words to the system under consideration in this paper.

Oliver Trager refers to “It’s All Over Now, Baby Blue” (the song on which I drew for my title) as depicting “a cold world in which nothing is certain” but one that “still brims with a kind of dark hope.”<sup>230</sup> The world of juveniles that I have depicted is “cold,” and little, if anything, is “certain.” But I retain some “hope”—albeit “dark hope”—that if we begin to take seriously the principles of international human rights law and therapeutic jurisprudence, our “orphan with his gun” may finally have a world that is a better place. For all of us.

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229. Michael L. Perlin, “Everything’s a Little Upside Down, As a Matter of Fact the Wheels Have Stopped”: *The Fraudulence of the Incompetency Evaluation Process*, 4 HOUSTON J. HEALTH L. & POL’Y 239, 240 (2004).

230. OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 320 (2004).