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“FOR THE MISDEMEANOR OUTLAW”: THE IMPACT OF THE ADA ON THE INSTITUTIONALIZATION OF CRIMINAL DEFENDANTS WITH MENTAL DISABILITIES

*Michael L. Perlin**

Notwithstanding widespread statutory and judicial endorsement of the “least restrictive alternative” (“LRA”) or “least intrusive means” principle,¹ certain classes of persons with mental disabilities—criminal defendants awaiting incompetency-to-stand-trial evaluations, criminal defendants found permanently incompetent to stand trial under *Jackson v. Indiana*,² criminal defendants awaiting insanity evaluations, and criminal defendants institutionalized following a finding of not guilty by reason of insanity (“NGRI”)—are frequently institutionalized in maximum security forensic institutions whether or not they (1) were arrested for violent crimes, (2) pose a significant threat of danger to the community, or (3) are seriously mentally ill. In some jurisdictions, this policy is statutory; in others, it is the result of case law; in still others, it is customary.

Commentators have criticized these policies as therapeutically counterproductive and cost-inefficient.³ For years these criticisms have been uniformly ignored; in fact, many jurisdictions have instead adopted rules that mandate greater security and make it less possible—virtually impossible in some instances—for certain categories of patients (*e.g.*, insanity acquittees) to *ever* be treated in less than the most restrictive en-

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1. See MICHAEL L. PERLIN, 1 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 2C-5.3, at 417-23 (2d ed. 1998).

2. 406 U.S. 715, 733 (1972) (finding a violation of the Due Process Clause when an individual is committed for more than the “‘reasonable period of time’ necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future”).

3. See generally Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921 (1985).

vironment, no matter what their level of mental illness or perceived dangerousness and no matter whether the original crime charged was one of violence. The Supreme Court's 1983 decision in *Jones v. United States*,⁴ rejecting arguments that it was unconstitutional to retain insanity acquittees for longer periods of time than the maximum sentence for the underlying crime,⁵ illuminated the Court's antipathy toward insanity pleaders in the context of the case of a defendant initially charged with attempted shoplifting.⁶ The Court's 1997 decision in *Kansas v. Hendricks*⁷—upholding the constitutionality of the most restrictive state-level “sexually violent predator act”⁸—appeared to add another obstacle to those seeking to ameliorate their conditions and, on the surface, made it appear that challenges to such restrictive confinement policies would be doomed.⁹

This scenario must be revisited, however, in light of the passage of the Americans with Disabilities Act of 1990 (“ADA”)¹⁰ and the potential application of the Supreme Court's 1999 decision in *Olmstead v. L.C.*,¹¹ finding a qualified right to community treatment and services for certain institutionalized persons.¹² *Olmstead*—although not a constitutional decision¹³—revitalizes the application of the LRA doctrine to questions involving the institutionalization of persons with mental disabilities,¹⁴ and compels us to rethink many of the repressive policies adopted in the past decade that mandate longer (and more restrictive) terms of confinement for many persons with mental disabilities who initially entered the institutional system through the portal marked “criminal.”

In this Article, I will argue that the application of *Olmstead* and the ADA to one subset of persons with mental disability—criminal defendants charged with misdemeanors and certain non-violent felonies—forces the abandonment of many of the policies to which I have already referred. I believe that, after *Olmstead*, policies that mandate that all defendants awaiting incompetence and insanity evaluations, all defendants found permanently incompetent under *Jackson*, and all NGRI ac-

4. 463 U.S. 354 (1983).

5. *Jones*, 463 U.S. at 368-69.

6. *Id.* at 359.

7. 521 U.S. 346 (1997).

8. *Hendricks*, at 371.

9. *Id.* at 388-89 (Breyer, J., dissenting).

10. 42 U.S.C. §§ 12101-12213 (1994).

11. 527 U.S. 581 (1999).

12. *Olmstead*, 527 U.S. at 596. See generally Michael L. Perlin, “I Ain’t Gonna Work on Maggie’s Farm No More”: *Institutional Segregation, Community Treatment, the ADA, and the Promise of Olmstead v. L.C.*, 17 COOLEY L. REV. (forthcoming 2000).

13. The court emphasized this in *Olmstead*. See *Olmstead*, 527 U.S. at 587 (“This case, as it comes to us, presents no constitutional question.”).

14. See Michael L. Perlin, “*Their Promises of Paradise*”: Will *Olmstead v. L.C.* Resuscitate the Constitutional “Least Restrictive Alternative” Principle in Mental Disability Law?, 37 HOUS. L. REV. (forthcoming 2000).

quittees must be evaluated, treated, or confined only in a state's maximum security facility for the criminally insane violate the ADA. I also believe that *Olmstead*—if we take Justice Ginsburg's majority opinion language seriously—forces us to restructure in many ways how we think about mentally disabled criminal defendants.

Here, I use the word "we" advisedly, for I am speaking of two very different universes. The first is the predictable one—where a vast, overwhelming majority appears to endorse more and more restrictive and repressive means of institutionalizing persons with mental disabilities (again, especially those who entered through the door marked "criminal") and is entirely comfortable with *Hendricks* and its blurring of the categories of "civil" and "criminal" confinement.¹⁵ The attitudes of this universe are relatively easy to discern. They are explicated daily on talk radio shows, in tabloid headlines, and in the pandering of cowardly politicians.¹⁶ The other universe—far, far tinier—is often nearly invisible, but is, in many ways, far more interesting. I speak here of the patients' rights bar and the mental disability advocates who historically have imposed a strict orthodoxy of analysis geared to separating out "criminal" mental health law from "civil" mental health law.¹⁷ This is a phenomenon I have thought about for years. I believe that I am one of very few law professors who writes about patients' rights issues that began his career as a public defender. This has been reinforced several times in the past few months by colleagues who have gotten wind of this project and have expressed concern about how it might be distorted and manipulated by the other universe to which I have just referred. This fear—a fear that application of the ADA to individuals charged with crime will somehow link images of persons institutionalized following an involuntary civil commitment and those of persons institutionalized following a criminal arrest, a fear that I will call "fear of fusion"—is an important one, and, to the best of my knowledge, has never been openly discussed. I raise it here because it reinforces in an important way that we can never lose sight of the corrosive impact of stigma in this entire enterprise.

15. See Michael L. Perlin, "There's No Success like Failure/and Failure's No Success at All": *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247, 1270 (1998).

This blurring contrasts—sadly—with the New Jersey Supreme Court's decision in *State v. Krol*, 344 A.2d 289, 297 (N.J. 1975), providing expanded procedural due process rights for insanity acquittees ("The labels 'criminal commitment' and 'civil commitment' are of no constitutional significance.").

16. For a flavor of the recent debate in New York City, see, for example, Joel Siegel, *Hil Rips Homeless Sweep/Says Giuliani's Policies "Punish Poverty"*, N.Y. DAILY NEWS, Dec. 1, 1999, at 2; *Streets Aren't Bedrooms, Giuliani Says, As Homeless Targeted*, ATLANTA J. & CONST'N, Nov. 21, 1999, at A5; Susan Rabinowitz, *Sharpton Rips Giuliani Says Mayor Panders with Homeless Stance*, N.Y. POST, Nov. 28, 1999, at 12; Zoe Heller, *Giuliani's Cure for the Homeless: Arrest Them*, LONDON DAILY TELEGRAPH, Dec. 11, 1999, at 24.

17. Michael L. Perlin, *Overview of Rights in the Criminal Process*, in 3 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 1879, 1891 (Paul R. Friedman ed. 1979).

I need to emphasize that I do *not* believe that the arguments I am making here apply only to defendants accused of misdemeanors and “minor” felonies. I have argued both in court and in academic literature that the seriousness of an underlying criminal charge alone is not enough of a predicate upon which to base maximum security confinement.¹⁸ I limit my argument in this Article to misdemeanants and petty felons, because I believe that, practically speaking, it is a necessary first step in the integration of the *Olmstead* doctrine into criminal procedure law.¹⁹

My Article will proceed in the following manner: First, I will provide some background on the ways that individuals in the four legal categories that I have mentioned—those awaiting incompetence evaluations on a misdemeanor or non-violent felony charge, those institutionalized following a finding of permanent incompetence (and thus, not triable) under *Jackson* on similar charges, those being evaluated on the question of their insanity at the time of their offense, and those found NGRI on such charges—are treated by the legal system, looking also at the impressive body of critical literature that has developed in the past two decades. Next, I will discuss the development of the LRA concept in mental disability law, with brief forays into the Supreme Court’s pre-*Olmstead* excursions into LRA law in *Youngberg v. Romeo*²⁰ and *Riggins v. Nevada*.²¹ Then, I will look at the ADA’s language, its congressional finding of facts and history, and the relevant supporting Department of Justice regulations. After that, I will briefly review the *Olmstead* decision, with particular focus on the ADA as an anti-stigma statute and its seeming endorsement (“resuscitation” might be a better choice of word) of the LRA doctrine (a doctrine seemingly left in ashes after the Supreme Court’s 1982 decision in *Youngberg*).²² Next, I will explain two concepts that are critical to an understanding of any aspect of mental disability law, especially when we look at the blurring between “civil” and “criminal” mental disability law—sanism and pretextuality. I will then assess their impact on the subject at hand.²³ Following that, I will briefly discuss the important concept of therapeutic jurispru-

18. See, e.g., *State v. Fields*, 390 A.2d 574, 580 (N.J. 1978) (insanity acquittees have same right to periodic review as civil patients); 1 PERLIN, *supra* note 1, § 2A-4.4b at 133-39 (discussing importance of *Krol*, 344 A.2d 289 (commitment criteria same in cases of civil and criminal commitment)). Both *Fields* and *Krol* had been charged with murder and were subsequently found not guilty by reason of insanity.

19. I want to thank Professor Grant Morris for his invaluable insights on this aspect of my Article.

20. 457 U.S. 307 (1982). See generally 2 PERLIN, *supra* note 1, §§ 3A-9 to 3A-9.9, at 87-108.

21. 504 U.S. 127 (1992). See generally 2 PERLIN, *supra* note 1, § 3B-8.3, at 323-29.

22. See Perlin, *supra* note 14.

23. See generally MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000).

dence,²⁴ and I will explain why it must be employed as a tool for deciphering areas of the law such as the one I am discussing.²⁵ Finally, I will conclude by showing that typical state policies that mandate the institutionalization of all "forensic patients," including those of the four categories that are the narrower focus of this Article, in maximum security settings, and that engage in a strong presumption—perhaps in some cases an irrebuttable one—that such institutionalization is preferred, violate the Americans with Disabilities Act as construed by the Supreme Court in *Olmstead*. These policies also reflect sanist and pretextual decision-making and are therapeutically counterproductive.

My title comes, in part, from Bob Dylan's all-too-rarely heard masterpiece, *Chimes of Freedom*,²⁶ a composition that critic Robert Shelton has characterized as Dylan's "most political song" and an expression of "affinity" for a "legion of the abused."²⁷ In it, Dylan sings:

Through the wild cathedral evening the rain unraveled tales
 For the disrobed faceless forms of no position
 Tolling for the tongues with no place to bring their thoughts
 All down in taken-for-granted situations
 Tolling for the deaf an' blind, tolling for the mute
 Tolling for the mistreated, mateless mother, the mistitled prostitute
 For the misdemeanor outlaw, chased an' cheated by pursuit
 An' we gazed upon the chimes of freedom flashing.²⁸

Dylan is no stranger to ambiguous, nearly oxymoronic imagery.²⁹

24. See, e.g., THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed. 1990); ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds. 1991) [hereinafter ESSAYS]; LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds. 1996); THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (Bruce J. Winick ed. 1997) [hereinafter TJ APPLIED]; David B. Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, 16 L. & HUM. BEHAV. 27 (1992); David B. Wexler, *Applying the Law Therapeutically*, 5 APP'L. & PREVEN. PSYCHOL. 179 (1996); David Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL'Y & L. 220 (1995); 1 PERLIN, *supra* note 1, § 2D-3, at 534-41; *Bibliography of Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 915 (1993).

25. I explore the relationships among sanism, pretextuality, and therapeutic jurisprudence in, *inter alia*, 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) [hereinafter Perlin, *Half-Wracked*]; Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 369 (1994) [hereinafter Perlin, *Understanding*]; Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. (forthcoming 2000) [hereinafter Perlin, *Healing*], and in PERLIN, *supra* note 23, at 273-303.

26. BOB DYLAN, *Chimes of Freedom*, on ANOTHER SIDE OF BOB DYLAN (Warner Bros. Inc. 1964).

27. ROBERT SHELTON, NO DIRECTION HOME: THE LIFE AND MUSIC OF BOB DYLAN 220 (1997).

28. BOB DYLAN, LYRICS, 1962-1985, at 132 (2d ed. 1985).

The phrase "misdemeanor outlaw" fits here comfortably within his lexicon.³⁰ And it reflects, nearly perfectly I think, the issue that is at the core of my inquiry here. The subjects are misdemeanants, charged with petty offenses and minor crimes, but we treat them as outlaws—as recidivistic criminals. In so doing, we subject them to inappropriately punitive conditions of confinement, which in turn forces us to unnecessarily spend vast amounts of money on security measures. I hope that this Article will provide a blueprint for rethinking these mindless and cruel policies.

I. LEGAL CATEGORIES

A. *Defendants Incompetent to Stand Trial*³¹

1. *Historical Background*

Few principles are as firmly embedded in Anglo-American criminal jurisprudence as the doctrine that an incompetent defendant may not be put to trial.³² The doctrine is traditionally traced to mid-seventeenth century England,³³ with commentators generally focusing on: (1) the in-

29. See BOB SPITZ, *DYLAN: A BIOGRAPHY* 256 (1989).

30. This phrase, according to the critic Paul Williams, "jump[s] out at the listener exactly like [a] lightning-illuminated glimpse[] of a familiar yet unreal landscape." PAUL WILLIAMS, *BOB DYLAN: PERFORMING ARTIST 1960-73, THE EARLY YEARS* 113 (1990).

31. See generally 3 PERLIN, *supra* note 1, §§ 14.02 to 14.03, at 206-15. I am including this section—although there is no parallel section on the history of the insanity defense—because I believe the historical references I discuss here are generally less well-known and less accessible than those that track the development of the insanity defense. See generally MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1st ed. 1994).

32. See generally Winick, *supra* note 3.

The incompetency-to-stand-trial determination is a numerically significant one. See, e.g., HENRY J. STEADMAN, *BEATING A RAP? DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL* 4 (1979) (approximately 9,000 defendants adjudicated incompetent yearly; 36,000 potentially incompetent defendants evaluated). See also Winick, *supra* note 3, at 922-23 n.3 (citing other empirical studies).

Professor Winick characterizes the costs of competency evaluations as "staggering." Winick, *supra* note 3, at 928. The numerical significance of incompetency determinations contrasts sharply with the remarkably few insanity defense cases adjudicated yearly. See, e.g., Joseph H. Rodriguez, et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 401 (1983) (of 32,500 criminal cases studied in 1982, insanity defense raised in only 50, and was successful in only 15); see generally PERLIN, *supra* note 31, at 108-14.

33. Bruce J. Winick & Terry L. DeMeo, *Competency to Stand Trial in Florida*, 35 U. MIAMI L. REV. 31, 32 n.2 (1980). See generally GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL* 912-15 (1974); HENRY WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 428-30 (1954). Roesch and Golding have suggested that the same problems may have been present as early as the thirteenth century. RONALD ROESCH & STEPHEN L. GOLDING, *COMPETENCY TO STAND TRIAL* 10 (1980).

Professor Slovenko has suggested that, historically, the incompetence plea emerged as a means by which to "undercut the [death] penalty." Ralph Slovenko, *The Developing Law on Competency to Stand Trial*, 5 J. PSYCHIATRY & L. 165, 178 (1977). Cf. Michael L. Perlin, *The Supreme Court*,

competent defendant's inability to aid in his defense,³⁴ (2) the parallels to the historic ban on trials in absentia,³⁵ and (3) the parallels to the problems raised by defendants who refuse to plead to the charges entered against them.³⁶

The primary purpose of the rule was, under all theories, to "safeguard the accuracy of adjudication."³⁷ As early as 1899, a federal court of appeals held that it was not due process of law to subject an "insane person"—meaning, in this case, an *incompetent* person—to trial upon an indictment involving "liberty or life."³⁸ Contemporaneously, a state supreme court suggested, "[I]t would be inhumane, and to a certain extent a denial of a trial on the merits, to require one who has been disabled by the act of God from intelligently making his defense to plead or to be tried for his life or liberty."³⁹ Thus, it became black letter law that the trial and conviction of a person mentally and physically⁴⁰ incapable of making a defense violates "certain immutable principles of justice which inhere in the very idea of a free government."⁴¹

the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the Ake in Barefoot's Achilles Heel, 3 N.Y.L. SCH. HUM. RTS. ANN. 91, 97 (1985) (questioning the conventional wisdom on the supposed parallel rise of the insanity defense).

Technically, incompetence is better understood as a *status* than a *plea* because it presupposes a lack of ability to enter a plea. Also, unlike other criminal pleas, it can be raised *sua sponte* by the court or the prosecutor. See *Drope v. Missouri*, 420 U.S. 162 (1975); 18 U.S.C. § 4241 (a) (1994); *Hamm v. Jabe*, 706 F.2d 765, 767 (6th Cir. 1983); *United States v. Warren*, 984 F.2d 325, 329 (9th Cir. 1993). Nonetheless, courts frequently continue to characterize incompetence as a "plea." See, e.g., *Waldrup v. State*, 482 S.E.2d 299, 304 n.1 (Ga. 1997); *Mantano v. State*, 649 N.E.2d 1053, 1058 (Ind. Ct. App. 1995); *Blanco v. State*, No. 05-93-00740-CR, 1994 WL 78892, *3 (Tex. Crim. App. Mar. 14, 1994).

34. See, e.g., 4 BLACKSTONE, COMMENTARIES 24 (9th ed. 1783); HALE, THE HISTORY OF THE PLEAS OF THE CROWN 34 (1847).

35. See, e.g., Caleb Foote, *A Comment on Pre-trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960). This issue is discussed fairly fully in *People v. Berling*, 251 P.2d 1017 (Cal. Ct. App. 1953).

36. Until the late eighteenth century, if the court concluded that a defendant was remaining "mute of malice," it could order him subjected to the practice of *peine forte et dure*, the placing of increasingly heavy weights on the defendant's chest to "press" him for an answer. This practice was abolished in 1772. See *Slovenko*, *supra* note 33, at 168. See also *Winick*, *supra* note 3, at 952.

37. Claudine Walker Ausness, Note, *The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat from Those Who Are Fit*, 66 KY. L.J. 666, 668 (1978).

38. *Youtsey v. United States*, 97 F. 937, 941 (6th Cir. 1899). *Youtsey* is discussed at length in William T. Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 21, 21-23 (1977).

39. *Jordan v. State*, 135 S.W. 327, 328 (Tenn. 1911). See also Ausness, *supra* note 37, at 670 ("A seldom mentioned but powerful psychological reason for the requirement that the defendant be competent is that in order to satisfy the urge of the community to punish, the defendant must understand what he is being punished for") (footnotes omitted).

40. On the question of a defendant's physical disability to proceed, see 3 PERLIN, *supra* note 1, § 14.12, at 242-43; Michael L. Perlin, "Big Ideas, Images and Distorted Facts": *The Insanity Defense, Genetics, and the "Political World,"* in GENETICS AND CRIMINALITY: THE POTENTIAL MISUSE OF SCIENTIFIC INFORMATION IN COURT 37 (J. Botkin et al. eds., 1999).

41. *Sanders v. Allen*, 100 F.2d 717, 720 (D.C. Cir. 1938) (citing *Powell v. Alabama*, 287 U.S. 45, 71 (1932)).

American courts quickly adopted the common-law test for assessing competency to stand trial:⁴² "Does the mental impairment of the prisoner's mind, if such there be, whatever it is, disable him . . . from fairly presenting his defense, whatever it may be, and make it unjust to go on with his trial at this time, or is he feigning to be in that condition . . .?"⁴³ To answer this question, courts considered whether the defendant was "capable of properly appreciating his peril and of rationally assisting in his own defense."⁴⁴

This standard—accepted by virtually every jurisdiction on either statutory or case law bases⁴⁵—was slightly modified by the U.S. Supreme Court⁴⁶ in *Dusky v. United States*,⁴⁷ where the Court asked whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he has a "rational as well as factual understanding of the proceedings against him."⁴⁸ This emphasis on rationality extended earlier doctrine as to the requisite level of a defendant's understanding; under *Dusky*, he must also be able to appraise and assess the proceedings.⁴⁹

Dusky, which was commonly seen as confusing and "less than helpful,"⁵⁰ was supplemented by *Drope v. Missouri*⁵¹ to require that the defendant be able to "assist in preparing his defense."⁵² The *Drope* court held:

42. There is no longer any question that the conviction of a legally incompetent person violates the due process clause of the Fourteenth Amendment. See *Pate v. Robinson*, 383 U.S. 375, 378 (1965).

43. *United States v. Chisolm*, 149 F. 284, 289 (S.D. Ala. 1906). For an earlier characterization, see *United States v. Lawrence*, 26 F. Cas. 887, 891 (D.C. Cir. 1835) (No. 15,577).

44. *United States v. Boylen*, 41 F. Supp. 724, 725 (D. Or. 1941).

45. See Ausness, *supra* note 37, at 671-72 nn.27-29. For an update, see Barbara Weiner, *Mental Disability and the Criminal Law*, in SAMUEL JAN. BRAKEL et al., *THE MENTALLY DISABLED AND THE LAW* 693, 695 (3d ed. 1985).

46. Although *Dusky v. United States*, 362 U.S. 402 (1960), established the test only for federal cases, several circuits and state supreme courts have adopted it as also setting out minimal constitutional standards. See Ausness, *supra* note 37, at 673 n.35; Winick & DeMeo, *supra* note 33, at 35.

47. 362 U.S. 402 (1960).

48. *Dusky*, 362 U.S. at 402.

49. Ausness, *supra* note 37, at 672. See, e.g., *People v. Swallow*, 301 N.Y.S.2d 798, 803 (N.Y. Sup. Ct. 1969) ("The word 'understanding' requires some *depth* of understanding, not merely surface knowledge of the proceedings." (emphasis added)).

For examples of more elaborate tests, see Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 377-78 (1985) (discussing N.J. REV. STAT. § 2C:4-4 (1981); *Wieter v. Settle*, 193 F. Supp. 318, 321-22 (W.D. Mo. 1961); *State v. Guatney*, 299 N.W.2d 538, 545 (Neb. 1980) (Krivoshva, C.J., concurring); FLA. R. CRIM. PROC. 3.211(a)(1) (1984)).

50. Bennett, *supra* note 49, at 376. For a survey of literature expressing dissatisfaction with the imprecision of *Dusky* formulation, see *id.* at n.8, and *id.* at 378-79.

51. 420 U.S. 162 (1975).

52. *Drope*, 420 U.S. at 171. The American Bar Association's Criminal Justice Mental Health Standards combine the *Dusky* and the *Drope* tests. See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Std. 7-4.1(B) (1984) [hereinafter STANDARDS], discussed in Bennett, *supra* note 49, at 376.

[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.⁵³

To be able to assist counsel, a defendant should have the ability to communicate,⁵⁴ the "capacity to reason from a simple premise to a simple conclusion,"⁵⁵ the "ability to recall and relate facts concerning his actions,"⁵⁶ and the "ability to comprehend instructions and advice, and make decisions based on well-explained alternatives."⁵⁷ Several courts have also considered whether a defendant is particularly susceptible to deterioration during the course of a trial.⁵⁸

2. Defendants Awaiting Incompetence Evaluations

As a matter of practice, defendants awaiting evaluations to determine their competency to stand trial have regularly been sent to maximum security forensic hospitals, regardless of the underlying criminal charge, even though such hospitalization is often not necessary or may even be counter-productive.⁵⁹ Although more forensic cases of all sorts

53. *Drope*, 420 U.S. 162 at 180. A New York court has listed six factors to be considered in determinations of incompetency:

[W]hether the defendant: (1) is oriented as to time and place; (2) is able to perceive, recall, and relate; (3) has an understanding of the process of the trial and the roles of Judge, jury, prosecutor and defense attorney; (4) can establish a working relationship with his attorney; (5) has sufficient intelligence and judgment to listen to the advice of counsel and, based on that advice, appreciate (without necessarily adopting) the fact that one course of conduct may be more beneficial to him than another; and (6) is sufficiently stable to enable him to withstand the stresses of the trial without suffering a serious prolonged or permanent breakdown.

People v. Picozzi, 482 N.Y.S.2d 335, 337 (N.Y. App. Div. 1984).

54. *Peter Silten & Richard Tullis, Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053, 1062 (1977); Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457 (1967-68).

55. *Silten & Tullis, supra* note 54, at 1064.

56. *Allen Wilkinson & Arthur Roberts, Defendant's Competency to Stand Trial*, 40 AM JUR. P.O.F.2d 171, at 187 (1984).

57. *Id.* at 187.

58. *E.g., Hamm v. Jabe*, 706 F.2d 765 (6th Cir. 1983); see also *Winick & DeMeo, supra* note 33, at 72-73.

59. *Pamela Casey & Ingo Keilitz, An Evaluation of Mental Health Expert Assistance Provided to Indigent Criminal Defendants: Organization, Administration, and Fiscal Management*, 34

are being treated in the community than was common a decade or more ago,⁶⁰ a substantial number of incompetency cases (both evaluations and post-*Jackson* commitments) are still treated as a matter of course in maximum security forensic settings.⁶¹ Such hospitalizations, of course, often burden the preparation of the defense of a case by making the gathering of evidence and the discovery of witnesses more difficult.⁶² In many—but not all—jurisdictions, bail is ostensibly available to persons who have raised the issues of incompetence, but such bail is rarely granted.⁶³

The length of time for such evaluations often extends far beyond the possible maximum potential sentence, especially in cases involving relatively minor offenses.⁶⁴ Outpatient (or jail-based) evaluations are cheaper, shorter and less stigmatizing,⁶⁵ yet, they are rarely used. This is especially troubling because a significant percentage of defendants who are evaluated for competency are charged with minor misdemeanors,⁶⁶ and a substantial minority of those charged with felonies in at least some

N.Y.L. SCH. L. REV. 19, 67 n.327 (1989); Winick, *supra* note 3, at 931.

60. Kirk Heilbrun & Patricia Griffin, *Forensic Treatment: A Review of Programs and Research*, in *PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE* 241, 255 (Ronald Roesch et al. eds., 1999).

61. See, e.g., *Hubbard v. State*, 812 S.W.2d 107, 110-11 (Ark. 1991); *State v. LeFlore*, 537 N.W.2d 148 (Wis. Ct. App. 1995) (table opinion) (unpublished opinion at 1995 WL 366220, *1); *State v. Phillips*, 458 N.W.2d 388 (Wis. Ct. App. 1990) (table opinion) (unpublished opinion at 1990 WL 95989, at *1); *Moten v. Commonwealth*, 374 S.E.2d 704, 705 (Va. Ct. App. 1988).

62. Winick, *supra* note 3, at 948. See Justine Dunlap, *What's Competence Got To Do With It? The Right Not to be Acquitted by Reason of Insanity*, 50 OKLA. L. REV. 495, 520 (1997) (“[A]s long as the defendant remains incompetent, she would not be able to assist in her defense and provide her attorney the very information needed to obtain an acquittal”).

On the difficulties inherent in the investigation of cases involving individuals institutionalized in psychiatric hospitals, see generally Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBS. 161 (Summer 1982).

63. Compare e.g., W. VA. CODE § 27-6A-7 (1999 Replacement Volume) (“Notwithstanding any finding of incompetence to stand trial, . . . the court . . . may at any stage of the criminal proceedings allow a defendant to be released with or without bail”); MASS. GEN. LAWS ch. 123 § 17 (1986); MICH. COMP. LAWS § 330.2036 (1999) (“The right of the defendant to be at liberty pending trial, on bail or otherwise, shall not be impaired because the issue of incompetence to stand trial has been raised”); MD. CODE ANN., [Health – General I] § 12-104(b)(2) (1994) (indicating that a court may set bail in non-capital cases where incompetence to stand trial raised), with WASH. REV. CODE § 10.77.060(1)(b) (1990) (stating that bail may be delayed pending a competency evaluation; in determining bail, court shall consider whether defendant ever had been previously found incompetent to stand trial), and *State ex rel. Porter v. Wolke*, 257 N.W.2d 881, 887 (Wis. 1977) (during period that competence to stand trial is being determined, right to release on bail is suspended) (construing WIS. STAT. § 971.14 (1998)). But see Winick, *supra* note 3, at 946 (“Another disadvantage facing defendants during the competency process is that raising the competency question routinely defers the setting of bail, ore results in the revocation of bail”) (emphasis added). Although this policy of automatically withholding bail is followed in many jurisdictions, it is inappropriate and may be unconstitutional.

64. Winick, *supra* note 3, at 925-26 n.12, quoting STANDARDS, *supra* note 52, at 7-160.

65. Winick, *supra* note 3, at 931-32.

66. Bruce Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 580 (1995), and see sources cited in same at 591 nn.102-03.

jurisdictions are charged with non-violent crimes.⁶⁷ No one has challenged Professor Winick's assertion that, in such cases, "the incompetency-to-stand-trial process has become a back door route to the mental hospital."⁶⁸

In some jurisdictions, the rationale for these policies is statutory. In Indiana, for example, a defendant in "any criminal case" believed to be incompetent to stand trial shall be confined in "an appropriate psychiatric institution."⁶⁹ In other jurisdictions, the policies for psychiatric evaluation come from court rules or court decisions.⁷⁰ To be sure, some jurisdictions provide for the option of outpatient evaluations,⁷¹ and in some cases, both outpatient and inpatient examinations are ordered.⁷² Kansas, for example, differentiates between the two in this manner:

To facilitate the examination, the court may: (a) If the defendant is charged with a felony, commit the defendant to the state security hospital or any county or private institution for examination and report to the court, or, if the defendant is charged with a misdemeanor, commit the defendant to any appropriate state, county or private institution for examination and report to the court, except that the court shall not commit the defendant to the state security hospital or any other state institution unless, prior to such commitment, the director of a local county or private institution recommends to the court and to the secretary of social and rehabilitation services that examination of the defendant should be performed at a state institution; . . .⁷³

3. Following an Incompetency Finding

When defendants are incompetent to stand trial, the overwhelming

67. See Elisa Robbins et al., *Competency to Stand Trial Evaluations: A Study of Actual Practice in Two States*, 25 J. AM. ACAD. PSYCHIATRY & L. 469, 475 (1997) (Table 2) (demonstrating that of 16 cases studied in Nebraska, nine involved violent crimes, and five involved non-violent crimes).

68. Winick, *supra* note 66, at 591 n.102.

69. IND. CODE § 35-36-3-1 (Supp. 1981).

70. See, e.g., ALA. R. CRIM. PRO. 11.2(d), discussed in this context in *Dixon v. State*, 668 So. 2d 65, 66 (Ala. Crim. App. 1994). Apparently, however, some Alabama evaluations are done on an outpatient basis. See, e.g., *Dobyné v. State*, 672 So. 2d 1353, 1354 (Ala. Crim. App. 1994); *Jackson v. State*, 560 So. 2d 1100, 1102 (Ala. Crim. App. 1989).

71. E.g., VA. CODE ANN. § 19.2-169.1 (Michie 1995); *State v. Dearry*, No. 03CC01-9612-CC-00462, 1998 WL 47946, at *5 (Tenn. Crim. App. Feb. 6, 1998); see also TENN. CODE ANN. § 33-7-301(a)(1) (1998); *United States v. Deters*, 143 F.3d 577, 579 (10th Cir. 1998) (construing 18 U.S.C. § 4247(b) (1994)); *State v. Evans*, 424 S.E.2d 512, 513 (S.C. Ct. App. 1992); see generally Richard Barnum & Thomas Grisso, *Competence to Stand Trial in Juvenile Court in Massachusetts: Issues of Therapeutic Jurisprudence*, 20 NEW ENG. J. CRIM. & CIV. CONFINEMENT 321, 321-24 (1994), discussing MASS. GEN LAWS ANN. ch. 123, §§ 15-17 (1986).

72. See, e.g., *United States v. Weston*, 36 F. Supp. 2d 7 (D.D.C. 1999).

73. KAN. STAT. ANN. § 22-3302 (3) (1995).

majority are committed to state hospitals.⁷⁴ Typical is the Alabama practice: "If it finds that [the defendant is incompetent to stand trial], the court *shall* make an order committing him to the Alabama state hospitals, where he must remain until he is restored to his right mind."⁷⁵ These commitments are frequently followed by a "shuttle process" by which defendants are stabilized, returned to jail to await trial, and returned to the hospital following relapse.⁷⁶ Professor Winick quotes a forensic report commissioned by a Dade County (Florida) mental health board: "The well known chain of events from incompetency determination to hospital to stabilization to return to jail to decompensation to re-determination of incompetency to re-hospitalization several times, means that some individuals are well known subjects of repeated forensic evaluations."⁷⁷

The Supreme Court's decision in *Jackson v. Indiana*,⁷⁸ banning indeterminate commitments in incompetency evaluation cases if there is no reasonable probability that the defendant will regain his competence within the "foreseeable future,"⁷⁹ has had surprisingly—"shockingly" might be a better descriptor—little impact on these practices.⁸⁰ Astonishingly, more than half the states allow for the indefinite commitment of incompetent-to-stand-trial defendants, in spite of *Jackson's* specific language outlawing this practice.⁸¹ In their comprehensive 1993 survey, Professors Grant Morris and J. Reid Meloy found that the key question of *Jackson*—what is a "reasonable period of time" necessary to determine whether a defendant will so attain his capacity to stand trial?—was not answered by the statutes of over thirty states.⁸²

74. Winick, *supra* note 3, at 925.

75. ALA. CODE § 15-16-21 (1975).

76. Winick, *supra* note 3, at 934-38. *See especially id.* at 935-36 n.57 (detailing the multiple transfers and tortured odyssey in the case of *State v. Alexander*, No. 74-4975 (Dade County (FL) Cir. Ct.)); Bruce Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243, 248-49 (1987); *see also* *State v. Carter*, 316 A.2d 449, 464 n.1 (N.J. 1974) (Clifford, J., concurring in part & dissenting in part) (recounting the "procedural jungle through which defendant has sought to make his way").

77. Winick, *supra* note 3, at 934 n.52, quoting E. NUEHRING, L. RAYBIN, A. PASCONI, E. FRITSCH & S. GRAY, A PLANNING AND NEEDS STUDY IN THE AREA OF COMMUNITY PROGRAMMING FOR FORENSIC MENTAL HEALTH CLIENTS 39 (1984).

78. 406 U.S. 715.

79. *Jackson*, 406 U.S. at 733.

80. *See* Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 680 (1993).

81. Winick, *supra* note 3, at 927 n.17; *see also* Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1, 11 (1993) (noting that more than half the states never implemented *Jackson*). I discuss the implications of these findings in Perlin, *Half-Wracked supra* note 25, at 23-24.

82. Morris & Meloy, *supra* note 81, at 26:

Although more than twenty years have passed since the Court decided *Jackson*, this question has not been answered by the statutes of thirty states and the District of Columbia. Of this number, twenty-three jurisdictions do not address the issue at

Some states make special provisions for incompetency findings in misdemeanor cases;⁸³ others do not. For example, Louisiana merely mandates that persons "found incompetent to stand trial" shall be committed to the Feliciana [maximum security] Forensic Facility or other such facility established by the state legislature.⁸⁴ In Kansas, this differentiation is made:

A defendant who is charged with a *felony* and is found to be incompetent to stand trial shall be committed for evaluation and treatment to the state security hospital or any appropriate county or private institution. A defendant who is charged with a *misdemeanor* and is found to be incompetent to stand trial shall be committed for evaluation and treatment to any appropriate state, county or private institution.⁸⁵

However, few states make special provisions for committed incompetent

all. Eight states address the issue but do not specify the length of the evaluation detention period. Typically, these statutes merely parrot the *Jackson* language allowing the incompetent defendant's detention for a "reasonable" period. Of the twenty states that specify the length of the detention period, ninety days is the most frequent period specified, with the shortest period being thirty days and the longest being twelve months. . .

Is the court that ordered the incompetent defendant's treatment statutorily obligated to review periodically the defendant's progress toward attaining competence? Although more than twenty years have passed since the Court decided *Jackson*, the question has not been answered by the statutes of thirty-two states and the District of Columbia. Of this number, twenty jurisdictions do not address the issue at all. Thirteen states mandate a clinical review of the defendant's condition but do not require a court hearing. In four of the thirteen states, the frequency of clinical review is not specified. In the ten states that do specify frequency of clinical review, a ninety-day interval is most typically mandated.

Of the eighteen states whose statutes mandate judicial oversight, eight states require a hearing at the end of ninety days and subsequent hearings after an additional ninety days or some lengthier period of time. The statutes of six states mandate an initial court review after six months. Maine requires a court review after thirty days, the shortest period specified. California requires a court review after eighteen months, the longest period specified.

See id. at 9-12.

83. In Texas, the legislature differentiates between commitments of persons incompetent because of mental illness and mental retardation. "When a defendant has been determined incompetent to stand trial for any felony or for a misdemeanor because of mental retardation," and is covered by the relevant language of *Jackson*, "the court shall enter an order committing the defendant to the maximum security unit of any facility designated by the Texas Department of Mental Health and Mental Retardation, to an agency of the United States operating a mental hospital, or to a Veterans Administration hospital for a period not to exceed 18 months." TEX. CODE CRIM. P. ANN. art. 46.02, § 5(a) (West Supp. 2000). On the other hand, "[w]hen a defendant has been determined incompetent to stand trial for a misdemeanor because of mental illness," and is covered by the *Jackson* language, "the court shall enter an order committing the defendant to the mental health facility designated by the Commissioner of Mental Health and Mental Retardation to serve the catchment area in which the committing court is located for a period not to exceed 18 months." *Id.*

84. LA. REV. STAT. ANN. § 28:25.1(C)(1)(a)(iv) (West Supp. 2000).

85. KAN. STAT. ANN. § 22-3303(1) (1995) (emphasis added).

misdemeanants.⁸⁶

In some other jurisdictions, post-*Jackson* commitments are made either to maximum security facilities or to other facilities (outpatient or inpatient) depending on the court's findings.⁸⁷ Some states do premise the choice between inpatient and outpatient evaluations on the extent of the defendant's dangerousness,⁸⁸ but few statutes specify the degree of dangerousness as a discriminating criteria at this stage.⁸⁹

"Empirical studies demonstrate that trial judges misunderstand the relationship between a finding of incompetency to stand trial and subsequent hospital commitment."⁹⁰ In a state-wide study conducted four years after the Supreme Court's decision in *Jackson*, almost one-half of all judges polled believed that commitment of incompetent criminal defendants to forensic hospitals should be *automatic* without regard to the severity of the underlying criminal offense or the defendant's present dangerousness.⁹¹ A subsequent national study of trial judges revealed that such hospitalization was the judicial intervention of choice in nearly ninety percent of all cases.⁹² Even in states that expressly sanction outpatient commitment as an alternative in criminal incompetency cases, judges remain reluctant to employ this mechanism due to their fear that the patient might become violent in an outpatient setting.⁹³

Also disturbing is the often unstated but lingering assumption that *any* defendant on whose "behalf" the incompetency status is raised is, in fact, "factually guilty" of the underlying crime. When I was a public defender, I represented in individual cases well over 200 criminal defendants who had been found—at some point—incompetent to stand

86. *But see, e.g.*, CAL. PENAL CODE § 1367.1 (West 2000) (providing special provisions for misdemeanor cases); KAN. STAT. ANN. § 22-3302(3)(a) (1995) (providing the same).

87. *E.g.*, MAINE REV. STAT. ANN. § 101-B(4) (West 1990); CAL. PENAL CODE §§ 1367.1, 1370, 1370.1 (West 2000); KY. REV. STAT. ANN. § 504.110 (Banks-Baldwin 1999); KY. REV. STAT. ANN. § 504.060 (Banks-Baldwin 1999) (defining "[t]reatment facility" and "[f]orensic psychiatric facility"); MICH. COMP. LAWS § 330.2026 (West 1999); OHIO REV. CODE ANN. § 2945.371 (West 1997); W. VA. CODE §§ 27-6A-1 to 2 (1999).

88. *E.g.*, N.J. STAT. ANN. § 2C:4-6b (West Supp. 2000) (requiring a defendant to be committed to state department of human services if he is "so dangerous to himself or others as to require institutionalization").

89. *See* N.J. STAT. ANN. § 2C:4-6b (West Supp. 2000); *see also* CAL. PENAL CODE § 1370 (West Supp. 2000).

90. Perlin, *supra* note 80, at 680; *see also* Dunlap, *supra* note 62, at 520 (discussing the extent of "professional confusion" in this area).

91. Ronald Roesch & Stephen Golding, *Legal and Judicial Interpretation of Competency to Stand Trial Statutes and Procedures*, 16 CRIMINOLOGY 420, 423-24 (1978).

Professor Mark Weber has (appropriately) questioned whether judges may—perhaps unconsciously—do this to create a disincentive for criminal defendants to feign incompetency. Personal communication with Mark Weber (Mar. 3, 2000). I partially address this issue in Perlin, *supra* note 80, at 678-79; *see also infra* text accompanying note 294.

92. Ingo Keilitz & J. Rudy Martin, *Criminal Defendants With Trial Disabilities: The Theory and Practice of Competency Assistance* (1984) (unpublished manuscript, on file with the author).

93. Ann L. Hester, *State v. Gravette: Is There Justice for Incompetent Defendants in North Carolina?*, 69 N.C. L. REV. 1484, 1497 (1991).

trial.⁹⁴ In not a single case did the prosecutor, the judge, or the forensic evaluator even acknowledge the possibility that the defendant might have been "factually innocent" of the underlying charge.⁹⁵ This is a topic that has been rarely, if ever, addressed in the case law or the legal or behavioral literature,⁹⁶ but I am convinced that it is one that must be taken seriously if we are going to carefully and comprehensively examine this question.

4. Conclusion

In short, the vast majority of incompetency evaluations are held in maximum security facilities without regard to the severity of the crime or the dangerousness of the defendant.⁹⁷ Post-evaluation commitments are similarly inevitably ordered to such facilities without similar regard to the nature of the crime, the defendant's dangerousness, or the letter and spirit of the Supreme Court's *Jackson v. Indiana* decision of twenty-eight years ago.

94. See *Dixon v. Cahill*, No. L.30977-71 P.W. (N.J. Super. Ct., Law Div. 1973) (implementing *Jackson*), reprinted in 3 PERLIN, *supra* note 1, § 14.17, at 256-59. I was class counsel to plaintiffs in *Dixon*, and, after the entry of the consent decree, the trial judge appointed me to individually represent each member of the class. Approximately 215 of the class members had previously been found incompetent to stand trial.

95. Of course, in an insanity defense case, the entry of an NGRI plea is an admission that the defendant, in fact, committed the acts that would be criminal but for the defendant's asserted lack of responsibility. *Jones v. United States*, 463 U.S. 354, 363 (1983); see also *infra* notes 118-124; *Dunlap*, *supra* note 62, at 522 (discussing the special problems raised when a possibly incompetent defendant pleads not guilty by reason of insanity).

96. Compare Mark Sblendorio, Note, 27 SETON HALL L. REV. 735, 739 n.13 (1997) (noting that "[o]ne of the most significant distinctions between an incompetency finding and a verdict of NGRI is that the defendant in an NGRI is assumed to have committed the criminal action at issue, but the incompetent defendant is never even 'put to trial' on the criminal charge"), to John Kip Cornwall, *Confining Mentally Disordered "Super-Criminals": A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651, 653 (1996) (noting that because "mentally disordered offenders have engaged, or are suspected of having engaged, in criminal activity, they may pose a greater threat to society than individuals civilly committed to the custody of the state or federal government and should perhaps be subject to different standards for involuntary detention on this basis." (emphasis added)).

97. Again, in many major cities—New York, Baltimore, San Diego, Boston, and others—the presence of forensic court clinics have substantially ameliorated this problem. See generally, *Casey & Keillitz*, *supra* note 59, at 66-87; see also, e.g., David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, 20 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 254-55 (1994); Ronnie Harmon et al., *Sex and Violence in a Forensic Population of Obsessional Harassers*, 4 PSYCHOL., PUB. POL'Y & L. 236 (1998); Ansar Haroun & Grant Morris, *Weaving a Tangled Web: The Deceptions of Psychiatrists*, 10 J. CONTEMP. LEGAL ISSUES 1227 (1999). A review of national practice, however, reveals that, globally, these are still the exception.

B. Defendants Pleading Not Guilty by Reason of Insanity⁹⁸

1. Introduction

Insanity pleaders are among the most despised individuals in our society,⁹⁹ and our revulsion appears to increase with every report of an attempted insanity defense in a high-profile case, whether or not that defense is "successful," whether or not it leads to a lengthy commitment in a maximum security facility, and whether or not there is any question as to the profundity of the defendant's mental illness or his lack of criminal responsibility.¹⁰⁰ In a series of books and articles,¹⁰¹ I have attempted to come to grips with both the incoherence of our insanity defense jurisprudence and the roots of our virulent antipathy.¹⁰² Whatever the cause (or causes) of these feelings,¹⁰³ I have no doubt that they are

98. See generally 3 PERLIN, *supra* note 1, §§ 15.01-15.43, at 277-409. The important substantive insanity defense tests are discussed in 3 *id.*, §§ 15.03-15.09, at 286-313.

99. Successful insanity defendants have traditionally been perceived as perhaps the "most despised" and most "morally repugnant" group of individuals in society. See Deborah C. Scott et al., *Monitoring Insanity Acquittes: Connecticut's Psychiatric Security Review Board*, 41 HOSP. & COMMUNITY PSYCHIATRY 980, 982 (1990). See also Michael L. Perlin, "The Borderline Which Separated You From Me": *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1379 (1997); see also Perlin, *supra* note 15, at 1247 n.5.

100. Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 8-12 (1990) (describing how high-profile insanity cases result in calls for the abolition of the defense).

101. See, e.g., PERLIN, *supra* note 31; Perlin, *supra* note 40; Perlin, *supra* note 99; Perlin, *supra* note 100; Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1996) [hereinafter Perlin, *Myths*]; Michael L. Perlin, *The Insanity Defense: Deconstructing the Myths and Reconstructing the Jurisprudence*, in LAW, MENTAL HEALTH AND MENTAL DISORDER 341 (Bruce Sales & Daniel Shuman eds. 1996) [hereinafter Perlin, *Deconstructing*]; Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599 (1989-90) [hereinafter Perlin, *Unpacking*].

102. See Perlin, *supra* note 99, at 1378 ("The overarching question to explore is: Why do we feel the way we do about *these* people (insanity pleaders), and how does the answer to that question preordain our answers to almost all of the legal and behavioral questions that are posed in this area?").

103. I concluded a recent insanity defense piece this way:

It is important to us—as individuals and as members of a larger community—to know that there is a "borderline" separating "you from me." Or, at the least, to believe that there is. On one hand, the insanity defense appears to establish such a borderline between those of us who are found to be criminally responsible for our acts and those of us who are not. But, on the other hand, a significant portion of society believes that the insanity defense actually blurs the borderline between good and evil, between "good guys" and "bad guys." . . . [W]e feel "doublecrossed," because it appears that "these people" are "getting away with it." And we feel that way even though we know—rationally and objectively—that, in that minute statistically insignificant universe of cases in which defendants *do* succeed in contested insanity defense cases, these defendants are subsequently incarcerated in maximum security institutions for periods of time as long as or, in many cases, much longer than they would have spent in prison for the same offense.

We know this and we ignore it, because we do not care about this objective real-

the (unconscious, perhaps) reason for the policies that control both the insanity defense evaluation process and the system of retention and institutionalization of insanity acquittees.

2. *Insanity Evaluations*

Insanity evaluations have traditionally been held on an inpatient basis at state forensic facilities.¹⁰⁴ Statutes often specify that such a facility be "secure"¹⁰⁵ or "suitably secure,"¹⁰⁶ and the emphasis is frequently on the question of custody. In Colorado, for instance, the court "shall give priority to the place where the defendant is in custody"¹⁰⁷ in determining where the insanity evaluation should be done. Typically, the laws governing such evaluations make no discrimination between the types of predicate offenses with which the defendant might be charged or the level of his dangerousness.¹⁰⁸ For example, in Arkansas, "[w]henver a defendant charged in circuit court" files notice that he intends to rely upon an insanity defense, the court "shall" enter an order

ity, a reality about which—following the publication of Henry Steadman's groundbreaking research—there can no longer be the shadow of a doubt. We do not care about it because this is simply an area too emotionally freighted for us to handle. Neither our legal system nor our individual psyches have the tensile strength required to accept the tensions and ambiguities inherent on a maturely functioning insanity defense system—one in which that "borderline" is inevitably so deeply blurred. Simply put, we cannot deal with the fact that insanity—pleading defendants may be more *like* us than *not* like us, and we thus develop elaborate mechanisms (legal and psychological) to distance ourselves from them and from that unacceptable reality.

So we accept an insanity defense system that is sanist, pretextual and teleological, a system that rests on the shaky underpinnings of heuristic reasoning and a false OCS [ordinary common sense]. And this acceptance may ultimately doom to failure any attempt to reconstitute insanity defense policy, even when examined through the lens of therapeutic jurisprudence.

Why is this? I believe that our refusal to care about or think about the objective realities that I have been discussing, and our dogged, banal reliance on sanist myths and pretextual reasoning is made far easier by both phenomena that I discussed earlier: by our authoritarian spirit, and our culture of punishment. These phenomena allow us—*encourage* us—to wilfully [sic] blind ourselves to behavioral, scientific, cultural and empirical realities [sic]. They do this to preserve the illusion of a "borderline" between "you and me". The evanescence of this borderline becomes, in the end, the reason why, after centuries, our insanity defense jurisprudence continues to operate as it always has—out of consciousness.

Perlin, *supra* note 99, at 1425-26.

104. See, e.g., Casey & Keilitz, *supra* note 59, at 67 n.327 (discussing the practice in one state).

105. E.g., ALASKA STAT. § 12.47.070(a) (Michie 1998).

106. E.g., WASH. REV. CODE § 10.77.060(1)(a) (West Supp. 2000).

107. COLO. REV. STAT. § 16-8-106(1) (West 1998).

108. *But see*, e.g., N.H. REV. STAT. § 135:17-a (Supp. 1999) (listing array of facilities to which defendant may be sent for evaluation); ARIZ. REV. STAT. ANN. § 13-502 (West 1989) (distinguishing evaluation sites in cases in which defendants are charged with crimes "involving the death or serious physical injury of or the threat of death or serious physical injury" to another); MASS. GEN. LAWS ch. 123, § 15 (1986) (specifying commitment to Bridgewater State Hospital if "such person is a male and appears to require strict security").

“[c]ommitting the defendant to the Arkansas State Hospital or other appropriate facility for the purpose of the examination.”¹⁰⁹

3. *Following Insanity Acquittals*

Following a finding of NGRI, “successful” insanity acquittees are invariably committed to maximum security forensic facilities for lengthy periods of time.¹¹⁰ The commitments are sometimes termed “automatic,”¹¹¹ and such commitments are often made mandatory by state law.¹¹² These time periods are often far longer than the defendants would have received had they been given the maximum sentence for the underlying criminal charge,¹¹³ and the disparity between the maximum sentence and the time spent in a maximum security facility as an insanity acquittee is largest in the cases of misdemeanors and other minor crimes.¹¹⁴ One California study revealed that the average stay of the “successful” insanity misdemeanor acquittee is *nine* times as long as the average sentence of criminal defendants convicted of like charges.¹¹⁵

As early as 1976, state policies that mandated the institutionalization of insanity acquittees in maximum security facilities were criticized by commentators who argued that the then-nascent LRA doctrine should equally apply in such cases and that due process mandated that placements of insanity acquittees must be made to “the least drastic setting commensurate with [the defendant’s] condition subsequent to his com-

109. ARK. CODE ANN. § 5-2-305 (a), (b)(1)(D) (Michie 1997). Interestingly, when a defendant pleads insanity in a family law contempt proceeding, the *only* place to which he can be committed for an evaluation is the Arkansas State Hospital. *See id.* § 9-14-104(a).

110. *See also, e.g.*, Abraham Halpern, *The Insanity Verdict, The Psychopath, and the Post-Acquittal Confinement*, 24 PAC. L.J. 1125, 1132-33 (1993).

111. *See, e.g.*, N.C. GEN. STAT. § 15A-1321 (1978) (discussing automatic civil commitment of defendants found not guilty by reason of insanity).

112. *See, e.g.*, TENN. CODE ANN. § 33-7-303(a) (1999); DEL. CODE ANN. tit. 11, § 403 (1998); KY. REV. STAT. ANN. § 504.030 (Banks-Baldwin 1999); ALA. CODE § 22-52-33 (1997); FLA. STAT. ANN. ch. § 916.15 (HARRISON 1999); LA. CODE CRIM. PROC. ANN. art. 654 (West 2000); N.Y. CRIM. PROC. LAW § 330.20 (McKinney 1994). *Compare* N.C. GEN. STAT. § 15A-1321 (1999) (mandating that commitment is “automatic,” and that if the underlying crime involved infliction or attempted infliction of “serious physical injury or death,” commitment is to forensic unit; in the case of all other crimes, commitment is to a “State 24-hour facility”).

113. *See* Jones v. United States, 463 U.S. 354, 363-68 (1983).

114. *See, e.g.*, W. VA. CODE § 27-6A-3(a) (1999) (“The court shall commit such defendant to a mental health facility under the jurisdiction of the department of health, with the court retaining jurisdiction over the defendant for the maximum sentence period”).

115. HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 58-61 (1993); *see also* Perlin, *supra* note 99, at 1405 n.194.

Of course, it is possible that, even if the Supreme Court had decided *Jones* differently (limiting insanity acquittal commitments to the maximum time to which the defendant could have been sentenced had he been convicted of the underlying criminal charges), some of these defendants would have been subjected to involuntary civil commitment at the conclusion of their insanity acquittal commitment. In this situation, however, the individuals in question would have likely been subjected to less restrictive conditions of confinement and to different allocations of the burden of proof on applications for release. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 727-30 (1972).

mitment hearing."¹¹⁶ There was little judicial response to these criticisms.¹¹⁷

It is clear that the United States Supreme Court is comfortable with lengthy post-acquittal commitments, even in cases involving nonviolent offenses. In *Jones v. United States*,¹¹⁸ a case involving an attempted petty larceny (shoplifting), the Court rejected the defendant's arguments that it was unconstitutional to confine a defendant as an insanity acquittee for a longer period of time than that to which he could have been sentenced had he been given the maximum sentence for the underlying crime.¹¹⁹ First, the Court saw no reason to treat a misdemeanor case any different from a case involving a murder, rape, or armed robbery. It quoted from an earlier decision of the District of Columbia Circuit that had been written by Chief Justice Burger when he was on that court: "[T]o describe the theft of watches and jewelry as 'non-dangerous' is to confuse danger with violence. Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both."¹²⁰ Beyond this, the Court saw no reason to limit the term of an insanity acquittee's confinement to the statutory maximum for the underlying crime.¹²¹ After pointing out that the entry of an insanity plea is an admission that the defendant committed the acts that are the elements of the underlying crime,¹²² the Court stressed that "[t]here simply is no necessary correlation between severity of the offense and length of time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment."¹²³

Jones was a political decision that permitted indeterminate commitment and reflected the Supreme Court's "unwillingness to contradict

116. June German & Anne Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011, 1052 (1976), see generally *id.* at 1050-53.

117. But see, e.g., *State v. Stacy*, 601 S.W.2d 696, 705 (Tenn. 1980) (Henry, J., dissenting) (reiterating that "[a]utomatic commitment and prolonged confinement of those found not guilty of criminal charges by reason of insanity are prohibited") (citing German & Singer, *supra* note 116, at 1025); *In re Anderson*, 140 Cal. Rptr. 546, 552 (Cal. Ct. App. 1977) (noting that "[c]ommunity treatment of a mental patient facilitates the patient's adjustment to community life and in many cases speeds restoration of his sanity as well as affording state institutional personnel the opportunity to make an informed decision as to the patient's suitability for absolute discharge") (citing German & Singer, *supra* note 116, at 1068).

118. 463 U.S. 354 (1983).

119. *Jones*, 463 U.S. at 363-68.

120. *Id.* at 365 n.14 (quoting *Overholser v. O'Beirne*, 302 F.2d 852, 861 (D.C. Cir.1961)).

121. *Id.* at 368.

122. We turn first to the question whether the finding of insanity at the criminal trial is sufficiently probative of mental illness and dangerousness to justify commitment. A verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness.

Id. at 363.

123. *Id.* at 369.

public sentiment [soon after the Hinckley acquittal] in such a controversial area."¹²⁴ It further provided the Court with a vehicle to impose its dissatisfaction with the insanity defense on defendants who succeeded in the use of a plea by making it even less likely that the plea would be used in the future.¹²⁵

Decisions in other NGRI cases are often just as overtly political. The public's faith in the judicial process becomes threatened when an insanity defense acquittal appears to reflect "official permissiveness."¹²⁶ Such a loss of faith has profound implications for the system's "gatekeepers" who must enforce the system's values and becomes explicitly more problematic in controversial cases, the most glaring example of which is that of John W. Hinckley.¹²⁷

[T]he final report of the National Institute of Mental Health's Ad Hoc Forensic Advisory Panel, which was specifically selected to review the policies and procedures of the St. Elizabeth's Hospital Forensic Division (where Hinckley is housed), underscored the pragmatic issues afoot in such a case. "From the perspective of the Hospital," noted the Report, "*in controversial cases such as Hinckley*, the U.S. Attorney's Office can be counted upon to oppose any conditional release recommendation." The bureaucratic issue is not one of moral philosophy, of treatment philosophy, or of clinical conditions: it is the *political* reality that the government will be sure to oppose release of a "controversial" patient.¹²⁸

There is no question that inpatient treatment is often seen as the only "politically acceptable" setting in which insanity acquttees can be housed.¹²⁹ Further, while insanity acquttees are eligible for transfer to less restrictive settings in some states,¹³⁰ in others, courts are even with-

124. See 1 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL*, § 3.43, at 333 (1st ed. 1989) (quoting Louise Dove, *Jones v. United States: Automatic Commitment of Individuals Found Not Guilty by Reason of Insanity*, 68 MINN. L. REV. 822, 840 (1984)).

125. PERLIN, *supra* note 31, at 200-01; 1 PERLIN *supra* note 124, § 3.43, at 333 n.702 (citing, *inter alia*, Janet Polstein, *Throwing Away the Key: Due Process Rights of Insanity Acquittees in Jones v. United States*, 34 AM. U. L. REV. 479, 521 (1985)).

126. Perlin, *Unpacking*, *supra* note 101, at 670 n.320, (quoting Scott Sherman, *Guilty But Mentally Ill: A Retreat From the Insanity Defense*, 7 AM. J.L. & MED. 237, 252 n.113 (1981)); Henry Steadman et al., *The Use of the Insanity Defense*, in *THE INSANITY DEFENSE IN NEW YORK, A REPORT TO GOVERNOR HUGH L. CAREY* 37, 38-39 (1978).

127. See PERLIN, *supra* note 31, at 333-48.

128. Perlin, *Unpacking*, *supra* note 101, at 670.

129. Sherin Vitro, *Promoting Therapeutic Objectives Through LB 518: A Sane Amendment to Nebraska Law Governing the Disposition of Insanity Acquittees*, 72 NEB. L. REV. 837, 854 n.129 (1993).

130. See *State v. Krol*, 344 A.2d 289, 297-98 (N.J. 1975); see generally 1 PERLIN, *supra* note 1, § 2A-4.4b, at 133-39.

See also Marilyn Hammond, *Predictions of Dangerousness in Texas: Psychotherapists' Conflcting Duties, Their Potential Liability, and Possible Solutions*, 12 ST. MARY'S L.J. 141, 150

out jurisdiction to hear challenges to placements in maximum security.¹³¹ Although a student note writer has appropriately recognized that judges "cannot allow political pressures and public reactions to insanity acquittals to cause them to view inpatient treatment as the only appropriate treatment,"¹³² the reality is that judges do exactly this, whether the charge is serious or minor. In short, placement of insanity acquittees is driven by a political decision-making process which largely ignores both the quality of the crime and the dangerousness of the individual defendant.¹³³

C. Conclusion

The evidence is clear. The vast majority of incompetency-to-stand-trial and insanity evaluations are conducted in maximum security facilities, and a like majority of incompetency-to-stand-trial and insanity commitments are ordered to such facilities, regardless of the severity of the offense or, in many cases, the dangerousness of the individual defendant.¹³⁴ These practices have continued notwithstanding the Supreme Court's decision in *Jackson v. Indiana* and notwithstanding unanimous scholarly criticism of both the states' failures to coherently implement *Jackson*¹³⁵ and of the overtly political agenda of *Jones v. United States*.¹³⁶

Strangely absent from much of the discourse has been a consideration of the application of the LRA doctrine to the questions at hand. Fifteen years ago, Professor Bruce Winick perceptively noted the relation-

(1980) (discussing the practice in Texas):

Predictions of dangerousness are required in the commitment procedures of criminal defendants who have been found not guilty by reason of insanity. If such a defendant is determined to be "manifestly dangerous" by a team of three psychiatrists, he will be detained in the state facility for the criminally insane or in a maximum security unit of another state hospital. If the team decides the defendant is not manifestly dangerous, he is sent to a nonsecurity unit. Here, if the head of the facility decides it best for the protection of others, the defendant can be indefinitely committed. Determinations of dangerousness by mental health personnel are instrumental in decisions about commitment of criminal defendants.

(Footnotes omitted).

131. *E.g.*, *Champagne v. Lewis*, No. CV-960565267, 1998 WL 321831, *2 (Conn. Super. June 9, 1998).

132. *Vitro*, *supra* note 129, at 854.

133. There is, to be sure, great irony in the fact that the most expansive due process decision in this area—*Krol*—involves a defendant charged with murder, while the most restrictive decision—*Jones*—involves a defendant charged with shoplifting.

134. *See, e.g.*, *People v. Powell*, 212 Cal. Rptr. 454 (Cal. Ct. App. 1985); *see also, e.g.*, *Havis v. City of Guntersville*, 586 So. 2d 947 (Ala. Civ. App. 1991).

135. *See, e.g.*, *Perlin, Half-Wracked*, *supra* note 25, at 23-24 (discussing the research reported in *Winick, supra* note 3; *Morris & Meloy, supra* note 81; and *Michael L. Perlin, Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 48 (1992)).

136. *See, e.g.*, 1 PERLIN, *supra* note 124, § 3.43, at 332-35 nn.701-08 (citing sources).

ship between this principle and the incompetency-to-stand-trial process.¹³⁷ Nearly twenty-five years ago, June German and Anne Singer similarly noted this relationship in the context of the insanity acquittee retention process.¹³⁸ Little attention, however, has been paid to these insights in the intervening years. In the next section, I will turn to the development of the LRA principle in mental disability law, before moving on to the Americans with Disabilities Act.

II. THE LEAST RESTRICTIVE ALTERNATIVE¹³⁹

A. *Lessard v. Schmidt*

The "least restrictive alternative" ("LRA") doctrine was first given constitutional life in the mental health context by the involuntary civil commitment case of *Lessard v. Schmidt*.¹⁴⁰ There, after crafting a substantive commitment standard¹⁴¹ and mandating a beyond a reasonable doubt standard of proof,¹⁴² the federal district court ruled that: "[e]ven if the standards for an adjudication of mental illness and potential dangerousness are satisfied, a court should order full-time involuntary hospitalization only as a last resort."¹⁴³

The court concluded that "persons suffering from the condition of being mentally ill, *but who are not alleged to have committed any crime*, cannot be totally deprived of their liberty if there are less drastic means for achieving the same basic goal."¹⁴⁴ It placed the burden for exploring alternatives to institutionalization on "the person recommending full-time involuntary hospitalization," who must prove:

- (1) what alternatives are available;
- (2) what alternatives were investigated;
- and (3) why the investigated alternatives were not deemed suitable. These alternatives include voluntary or court-ordered outpatient treatment, day treatment in a hospital, night

137. See Winick, *supra* note 3, at 943 n.97: "Under the least restrictive alternative doctrine, . . . where outpatient treatment is at least as effective as hospitalization in restoring a particular defendant's competency to stand trial, hospitalization, involving a greater deprivation of the defendant's constitutional rights, would seem constitutionally offensive." (citation omitted).

138. See German & Singer, *supra* note 116, at 1050-53.

139. See generally 1 PERLIN, *supra* note 1, § 2C-5.3a, at 419-23; Perlin, *supra* note 14.

140. 349 F. Supp. 1078, 1095-96 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976), *superseded by statute as stated in* Flower v. Leean, No. 99-2999, 2000 U.S. App. LEXIS 9617 (7th Cir. May 3, 2000).

141. See 1 PERLIN, *supra* note 1, § 2A-4.4a, at 126-32.

142. See *id.*, § 2C-5.1, at 392-94; see *Addington v. Texas*, 441 U.S. 418 (1979) (holding that clear convincing evidence is all that is constitutionally required).

143. *Lessard*, 349 F. Supp. at 1095.

144. *Id.* at 1096 (emphasis added).

treatment in a hospital, placement in the custody of a friend or relative, placement in a nursing home, referral to a community mental health clinic, and home health aide services.¹⁴⁵

Lessard's reasoning was subsequently adopted in other civil commitment challenges¹⁴⁶ and endorsed extensively in the literature.¹⁴⁷ Other courts quickly expanded the scope of the LRA doctrine beyond involuntary civil commitment decision-making¹⁴⁸ to include regulation of the conditions of confinement,¹⁴⁹ the availability of treatment,¹⁵⁰ and the right of a patient to refuse treatment.¹⁵¹ Notwithstanding the *Lessard* court's disclaimer about patients not charged with crime,¹⁵² a handful of cases also considered the applicability of the doctrine to cases involving

145. *Id.*

For a list of factors to be weighed in determining the LRA, see Ingo Keilitz et al., *Least Restrictive Treatment of Involuntary Patients: Translating Concepts Into Practice*, 29 ST. LOUIS U. L.J. 691, 696 (1985) (stating that factors include:

the environmental restrictiveness of the treatment setting; the psychological or physical restrictiveness of behavioral, chemical, or biological treatment; clinical variables, including the person's behavior as it relates to the legal criteria for involuntary commitment; the relative risks and benefits of treatment alternatives; the family and community support available in the person's environment; the quality or likely effectiveness of the alternative care and treatment; the duration of treatment; the likelihood that a person may pose a risk to public safety; the availability, cost, and accessibility of alternative treatment and care; the likelihood of the person's cooperation or compliance with the conditions of alternative treatment programs; and mechanisms for monitoring and reviewing that compliance)

(footnote omitted).

146. See, e.g., *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1132-33 (D. Haw. 1976); *Lynch v. Baxley*, 386 F. Supp. 378, 392 (M.D. Ala. 1974), superseded by statute as stated in *Garrett v. State*, 707 So. 2d 273 (Ala. Civ. App. 1997); *Application of D.D.*, 285 A.2d 283, 286 (N.J. Super. Ct. App. Div. 1971); *Kesselbrenner v. Anonymous*, 350 N.Y.S.2d 889, 892 (N.Y. 1973).

147. For a collection of relevant scholarship, see David Zlotnick, *First Do No Harm: Least Restrictive Alternative Analysis and the Right of Mental Patients to Refuse Treatment*, 83 W. VA. L. REV. 375, 402-03 n.109 (1981).

148. See, e.g., *In re Maxwell*, 703 P.2d 574 (Ariz. Ct. App. 1985) (discussing the issue of the patient's right to a written treatment plan, and holding that an order for treatment which committed a patient to program of combined inpatient and outpatient treatment was void, absent a showing that the court was presented with and approved a written treatment plan); see also *In re J.M.R.*, 505 A.2d 662 (Vt. 1986) (holding that the trial court could not continue involuntary treatment on nonhospitalized basis for indeterminate time, absent some finding that the patient was dangerous to himself or others, or would become so if treatment plan was discontinued); but see *In re Harhut*, 367 N.W.2d 628 (Minn. Ct. App. 1985) (noting that the trial court erred in prescribing specific treatment programs, in ordering the county to prepare treatment reports and the hospital to submit a program plan to the court, and in ordering the county to create community placements in a commitment order).

149. See, e.g., *Scott v. Plante*, 641 F.2d 117 (3d Cir. 1981), vacated, 458 U.S. 1101 (1982), on remand, 691 F.2d 634 (3d Cir. 1982); see also *Matter of James*, 547 N.E.2d 759, 761-62 (Ill. App. Ct. 1989) (holding that an absence of report on appropriateness and availability of alternative treatment facilities and preliminary treatment plan required commitment reversal).

150. See, e.g., *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir. 1980), vacated, 457 U.S. 307 (1982), on remand 687 F.2d 33 (3d Cir. 1982).

151. See, e.g., *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), supplemented., 476 F. Supp. 1294 (D.N.J. 1979), modified, 653 F.2d 836 (3d Cir. 1981), vacated, 458 U.S. 1119 (1982), on remand, 720 F.2d 266 (3d Cir. 1983).

152. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972).

prisoners transferred to mental hospitals¹⁵³ and insanity acquittees seeking release.¹⁵⁴ By the late 1970s, the LRA concept had apparently been successfully—and virtually completely—engrafted on to the involuntary civil commitment process.¹⁵⁵

B. *The Significance of Youngberg*

The vitality of the LRA as a constitutional doctrine was called into question by the United States Supreme Court's 1982 decision in *Youngberg v. Romeo*.¹⁵⁶ In that case, the Third Circuit had initially held that involuntarily institutionalized persons with mental retardation had a right to habilitation in the least restrictive alternative.¹⁵⁷ Under its complex formulation of this doctrine, the court directed the use of the "least intrusive" means analysis where an institutional defendant sought to justify "severe intrusions on individual dignity."¹⁵⁸

This argument was ultimately abandoned at the U.S. Supreme Court level by plaintiff's counsel, who "concede[d] that this issue is not present in this case."¹⁵⁹ The Court then articulated, for the first time, those substantive constitutional rights owed to mentally retarded persons who had been involuntarily committed to state institutions.¹⁶⁰ In restating the scope of these rights, the Court added that plaintiff was entitled to "reasonably nonrestrictive confinement conditions."¹⁶¹ This phrase was neither defined nor explained, yet it appears to be the Court's first acknowledgment that some calibration of restrictivity of treatment is essential in any case construing substantive treatment rights.¹⁶²

Citing in a *cf.* reference *Jackson v. Indiana*¹⁶³ and in an earlier footnote that had distinguished *Jackson*,¹⁶⁴ the Court did explain that "[s]uch

153. See *Dobbs v. Neverson*, 393 A.2d 147 (D.C. Cir. 1978); see also *Johnson v. Levine*, 450 F. Supp. 648, 657-58 (D. Md. 1987) *aff'd in part and remanded in part on other grounds*, 588 F.2d 1378 (4th Cir. 1978), *on appeal after remand sub nom. Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981); *United States ex rel. Souder v. Watson*, 413 F. Supp. 711 (M.D. Pa. 1976).

154. See *Matter of Portus*, 371 N.W.2d 871 (Mich. Ct. App. 1985); *Matter of Commitment of J.L.J.*, 481 A.2d 563 (N.J. Super. Ct. App. Div. 1984).

155. See 1 PERLIN, *supra* note 1, § 2C-5.3b, at 424 ("By 1985, thirty-nine states required courts to consider alternatives to hospitalization at the time of involuntary civil commitment. Of the few jurisdictions without such a direct statutory requirement, several grant the hearing court discretionary power to make such an inquiry; and others do so by administrative regulation.") (footnotes omitted).

156. 457 U.S. 307 (1982), *on remand*, 987 F.2d 33 (3d Cir. 1982).

157. *Romeo v. Youngberg*, 644 F.2d 147, 166 (1980).

158. *Romeo*, 644 F.2d at 166.

159. *Youngberg*, 457 U.S. at 313 n.14.

160. *Id.* at 314.

161. *Id.* at 324.

162. The Court had applied the similar concept of "least drastic means" many times in other fact contexts. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960).

163. 406 U.S. 715 (1972).

164. *Youngberg*, 457 U.S. at 320 n.27.

conditions of confinement would comport fully with the purpose[s] of respondent's commitment."¹⁶⁵ Other than this somewhat arcane reference, however, the source of the phrase is left unexplained. Although *Youngberg* made it appear that "the federal courts seemed to be out of the business of compelling states to create alternate treatment venues in the community,"¹⁶⁶ the abandonment of constitutional LRA language in *Youngberg* actually had little practical impact on subsequent developments.¹⁶⁷ Other courts continued to adhere to that principle in cases involving, for example, the right to refuse treatment,¹⁶⁸ involuntary civil commitment statutes,¹⁶⁹ and the right to sexual interaction.¹⁷⁰ In individual involuntary civil commitment matters, "most subsequent cases have construed state statutes carefully, with most courts continuing to demand relatively strict adherence to the appropriate statutory provisions."¹⁷¹

C. *The Impact of Riggins*

This area of the law became more muddled after the Supreme Court's 1992 decision in *Riggins v. Nevada*.¹⁷² The *Riggins* Court reversed a death sentence in the case of a competent insanity defense pleader, who sought to refuse the administration of antipsychotic medications during the pendency of his trial.¹⁷³ The Court found that the involuntary medication was a violation of the defendant's right to a fair trial.¹⁷⁴ In *Riggins*, although the Court did not set down a bright line test articulating the state's burden in sustaining forced drugging of a detainee at trial, it found that this burden would be met had the state demonstrated "medical appropriateness" and that either (1) in consideration of less intrusive alternatives, forced drugging was "essential for the sake of Riggins' own safety or the safety of others" or (2) there were not less intrusive means by which to obtain an adjudication of the defendant's guilt or innocence.¹⁷⁵

165. *Youngberg*, 457 U.S. at 324.

166. Paul Appelbaum, *Least Restrictive Alternative Revisited: Olmstead's Uncertain Mandate for Community-Based Care*, 50 PSYCHIATRIC SERVICES 1271, 1271 (1999).

167. See 2 PERLIN, *supra* note 1, § 3A-9.8, at 105.

168. *E.g.*, *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985); *People v. Medina*, 705 P.2d 961, 974 (Colo. 1985). *But cf.* *Rennie v. Klein*, 720 F.2d 266, 269 (3d Cir. 1983) (LRA analysis abandoned after Supreme Court's decision in *Youngberg*).

169. *E.g.*, *Lynch v. Baxley*, 744 F.2d 1452, 1459 (11th Cir. 1984), *vacated on other grounds sub nom.*, *Lynch v. Sessions*, 942 F. Supp. 1419 (M.D. Ala. 1996).

170. *E.g.*, *Foy v. Greenblott*, 190 Cal. Rptr. 84, 90-91 n.2 (Cal. Ct. App. 1983).

171. 1 PERLIN, *supra* note 1, § 2C-5.3c, at 426-27.

172. 504 U.S. 127 (1992). See generally 2 PERLIN, *supra* note 1, § 3B-8.3, at 323-29 (discussing the issues left unresolved by *Riggins* and the varying interpretations by lower courts of the *Riggins* decision).

173. *Riggins*, 504 U.S. at 130-31.

174. *Id.* at 137.

175. *Id.* at 135-36.

Riggins' use of "less intrusive alternatives" and "less intrusive means"¹⁷⁶ language in this context was especially surprising, as it appeared to augur at least a partial constitutional resuscitation of the LRA doctrine, in the context of a case (an insanity plea in a homicide)¹⁷⁷ that—at first blush—would appear to elicit far less sympathy with members of the Rehnquist Court than the facts in *Youngberg* (a civil case brought on behalf of a person with profound mental retardation who had been victimized on numerous occasions while a resident of a state facility for persons with developmental disabilities), where it declined to constitutionalize the LRA requirement.¹⁷⁸ *Riggins* gave new life to the LRA doctrine, but it was not until the first generation of lower court ADA litigation and the Supreme Court's decision in *Olmstead v. L.C.*¹⁷⁹ that the doctrine appeared to regain new constitutional life and vitality.

III. THE AMERICANS WITH DISABILITIES ACT¹⁸⁰

A. Introduction

The Americans with Disabilities Act has been hailed by advocates for persons with disabilities as "[a] [b]reathtaking [p]romise,"¹⁸¹ "the most important civil rights act passed since 1964,"¹⁸² and the "Emancipation Proclamation for those with disabilities."¹⁸³ It is, without question, Congress' most innovative attempt to address the pervasive problems of discrimination against citizens with physical and mental disabilities¹⁸⁴ by providing, in the words of a congressional committee, "a

176. *Id.* at 135.

177. *Id.* at 129-31.

178. *Youngberg*, 457 U.S. at 310-11.

179. 526 U.S. 581 (1999).

180. See Perlin, *supra* note 12; Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 J. L. & HEALTH 15 (1993-94); Michael L. Perlin, "Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization, 46 DEPAUL L. REV. 947 (1997) [hereinafter Perlin, *Promises*]. The material accompanying notes 181-94 *infra* is generally adapted from Perlin, *Promises*, *supra* at 947-49.

181. Bonnie Milstein, Leonard Rubenstein, & Renée Cyr, *The Americans With Disabilities Act: A Breathtaking Promise for Persons with Mental Disabilities*, 24 CLEARINGHOUSE REV. 1240, 1240 (1991).

182. Kent Jenkins, Jr., *Spotlight Finds Hoyer*, WASH. POST, May 28, 1990, at D1, col. 5, *cited in* Kimberly Ackourey, *Insuring Americans With Disabilities: How Far Can Congress Go To Protect Traditional Practices?*, 40 EMORY L.J. 1183, 1183 n.1 (1991).

183. 4 Americans With Disabilities Act of 1990: Summary and Analysis, Special Supplement (BNA), at S-5, *cited in* Ackourey, *supra* note 182, at 1183 n.2 (statement by bill's sponsors). See also, e.g., Sandra Law, *The Americans With Disabilities Act of 1990: Burden on Business or Dignity for the Disabled?* 30 DUQ. L. REV. 99, 114 (1991) (calling the ADA a "solid and positive step toward making this country a better nation").

184. PERLIN, *supra* note 1, § 6.44A, at 16 (1999 Cum. Supp.) (explaining that the ADA stands as Congress's "most innovative attempt to address the pervasive problem of discrimination against physically and mentally handicapped citizens").

clear and comprehensive national mandate for the elimination discrimination against individuals with disabilities."¹⁸⁵

The language that Congress chose to use in its introductory findings is of extraordinary importance.¹⁸⁶ Its specific finding that individuals with disabilities are a "discrete and insular minority. . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness"¹⁸⁷ is not just precatory flag-and-apple-pie rhetoric.¹⁸⁸ This language—granted "the force of law"¹⁸⁹—was carefully chosen; it comes from the heralded "footnote 4" of the *United States v. Carolene Products*¹⁹⁰ case, which has served as the springboard for nearly a half century of challenges to state and municipal laws that have operated in discriminatory ways against other minorities.¹⁹¹ The language also reflects a congressional commitment to provide "protected class" categorization for persons with disabilities.¹⁹² This in turn forces

185. H.R. REP. NO. 485, pt. 1, at 3 (1990).

186. On the "shocking and eye-opening" nature of these findings, see Amy Lowndes, *The Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons*, 44 FLA. L. REV. 417, 446 (1992).

187. 42 U.S.C. § 12101(a)(7) (1994).

188. Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 8-11 (1981) (citing the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 *et seq.* (1976), which simply created a federal-state granting statute, and did not vest developmentally disabled individuals with a legally enforceable cause of action). This conclusion was criticized as "absurd" and "objectionable" in an article co-authored by plaintiffs' lead counsel in the *Pennhurst* case. David Ferleger & Patrice Maguire Scott, *Rights and Dignity: Congress, the Supreme Court, and People with Disabilities After Pennhurst*, 5 W. NEW ENG. L. REV. 327, 350 (1983). For a survey of all commentary, see 2 PERLIN, *supra* note 1, § 7.13 at 617-23. On the question of whether key sections of the ADA will be seen as little more than hortatory language, see Perlin, *Promises supra* note 180, at 955; Perlin, *supra* note 12, at 16-17.

189. James Miller, *The Disabled, the ADA, and Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 413 (1994).

190. 304 U.S. 144 (1938).

191. See *Carolene Products*, 304 U.S. at 152 n.4. On the significance of the *Carolene Products* language to the ADA, see Leonard Rubenstein, *Ending Discrimination Against Mental Health Treatment in Publicly Financed Health Care*, 40 ST. LOUIS U. L.J. 315, 339 (1996) (stating that the ADA's invocation of *Carolene Products* footnote demonstrates justification for employing "heightened judicial scrutiny" test); Susan Lee, *Heller v. Doe: Involuntary Civil Commitment and the "Objective" Language of Probability*, 20 AM. J. L. & MED. 457, 467-68 n.90 (1994) (stating that the language reflects congressional intent to identify disabled persons as group "deserving heightened scrutiny"); Lisa Montanaro, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621, 663 (1995) (by adopting ADA, Congress attempted to utilize *Carolene Products* theory to imply that a "heightened level of scrutiny" should be used in ADA cases).

192. Montanaro, *supra* note 191, at 663-64 (noting that Congress intended to transform disabled into suspect class for purposes of constitutional and statutory interpretation); Lowndes, *supra* note 186, at 446 ("Congress clearly intended to create a new protected class—the disabled"). See also, e.g., Miller, *supra* note 189, at 412 (noting that Congress applied the "suspect class" test in ADA statutory language); Phyllis Coleman & Ronald Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the Americans with Disabilities Act and Constitution*, 20 J. LEGIS. 147, 151 n.23 (1994) ("the ADA treats disabled persons as a suspect class").

In a trilogy of employment cases, the Supreme Court narrowed the category of persons who are to be treated as "disabled" under the ADA. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 576 (1999); *Albertsons, Inc v. Kirkingburg*,

courts to employ a "compelling" state interest" or "strict scrutiny" test in considering statutory and regulatory challenges to allegedly discriminatory treatment.¹⁹³ The law's invocation of the full "sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment"¹⁹⁴ simply means that any violation of the ADA must be read in the same light as a violation of the Equal Protection clause of the Constitution, guaranteeing—for the first time—that this core constitutional protection will finally be made available to persons with disabilities.¹⁹⁵

Individuals in inpatient psychiatric hospitals comprise a population that is classically voiceless, friendless, and with few contacts in the free world. It is a population whose disenfranchisement starkly mirrors the sort of powerlessness and marginalization spoken to by the Supreme Court in the *Carolene Products* case and, of course, spoken to by Congress in the ADA's initial findings section.¹⁹⁶ Furthermore, forensic patients have always been the most powerless and marginalized of all psychiatric inpatients.¹⁹⁷

527 U.S. 555 (1999). Nothing in these decisions, however, goes to the question of how the Court would construe discrimination cases involving individuals found to be "disabled" within the ADA's meaning. See Perlin, *supra* note 12 (manuscript at 18-22).

193. Crowder v. Kitagawa, 842 F. Supp. 1257, 1264 (D. Haw. 1994), *rev'd.*, 81 F.3d 1480 (9th Cir. 1996) (assuming application of strict scrutiny level in ADA cases); William Christian, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 TEX. L. REV. 409, 424 (1994) (stating that laws treating persons with disabilities differently should be subject to heightened scrutiny).

In *City of Cleburne v. Cleburne Living Center*, the Supreme Court ruled that mental retardation was neither a suspect class nor a quasi-suspect class for purposes of equal protection analysis. 473 U.S. 432, 441-42 (1985). In supporting its conclusion, it noted that a contrary decision would have made it difficult to distinguish other groups such as persons with mental illness "who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." *Cleburne Living Center*, 473 U.S. at 445.

194. 42 U.S.C. §12101(b)(4) (1994).

195. See, e.g., Timothy Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 434 (1991): ("[Congressional] findings indicate unambiguously that Congress considered disability classifications to be just as serious and just as impermissible as racial categorizations that are given 'strict' or 'heightened' scrutiny, sustainable by the courts only if they are tailored to serve a 'compelling' governmental interest.")

Cook's article is cited approvingly in, *inter alia*, *Muller v. Costello*, 187 F.3d 298, 308 (2d Cir. 1999); *Kathleen S. v. Department of Pub. Welfare*, 10 F. Supp. 2d 460, 467 (E.D. Pa. 1998), *stay denied*, 10 F. Supp. 2d 476 (E.D. Pa. 1998); *Heather K. by Anita K. v. City of Mallard, Iowa*, 887 F. Supp. 1249, 1263 (N.D. Iowa 1995); *Valentine v. American Home Shield Corp.*, 939 F. Supp., 1376, 1388 (N.D. Iowa 1996); *Fink v. Kitzman*, 881 F. Supp. 1347, 1368 (N.D. Iowa 1995); *Hutchinson v. United Parcel Serv., Inc.*, 883 F. Supp. 379, 387 (N.D. Iowa 1995), and *Muller v. Hotsy Corp.*, 917 F. Supp. 1389, 1402 (N.D. Iowa 1996).

196. See Rubenstein, *supra* note 191, at 338-39, 350.

197. See, e.g., German & Singer, *supra* note 116, at 1074 ("No group of patients has been more deprived of treatment, discriminated against, or mistreated than persons acquitted of crimes on grounds of insanity.")

B. Early Case Law

Early case law on the application of the ADA to the criminal process in general and to forensic patients in particular has been skimpy.¹⁹⁸ Idiosyncratic cases have considered the application of the ADA to motions seeking suppression of a criminal confession¹⁹⁹ or seized evidence,²⁰⁰ to the criminal plea bargaining process,²⁰¹ to a motion seeking to withdraw a guilty plea,²⁰² to the means used for transporting prisoners with disabilities,²⁰³ to the revocation of alternative sentencing in sex offender cases,²⁰⁴ to probation revocations,²⁰⁵ to the conduct of law enforcement officers pursuant to arrests,²⁰⁶ and to the questioning of deaf arrestees.²⁰⁷ But no coherent doctrinal threads could be found in a reading of this universe of cases. On the other hand, the Supreme Court has found that the ADA applies to state prisons.²⁰⁸ In *Pennsylvania Department of Corrections v. Yeskey*,²⁰⁹ the Court unanimously, per Justice Scalia, affirmed a Third Circuit decision that allowed the plaintiff to maintain his suit against the state department of corrections by alleging that he was denied placement in a "Motivational Boot Camp" first-offender program because of his medical history of hypertension.²¹⁰

The Court found that the ADA's language "unmistakably includes

198. See PERLIN, *supra* note 1, § 6.44A, at 62-76 (1999 Cum. Supp.).

199. *People v. Gaylord*, 621 N.Y.S.2d 247 (N.Y. App. Div. 1994) (holding that non-compliance with ADA is not basis for confession suppression); *Patrice v. Murphy*, 43 F. Supp. 2d 1156 (W.D. Wash. 1999) (holding that Miranda warnings were adequately communicated through the use of written materials).

200. *People v. Long*, 693 N.E.2d 1260 (Ill. App. Ct. 1998) (finding no ADA violation).

201. *State v. Duford*, 660 A.2d 736 (Vt. 1995) (finding no plain error where State failed to institute reasonable accommodation at plea bargain conference).

202. *Martin v. State*, 705 So. 2d 876 (Ala. Crim. App. 1997) (rejecting defendant's argument seeking to vacate plea).

203. *Gorman v. Barch*, 152 F.3d 907 (8th Cir. 1998) (holding the ADA applicable to suits seeking damages to recover for injuries that resulted from the means used to transport following arrest). See also James Johnson, *Does the Americans with Disabilities Act Apply to the Conduct of Law Enforcement Officers Pursuant to Arrests? A Survey of Gorman v. Barch*, 14 GA. ST. U. L. REV. 901 (1998).

204. *State v. Dahl*, 91 Wash. App. 1040 (1998) (holding that the ADA is inapplicable in these situations) *rev'd*, 990 P.2d 396 (Wash. 1999).

205. *Rodriguez v. State*, No. 07-98-0135-CR, 1999 WL 94971 (Tex. Ct. App. Feb. 25, 1999) (holding that ADA issues must be raised at trial level in order to be considered on appeal where case involves revocation of probation).

206. *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1998) (finding no ADA violation in arrest process); *Foote v. Spiegel*, 36 F. Supp. 2d 1320 (D. Utah 1999) (holding no ADA violation in arrest process because arrestee was not an individual with a disability).

207. *Calloway v. Boro of Glassboro Dep't of Police*, 89 F. Supp. 2d 543 (D.N.J. 2000) (holding that the ADA prohibits discrimination against deaf persons in context of police station house interviews).

208. See Michael L. Perlin, *Hidden Agendas And Ripple Effects: Implications of Four Recent Supreme Court Decisions For Forensic Mental Health Professionals*, 1 J. FORENSIC PSYCHOL. PRAC. (forthcoming 2000).

209. 524 U.S. 206 (1998).

210. *Yeskey*, 524 U.S. at 208.

State prisons and prisoners within its coverage,” noting that the law contained no “exception that could cast the coverage of prisons into doubt.”²¹¹ In doing so, it rejected the state’s argument, based on *Gregory v. Ashcroft*,²¹² that federal courts should be loath, absent an “unmistakably clear” expression of Congress’ intent, to “alter the ‘usual constitutional balance between the States and the Federal Government.’”²¹³ Although control over state prisons “may well be . . . a traditional and essential state function,”²¹⁴ the explicit language of the ADA defeated the state’s *Gregory*-based argument.²¹⁵

The Court also rejected arguments by the state that state prison programs were not “benefits” under the ADA,²¹⁶ that the phrase “qualified individual with a disability”²¹⁷ was ambiguous as to state prisoners (on the theory that the statute’s use of the words “eligibility” and “participation” implied a level of voluntariness that a prisoner could not meet),²¹⁸ and that, because the statute’s statement of findings did not specifically mention prisons, the ADA should not apply to such facilities.²¹⁹

Yeskey’s erasure of any lingering doubt as to the application of the Americans with Disabilities Act to prisons also means that there can no longer be any question as to the application of the ADA to *all* non-federal institutions in which persons with physical or mental disabilities (or those so perceived) reside.²²⁰

C. The Importance of *Olmstead*

These developments, however, were all a prelude to the Court’s 1999 decision in *Olmstead v. L.C.*,²²¹ which substantially affirmed a de-

211. *Id.* at 209.

212. 501 U.S. 452 (1991).

213. *Gregory*, 501 U.S. at 460 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

214. *Yeskey*, 524 U.S. at 209.

215. *Id.* at 208-09.

216. *Id.* at 210.

217. 42 U.S.C. § 12131(2) (1994). This section provides that a “qualified individual with a disability” is anyone who “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” *Id.*

218. *Yeskey*, 524 U.S. at 210-11.

219. *See id.* at 211-12.

220. *But see* *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1265 (2000) (holding that Congress lacked authority to abrogate state’s Eleventh Amendment immunity in ADA). *See generally* Perlin, *supra* note 12; Perlin, *supra* note 14.

The Supreme Court has since granted *certiorari* in (and in late October 2000, heard oral argument in) *Garrett v. University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214 (11th Cir. 1999), *cert. granted in part*, 120 S. Ct. 1669 (2000) (states do not have Eleventh Amendment sovereign immunity in ADA cases). For a discussion of the oral argument in *Garrett*, see Tony Mauro, *High Court Weighs Whether ADA Applies to the States*, N.Y.L.J., Oct. 12, 2000, at 1.

221. 527 U.S. 581 (1999).

cision by the Eleventh Circuit that had provided the first coherent answer to the question of the right of institutionalized persons with mental disabilities to community services under the ADA.²²² Plaintiffs L.C. and E.W. had challenged their placement at Georgia Regional in Atlanta, arguing that Title II of the ADA entitled them to "the most integrated setting appropriate to [their] needs."²²³ The district court granted summary judgment to plaintiffs, finding that the state's failure to place them in an "appropriate community-based treatment program" so violated the ADA, and the state appealed.²²⁴ On appeal, the Eleventh Circuit affirmed the judgment that the state had discriminated against the plaintiffs, but also remanded "for further findings related to the State's defense that the relief sought by plaintiffs would 'fundamentally alter the nature of the service, program, or activity'."²²⁵

On appeal, the Supreme Court, in a split opinion per Justice Ginsburg, qualifiedly affirmed.²²⁶ After setting out the provisions of the ADA that focused on the institutional segregation and isolation of persons with disabilities, and the discrimination faced by persons with disabilities (including "exclusion . . . and segregation"),²²⁷ the Court reviewed the key Department of Justice regulations, including the "integration" regulation,²²⁸ pointing out that the case, as presented, did *not* challenge their legitimacy.²²⁹ It then set out its holding:

We affirm the Court of Appeals' decision in substantial part. Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-

222. *L.C. v. Olmstead*, 138 F.3d 893 (11th Cir. 1998), *aff'd in part, rev'd in part & vacated in part*, 527 U.S. 581 (1999). See Perlin, *supra* note 12; PERLIN, *supra* note 23, at 191-204.

223. *Olmstead*, 138 F.3d at 895. Although both plaintiffs were transferred to community settings prior to the court's decision, the court declined to find the case moot as such cases were "capable of repetition, yet evading review." *Id.* at 895 n.2. (citing, *inter alia*, *Honig v. Doe*, 484 U.S. 305, 318-23 (1988)).

224. *Id.* at 895.

225. *Id.* (citing 28 C.F.R. §35.130(b)(7) (2000)).

226. *Id.* at 587. Justices O'Connor, Breyer, Souter and Stevens (the latter in a separate opinion) joined Justice Ginsburg in most of her opinion. *Olmstead*, 527 U.S. at 582, 607-08. Justice Stevens, who would have preferred to simply affirm the Eleventh Circuit's opinion, joined with these four justices in all of the opinion save that portion that outlined the State's obligations in such cases. *Id.* at 607-08. Justice Kennedy filed a concurring opinion, joined in part by Justice Breyer. *Id.* at 608-15. Justice Thomas dissented for the Chief Justice, Justice Scalia, and himself. *Id.* at 615-26.

227. *Olmstead*, 527 U.S. at 591-92 (quoting 42 U.S.C. §§ 121101 (a)(2), (3), (5) (1994)).

228. *Id.* at 592.

229. *Id.*

alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.²³⁰

The Court endorsed the Department of Justice's position that "undue institutionalization qualifies as discrimination 'by reason of . . . disability,'"²³¹ and then characterized the ADA as having "stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living."²³² It stressed how much more comprehensive the ADA was than "aspirational" or "hortatory" laws such as the Developmentally Disabled Assistance and Bill of Rights Act.²³³ It then focused on what it saw as congressional judgment supporting the finding that "unjustified institutional isolation of persons with disabilities is a form of discrimination":

First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. *Cf. Allen v. Wright*, 468 U.S. 737, 755 (1984) ("There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action."); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971))). Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. See Brief for American Psychiatric Association et al., *as Amici Curiae* 20-22. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacri-

230. *Id.* at 597.

231. *Id.* at 597.

232. *Olmstead*, 527 U.S. at 599.

233. *Id.* (discussing 42 U.S.C. § 6010(2) (1976), as construed in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981)).

face.²³⁴

The majority immediately clarified some qualifications in its opinion. It emphasized that the ADA did *not* "condone[] termination of institutional settings for persons unable to handle or benefit from community settings,"²³⁵ the states "generally may rely on the reasonable assessments of its own professionals" in determining whether an individual is eligible for community-based programs,²³⁶ and there was no requirement that "community-based treatment be imposed on patients who do not desire it."²³⁷ None of these issues, however, were present in the case before it: Georgia's professionals determined that community-based treatment would be appropriate for the plaintiffs, both of whom desired such treatment.²³⁸ The Court added one additional word of caution here:

We do not in this opinion hold that the ADA imposes on the States a "standard of care" for whatever medical services they render, or that the ADA requires States to "provide a certain level of benefits to individuals with disabilities." . . . We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.²³⁹

The ADA, it concluded, "is not reasonably read to . . . phase out institutions, placing patients in need of close care at risk," nor is the law's mission "to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter."²⁴⁰ For some patients, "no placement outside the institution may ever be appropriate."²⁴¹ Because of these factors, Justice Ginsburg concluded that the state must have more leeway than offered by the Eleventh Circuit's remedy:

If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the

234. *Id.* at 600-01. See Brief for United States as *Amicus Curiae* 6-7, 17.

235. *Olmstead*, 527 U.S. at 601-02.

236. *Id.* at 602.

237. *Id.*

238. *Id.* at 602-03.

239. *Id.* at 603 n.14.

240. *Olmstead*, 527 U.S. at 604-605. At one point, Georgia had proposed such a placement for one of the named plaintiffs, and then later retracted it. *Id.* at 605.

241. *Id.* at 605. On this point, the opinion cited, *inter alia*, Justice Blackmun's concurrence in *Youngberg v. Romeo*, 457 U.S. 307, 327 (1982): "For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know." *Id.*

State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.²⁴²

She summarized in this way:

Under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.²⁴³

IV. SANISM AND PRETEXTUALITY

Earlier, I alluded to the impact of *sanism* and *pretextuality* on developments in this area.²⁴⁴ Simply put, "sanism" is an irrational prejudice of

242. *Olmstead*, 527 U.S. at 605-06.

243. *Id.* at 607.

Justice Stevens concurred, stating that he would have preferred simply affirming the Eleventh Circuit's opinion, but, because there were not five votes for that disposition, he joined in all of Justice Ginsburg's opinion, except for the remedy-enforcement portion. *Id.* at 607-08. Justice Kennedy concurred, urging "caution and circumspection" in the enforcement of the *Olmstead* case. *Id.* at 610. After stressing that persons with mental disabilities "have been subject to historic mistreatment, indifference, and hostility," he traced what he saw as the history of deinstitutionalization: that, while it has permitted "a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity," it has "ha[d] its dark side" as well. *Id.* at 608-09. It would be a "tragic event," Justice Kennedy warned, if states read the ADA—as construed in *Olmstead*—in such a way as to create an incentive to states, "for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision," *Olmstead*, 527 U.S. at 610, and he thus emphasized that opinions of "a responsible treating physician" should be "given the greatest of deference." *Id.* He again urged "caution and circumspection" and "great deference to the medical decisions of the responsible, treating physicians." *Id.* Justice Breyer joined in this portion of Justice Kennedy's concurrence.

Finally, he parted company from Justice Ginsburg on the weight she gave to the congressional findings. The findings in question, he concluded, "do not show that segregation and institutionalization are always discriminatory or that segregation or institutionalization are, by their nature, forms of prohibited discrimination." *Id.* at 614. Instead, he reasoned, "they underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional settings and policies and its concern that segregating disabled persons from others can be discriminatory." *Id.* at 614.

Justice Thomas dissented, criticizing the majority opinion for interpreting "discrimination" to "encompass [] disparate treatment among members of the same protected class." *Olmstead*, 527 U.S. at 616. He argued that the congressional findings on which the majority premised its conclusions were "vague" and written in "general hortatory terms." *Id.* at 620-21. He further argued that the majority's approach imposed "significant federalism costs" and warned that states "will now be forced to defend themselves in federal court every time resources prevent the immediate placement of a qualified individual." *Id.* at 624-25. He concluded:

Continued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement, does not establish that the denial of community placement occurred 'by reason of' their disability. Rather, it establishes no more than the fact that petitioners have limited resources.

Id. at 626.

244. See generally Perlin, *Half-Wracked*, *supra* note 25 (exploring the relationships among

the same quality and character as other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry.²⁴⁵ It infects both our jurisprudence and our lawyering practices.²⁴⁶ Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" ("OCS") and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.²⁴⁷

"Pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decision-making, specifically where witnesses, especially *expert* witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends."²⁴⁸ This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.²⁴⁹

In a series of recent articles and a new book, I have sought to demonstrate that mental disability law is sanist and pretextual, no matter whether the topic in question is involuntary civil commitment law, institutional rights law, the right to sexual interaction, the insanity defense, competency to plead guilty or waive counsel, or the Federal Sentencing Guidelines.²⁵⁰ In the final part of this Article, I will expand this inquiry

sanism, pretextuality, and therapeutic jurisprudence).

245. The classic treatment is GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1955). For an important new, and different, perspective, see ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICE* (1996). See generally PERLIN, *supra* note 23, ch. 2 (discussing roots of sanism and the relationship between sanism and other "ismic" behavior, such as racism or sexism or homophobia).

246. The phrase "sanism" was probably coined by Dr. Morton Birnbaum. See Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960) (cited at *Koe v. Califano*, 573 F.2d 761, 764 (2d Cir. 1978)); see also Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 92-93 (1991) (discussing Birnbaum's insights).

247. See generally PERLIN, *supra* note 23, at 21-58.

248. Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 135 (1991); see also Charles Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 840 (1974).

249. See generally PERLIN, *supra* note 23, at 59-75.

250. See generally PERLIN, *supra* note 23; Perlin, *Half-Wracked*, *supra* note 25; see also Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?* 1 PSYCHOL., PUB. POL'Y & L. 80 (1995); Michael L. Perlin & Deborah A. Dorfman, *Is It More Than "Dodging Lions and Wastin' Time"? Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCHOL., PUB. POL'Y & L. 114 (1996); Michael L. Perlin, *Decoding Right to Refuse Treatment Law*, 16 INT'L J.L. & PSYCHIATRY 151 (1993); Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?* 20 N.Y.U. REV. L. & SOC. CHANGE 302 (1993-94); Michael L. Perlin, *"Dignity Was the First To*

to the question before us: are policies governing incompetency and insanity evaluations and placements sanist and pretextual as well?

V. THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence presents a new model by which we can assess the ultimate impact of case law and legislation that affects mentally disabled individuals, studying the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or anti-therapeutic consequences, and questioning whether such rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles.²⁵¹

Recent therapeutic jurisprudence articles and essays have thus considered such matters as the insanity acquittee conditional release hearing, health care of mentally disabled prisoners, the psychotherapist-patient privilege, incompetency labeling, competency decision-making, juror decision-making in malpractice and negligent release litigation, competency to consent to treatment, competency to seek voluntary treatment, standards of psychotherapeutic tort liability, the effect of guilty pleas in sex offender cases, correctional law, health care delivery, "repressed memory" litigation, the impact of scientific discovery on substantive criminal law doctrine, and the competency to be executed.²⁵² I have weighed the therapeutic jurisprudence implications of much of mental disability law²⁵³ and, again, in the final section of this Article, will consider those implications for the question I am here addressing.

VI. THE IMPACT OF *OLMSTEAD* ON INCOMPETENCY AND INSANITY LAW

Before *Olmstead*, a smattering of case law applied LRA principles to cases concerning the conditions of confinement of defendants found not guilty by reason of insanity,²⁵⁴ but the courts were silent on cases in-

Leave": Godinez v. Moran, *Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996); Perlin, *Myths*, *supra* note 101; Perlin, *Deconstructing*, *supra* note 101; Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431 (1995).

251. See generally *supra* note 24 (providing relevant materials for therapeutic jurisprudence).

252. See, e.g., 1 PERLIN, *supra* note 1, § 2D-3, at 535-40 nn.83-132.

253. For my most recent inquiries see Perlin, *Healing*, *supra* note 25 and PERLIN, *supra* note 23, at 261-72.

254. See *State v. Randall*, 532 N.W.2d 94, 108 (Wis. 1995) (noting that insanity acquittees, unlike other involuntarily committed persons, do not have right, under prior version of patients' rights statute, to confinement in least restrictive conditions necessary to achieve purposes of their commitment); *People v. Cross*, 704 N.E.2d 766, 771 (Ill. App. Ct. 1998) (reasoning that the requirement under corrections law that insanity acquittee be held in secure setting governed over requirement under Mental Health and Developmental Disabilities Code that person involuntarily committed be held in the least restrictive environment possible); *McSwain v. Stricklin*, 540 So. 2d

volving incompetency to stand trial and insanity evaluations and placement of defendants found permanently incompetent under *Jackson*.²⁵⁵ Commentators such as Professor Winick have long urged the application of these principles to incompetency cases,²⁵⁶ but courts have never responded.²⁵⁷ And the Supreme Court's decision in *Kansas v. Hendricks*²⁵⁸—upholding the constitutionality of Kansas' "sexually violent predator act"²⁵⁹—made it appear as if "the Supreme Court is comfortable with a statutory scheme that has the potential of transforming psychiatric treatment facilities into *de facto* prisons and that uses mental health treatment as a form of social control,"²⁶⁰ a position that would appear to make any movement toward an application of LRA principles in *any* forensic cases even less likely. All of this, of course, preceded *Olmstead*.

The question is thus cast: what impact does *Olmstead*—specifically using "less restrictive settings" language—have on the ways that incompetency, insanity evaluations, and commitments are conducted and ordered?

81, 84 (Ala. Civ. App. 1989) (citing the trial court's finding that continued placement in secure medical facility was least restrictive means of treating schizophrenia of defendant who had been found not guilty by reason of insanity was sufficiently supported by evidence, even though that defendant's schizophrenia could currently be controlled through use of drug); *Brown v. United States*, 682 A.2d 1131, 1137 (D.C. 1996) (holding that a "[h]ospital is obligated to follow the least restrictive form of treatment" if the court has ordered the civil commitment of a mental patient, but if the committee is acquitted, "[t]he nature of the acquttee's treatment while confined may be relevant to the level of custody . . . it is to be weighed in the context of affording reasonable assurances of public safety.") Cf. *State v. Kinman*, 671 N.E.2d 1083, 1084 (Ohio Ct. App. 1996) (arguing that the state bears the burden to prove by clear and convincing evidence which commitment alternative is least restrictive at initial determination of whether insanity acquttee should be involuntarily committed); *Schuttemeyer v. Commonwealth*, 793 S.W.2d 124, 128 (Ky. Ct. App. 1990), *reh'g denied* (1990), *and discret. rev. denied*. (1990) (holding that evidence would not permit finding that hospitalization was least restrictive alternative mode of treatment for defendant found not guilty by reason of insanity, so as to support involuntary hospitalization; testifying psychologist unequivocally stated that involuntary hospitalization was not necessary). *See also*, e.g., *supra* note 154.

255. Courts have, on the other hand, employed the LRA principle in their resolution of cases involving incompetent-to-stand-trial defendants in a situation beyond the scope of this Article: the right of such defendants to refuse antipsychotic medication so as to make them competent to stand trial. *See, e.g.*, *United States v. Brandon*, 158 F.3d 947 (6th Cir. 1998); *see* Michael L. Perlin, *Are Courts Competent to Decide Questions of Competency? Stripping the Facade From United States v. Charters*, 38 U. KAN. L. REV. 957 (1990); Bruce Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145 (1997).

256. *See supra* note 137. Cf. Erika King, *Outpatient Civil Commitment in North Carolina: Constitutional and Policy Concerns*, 58 LAW & CONTEMP. PROBS. 250, 267 n.100 (1995) ("[A] mentally ill but easily curable criminal defendant committed (pending trial) on a finding of incompetence might successfully argue that the *Jackson* rule mandated precisely that treatment necessary to restore his competence").

257. Courts have been reluctant to broaden the rights of incompetent-to-stand-trial defendants in other contexts as well. *See, e.g.*, *People v. Fox*, 669 N.Y.S.2d 470 (N.Y. Crim. Ct. 1997) (stating that such defendants are neither a suspect nor a quasi-suspect class for equal protection purposes in the grand jury selection process).

258. 521 U.S. 346 (1997).

259. *See generally* Perlin, *supra* note 15 (criticizing decision in *Kansas v. Hendricks*).

260. 1 PERLIN, *supra* note 1, § 2A-3.3, at 90.

There has been astonishingly little literature on the impact of *Olmstead* on the future of the LRA doctrine.²⁶¹ Most optimistic of the early commentators has been John Parry, editor of the MENTAL AND PHYSICAL DISABILITY LAW REPORTER. Concluded Parry:

Of all the ADA Supreme Court decisions this term, *Olmstead* is the most significant for several reasons. Fundamentally, it expands the possibilities for persons in state-run mental institutions. Until *Olmstead*, the Court was suspicious of any kind of constitutionally based right to services in the community or least restrictive setting. In the past, the foundation of deinstitutionalization was the absence of dangerousness to self or others, not the appropriateness of treatment or essential services in non-institutional settings . . . The ADA's integration of service mandate, however, presented a new opportunity for advocates to obtain appropriate community-based services from the states, but many states argued that Title II did not obligate them to provide such services. Now that obligation is beyond dispute.²⁶²

In addition, a student commentator noted how *Olmstead* showed a "clear preference, in the civil rights context, for care in the least restrictive environment."²⁶³ On the other hand, writing soon after the decision, Professor Paul Appelbaum speculated as to whether the initial "ecstatic" response of mental disability advocates was premature, and concluded:

[I]t is unclear to what extent the U.S. Supreme Court will support lower courts in compelling states to create community alternatives that do not now exist. No bright line has been identified to separate states that can rely on the fundamental-alteration defense from those that cannot. The reluctance of the courts to trample on executive branch prerogatives has always been the bugaboo of the least restrictive alternative doctrine. Whatever else it may accomplish, the decision in *Olmstead v. L.C.* is unlikely to precipitate the widespread creation of community-based services for persons with mental disabilities.²⁶⁴

261. I consider this at greater length in Perlin, *supra* note 14.

262. John Parry, *The Supreme Court Interprets the ADA*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 454, 456 (1999) (citations omitted).

263. Sarah Light, *Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law*, 109 YALE L.J. 381, 391 (1999).

264. Appelbaum, *supra* note 166, at 1272. Cf. Note, *Leading Cases: Federal Statutes, Regulations, and Treaties*, 113 HARV. L. REV. 326 (1999):

In *Youngberg*, the Court held that, in assessing the constitutionality of the use of restraints in mental institutions, the decision to use restraints, "if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Although the Court in *Olmstead*

And certainly, the fear of tort-based litigation—litigation that favors a policy of erring on the side of over-confinement²⁶⁵—must be juxtaposed against any LRA preference suggested in *Olmstead*.

In the months since *Olmstead* was decided, there have been remarkably few cases relying upon it. Lower federal courts and state courts have cited *Olmstead* for the proposition that "the ADA in fact prohibits segregation of persons with disabilities and requires states to make reasonable efforts to place institutionalized individuals with disabilities into the community"²⁶⁶ in the "most integrated setting to fit their needs"²⁶⁷ and have quoted its language that the ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."²⁶⁸ But there are as of yet no cases that seriously reconceptualize the LRA doctrine after *Olmstead*.

The ADA's "community integration" mandate is silent on forensic issues. The Supreme Court made it clear in *Yeskey* that the ADA applies to state prisons,²⁶⁹ and lower courts have weighed the application of the ADA to a host of issues related to the criminal process (both trial and pre-trial).²⁷⁰ None of these cases, though, addresses the issue that I am tackling in this Article: Does *Olmstead's* interpretation of the ADA's employment of the LRA test require a recalibration of our policies governing incompetency-to-stand-trial and insanity evaluations and commitments? Only one pre-*Olmstead* case has ever considered these issues on the merits: there, a federal district court found that an involuntarily committed insanity acquittee did not raise valid claims that the state's denial of outpatient treatment violated the ADA.²⁷¹ At least two pre-*Olmstead* cases brought under the Federal Fair Housing Act Amendments of 1988, argued—successfully—that the exclusion of insanity

avoided citing *Youngberg*, its deference to professional judgment seemed to invoke the spirit of *Youngberg*. In the wake of *Olmstead* and its explicit deference to professional judgment, institutions may simply avoid complying with the ADA by creating cultures in which recommendations for patient community treatment are few and far between.

Id. at 332-33.

265. Light, *supra* note 263, at 392.

266. Rolland v. Cellucci, 191 F.R.D. 3, 9 (D. Mass. 2000).

267. Kathleen S. v. Department of Pub. Welfare, No. 97-6610, 1999 WL 1257284, at *5 (E.D. Pa. Dec. 23, 1999).

268. Kirbens v. Wyoming St. Bd. of Med., 992 P.2d 1056, 1061 (Wyo. 1999).

269. See *supra* text accompanying notes 208-18.

270. See *supra* text accompanying notes 199-207.

271. Greist v. Norristown State Hosp., No. CIV-A-96-CV-8495, 1997 WL 661097 (E.D. Pa. Oct. 16, 1997), *aff'd o.b.*, 156 F.3d 1224 (3d Cir. 1998) and *cert. denied.*, 525 U.S. 1057 (1998). See also Neiberger v. Hawkins, 70 F. Supp. 2d 1177 (D. Colo. 1999) (holding that ADA prohibition on discrimination against disabled persons by a public entity did not apply to suit against state officials in their personal capacities).

acquittes from congregate living facilities in the community violated that law,²⁷² but neither invoked the ADA.²⁷³

One post-*Olmstead* case—an ADA challenge to a long-term disability insurance program²⁷⁴—offers some insights that may be moderately helpful. In the course of its decision denying the defendants' motion to dismiss, the district court carefully read *Olmstead*'s rejection of the argument that disparate treatment of different members of a protected class is not discrimination.²⁷⁵ Concluded the trial court: "It logically follows that the ADA is violated by a policy that disadvantages schizophrenics based on their disability, despite the fact that individuals confined to wheelchairs are benefited."²⁷⁶ This argument could be used to support the position that a policy that discriminates against persons with mental disabilities who are treated as forensic patients in comparison to those who are treated as civil patients similarly violates the ADA.²⁷⁷ In the months since *Olmstead* was decided, however, this is the *only* reported case that is remotely relevant to the issue at hand.²⁷⁸

Olmstead mandates a change in our "business as usual" means of dealing with the populations in question. Under *Olmstead*, policies that require the automatic (or de jure) commitment of all incompetency and insanity pleaders to maximum security facilities—notwithstanding the nature of the charge or the individual dangerousness of the defendant—potentially violate the ADA, in part, at least, because of their explicit and implicit lack of individualization. After *Olmstead*, individualized determinations must be made in each case as to whether or not such maximum security institutionalization is necessary—whether the case involves an evaluation of an incompetency or insanity pleader, the placement of a defendant permanently incompetent under *Jackson*, or a "successful" insanity acquittee. Certainly, a significant number of individuals in each of these categories could be treated in settings less re-

272. See *Township of West Orange v. Whitman*, 8 F. Supp. 2d 408 (D.N.J. 1998); *Commitment of J.W.*, 672 A.2d 199 (N.J. Super. Ct. App. Div 1996).

273. More typical of pre-*Olmstead* cases is *Milner v. Apfel*, 148 F.3d 812 (7th Cir. 1998), cert. denied, 524 U.S. 1024 (1998) (failing to cite the ADA, the court held that a statute denying social security benefits to institutionalized NGRI acquittes but providing them to patients institutionalized following involuntary civil commitment did not violate the equal protection clause) (ADA not cited).

274. *Boots v. Northwestern Mut. Life Ins. Co.*, 77 F. Supp. 2d 211 (D.N.H. 1999).

275. See *Olmstead*, 527 U.S. at 588 n.10.

276. *Boots*, 77 F. Supp. 2d at 219.

277. Although it may be argued that *Yeskey* is distinguishable in that it deals with a prisoner's right to not be deprived of a placement entitlement because of his disability (as opposed to a forensic patient's right to a specific locus for an evaluation or commitment), I believe that the *Olmstead*-based argument relied upon successfully in *Boots* compels the conclusion that *Yeskey* is equally applicable here. My thanks again to Grant Morris for calling my attention to this issue.

278. Cf. *Matter of Sanon v. Wing*, No. 403296/98, 2000 N.Y. Misc. LEXIS 139 (N.Y. Sup. Ct. Feb. 25, 2000) (finding that *Olmstead* forbids New York City and state officials from denying person with disability access to public benefit).

strictive than the state's maximum security forensic facility, and *Olmstead* suggests that it is no longer permissible under federal law to continue the former policies.

Olmstead makes clear that "unjustified isolation" is "properly regarded as discrimination based on disability,"²⁷⁹ and "undue institutionalization qualifies as discrimination 'by reason of . . . disability.'"²⁸⁰ It further explains that institutional placement of those who can "handle and benefit" from community settings "perpetuates unwarranted assumptions that [such isolated] persons . . . are incapable or unworthy of participating in community life,"²⁸¹ institutional confinement "severely diminishes the everyday life activities of individuals,"²⁸² and that states must have operative "working" plans "for placing qualified persons with mental disabilities in less restrictive settings."²⁸³ Nothing in *Olmstead* suggests that these holdings are limited to civil patients.

The evidence appears clear that reliance on maximum security facilities for incompetency evaluations in misdemeanor and petty crime cases is unnecessary and counterproductive, highly stigmatizing, unduly expensive, and an impediment to the investigation of cases in preparation for trial.²⁸⁴ It is also clear that many states—perhaps most—have been derelict in the implementation of *Jackson v. Indiana*, that maximum security hospitalization is the disposition of almost all *Jackson* cases, and that nearly half of all trial judges believe that such disposition is mandatory.²⁸⁵ Similarly, it is clear that insanity evaluations—again, in most instances, regardless of the underlying charge or the defendant's dangerousness—are generally done in such facilities, and that state statutes often specify that such settings be "secure."²⁸⁶ And, the politics of the insanity defense makes it similarly inevitable that defendants who are found "not guilty by reason of insanity" will most likely be housed in maximum security settings, often for far longer than the maximum sentence that they could have received had they been convicted of the underlying offense.²⁸⁷

Olmstead requires us to rethink these policies and begin to seriously question the constitutionality of statutes, rules and court decisions that have endorsed the current state of affairs. I recognize that this position may well be a controversial one and may be opposed by some of those who typically argue that the civil rights and civil liberties of civilly in-

279. *Olmstead*, 527 U.S. at 597.

280. *Id.*

281. *Id.* at 600.

282. *Id.*

283. *Id.* at 606.

284. See *supra* text accompanying notes 59-68.

285. See *supra* text accompanying notes 78-82 & 90-93.

286. See *supra* text accompanying notes 104-09.

287. See *supra* text accompanying notes 110-17.

stitutionalized persons with disabilities should be maximized. As I noted in the introduction to this Article, I understand that many advocates may be concerned that application of *Olmstead* principles to a forensic population may fuse in the public's mind images of the civilly and the criminally committed, and that this fusion may potentially be exploited by those who seek to minimize the rights of *all* persons with mental disabilities. Although this possibility certainly troubles me, I do not believe that the inchoate fear expressed should lead us to abandon our commitment to a universe that includes some of the most despised and mistreated of all persons with disabilities: the universe of forensic patients.

VII. SANISM, PRETEXTUALITY, THERAPEUTIC JURISPRUDENCE, AND "MISDEMEANOR OUTLAWS"

I also believe that the current policies that I have been discussing are sanist and pretextual, and that a therapeutic jurisprudence analysis will demonstrate that they are anti-therapeutic as well.

A. Sanism

Underlying this entire area of the law is the assumption that individuals who plead incompetency and insanity are somehow more dangerous than other persons with mental illness (and, indeed, more dangerous than other criminal defendants who do not raise mental status defenses).²⁸⁸ That assumption—one that is premised on an implicit policy of non-individualization—is a sanist one. The Supreme Court's decision in *Jones v. United States*²⁸⁹ resonates with sanism, making, as it does, "a presumed absolute linkage between mental illness and dangerousness,"²⁹⁰ and arguing—there is no other descriptor for this part of the opinion but "absurdly"—that "larceny is *usually* less violent than murder or assault."²⁹¹

Our insanity defense and incompetency-to-stand-trial jurisprudences are riddled with examples of sanism. Think of some of these myths that permeate case law, statutes, and practice:

- reliance on a fixed vision of popular, concrete, visual images

288. See, e.g., PERLIN, *supra* note 31, at 109 (noting that defendants who asserted an insanity defense at trial and were ultimately found guilty served significantly longer sentences than defendants tried on similar charges who did not assert the insanity defense); see also, Winick, *supra* note 3, at 580-81 (noting that defendants evaluated for incompetency confined longer than had they either pled guilty or been convicted at trial without having raised the question of their mental status)

289. See *supra* text accompanying notes 118-23.

290. PERLIN, *supra* note 31, at 389.

291. *Jones v. United States*, 463 U.S. 354, 365 n.14 (1983) (emphasis added).

of craziness;

- an obsessive fear of feigned mental states;
- sanctioning of the death penalty in the case of mentally retarded defendants, some defendants who are "substantially mentally impaired," or defendants who have been found guilty but mentally ill (GBMI);
- the incessant confusion and conflation of substantive mental status tests; and
- the regularity of sanist appeals by prosecutors in insanity defense summations, arguing that insanity defenses are easily faked, that insanity acquittees are often immediately released, and that expert witnesses are readily duped.²⁹²

Myths such as these, which rely irrationally on behavioral stereotypes and employ distorted heuristic cognitive devices,²⁹³ help explain why the insanity defense evaluation and commitment systems have developed as they have. We fear and despise defendants who raise the insanity defense—at least one survey has demonstrated that our feelings are constant whether we perceive the defense as real or feigned²⁹⁴—and we punish them for daring to plead that they are not responsible. We assume they are the most dangerous of all criminal defendants, even when the underlying charge is as petty as attempted larceny. The current practice—a practice that must be reconsidered in light of *Olmstead*—can easily be described as sanism *per se*.

Sanism similarly infects incompetency-to-stand-trial jurisprudence in at least four critical ways:

- (1) courts resolutely adhere to the conviction that defendants regularly malingering and feign incompetency;
- (2) courts stubbornly refuse to understand the distinction between incompetency to stand trial and insanity, even though the two statuses involve different concepts, different standards, and different points on the "time line";
- (3) courts misunderstand the relationship between incompetency and subsequent commitment, and fail to consider the lack of a necessary connection between post-determination institutionalization and appropriate treatment; and
- (4) courts regularly accept patently inadequate expert

292. Perlin, *supra* note 99, at 1422.

293. PERLIN, *supra* note 31, at 390. On heuristics in this context in general, see Perlin, *supra* note 100, Perlin, *supra* note 255, and PERLIN, *supra* note 23, at 3-20.

294. See *State v. Perry*, 610 So. 2d 746, 781 (La. 1992) (Cole, J., dissenting) ("Society has the right to protect itself from those who would commit murder and seek to avoid their legitimate punishment by a subsequently contracted, or feigned, insanity."); Gilbert Geis & Robert F. Meier, *Abolition of the Insanity Plea in Idaho: A Case Study*, 477 ANNALS 72, 73 (1985) (explaining that Idaho residents hold view that persons should not be able to avoid punitive consequences of criminal acts by reliance on "either a real or a faked plea of insanity").

testimony in incompetency to stand trial cases.²⁹⁵

The failure of the states to implement *Jackson*, the failure of trial judges to learn that there are alternatives other than maximum security facilities to which they may order defendants for incompetency evaluations, the failure of policymakers to remediate the "shuttle" system through which defendants are sent endlessly from security hospital to jail and back, and the failure of the legal system to inquire as to whether the treatment received by defendants through these processes is even appropriate all reflect sanism in this aspect of criminal procedure. Again, *Olmstead* forces us to rethink the impact of these acts.

B. Pretextuality

Many of these sanist acts are also pretextual. The failure of over half the states to implement the Supreme Court's 1972 decision in *Jackson v. Indiana* is a textbook example of pretextuality.²⁹⁶ The political decision-making in insanity acquittal cases—best exemplified by the NIMH Report conceding that individual release decisions are made in accordance with political dictates in "controversial cases"²⁹⁷—demonstrates the pretextuality that drives this area of jurisprudence.

In a recent article on the insanity defense, I made this link between insanity defense jurisprudence and pretextuality:

Indeed, all aspects of the judicial decisionmaking process embody pretextuality. [T]he fear that defendants will fake the insanity defense to escape punishment continues to paralyze the legal system in spite of an impressive array of empirical evidence that reveals (1) the minuscule number of such cases, (2) the ease with which trained clinicians are usually able to catch malingering in such cases, (3) the inverse greater likelihood that defendants, even at grave peril to their life, will be more likely to try to convince examiners that they're not crazy, (4) the high risk in pleading the insanity defense (leading to statistically significant greater prison terms meted out to *unsuccessful* insanity pleaders), and (5) that most successful insanity pleaders remain in maximum security facilities for a far greater length of time than they would have had they been convicted on the underlying criminal indictment. In short, pretextuality dominates insanity defense decisionmaking. The inability of judges to disregard public opinion and inquire into whether defendants have had fair

295. Perlin, *supra* note 80, at 678.

296. See, e.g., Winick, *supra* note 3, at 927; Morris & Meloy, *supra* note 81, at 9-12; Perlin, *Half-wracked*, *supra* note 25, at 23-24.

297. See *supra* text accompanying note 128.

trials is both the root and the cause of pretextuality in insanity defense jurisprudence.²⁹⁸

Again, a careful reading of the *Olmstead* case calls into question the pretextual way we have conducted insanity defense "business as usual."

C. Therapeutic Jurisprudence

What about therapeutic jurisprudence? It is clear to me that the current system is anti-therapeutic. The indiscriminate use of maximum security for the vast majority of insanity and incompetency evaluations—no matter what the charge or the perceived degree of dangerousness of the individual defendant—as well as for those defendants found permanently incompetent or NGRI results in unnecessarily lengthy stays in settings that often are anti-therapeutic by the very nature of their prison-like conditions and their focus on custody and security at the expense of individualized treatment rights. In such facilities—many of which have been the target of class-action or law-reform conditions litigation²⁹⁹—patients typically have had less access to family visits, attorney contacts, and alternative therapeutic modalities,³⁰⁰ and frequently are ineligible (or certainly, *less* eligible) for work-release programs, placement in halfway houses, or other such less restrictive alternatives.³⁰¹ It is likely that they are even *more* stigmatized by being housed in such a facility.³⁰² The anti-therapeutic impact of such conditions should be clear.

David Wexler has written extensively about the anti-therapeutic nature of the current insanity acquittee system, and has drawn on the works of Donald Meichenbaum and Dennis Turk in a search for a strategy that would significantly increase patient treatment adherence in this context.³⁰³ Bruce Winick has similarly written extensively about the anti-therapeutic impact of incompetency labeling and of an incompetency system whose hallmarks are maximum security and delay.³⁰⁴ In an earlier piece, I suggested a link between the ADA and therapeutic juris-

298. Perlin, *supra* note 99, at 1423.

299. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Scott v. Plante*, 641 F.2d 117 (3d Cir. 1981); *Davis v. Armistead*, 575 F. Supp. 695 (M.D. La. 1983); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974).

300. See Winick, *supra* note 3, at 942; STEADMAN, *supra* note 32, at 8-9.

301. See, e.g., *Harman v. United States*, 718 A.2d 114 (D.C. 1998) (finding an insanity acquittee ineligible for work release or furlough program); cf. *People v. Nelson*, 614 N.E.2d 277 (Ill. App. Ct. 1993) (ordering halfway house placement over state's objections).

302. See generally Bruce Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of Medina v. California and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817, 853 (1993).

303. David Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, in ESSAYS, *supra* note 24, at 199.

304. Bruce Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, in TJ APPLIED, *supra* note 24, at 93.

prudence. I argued that "the actual application of the ADA to these key areas of patients' civil rights law might result in the total transformation of these areas of the law, and might do so in ways that combat sanism, expose pretextuality, and provide a building block of therapeutic jurisprudence."³⁰⁵

The use of the ADA as a tool on behalf of the populations that were the subject of Wexler and Winick's therapeutic jurisprudence inquiries is an important step toward confronting the sanism and pretextuality that continue to dominate this area of the law. And *Olmstead* is—as of this date—the best vehicle to be used to this end.

VIII. CONCLUSION

In *Chimes of Freedom*, Bob Dylan identifies explicitly with The Other³⁰⁶—"the deaf, the blind the mute/ . . . the mistreated, mateless mother, the mistitled prostitute/ . . . the misdemeanor outlaw, chased an' cheated by pursuit."³⁰⁷ In footnote 4 of the *Carolene Products* case—the inspiration for the findings that gave the ADA its spiritual strength and much of its constitutional muscle³⁰⁸—Congress gives special status to persons with disabilities as a "discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness."³⁰⁹ The unconscious parallels between the two descriptions are astounding.

For decades, mentally disabled criminal defendants who have raised mental status defenses have been "deprived of treatment, discriminated against [and] mistreated."³¹⁰ Although they have perhaps now been supplanted by convicted sex offenders as the "most despised" group in soci-

305. Perlin, *Promises*, *supra* note 180, at 956-57. The link between the ADA and therapeutic jurisprudence is also made explicit in Deborah A. Dorfman, *Effectively Implementing Title I of the Americans with Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis*, 8 J.L. & HEALTH 105 (1993-94), in Rose Daly-Rooney, *Designing Reasonable Accommodations Through Co-worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act.*, 8 J.L. & HEALTH 89 (1993-94), and in T. Howard Stone, *Therapeutic Implications of Incarceration of Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283 (1997).

306. See SANDER L. GILMAN, *DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS* 130 (1985); 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, 787 (1998):

[W]e are doing two things: we are distancing ourselves from mentally disabled persons—the "them"—and we are simultaneously trying to construct an impregnable borderline between "us" and "them," both to protect ourselves and to dehumanize what Sander Gilman calls "the Other." The label of "sickness" reassures us that "the Other"—seen as "both ill and infectious, both damaged and damaging" not like us and further animates our "keen . . . desire to separate 'us' and 'them'."

307. DYLAN, *supra* note 28, at 132.

308. See *supra* text accompanying notes 186-95; Perlin, *Promises*, *supra* note 180, at 949.

309. 42 U.S.C. § 12101(a)(7) (2000).

310. German & Singer, *supra* note 116, at 1074.

ety,³¹¹ little else has changed. Judges ignore Supreme Court rulings, miscomprehend the relevant law (usually with impunity), and decide cases based on political fears. Although respected commentators have called our attention to this state of affairs for years, little has changed. The Supreme Court's decision in *Olmstead*, though, may force us to reconceptualize our policies and make us think carefully and deliberately about the implications of the ADA and the LRA doctrine for forensic populations in general, and, specifically, for "the misdemeanor outlaw."

In the final verse of *Chimes of Freedom*, Dylan invokes his fantastic images of the chimes "tolling for the aching ones whose wounds cannot be nursed/For the countless confused, accused, misused, strung-out ones an' worse."³¹² Perhaps the ADA—through the majority opinion in *Olmstead*—will finally allow the "chimes of freedom" to flash for one and all.

311. See Perlin, *supra* note 15, at 1248.

312. DYLAN, *supra* note 28, at 133.

