

# “THE DISTANT SHIPS OF LIBERTY”: WHY CRIMINOLOGY NEEDS TO TAKE SERIOUSLY INTERNATIONAL HUMAN RIGHTS LAWS THAT APPLY TO PERSONS WITH DISABILITIES<sup>+</sup>

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## ABSTRACT

Persons institutionalized in forensic psychiatric facilities have been hidden from the public view for decades—physically, socially, and legally. This reality must be radically reconsidered in light of the ratification of the United Nations’ Convention on the Rights of Persons with Disabilities (“CRPD”), the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities. There has been, however, virtually no attention paid by criminologists to the potential impact of this Convention on forensic populations. In this paper,

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we will focus on a series of core issues—including the lack of attorneys and advocates who represent this population, the lack of scholarly interest in this matter, and the conditions common to many forensic facilities—all through the prism of therapeutic jurisprudence (“TJ”). Additionally, we will explore the reasons why this population is often left behind and why it is essential that criminologists begin to take this issue seriously.

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#### I. INTRODUCTION

Persons institutionalized in forensic psychiatric facilities have been hidden from the public view for decades—physically, socially, and legally.<sup>1</sup> The forensic population<sup>2</sup> also faces multiple forms of discrimination, both

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<sup>1</sup> See generally Maya Sabatello, *Where Have the Rights of Forensic Patients Gone?*, 109 AM. SOC’Y INT’L L. PROC. 77, 78 (2015) (noting that forensic patients have largely remained invisible throughout the drafting process and aftermath of the CRPD).

<sup>2</sup> See Michael L. Perlin & Meredith R. Schriver, “*You That Hide Behind Walls*”: *The Relationship Between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients*, in TORTURE IN HEALTH-CARE SETTINGS: REFLECTIONS ON THE SPECIAL RAPPORTEUR ON TORTURE’S 2013 THEMATIC REPORT 197 (Am. Univ. Ctr. Hum. Rts. & Humanitarian L. 2014) [hereinafter *You That Hide Behind Walls*] (discussing that forensic populations encompass “mostly those awaiting incompetency-to-stand trial determinations, those found permanently incompetent to stand trial, those who had been acquitted by reason of insanity, and, in some jurisdictions, individuals transferred from correctional facilities”).

as a result of their criminal histories<sup>3</sup> and their mental illnesses.<sup>4</sup> Moreover, the conditions in such facilities are “even more abysmal than in civil facilities.”<sup>5</sup> This reality must be radically reconsidered in light of the ratification of the United Nations’ Convention on the Rights of Persons with Disabilities (“CRPD”),<sup>6</sup> the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities.<sup>7</sup>

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<sup>3</sup> See generally Michael L. Perlin, “God Said to Abraham/Kill Me a Son”: *Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 AM. CRIM. L. REV. 477, 488–516 (2017) [hereinafter *Insanity Defense and the Incompetency Status*] (discussing how a determination or evaluation of incompetency to stand trial in no way is an admission or indicia of guilt, but rather, a finding that the person in question cannot consult with counsel or understand the proceedings against him). Nonetheless, most assume the raising of this status (not a defense) is an admission of guilt to the underlying charge. *Id.* at 489. See generally AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS ch. 7, pt. IV (AM. BAR ASS’N 2016) (noting that the doctrine of incompetence to stand trial “has no bearing on guilt or innocence”).

<sup>4</sup> It is important to note that a significant number of persons in forensic facilities are not mentally ill but are intellectually disabled. See Jill Diane Stinson & Sharon Bradford Robbins, *Characteristics of People with Intellectual Disabilities in a Secure U.S. Forensic Hospital*, 7 J. MENTAL HEALTH RSCH. INTELL. DISABILITIES 337, 339 (2014). Such patients were found to comprise 12.8% of all patients with forensic involvement, but there has still been minimal focus on the high rates of abuse and neglect experienced by this population. Y. Lunsky, C. Gracey, C. Koegl, E. Bradley, J. Durbin & P. Raina, *The Clinical Profile and Service Needs of Psychiatric Inpatients with Intellectual Disabilities and Forensic Involvement*, 17 PSYCH. CRIME & L. 9, 19–20 (2011); see also W. Glaser & D. Florio, *Beyond Specialist Programmes: A Study of the Needs of Offenders with Intellectual Disability Requiring Psychiatric Attention* 48 J. INTELL. DISABILITY RSCH. 591, 592 (2004).

<sup>5</sup> See, e.g., 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. UNIV. L. REV. 483, 492 (2009) [hereinafter *A Change Is Gonna Come*].

<sup>6</sup> Convention on the Rights of Persons with Disabilities, *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD] (signed by President Barack Obama in July 2009, but not ratified by Congress).

<sup>7</sup> See generally Michael L. Perlin & Éva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 80 (Michael Dudley et al. eds., 2012) [hereinafter *Contemporary Challenges*] (discussing the CRPD and the expansion of human rights in disability law in the international context); MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD (2011) [hereinafter *WHEN THE SILENCED ARE HEARD*] (examining the mistreatment of people with mental disabilities globally and identifying universal factors that contaminate mental disability law); Michael L. Perlin & Éva Szeli, *Article 14: Liberty and Security of the Person*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 402 (Ilias Bantekas et al. eds., 2018) (discussing Article 14 of the CRPD, which addresses the fundamental right of liberty and security). See *Insanity Defense and the Incompetency Status*, *supra* note 3, at 494–504, for a discussion on the potential impact of the General Comment on the CRPD, which requires the abolition of the insanity defense and the incompetency status on this population.

In other scholarly works, two of the co-authors—separately, together, and with others (both lawyers and forensic psychologists)—have begun to consider the impact of this Convention on this population and the changes that must be made in forensic facilities so as to comport with these recent developments in international human rights law.<sup>8</sup> There has been, however, virtually no attention paid by criminologists—or by scholarly criminology journals—to the potential impact of this Convention on forensic populations.<sup>9</sup> In this paper, we will highlight some of the key issues that must be examined in this context, examine them through the lens of therapeutic jurisprudence (“TJ”), and offer some suggestions for future explorations in this area.

As we will note, there is a significant lack of attorneys and advocates available to represent this population. What is especially distressing is the

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<sup>8</sup> See, e.g., *You That Hide Behind Walls*, *supra* note 2; *Insanity Defense and the Incompetency Status*, *supra* note 3; *Contemporary Challenges*, *supra* note 7; WHEN THE SILENCED ARE HEARD, *supra* note 7; Michael L. Perlin & Alison J. Lynch, “All His Sexless Patients”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 273–77 (2014) [hereinafter *Sexless Patients*]; Michael L. Perlin & Alison J. Lynch, “Love Is Just a Four-Letter Word”: *Sexuality, International Human Rights, and Therapeutic Jurisprudence*, 1 CANADIAN J. COMPAR. & CONTEMP. L. 9, 12–16 (2015) [hereinafter *Love Is Just a Four-Letter Word*]; Michael L. Perlin & Alison Julia Lynch, “Toiling in the Danger and in the Morals of Despair”: *Risk, Security, Danger, the Constitution, and the Clinician’s Dilemma*, 5 IND. J.L. & SOC. EQUAL. 409, 428–40 (2017) [hereinafter *Toiling in the Danger*]; 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, 257 (2009) [hereinafter *Home in the Valley*]; Astrid Birgden & Michael L. Perlin, “Tolling for the Luckless, the Abandoned and Forsaken”: *Community Safety, Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees*, 13 LEGAL & CRIMINOLOGICAL PSYCH. 231 (2008) [hereinafter *Tolling for the Luckless*].

<sup>9</sup> There is virtually no scholarly attention paid in the legal literature to this population at all. Westlaw searches (using the Journal and Law Reviews database, which includes hundreds of law reviews, bar journals, and continuing legal education materials) for <“forensic hospital” /s condition>, and for <forensic +2 hospital facility institution /s hidden> revealed not a single relevant article. The authors completed this search on April 6, 2022. On the potential impact of the CRPD on correctional inmates, see 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, 676–92 (2009). On the impact of international human rights law in general on this population, see Rick Lines, *The Right to Health of Prisoners in International Human Rights Law*, 4 INT’L J. PRISONER HEALTH 3, 20, 33–35 (2008). On the potential impact of the CRPD on the practice of forensic psychology, see Michael L. Perlin, *With Faces Hidden While the Walls Were Tightening’: Applying International Human Rights Standards to Forensic Psychology*, 7 U.S.-CHINA L. REV. 1, 11 (2010); Michael L. Perlin, “Your Old Road Is/Rapidly Agin’”: *International Human Rights Standards and Their Impact on Forensic Psychologists, the Practice of Forensic Psychology, and the Conditions of Institutionalization of Persons with Mental Disabilities*, 17 WASH. UNIV. GLOBAL STUD. L. REV. 79, 83 (2018).

lack of attention paid by the “psychiatric survivor” movement<sup>10</sup> to this issue and to the special problems faced by forensic patients who are intellectually disabled. We will briefly explore the reasons why this population is often left behind as new paradigms in mental health and human rights continue to emerge. But again, this does not appear to be a topic of significant interest to criminologists and criminal justice scholars.

We approach the issues in this manner. First, in Part II, we discuss forensic facilities and how forensic patients are often ignored in much of the significant litigation. Then, in Part III, we examine the CRPD and other relevant international human rights law in the context of the focus of this paper. In Part IV, we question why organized criminology has been so silent about the underlying problems. Following that, in Part V, we explain the significance of TJ to the issues under discussion. Finally, in Part VI, we conclude with some suggestions as to how the issues and problems we raise can be remediated.

Our title comes from this couplet in a relatively unknown (but nonetheless powerful) song of Bob Dylan’s, *Caribbean Wind*:

And them distant ships of liberty on them iron waves so  
bold and free/  
Bringing everything that’s near to me nearer to the fire.<sup>11</sup>

Critics have characterized the image of “ships” in Dylan’s writings as “[o]ne of Dylan’s prophesies, optimistic and vengeful in heralding the day when evil will be purged.”<sup>12</sup> The use of the word “wind” in the title is seen as “the metaphor for change.”<sup>13</sup> We believe that the conditions in many (perhaps most) forensic facilities around the world are “evil,” and we believe that change is needed. We thus incorporate this line into our title in the hopes that new policies—quoting the lyric, “bold and free”—will soon come into place.

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<sup>10</sup> See *infra* note 74 and accompanying text.

<sup>11</sup> Dylan has sung it in concert only once, some forty years ago. See *Caribbean Wind*, BOBDYLAN.COM, <https://www.bobdylan.com/songs/caribbean-wind/> [https://perma.cc/DA5U-LNES].

<sup>12</sup> Paul Robert Thomas, *Bob Dylan’s ‘Caribbean Wind’*, PAULLYRICS.COM (2019), <http://www.paullyrics.com/bob-dylans-caribbean-wind/> [perma.cc/534F-67FB].

<sup>13</sup> Tony Attwood, *Caribbean Wind: Dylan’s Ever Changing Song That Never Made the Never Ending Tour*, UNTOLD DYLAN (Aug. 3, 2013), <http://bob-dylan.org.uk/archives/440> [https://perma.cc/TY8L-XGDK].

## II. FORENSIC FACILITIES

Persons institutionalized in psychiatric institutions and facilities for persons with intellectual disabilities have always been hidden from view.<sup>14</sup> These facilities were often constructed far from major urban centers, making the availability of transportation to such institutions limited. Those who were locked up were, to the public, faceless and often seen as less than human.<sup>15</sup> Although there were sporadic exposés in the nineteenth century, and then later in the mid-twentieth century,<sup>16</sup> it was not until the early 1970s (when the civil rights revolution reached psychiatric hospitals and facilities for persons with intellectual disabilities) that there was any true public awareness of the conditions in such facilities.<sup>17</sup>

A series of court cases brought by young public interest lawyers in both the United States and Western Europe shone a harsh light on the brutal and inhuman conditions in such facilities in the early and mid-1970s.<sup>18</sup> One expert referred to the Pennhurst State School, in suburban Philadelphia, as “a Dachau, without ovens.”<sup>19</sup> These cases led to the predictable empowerment of blue-ribbon commissions, the issuance of lengthy reports excoriating states for the shameful conditions in which individuals were treated, and eventually, albeit tardily, the legislative passage of so-called “Patients’ Bills of Rights.”<sup>20</sup> The Patients’ Bills of Rights created

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<sup>14</sup> See LAURIE AHERN & ERIC ROSENTHAL, *MENTAL DISABILITY RTS. INT’L, HIDDEN SUFFERING: ROMANIA’S SEGREGATION AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES* (2006) (reporting on human rights abuses against children with disabilities in institutions in Romania). See generally *WHEN THE SILENCED ARE HEARD*, *supra* note 7.

<sup>15</sup> See, e.g., MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 43 (2000) (discussing sanist myths depicting persons with intellectual disabilities as “different” and “less than human”); Evelyn W. Lusthaus, *Involuntary Euthanasia and Current Attempts to Define Persons with Mental Retardation as Less Than Human*, 23 *MENTAL RETARDATION* 148 (1985).

<sup>16</sup> See MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, 1 *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 3-2.2 (2021) (discussing reform work of Dorothea Dix, E.P.W. Packard, and Albert Deutsch).

<sup>17</sup> See, e.g., Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 *LOY. L.A. L. REV.* 1249, 1250–51 (1987).

<sup>18</sup> See PERLIN & CUCOLO, *supra* note 16, § 1-2.1.1; see also MICHAEL L. PERLIN, ARLENE S. KANTER, MARY PAT TREUHART, EVA SZELI & KRIS GLENDHILL, *INTERNATIONAL HUMAN RIGHTS & COMPARATIVE MENTAL DISABILITY LAW* 451–782 (2006).

<sup>19</sup> LEOPOLD LIPPMAN & I. IGNANCY GOLDBERG, *RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATION FOR EXCEPTIONAL CHILDREN* 17 (Frances P. Connor ed., 1973), reprinted in Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 *HOUS. L. REV.* 63, 100 n.215 (1991).

<sup>20</sup> See PERLIN & CUCOLO, *supra* note 16, § 7-7.

substantive and procedural protection for those in danger of being deprived of their liberty and for those who had been so deprived.<sup>21</sup>

A similar progression was occurring in Western Europe at this time and community-based treatment was scrutinized and discussed in government policies known as “Better Services for the Mentally Ill” and “Community Care with Special Reference to Mentally Ill and Mentally Handicapped [P]eople.”<sup>22</sup> Perhaps as a by-product of all of this, those individuals who had been hidden and whose voices had been silenced began to raise their voices to protest the dehumanization of the conditions in which they had been confined.<sup>23</sup>

Much of the case law ignores forensic patients entirely.<sup>24</sup> By and large (although not exclusively<sup>25</sup>), the facilities subject to this litigation and the concomitant press scrutiny<sup>26</sup> mostly housed patients who had never been charged with or tried on criminal charges. Interestingly and ironically, this

<sup>21</sup> See, e.g., 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, 487 (2008) [hereinafter *Sexual Autonomy Rights of Persons Institutionalized*].

<sup>22</sup> Helen Killaspy, *From the Asylum to Community Care: Learning from Experience*, 79 BRITISH MED. BULL. 245, 249 (2007).

<sup>23</sup> The involvement of such groups in test case litigation—exercising the right of self-determination in an effort to control their own destinies to the greatest extent possible—is a major development that cannot be overlooked by any participant in subsequent mental disability litigation. See, e.g., JUDI CHAMBERLIN, ON OUR OWN: PATIENT-CONTROLLED ALTERNATIVES TO THE MENTAL HEALTH SYSTEM (1978) (discussing how advocates can create more patient-controlled mental health facilities as an alternative to traditional mental health hospitals, where patients are often alienated, ignored, or overmedicated); Neal Milner, *The Right to Refuse Treatment: Four Case Studies of Legal Mobilization*, 21 L. & SOC’Y REV. 447 (1987) (discussing impact of ex-patient groups on course of right to refuse treatment litigation); Judi Chamberlin & Joseph A. Rogers, *Planning a Community-Based Mental Health System: Perspective of Service Recipients*, 45 AM. PSYCH. 1241, 1241 (1990); Symposium, *Challenging the Therapeutic State: Critical Perspectives of Psychiatry and the Mental Health System*, 11 J. MIND & BEHAV. 247 (1990); Peter Margulies, *The Cognitive Politics of Professional Conflict: Law Reform, Mental Health Treatment Technology, and Citizen Self-Governance*, 5 HARV. J.L. & TECH. 25, 56–57 n.132 (1992). See Symposium, *Challenging the Therapeutic State, Part Two: Further Disquisitions on the Mental Health System*, 15 J. MIND & BEHAV. 1 (1994) (surveying on the various kinds of historical challenges faced by people with intellectual disabilities and their impact on such population); Jennifer Honig & Susan Fendell, *Meeting the Needs of Female Trauma Survivors: The Effectiveness of the Massachusetts Mental Health Managed Care System*, 15 BERKELEY WOMEN’S L.J. 161, 184–85 (2000).

<sup>24</sup> See *Sexual Autonomy Rights of Persons Institutionalized*, *supra* note 21, at 488.

<sup>25</sup> See, e.g., *Davis v. Watkins*, 384 F. Supp. 1196, 1201–02 (N.D. Ohio 1974); see also *Sexual Autonomy Rights of Persons Institutionalized*, *supra* note 21, at 488 (“Of the important [first generation right-to-treatment institutional conditions cases], forensic patients were part of the plaintiff class only in the Ohio case of *Davis v. Watkins*.”). For a full discussion of *Davis v. Watkins*, see PERLIN & CUCOLO, *supra* note 16, § 7-3.2.

<sup>26</sup> For the role of the press, see Paul Davis, *Wyatt v. Stickney: Did We Get It Right This Time?*, 35 L. & PSYCH. REV. 143, 153 (2011).

fact is discordant with the false “ordinary common sense”<sup>27</sup> that “[m]ost mentally ill individuals are dangerous and frightening [and] are invariably more dangerous than non-mentally ill persons.”<sup>28</sup> Even in the hidden world of those institutionalized because of psychiatric disability (or alleged disability), forensic patients—mostly those awaiting incompetency-to-stand trial determinations, those found permanently incompetent to stand trial, those who had been acquitted by reason of insanity, and in some jurisdictions, individuals transferred from correctional facilities—remain the most hidden.

### III. THE CRPD AND INTERNATIONAL HUMAN RIGHTS LAW

This reality must be radically reconsidered in light of the ratification of the United Nations’ Convention on the Rights of Persons with Disabilities,<sup>29</sup> “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>30</sup>

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<sup>27</sup> See Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 38 (2012) (“[O]rdinary common sense’ . . . is self-referential and non-reflective (‘I see it that way, therefore everyone sees it that way; I see it that way, therefore that’s the way it is’).”).

<sup>28</sup> Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 724 n.220 (2003).

<sup>29</sup> See generally WHEN THE SILENCED ARE HEARD, *supra* note 7.

<sup>30</sup> Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 4 (2008); see also Press Release, Human Rights Council, Human Rights Council Holds Special Event on Convention on Rights of Persons with Disabilities (Mar. 26, 2007), <https://www.un Geneva.org/en/news-media/press/taxonomy/term/175/41989/human-rights-council-holds-special-event-convention-rights> [https://perma.cc/GE5X-9Z63]. The CRPD was signed by former President Obama, but it was never ratified by the Senate. Michael L. Perlin & Meredith R. Schriver, “*You Might Have Drugs at Your Command*”: *Reconsidering the Forced Drugging of Incompetent Pre-trial Detainees from the Perspectives of International Human Rights and Income Inequality*, 8 ALB. GOV’T L. REV. 381, 385 (2015) [hereinafter *You Might Have Drugs at Your Command*]; see also Arlene S. Kanter, *Let’s Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 TOURO L. REV. 301, 330, 342 (2019). Under these circumstances, “a state’s obligations under it are controlled by the Vienna Convention of the Law of Treaties . . . which requires signatories ‘to refrain from acts which would defeat the Disability Convention’s object and purpose.’” *Id.* (quoting in part Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331); see also Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS UNIV. J. HEALTH L. & POL’Y 331, 362–63 (2011). In at least one case, while noting that the non-ratified Convention was not binding on U.S. courts, the Massachusetts



The CRPD is the most revolutionary international human rights document ever created that applies to persons with disabilities.<sup>31</sup> It furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in almost every aspect of life.<sup>32</sup> It firmly endorses a social model of disability and reconceptualizes mental health rights as disability rights—a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law.<sup>33</sup> “The Convention . . . sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities.”<sup>34</sup> It provides a framework for ensuring that mental health laws “fully recognise the rights of those with mental illnesses.”<sup>35</sup> There is no question that it has “ushered in a new era of disability rights policy.”<sup>36</sup>

This is epitomized through the Convention calling for the “respect for [the] inherent dignity”<sup>37</sup> of people with mental illness and to practice “non-discrimination.”<sup>38</sup> Subsequent Articles declare freedom from “arbitrary or unlawful interference” with privacy,<sup>39</sup> “[f]reedom from torture or cruel, inhuman or degrading treatment or punishment,”<sup>40</sup> “[f]reedom from exploitation, violence and abuse,”<sup>41</sup> and a right to protection of the

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Supreme Judicial Court “read the entire text of the convention, . . . [and in an adoption case] conclude[d] that the outcome of the proceedings in [that] case [was] completely in accord with principles expressed therein.” See *In re Adoption of Peggy*, 767 N.E.2d 29, 38 (Mass. 2002).

<sup>31</sup> See *Contemporary Challenges*, *supra* note 7, at 5; WHEN THE SILENCED ARE HEARD, *supra* note 7, at 3–21; *You Might Have Drugs at Your Command*, *supra* note 30, at 385.

<sup>32</sup> See 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 (2005).

<sup>33</sup> Phil Fennell, *Human Rights, Bioethics, and Mental Disorder*, 27 MED. & L. 95 (2008) (concluding that people with mental disorders may be afforded different treatment in relation to bioethics instruments on the international plane). See generally Michael L. Perlin, “Abandoned Love”: *The Impact of Wyatt v. Stickney on the Intersection Between International Human Rights and Domestic Mental Disability Law*, 35 L. & PSYCH. REV. 121, 139 (2011).

<sup>34</sup> Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT’L L.J. 249, 256 (2009); see also Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections* (Sydney L. Sch. Research Paper No. 10/30, 2010).

<sup>35</sup> Bernadette McSherry, *International Trends in Mental Health Laws: Introduction*, 26 L. CONTEXT 1, 8 (2008).

<sup>36</sup> Paul Harpur, *Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 VAL. UNIV. L. REV. 1271, 1295 (2011).

<sup>37</sup> CRPD, *supra* note 6, art. 3(1).

<sup>38</sup> *Id.* art. 3(2).

<sup>39</sup> *Id.* art. 22.

<sup>40</sup> *Id.* art. 15.

<sup>41</sup> *Id.* art. 16.

“integrity of the person.”<sup>42</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.<sup>43</sup> It not only clarifies that States should not discriminate against persons with disabilities, but 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>44</sup>

As noted above, the Convention was signed by President Obama but not ratified by the Senate.<sup>45</sup> Notwithstanding this, the Convention has been cited with approval by multiple U.S. courts on the theory that “international adoption of the protection of the rights of persons with intellectual and other disabilities, including the right to periodic review of burdens on individual liberty, is entitled to ‘persuasive weight’ in interpreting our own laws and constitutional protections.”<sup>46</sup>

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<sup>42</sup> *Id.* art. 17.

<sup>43</sup> Michael L. Perlin, *Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the UN Convention on the Rights of Persons with Disabilities*, 44 GEO. WASH. INT’L L. REV. 1, 22 (2012) [hereinafter *Promoting Social Change in Asia*].

<sup>44</sup> For a discussion on the changes that ratifying states need to make in their domestic involuntary civil commitment laws to comply with CRPD mandates, see Bryan Y. Lee, *The U.N. Convention on the Rights of Persons with Disabilities and Its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities*, 44 COLUM. J.L. & SOC. PROBS. 393 (2011); see also István Hoffman & György Könczei, *Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 LOY. L.A. INT’L & COMPAR. L. REV. 143 (2010) (discussing the application of the CRPD to capacity issues); 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 UNIV. MIAMI L. REV. 523 (2012) (discussing the application of the CRPD to solitary confinement in correctional institutions).

<sup>45</sup> *You Might Have Drugs at Your Command*, *supra* note 30, at 385; see also Kanter, *supra* note 30, at 330, 342.

<sup>46</sup> *In re Mark C.H.*, 906 N.Y.S.2d 419, 434 (N.Y. Sur. Ct. 2010); 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, 1177–78 (2013) [hereinafter *Future of Guardianship Law*]; *In re Guardian of Michelle M.*, No. 2014, 2016 WL 3981204, at \*9 (N.Y. Sur. Ct. 2016) (“This [approach assuming that the status of intellectual disability is a sufficient basis to remove an individual’s legal right to make decisions for him or herself] is contrary to established conventions of international human rights.”), reprinted in Michael L. Perlin & Naomi M. Weinstein, “*There’s Voices in the Night Trying to be Heard*”: *The Potential Impact of the Convention on the Rights of Persons with Disabilities on Domestic Mental Disability Law*, 84 BROOK. L. REV. 873, 892–93 (2019) [hereinafter *Voices in the Night*] (explaining that CRPD provided “persuasive authority for the foundational premise that ‘persons with disabilities have a right to recognition everywhere as persons before the law’ and ‘persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’”).

The Convention must be read hand-in-glove with the United Nations Convention against Torture (“CAT”).<sup>47</sup> Together, these documents make it more likely—or *should* make it more likely—that, for the first time, attention will be paid to the conditions of confinement of this population worldwide, how those conditions regularly violate international human rights law, and how those who oversee these institutions do so with impunity.

The CAT defines the term torture to mean

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on people for such purposes as obtaining from them or a third person information or a confession, punishing them for an act they have or a third person has committed or is suspected of having committed, or intimidating or coercing them or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>48</sup>

The Convention Against Torture was intended to “*strengthen* the existing prohibition[s]” on torture in international law.<sup>49</sup> It must be noted, however, that such torture must be “severe” and “requires a specific intent to cause severe pain and suffering.”<sup>50</sup>

Janet Lord has written eloquently about the “anti-torture” framework of the CRPD,<sup>51</sup> concluding:

The adoption of the CRPD clearly constitutes an important development in the anti-torture framework under international human rights law. Its principal contribution

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<sup>47</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

<sup>48</sup> *Id.* art. 1.

<sup>49</sup> J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (1988).

<sup>50</sup> Mario Silva, *Extraordinary Rendition: A Challenge to Canadian and United States Legal Obligations under the Convention Against Torture*, 39 CAL. W. INT’L L.J. 313, 334–35 (2009).

<sup>51</sup> See generally 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 & COMPAR. L. REV. 27 (2010) (discussing how the CRPD can foment the progressive development of the anti-torture framework and foster a deeper normative consensus around Article 15’s meaning).

is to apply the torture prohibition within a disability context, consistent with core principles of the CRPD including dignity, non-discrimination, autonomy, and independence. It also contributes to the framework by introducing explicitly, for the first time in an international human rights treaty, the requirement that reasonable accommodations be provided and that the failure to do so results in a finding of discrimination. . . . These principles add content to the overall anti-torture framework and should thus find ready application as a guide to regional and international regimes applying the prohibition against torture and other cruel, inhuman, and degrading treatment or punishment.<sup>52</sup>

However, there has been little follow-up literature on this connection, and that gap is truly problematic if we are ever to fully contextualize the two Conventions within the context of the treatment of persons with disabilities, especially those institutionalized because of mental disabilities. With another co-author, I have previously written about this issue, focusing on the relationship between the CRPD and the CAT in questions related to the treatment of institutionalized forensic patients (those admitted to psychiatric institutions following involvement in the criminal justice system), highlighting some of the key issues that must be examined in this context, and examining the issues in question through the lens of TJ.<sup>53</sup> It is important to note that law professors and public interest lawyers<sup>54</sup> have considered some of the underlying issues as well.<sup>55</sup> But criminologists have been stunningly silent about these issues.

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<sup>52</sup> *Id.* at 78–79.

<sup>53</sup> See *You That Hide Behind Walls*, *supra* note 2, at 201–02.

<sup>54</sup> See, e.g., Meghan Gallagher & Michael L. Perlin, “*The Pain I Rise Above*”: *How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities*, 29 FLA. J. INT’L L. 271 (2017).

<sup>55</sup> See, e.g., Sheila Wildeman, *Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities*, 41 J.L. MED. & ETHICS 48, 48 (2013) (examining “the inevitable byproducts of the CRPD’s fragile reconciliation of historically polarized ideas and interests”); Lord, *supra* note 51.

## IV. WHERE IS CRIMINOLOGY?

In order to answer this question, we performed a search on the two most comprehensive databases of articles in criminology, Criminal Justice Abstracts and EBSCOHost, both of which contain articles published in the last forty years. We searched the terms “disability and human rights,” “mental disabilities and human rights,” “mental disability and human rights,” and “mental illness and human rights.” We then cross-referenced our findings against the list of criminology and criminal justice journals available on the American Society of Criminology website.<sup>56</sup>

We found a total of just *six* articles as a result of our searches. Three of these, those by Brookbanks,<sup>57</sup> Chan,<sup>58</sup> and Weber, Fishwick, and Marmo<sup>59</sup> focus on people with mental disabilities and human rights in New Zealand, Australia, and North America. The other three (those by Arrigo and Bullock,<sup>60</sup> Nolasco and Vaughn,<sup>61</sup> and Shalev<sup>62</sup>) focus on the use of solitary confinement in institutional corrections in the United States.<sup>63</sup> But

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<sup>56</sup> See *Criminology/Criminal Justice Related Journals & Newsletters*, AM. SOC'Y CRIMINOLOGY, <https://asc41.com/resources/journals-newsletters/> [<https://perma.cc/F3HQ-6S9P>].

<sup>57</sup> See generally Warren Brookbanks, *Protecting the Interests of Vulnerable Defendants in the Criminal Justice System: The New Zealand Experience*, 83 J. CRIM. L. 55 (2019) (discussing the management of people with intellectual disabilities and the compulsory care regime in New Zealand).

<sup>58</sup> See generally Jeffrey Chan, *Challenges to Realizing the Convention on the Rights of Persons with Disabilities (CRPD) in Australia for People with Intellectual Disability and Behaviours of Concern*, 23 PSYCHIATRY, PSYCH. & L. 1 (2015) (exploring the challenges that limit the full realization of rights through the CRPD).

<sup>59</sup> See generally LEANNE WEBER, ELAINE FISHWICK & MARINELLA MARMO, *CRIME, JUSTICE AND HUMAN RIGHTS* (2014) (highlighting the potential and limitations of human rights in informing new directions in criminology).

<sup>60</sup> See generally Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY, 622 (2008) (examining psychological consequences of short- and long-term solitary confinement for prisoners subjected to administrative or disciplinary segregation in the United States).

<sup>61</sup> See generally Claire Angelique Nolasco & Michael S. Vaughn, *Construing the Legality of Solitary Confinement: Analysis of United States Federal Court Jurisprudence*, 44 AM. J. CRIM. JUST. 812 (2019) (analyzing the constitutional parameters of solitary confinement, administrative segregation, and punitive isolation within American correctional facilities).

<sup>62</sup> See generally Sharon Shalev, *Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis*, 11 J. FORENSIC PSYCH. PRAC. 151 (2011) (analyzing how prolonged solitary confinement and additional deprivations in supermax prisons measure up against legal protections afforded to those deprived of their liberty).

<sup>63</sup> Probably the most well-known scholar on the use of solitary confinement and its effects is psychologist Craig Haney, who has written extensively and has testified before Congress about the deleterious effects of solitary confinement on people with mental illness in correctional

this was all we found. Wallace has noted a similar dearth of scholarship on people with disabilities in the criminological literature, despite the thirty years since the passage of the Americans with Disabilities Act (“ADA”).<sup>64</sup>

Our findings are frankly perplexing and troubling, especially because this lack of attention and concern stands in stark contrast to criminology’s important focus on both violations of international criminal law and state-sanctioned crime.<sup>65</sup> We are heartened that in the Newsletter of the European Society of Criminology (“ESC”), Sonja Snacken called attention to “the complete absence of human rights” in the analyses of western penology on the part of leading scholars during her acceptance speech for the ESC European Criminology Award.<sup>66</sup> She urged that criminologists should base their work on “commonly shared basic values such as social equality, democracy and human rights.”<sup>67</sup> But it is depressing that the citations that she offers to this laudable principle are solely her own work and the work of her and a colleague.<sup>68</sup>

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institutions. See, e.g., Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *CRIME & DELINQ.* 124 (2003); Craig Haney, “Madness” and Penal Confinement: Some Observations on Mental Illness and Prison Pain, 19 *PUNISHMENT & SOC’Y* 310 (2017); Craig Haney, Sarah Camille Conrey & Roxy Davis, *The Plight of Long-Term Prisoners with Mental Illness*, in *CRIMINALIZATION OF MENTAL ILLNESS READER* 163 (Kelly Frailing & Risdon N. Slate eds., 2018); see also *Testimony of Professor Craig Haney Before the S. Subcomm. on the Judiciary*, 112th Cong. (2012) (statement of Craig Haney, Professor, University of California, Santa Cruz) (testifying on the Constitution, civil rights, human rights, and solitary confinement).

<sup>64</sup> Danielle Wallace, *Criminology, Criminal Justice, and 30 Years of the Americans with Disabilities Act: Where Is the Research from Our Field?*, 46 *CRIMINOLOGIST* 1, 4 (2021) (noting that although persons with disabilities are far more likely to be victimized than persons without such disabilities and are over-represented in the jail and prison systems, the criminology literature has ignored key questions such as how such persons came to be involved in the system, how they experience incarceration and detention, and the consequences of system involvement).

<sup>65</sup> See, e.g., Stephan Parmentier & Elmar G. M. Weitekamp, *Political Crimes and Serious Violations of Human Rights: Towards a Criminology of International Crimes*, 9 *SOCIO. CRIME, L. & DEVIANCE* 109 (2007) (discussing state-sanctioned political crimes); George S. Yacoubian, *Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law*, 165 *WORLD AFFS.* 133 (2003) (discussing genocide as a violation of international law); Penny J. Green & Tony Ward, *State Crime, Human Rights, and the Limits of Criminology*, 27 *SOC. JUST.* 101 (2000). But see John Hagan, *While Criminology Slept: A Criminal War of Aggression in Iraq*, 40 *CRIMINOLOGIST* 1, 1 (2015) (criticizing organized criminology for sleeping through the war in Iraq).

<sup>66</sup> Sonja Snacken, *Criminology Between Science and Justice*, 14 *EUR. SOC’Y CRIMINOLOGY*, 2015, at 11.

<sup>67</sup> *Id.* at 12.

<sup>68</sup> *Id.* (citing Sonja Snacken, *Punishment, Legitimate Policies and Values: Penal Moderation, Dignity and Human Rights*, 17 *PUNISHMENT & SOC’Y* 397 (2015); Sonja Snacken & Els Dumortier, *Resisting Punitiveness in Europe? An Introduction*, in *RESISTING PUNITIVENESS IN EUROPE? WELFARE, HUMAN RIGHTS AND DEMOCRACY* 1 (Sonja Snacken & Els Dumortier eds.,

There are six core issues that must be “on the table” if the scope of the underlying problems is to be understood:

- a. Although there is a robust literature on the CRPD and on the CAT, there is virtually no mention of the plight of forensic patients.<sup>69</sup> So, even within the world of those who focus broadly on these human rights issues, this population has remained invisible.<sup>70</sup>
- b. Conditions at forensic facilities around the world continue to shock the conscience.<sup>71</sup>
- c. Even when regional courts and commissions have found international human rights violations in cases involving forensic patients (for example, *Victor Rosario Congo v. Ecuador*),<sup>72</sup> the discussion of these cases largely ignores the plaintiffs’ statuses as forensic patients.
- d. There are few lawyers and fewer “mental disability advocates” providing legal and advocacy services to this population.<sup>73</sup>

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2012); Sonja Snacken, *Resisting Punitiveness in Europe?*, 14 THEORETICAL CRIMINOLOGY 273 (2010)). None of these four pieces have been cited in a law review accessible through Westlaw or Lexis. We are also heartened that in a “Message from the President” column in a different volume of the same newsletter, Michael Tonry discussed the “positive role that European criminology may play in remaking the American criminal justice system.” Michael Tonry, *European Criminology and the ESC—Continental Cures for American Ailments*, 14 EUR. SOC’Y CRIMINOLOGY, 2015, at 3. For a discussion on the future essentiality of the moral and humane dimensions of criminology in Europe, see David J. Smith, *Wider and Deeper: The Future of Criminology in Europe*, 11 EUR. J. CRIMINOLOGY 3 (2014).

<sup>69</sup> See *Insanity Defense and the Incompetency Status*, *supra* note 3, at 477 (“The conditions of treatment of forensic patients—their institutionalization in psychiatric facilities, their confinement in such facilities, and their possible pathways out—has always been stunningly under-considered, not just in academic literature and case law, but also in the discussions and negotiations that led to the final draft of the Convention on the Rights of Persons with Disabilities[.]”).

<sup>70</sup> See Sabatello, *supra* note 1, at 78 (“[F]orensic patients—i.e., individuals with psychiatric conditions who committed a crime [sic]—have remained largely invisible throughout the drafting process, and its aftermath.”).

<sup>71</sup> For an example of such a forensic case, see, e.g., *Scott v. Plante*, 641 F.2d 117 (3d Cir. 1981), *vacated*, 458 U.S. 1101 (1982).

<sup>72</sup> *Victor Rosario Congo v. Ecuador*, Case 11.427, Inter-Am. Comm’n H.R., Report No. 63/99, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 66 (1999). For a discussion of *Victor Rosario Congo* in this context, see Michael L. Perlin, *An Internet-Based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economies*, 30 FORDHAM INT’L L.J. 435, 447–48 (2007).

<sup>73</sup> See Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT’L L. & COM. 333, 354–55 (2007) [hereinafter *Comparative Mental Disability Law*] (showing examples that persons in the forensic system

*e.* There is little mention in the survivor movement literature about the specific plight of forensic patients.<sup>74</sup>

*f.* Forensic patients in facilities for persons with intellectual disabilities are particularly absent from the discourse.<sup>75</sup>

Each of these issues—it seems to us—screams out for consideration by criminologists and criminal justice scholars. Each is of immeasurable “real world” importance. We know, by way of parallel examples, that criminology becomes more and more important in the study of terrorism,<sup>76</sup> as well as the study of environmental (also called green) crimes such as air and water pollution, deforestation, and crimes against animals,<sup>77</sup> and that criminology has been identified as a potential means of dealing with *state* criminality.<sup>78</sup> But there has been virtually no attention paid to any of these issues, all of which, we believe, should be of significant concern to criminologists and to lawyers who work with criminologists.

We have found only one article that suggests a connection between critical criminology and critical disability rights studies, and that considers

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receive “less humane services than do civil patients”); *see also* Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 195 (2000) [hereinafter *For the Misdemeanor Outlaw*] (discussing that patients’ rights bars and mental disability advocates “historically have imposed a strict orthodoxy of analysis geared to separating out ‘criminal’ mental health law from ‘civil’ mental health law”).

<sup>74</sup> Astonishingly, a Westlaw search of <“psychiatric survivor” /p forensic> revealed *no articles* (search done March 19, 2022). Ironically, “although there is a robust ‘psychiatric survivor’ movement both in the United States and elsewhere, this voice is typically ignored.” *See generally* 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, 261 (2008) (citing Peter Margulies, *The Cognitive Politics of Professional Conflict: Law Reform, Mental Health Treatment Technology, and Citizen Self-Governance*, 5 HARV. J.L. & TECH. 25, 56–57, 56 n.132). For a discussion on the history of the “psychiatric survivor” movement, *see* FRED PELKA, *THE ABC-CLIO COMPANION TO THE DISABILITY RIGHTS MOVEMENT* 251–53 (1997). For a discussion on how it “worked successfully to change laws governing involuntary commitment and treatment,” *see* Daniela Peterka-Benton & Brian Paul Masciadrelli, *Legitimacy of Corrections as a Mental Health Care Provider: Perspectives from U.S. and European Systems*, 13 J. INST. JUST. INT’L STUD. 171, 173 (2013).

<sup>75</sup> *You That Hide Behind Walls*, *supra* note 2, at 202–03; Michael L. Perlin, *Introductory Remarks by Michael L. Perlin*, 109 AM. SOC’Y INT’L L. PROC. 75, 77 (2015) (introducing a panel at the 109th Annual Meeting of the American Society of International Law).

<sup>76</sup> *See generally* Sharla Rausch & Gary LaFree, *The Growing Importance of Criminology in the Study of Terrorism*, 32 CRIMINOLOGIST 1 (2007).

<sup>77</sup> Avi Brisman & Nigel South, *The Growth of a Field: A Short History of a ‘Green’ Criminology*, in *ROUTLEDGE INTERNATIONAL HANDBOOK OF GREEN CRIMINOLOGY* 39, 39–51 (Avi Brisman & Nigel South eds., 2d ed. 2020).

<sup>78</sup> *See* Gregg Barak, *Crime, Criminology and Human Rights: Towards an Understanding of State Criminality*, 2 J. HUM. JUST. 11 (1990).



the significance of the CRPD.<sup>79</sup> That article appropriately notes that persons with disabilities in prison not only have the same human rights afforded to all, but also have particular rights as recognized in an array of human rights instruments, including Articles 12, 13, 14 and 15 of the CRPD. Additionally, the article underscores that “these umbrella protections, however, appear to have had limited impact on the increasing overrepresentation of people with [psychosocial and intellectual disabilities] in the criminal justice system.”<sup>80</sup> But, the reality is this: these issues are simply off the table for criminology.<sup>81</sup>

Why is this? In an earlier paper, two co-authors speculated:

[The] extra level of social isolation [faced by forensic patients] was generally just fine with most of those who had been involved in the patients’ rights revolution, which has restructured mental health care around the world. It was fine to the advocacy groups that came forward at that time because the existence of a forensic “world” could be used as evidence that there was a causal relationship between mental illness (or intellectual disability) and “dangerousness.” It was fine to the lawyers who brought the bulk of the first generation of public interest cases since one of the significant underpinnings of the initial right to liberty or least restrictive alternative civil rights suits was that the plaintiff had never been “alleged to have committed any crime.” It was fine to the state hospital system because if a *forensic* population was released or deinstitutionalized, there would be a predictable public outcry. And it was fine to prosecutors and police officials since it insured that this population would remain locked up indefinitely. As a result of all of this, the status quo has remained for about forty years, and the changes in

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<sup>79</sup> See generally Leanne Dowse, Eileen Baldry & Phillip Snoyman, *Disabling Criminology: Conceptualising the Intersections of Critical Disability Studies and Critical Criminology for People with Mental Health and Cognitive Disabilities in the Criminal Justice System*, 15 AUSTL. J. HUM. RTS. 29 (2009) (suggesting a need to develop a hybrid interdisciplinary theoretical perspective merging critical disability studies and critical criminology).

<sup>80</sup> *Id.* at 30.

<sup>81</sup> To this date (March 19, 2022), the Dowse-Baldry-Snoyman article, *supra* note 79, has not been cited in any U.S.-based law review (or at least, any available on Westlaw or Lexis, the two major databases for law reviews) although it was cited in one Australian law journal (co-authored by one of its authors). See Linda Steele, Leanne Dowse & Julian Trofimovs, *Who Is Diverted?: Moving Beyond Diagnosed Impairment Towards a Social and Political Analysis of Diversion*, 38 SYDNEY L. REV. 179, 185 (2016).

conditions for civil patients have had very little impact on those in forensic facilities.<sup>82</sup>

If we were right—and in the eight years since this book chapter was published there has been no pushback to these positions at all<sup>83</sup>—it is yet one more reason for criminologists to involve themselves in this area. This lack of involvement is even more disturbing in light of Mary Barnao and Tony Ward’s findings that “there is a paucity of empirical research to guide the rehabilitation of [mentally disordered offenders] in a forensic mental health context and the majority of published literature has focused on the application and evaluation of specific interventions rather than on the development of overarching models of care.”<sup>84</sup> Again, this conclusion screams out to criminology and criminologists for greater attention to be paid to these issues.

We know that working with criminologists on these issues and embracing the differences in the disciplines and approaches to these issues will improve both scholarship and the representation of the population on which we focus in this article. A greater understanding of the human rights implications of confining individuals in forensic facilities is key in moving legal education and the law forward. However, we also want to stress the potential benefits we see for criminology, criminologists, and criminology scholars who may be wondering how this area of study can help their disciplines grow and expand.

At its most basic level, criminology is a scientific study of the nature, extent, management, causes, control, consequences, and prevention of criminal behavior, both on the individual and social levels.<sup>85</sup> Criminologists often have more of a quantitative focus in their work than many legal scholars<sup>86</sup> but may not have access to as much real-time information about

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<sup>82</sup> See *You That Hide Behind Walls*, *supra* note 2, at 197–98. See generally *A Change Is Gonna Come*, *supra* note 5. On how the insanity defense became subject to additional assaults from the civil-libertarian left and the ex-patient “psychiatric survivor” movements, see Michael L. Perlin, Deborah A. Dorfman & Naomi M. Weinstein, “On Desolation Row”: *The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means to All of Us*, 24 *TEX. J. CIV. LIBERTIES & CIV. RTS.* 59, 61, 61 nn. 8–9 (2018).

<sup>83</sup> But see Carole J. Petersen, *Addressing Violations of Human Rights in Forensic Psychiatric Institutions: Philosophical and Strategic Debates*, 109 *AM. SOC’Y INT’L L. PROC.* 80, 80 (2015), (disagreeing “with the contention that the disability rights movement has also ignored this population”).

<sup>84</sup> Mary Barnao & Tony Ward, *Sailing Uncharted Seas Without a Compass: A Review of Interventions in Forensic Mental Health*, 22 *AGGRESSION & VIOLENT BEHAV.* 77, 84 (2015).

<sup>85</sup> See LARRY J. SIEGEL, *CRIMINOLOGY: THE CORE* 21, 27 (4th ed. 2011).

<sup>86</sup> See David Weisburd & Alex R. Piquero, *How Well Do Criminologists Explain Crime? Statistical Modeling in Published Studies*, 37 *CRIME & JUST.* 453, 457 (2008). But see Richard

what is happening “on the ground.” This is where we think a partnership between the two disciplines could be mutually beneficial.<sup>87</sup> Attorneys are consistently in court discussing these issues, trying to convince jurors of mitigating evidence, (by way of example, of the weight and significance of mitigating evidence in death penalty cases),<sup>88</sup> and on the front lines of policy and legislative reforms on a broad range of law reform issues related to both international human rights law and conditions in forensic facilities.<sup>89</sup> Through relationships with legal practitioners, we believe criminology as a discipline can be better deployed to examine these issues from a social science perspective, and therefore provide a more comprehensive understanding of these issues, and of what to do about them.

Using this topic as an example, criminology’s interest in the management, consequences and control of criminal behavior can be

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Tewksbury, *Qualitative Versus Quantitative Methods: Understanding Why Qualitative Methods Are Superior for Criminology and Criminal Justice*, 1 J. THEORETICAL & PHIL. CRIMINOLOGY 38 (2009).

<sup>87</sup> For a discussion on how therapeutic jurisprudence—see *infra* Part V—has begun to forge such a partnership, see David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 25–27 (2008); see also Tali Gal & David B. Wexler, *Synergizing Therapeutic Jurisprudence and Positive Criminology*, in POSITIVE CRIMINOLOGY 85, 85–97 (Natti Ronel & Dana Segev eds., 2015). One of the criminologist co-authors and one of the legal scholar co-authors of this article have just co-edited a book looking at some of these issues from both legal and criminological perspectives. See JUSTICE OUTSOURCED: THE THERAPEUTIC JURISPRUDENCE IMPLICATIONS OF JUDICIAL DECISION-MAKING BY NON-JUDICIAL OFFICERS (Michael L. Perlin & Kelly Frailing, eds.) (forthcoming 2022) (on file with authors).

<sup>88</sup> See, e.g., Michael L. Perlin, Talia Roitberg Harmon & Sarah Chatt, “*A World of Steel-Eyed Death*”: An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty, 53 UNIV. MICH. J.L. REFORM 261, 265 (2019) [hereinafter *Steel-Eyed Death*]; Michael L. Perlin, Talia Roitberg Harmon & Sarah Wetzal, “*Man Is Opposed to Fair Play*”: An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously *Atkins v. Virginia*, 11 WAKE FOREST J.L. & POL’Y 451 (2021) [hereinafter *Opposed to Fair Play*]; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1860 (1994); Am. Bar Ass’n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003). Sadly, the introduction of such mitigating evidence often leads to imposition of the death penalty. See Lauren N. Miley, Ellie Heiss-Moses, John K. Cochran, Kathleen M. Heide, Sondra J. Fogel, M. Dwayne Smith & Beth J. Bejerregaard, *An Examination of the Effects of Mental Disorders as Mitigating Factors on Capital Sentencing Outcomes*, 38 BEHAV. SCI. & L. 381, 399 (2020).

<sup>89</sup> See, e.g., HUMAN RIGHTS FIRST, <https://www.humanrightsfirst.org/> [https://perma.cc/JN28-UH5R]; International Human Rights Committee, N.Y.C. BAR, <https://www.nycbar.org/member-and-career-services/international-human-rights-committee> [https://perma.cc/7RLQ-BLMM]; Sabatello, *supra* note 1; Michael L. Perlin, *International Human Rights and Institutional Forensic Psychiatry: The Core Issues*, in THE USE OF COERCIVE MEASURES IN FORENSIC PSYCHIATRIC CARE: LEGAL, ETHICAL AND PRACTICAL CHALLENGES 9 (Birgit Völlm & Norbert Nedopil, eds., 2016).

informed by the international human rights movement,<sup>90</sup> especially in the cases of individuals who are already at a disadvantage in the legal system due to bias against mental illness.<sup>91</sup> One of the co-authors—in an article with a different author—has concluded that the CRPD can serve as a “vehicle that will finally extinguish the toxic stench of sanism that permeates all levels of society.”<sup>92</sup> The human rights implications of individuals confined in a forensic unit can be used by criminology researchers to examine the myriad consequences that accompany such conditions. We believe that research like this would strengthen the field and help to expand it into greater opportunities for cross-disciplinary collaboration—something we think is critical between the two disciplines.

Additionally, legal scholars are working on ideas and theories that could be integrated into current criminological research, to strengthen the scholarship in both disciplines.<sup>93</sup> We believe that TJ is a perfect example

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<sup>90</sup> There has been some interest in this relationship in the context of the detention of suspected terrorists. See Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811, 845–49 (2008) (arguing that international human rights law and international humanitarian law prohibit “incommunicado” detention for periods lasting “more than a few days”).

<sup>91</sup> For more discussion on this bias, to which scholars refer to as “sanism,” see Michael L. Perlin & Alison J. Lynch, “*Mr. Bad Example*”: *Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYO. L. REV. 299, 306 (2016) [hereinafter *Mr. Bad Example*]:

Sanism is an “irrational prejudice of the same quality and character as other irrational prejudices that cause, and are reflected in, prevailing social attitudes such as racism, sexism, homophobia, and ethnic bigotry . . . .” Sanism reflects discrimination on the basis of one’s mental state or condition. Sanism—“the pervasive stigma that befalls persons with mental disabilities”—permeates the legal process both in cases in which mental capacity is a central issue, and those in which such capacity is a collateral question. It affects all participants in the mental disability law system, including litigants, fact finders, counsel, and expert and lay witnesses, and its corrosive effects have warped all aspects of mental disability law, involuntary civil commitment law, anti-discrimination law institutional law, tort law, and all aspects of the criminal process. Sanism also reflects what civil rights lawyer Florynce Kennedy has characterized as the “pathology of oppression.”

See, e.g., Michael L. Perlin, *On “Sanism”*, 46 SMU L. REV. 373 (1993); Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3 (1999).

<sup>92</sup> *Voices in the Night*, *supra* note 46, at 879.

<sup>93</sup> See, e.g., David B. Wexler, *Getting and Giving: What Therapeutic Jurisprudence Can Get from and Give to Positive Criminology*, 6 PHOENIX L. REV. 907 (2013) [hereinafter *Getting and Giving*]; David B. Wexler, *Therapeutic Jurisprudence and Its Application to Criminal Justice Research and Development*, 7 IRISH PROB. J. 94 (2010); Tali Gal & Hadar Dancig-Rosenberg, “*I Am Starting to Believe in the Word ‘Justice’*”: *Lessons from an Ethnographic Study on Community Courts*, 20 AM. J. COMPAR. L. 1 (2020).

of a way in which a legal concept dealing with the individual person, the client, can be used to strengthen criminological research. TJ has the benefit of looking at larger groups and coming to more data-based conclusions. TJ will also allow criminologists to understand why these issues must be tackled and why they can be made even stronger with an integration of our disciplines.<sup>94</sup>

Consider one example, where observations that have been made involving post-conviction status hearings in which program participants and the judge interact. Particularly in problem solving courts,<sup>95</sup> such as drug or mental health courts, and in some specialized probation programs, these interactions are a key opportunity for TJ to manifest itself.<sup>96</sup> It can be clearly observed, for example, in the opportunity participants have to make their voices heard in the proceedings and in the praise the judge offers for acute achievements (for example, securing a new job) as well as for patterns of success (for example, a prolonged period of sobriety).<sup>97</sup>

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<sup>94</sup> See *infra* Part V.

<sup>95</sup> See, e.g., Michael L. Perlin, “John Brown Went Off to War”: *Considering Veterans Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445 (2013); Gallagher & Perlin, *supra* note 54.

<sup>96</sup> See Michael L. Perlin, “Who Will Judge the Many When the Game is Through?”: *Considering the Profound Differences Between Mental Health Courts and “Traditional” Involuntary Civil Commitment Courts*, 41 SEATTLE UNIV. L. REV. 937, 945–61 (2018).

<sup>97</sup> See, e.g., Kelly Frailing, *How Mental Health Courts Function: Outcomes and Observations*, 33 INT’L J.L. & PSYCHIATRY 207, 211–13 (2010); Kelly Frailing, Brandi Alfonso & Rae Taylor, *Therapeutic Jurisprudence in Swift and Certain Probation*, 64 AM. BEHAV. SCIENTIST 1768, 1774 (2020) [hereinafter *Swift and Certain Probation*]; Kelly Frailing & Diana Carreon, *Quiero Hablar con Usted en Espanol. Juez: The Importance of Spanish at a Majority Hispanic Drug Court*, 27 CRIM. JUST. POL’Y REV. 164 (2016).

V. THE SIGNIFICANCE OF THERAPEUTIC JURISPRUDENCE<sup>98</sup>

TJ “asks us to look at law as it actually impacts people’s lives.”<sup>99</sup> It focuses on the law’s influence on emotional and psychological well-being,<sup>100</sup> forcing us to look at the “real world” implications of the failure of criminology to confront international human rights as it applies to persons institutionalized because of mental disability.

Importantly, the ultimate aim of TJ is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to “enhance their therapeutic potential, while not subordinating due process principles.”<sup>101</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] imping[e] upon justice concerns.”<sup>102</sup> Again, it is vital to keep in mind that “an inquiry into therapeutic outcomes does *not* mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”<sup>103</sup> In its aim to use the law to empower

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<sup>98</sup> This section is generally adapted from *Sexless Patients*, *supra* note 8, at 277–79; Michael L. Perlin & Naomi M. Weinstein, “*Friend to the Martyr, a Friend to the Woman of Shame*”: *Thinking About the Law, Shame and Humiliation*, 24 S. CAL. REV. L. & SOC. JUST. 1, 9–13 (2014); Michael L. Perlin & Alison J. Lynch, “*Had to be Held Down by Big Police*”: *A Therapeutic Jurisprudence Perspective on Interactions Between Police and Persons with Mental Disabilities*, 43 FORDHAM URB. L.J. 685, 701–04 (2016); Michael L. Perlin & Heather Ellis Cucolo, “*See this Empty Cage Now Corrode*”: *The International Human Rights and Comparative Law Implications of Sexually Violent Predator Laws*, 23 NEW CRIM. L. REV. 388, 427–32 (2020) [hereinafter *See this Empty Cage*]; Michael L. Perlin, “*I’ve Got My Mind Made Up*”: *How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 J. EQUAL RTS. & SOC. JUST. 81 (2017). It also distills the work of authors over the past twenty-eight years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y. L. SCH. J. HUM. RTS. 623 (1993).

<sup>99</sup> Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

<sup>100</sup> See 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).

<sup>101</sup> 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); Heather Ellis Cucolo & Michael L. Perlin, “*Far from the Turbulent Space*”: *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 UNIV. PA. J.L. & SOC. CHANGE 125, 165 (2015) [hereinafter *Turbulent Space*].

<sup>102</sup> See David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); see also David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCH. 179, 185 (1996).

<sup>103</sup> Michael L. Perlin, *A Law of Healing*, 68 UNIV. CIN. L. REV. 407, 412 (2000) (emphasis added); Michael L. Perlin, “*Where the Winds Hit Heavy on the Borderline*”: *Mental Disability Law, Theory and Practice, “Us” and “Them”*, 31 LOY. L.A. L. REV. 775, 782 (1998).

individuals, enhance rights, and promote well-being, TJ 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 emphasise[s] psychological wellness over adversarial triumphalism.”<sup>104</sup> That is, TJ supports an ethic of care.<sup>105</sup>

One of the central principles of TJ is a commitment to dignity.<sup>106</sup> Professor Amy Ronner describes the “three Vs” as “voice, validation, and voluntary participation,”<sup>107</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 litigants [sic] 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

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<sup>104</sup> Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); see also Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 341 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006). The use of the phrase dates from CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1993).

<sup>105</sup> See, e.g., Winick & Wexler, *supra* note 104, at 605–07; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); 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).

<sup>106</sup> See BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005).

<sup>107</sup> 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). For a discussion on the importance of “voice,” see Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 588 (2008).

decisions.<sup>108</sup>

TJ principles frequently converge with many of the principles underlying international human rights protections for those with mental disabilities, such as “the protection of liberty against arbitrary deprivation and a commitment to procedural fairness, and a need for robust counsel.”<sup>109</sup> As previously noted, the CRPD declares a right to “[f]reedom from . . . degrading treatment or punishment”<sup>110</sup> and a “[r]espect for inherent dignity.”<sup>111</sup> It promotes “awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities.”<sup>112</sup> An understanding of dignity is central to an understanding of the intersection between international human rights and mental disability law.<sup>113</sup> TJ can provide insights on how international human rights principles should be applied “to achieve therapeutic aims and avoid antitherapeutic effects.”<sup>114</sup> In the subsequent section, we discuss how this can best be done in this context.

## VI. CONCLUSION

In an earlier article, one of the co-authors posed this question: “to what extent can international human rights law reach out to therapeutic jurisprudence to best insure that these principles written about by Professor Ronner—the principles of voluntariness, voice and validation—be fulfilled in matters involving residents of forensic institutions?”<sup>115</sup> There, he noted that there *has been* some important work done on the relationship of TJ to the application of international human rights principles to *prisoners* and *detainees* with a mental illness. Much of the work was a response to the reality that the conditions of prison facilities and forensic facilities around

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<sup>108</sup> Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 UNIV. CIN. L. REV. 89, 94–95 (2002).

<sup>109</sup> *Voices in the Night*, *supra* note 46, at 903.

<sup>110</sup> CRPD, *supra* note 6, art. 15.

<sup>111</sup> *Id.* art. 3(1).

<sup>112</sup> *Id.* art. 8(1)(a).

<sup>113</sup> Charles R. Beitz, *Human Dignity in the Theory of Human Rights: Nothing but a Phrase?*, 41 PHIL. & PUB. AFFS. 259, 281 (2013).

<sup>114</sup> Bruce J. Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y.L. SCH. J. INT’L & COMPAR. L. 537, 544 (2002).

<sup>115</sup> *You That Hide Behind Walls*, *supra* note 2, at 215.



the world are textbook examples of anti-therapeutic conditions.<sup>116</sup> For example, Astrid Birgden argues forcefully that “[a]pplying therapeutic jurisprudence can assist forensic psychologists in actively addressing human rights in general, as well as prisoners and detainees with mental disabilities in particular.”<sup>117</sup> But this literature applies to correctional facilities, not forensic facilities, and it was all written by forensic psychologists and lawyers.

Consistent with a TJ orientation, some criminologists and some legal scholars have recognized the value of examining participant perspectives in specialty courts such as drug, mental health, and reentry courts. Such information is valuable because it helps to contextualize whether these courts and programs work, and if so, for whom and why.<sup>118</sup> Others have focused on how TJ can manifest in probation.<sup>119</sup> But very few criminologists have focused on the theoretical importance or potential manifestations of TJ in institutional corrections, although some legal scholars<sup>120</sup> and some criminologists<sup>121</sup> have recognized its absence in that context.

Conditions in forensic facilities across the world “shock the conscience,” and, in some instances, are so bereft of humanity that they

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<sup>116</sup> See generally Dirk van Zyl Smit, *Regulation of Prison Conditions*, 39 CRIME & JUST. 503 (2010) (arguing that the efficacy of local monitoring committees for individual prisons, complaints procedures, and court actions may be increased by international support and the national acceptance of the salience of human rights standards for prisons); Fred Cohen & Joel A. Dvoskin, *Therapeutic Jurisprudence and Corrections: A Glimpse*, 10 N.Y.L. SCH. J. HUM. RTS. 777 (1993).

<sup>117</sup> Astrid Birgden, *Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required*, 78 REVISTA JURÍDICA U.P.R. 43, 56 (2009); see also *Home in the Valley*, supra note 8, at 257; *Tolling for the Luckless*, supra note 8.

<sup>118</sup> See, e.g., Jamey Hueston & Miriam Hutchins, *The Power of Compassion in the Court: Healing on Both Sides of the Bench*, 54 CT. REV. 96 (2018); Shannon Portillo, Danielle S. Rudes, Jill Viglione & Matthew Nelson, *Front-Stage Stars and Backstage Producers: The Role of Judges in Problem-Solving Courts*, 8 VICTIMS & OFFENDERS 1 (2013); KAREN A. SNEDKER, *THERAPEUTIC JUSTICE: CRIME, TREATMENT COURTS AND MENTAL ILLNESS* (2018); Richard L. Wiener, Bruce J. Winick, Leah Skovram Georges & Anthony Castro, *A Testable Theory of Problem Solving Courts: Avoiding Past Empirical and Legal Failures*, 33 INT’L J.L. & PSYCHIATRY 417 (2010).

<sup>119</sup> See, e.g., Lorana Bartels, *HOPE-ful Bottles: Examining the Potential for Hawaii’s Opportunity Probation with Enforcement (HOPE) to Help Mainstream Therapeutic Jurisprudence*, 63 INT’L J.L. & PSYCHIATRY 26 (2019); Max Henshaw, Lorana Bartels & Anthony Hopkins, *Set Up to Fail? Examining Australian Parole Compliance Laws Through a Therapeutic Jurisprudence Lens*, 45 UNIV. W. AUSTL. L. REV. 107 (2019); *Swift and Certain Probation*, supra note 97; J.C. Oleson, *HOPE Springs Eternal*, 15 CRIMINOLOGY & PUB. POL’Y 1163 (2016).

<sup>120</sup> See Deborah A. Dorfman, *Doing Time in “The Devil’s Chair:” Evaluating Nonjudicial Administrative Decisions to Isolate and Restrain Prisoners and Detainees with Mental Health Disabilities in Jails and Prisons*, 64 AM. BEHAV. SCIENTIST 1702, 1705 (2020).

<sup>121</sup> Talia Roitberg Harmon, Michael Cassidy & Richelle Kloch, *Examination of Decision-Making and Botched Lethal Injection Executions in Texas*, 64 AM. BEHAV. SCIENTIST 1715 (2020).

challenge the notion that we are a civilized society.<sup>122</sup> As one of the authors has written, “these conscience-shocking conditions scream[] out for an in-depth TJ analysis, to demonstrate their destructiveness and their negative impact on the mental health of those unlucky enough to be housed in such facilities.”<sup>123</sup> Elsewhere, one of the co-authors has written, “The CRPD is a document that resonates with TJ values.”<sup>124</sup> Although there has been some interest in the overlap between TJ and the CRPD,<sup>125</sup> this interest has not extended to the specific problems raised by forensic institutions.<sup>126</sup> And, sadly, there has been little demonstration of interest by criminology scholars.

Ironically, the link between TJ and criminology is, or at least, *should be* clear. As one of the founders of TJ wrote recently, “TJ scholarship looks to the behavioral sciences, and notably to criminology, for guidance.”<sup>127</sup> But, to the best of our knowledge, only a handful of criminologists write regularly and consciously in the vein of TJ: Tali Gal,<sup>128</sup> the team of Kimberley Kaiser and Kristy Holtfreter, Talia Harmon, David Patton, and

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<sup>122</sup> See, e.g., *Comparative Mental Disability Law*, *supra* note 73, at 343, 349; 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).

<sup>123</sup> Michael L. Perlin, “*The Ladder of the Law Has No Top and No Bottom*”: *How Therapeutic Jurisprudence Can Give Life to International Human Rights*, 37 INT’L J.L. & PSYCHIATRY 535, 539 (2014) [hereinafter *The Ladder of the Law*].

<sup>124</sup> *Promoting Social Change in Asia*, *supra* note 43, at 36.

<sup>125</sup> See, e.g., *Future of Guardianship Law*, *supra* note 46, at 1187–89; Michael L. Perlin, “*Yonder Stands Your Orphan With His Gun*”: *The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH L. REV. 301 (2013); *Voices in the Night*, *supra* note 46; Anna Arstein-Kerslake & Jennifer Black, *Right to Legal Capacity in Therapeutic Jurisprudence: Insights from Critical Disability Theory and the Convention on the Rights of Persons with Disabilities*, 68 INT’L J.L. & PSYCHIATRY 1 (2020).

<sup>126</sup> *But see The Ladder of the Law*, *supra* note 123, at 542 (calling for, as part of a new TJ research agenda, the study of “the TJ implications of instituting reform of forensic facilities”).

<sup>127</sup> *Getting and Giving*, *supra* note 93, at 908; see also Georgia Zara, *Therapeutic Jurisprudence As an Integrative Approach to Understanding the Socio-Psychological Reality of Young Offenders*, 71 UNIV. CIN. L. REV. 127, 128 (2002) (“Within a multidisciplinary therapeutic jurisprudence (TJ) perspective, the new mode of criminological research brings together clinical, biological, medical, psychological and social perspectives.”).

<sup>128</sup> See, e.g., Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313 (2013) [hereinafter *Restorative Criminal Justice*]. One of the co-authors has noted that at a major criminology scholarly conference in 2013, besides him and a co-author, Professor Gal was the only other person to do a TJ-based presentation. Note that *Turbulent Space*, *supra* note 101, was initially presented at that conference. See also Michael L. Perlin, “*There’s A Dying Voice Within Me Reaching out Somewhere*”: *How TJ Can Bring Voice to the Teaching of Mental Disability Law and Criminal Law*, 3 SUFFOLK UNIV. L. REV. ONLINE 37, 41–42 (2015).

Voula Marinos (alone and with her colleague, Lisa Whittingham), and Kelly Frailing.<sup>129</sup>

Professor David Wexler, one of the founders of the school of TJ, has recently argued that TJ is remarkably (but not at all surprisingly) consistent with the school of “Positive Criminology,” which is “oriented to human strengths, resilience, and positive encounters that can assist individuals in abstaining from crime and deviant behaviors.”<sup>130</sup> As Wexler and Tali Gal, an Israeli criminologist and lawyer, explain: positive criminology “goes against the focus of much of the research which highlights ‘goodness’ in relation to normative people and ‘badness’ in relation to law-breakers, offering an alternative research agenda that focuses on goodness in the lives of offenders, victims, and those at risk of become [sic] either.”<sup>131</sup>

There are a few other inquiries to consider. Professors Kaiser and Holtfreter have argued that specialized court programs must incorporate TJ and procedural justice concepts.<sup>132</sup> Professor Marinos has carefully analyzed the differences between juvenile mental health courts and traditional juvenile “guilty plea” courts, concluding that it is more likely in a well-functioning juvenile mental health court that those before the court

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<sup>129</sup> *Restorative Criminal Justice*, *supra* note 128; Hadar Dancig-Rosenberg & Tali Gal, *Criminal Law Multitasking*, 18 LEWIS & CLARK L. REV. 893 (2014) [hereinafter *Criminal Law Multitasking*]; *Steel-Eyed Death*, *supra* note 88; *Opposed to Fair Play*, *supra* note 88; Harmon et al., *supra* note 121; Perlin, Harmon & Chatt, *supra* note 88; Perlin, Harmon & Wetzel, *supra* note 88; Kimberly A. Kaiser & Kristy Holtfreter, *An Integrated Theory of Specialized Court Programs: Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation*, 43 CRIM. JUST. & BEHAV. 45 (2016); Voula Marinos & Lisa Whittingham, *The Complexities of Criminal Responsibility and Persons with Intellectual and Developmental Disabilities: How Can Therapeutic Jurisprudence Help?*, 64 AM. BEHAV. SCIENTIST 1733 (2020); Voula Marinos, *Methodologies for the Study of TJ Processes or Procedural Justice Within the Operation of TJ-Related Courts: A Conversation* (Oct. 14, 2016) (unpublished paper) (powerpoint on file with authors); David Patton, *The Need for New Emotionally Intelligent Criminal Justice & Criminological Approaches to Help End the ‘War on Terror’*, DIPL. & POL. FEAR, Sept. 2016; see also Bruce A. Arrigo & Jeffrey J. Tasca, *Right to Refuse Treatment, Competency to Be Executed, and Therapeutic Jurisprudence: Toward a Systematic Analysis*, 23 L. & PSYCH. REV. 1 (1999); Frailing & Carreon, *supra* note 97; Frailing et al., *supra* note 97.

<sup>130</sup> *Getting and Giving*, *supra* note 93, at 908.

<sup>131</sup> Gal & Wexler, *supra* note 87, at 87. Australian forensic psychologist Tony Ward has created the “good lives model.” See Tony Ward, *Good Lives and the Rehabilitation of Offenders Promises and Problems*, 7 AGGRESSION & VIOLENT BEHAV. 513 (2002). Based on therapeutic principles and on positive psychology, the “good lives model” is “a strength-based approach to supporting offenders in meeting their human needs.” Astrid Birgden, *Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required*, 78 REVISTA JURÍDICA UPR 43, 49 (2009). See generally Mr. Bad Example, *supra* note 91, at 322 (“[Positive psychology] emphasizes positive experiences and traits, and studies how people flourish, focusing on an individual’s well-being and the ‘good life.’”).

<sup>132</sup> Kaiser & Holtfreter, *supra* note 129, at 58.

will be consulted about decisions made about them.<sup>133</sup> One of the co-authors of this article and her colleagues have recently examined the ways TJ can manifest in a HOPE-like probation program,<sup>134</sup> highlighting both interactions with the judge and with probation officers as crucial in participant perceptions of procedural justice. Professor Patton has recently written about how an “emotionally intelligent” criminal justice system must incorporate TJ principles.<sup>135</sup> But other than those professors, few criminologists have spoken out on these topics. We believe it is time to do so. The issues we are raising here are perfect for criminologists to explore.

We used a lyric from Bob Dylan’s song, *Caribbean Wind*, as the start of our paper title. We believed that just as ships of liberty (in Dylan’s vision) needed to sail on waves “bold and free,” so do criminology scholars have to chart out new visions and new territory of (intellectual) exploration so that they can be “bold and free” in their discoveries. And as a result, the facilities about which we speak will finally, in the words of a music critic discussing this lyric in this song, be “purged of evil.”

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<sup>133</sup> Marinos, *supra* note 129.

<sup>134</sup> *Swift and Certain Probation*, *supra* note 97. HOPE is an acronym for “Hawaii’s Opportunity Probation with Enforcement,” and it involves swift, certain, and proportional responses to criminal behavior in an intensely supervised probation population. *See, e.g.*, Bartels, *supra* note 119, at 26; Oleson, *supra* note 119 (summarizing achievements of Hawaii’s HOPE program and describing its adoption around the world); Zachary Hamilton, Christopher M. Campbell, Jacqueline van Wormer, Alex Kigerl & Brianne Posey, *Impact of Swift and Certain Sanctions: Evaluation of Washington State’s Policy for Offenders on Community Supervision*, 15 *CRIMINOLOGY & PUB. POL’Y* 1009 (2016) (concluding that Washington State’s swift-and-certain (SAC) policy, which was intended to expand upon the HOPE program, provided noteworthy positive effects and no appreciable negative impacts on public safety).

<sup>135</sup> Patton, *supra* note 129, at 6.