

A Therapeutic Jurisprudence Inquiry Into the Roles of Dignity and Humiliation in the Law

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One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).¹ TJ 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.² It “asks us to look law as it actually impacts people’s lives.”³ In recent years,

¹ 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); 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).

² See e.g., Michael L. Perlin, *Everybody Is Making Love/Or Else Expecting Rain@: Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 U. WASH. L. REV. 481, 510 n. 139 (2008); Michael L. Perlin, *AShe Breaks Just Like a Little Girl : Neonaticide, The Insanity Defense, and the Irrelevance of Ordinary Common Sense*, 10 WM. & MARY J. WOMEN & L. 1, 30-31 n.233 (2003).

scholars have considered a vast range of topics through a TJ lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law.⁴ Importantly, for the purposes of this discussion, it has played a major role in the emergence of problem-solving courts, including youth courts, mental health courts, indigenous courts, drug courts, neighborhood justice courts and domestic violence courts.⁵ As Prof. Ian Freckelton has noted, “it is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications.”⁶

One of the central principles of TJ is a commitment to dignity. Prof. Amy Ronner writes about the “three Vs”: voice, validation and voluntariness.⁷ She argues:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigants story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.⁸

³ Bruce Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

⁴ See e.g., Michael L. Perlin, *A Things Have Changed@: Looking at Non-institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 544-45 (2002-03).

⁵ Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: the Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 582 (2008).

⁶ *Id.* at 576.

⁷ Amy Ronner, *The Learned-helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

Much of TJ's strength comes from this commitment to dignity and its awareness of the potential ravages of humiliation in all aspects of the legal process. An examination of the TJ literature shows that TJ authors have discussed these topics in the context of a wide range of substantive law issues, including criminal prosecution,⁹ child abuse and neglect proceedings,¹⁰ involuntary civil commitments,¹¹ the law of terrorism,¹² international human rights,¹³ *Miranda* warnings,¹⁴ and problem-solving courts.¹⁵ Authors underscore that TJ rejects humiliation as a legal tool and stands alongside dignity;¹⁶ that it empowers participants in the legal process;¹⁷ that it presupposes the protection of and shares the values of dignity,¹⁸ and that it can be a tool for the restoration of dignity.¹⁹ As Bruce Winick tells us: "If people are treated with dignity ... and generally treated in ways that they consider to be fair, they will experience greater

⁸ Amy Ronner, *Songs Of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. Cin. L. Rev. 89, 94-95 (2002).

⁹ See Winick, *supra* note 3.

¹⁰ See Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623 (2005).

¹¹ See Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37 (1999).

¹² See Edgardo Rotman, *Therapeutic Jurisprudence and Terrorism*, 30 T. JEFFERSON L. REV. 525 (2008).

¹³ See Bruce J. Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 537(2002).

¹⁴ See Ronner, *supra* note 8.

¹⁵ See Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URBAN L.J. 1055 (2003).

¹⁶ Freckelton, *supra* note 5, at 579, 594.

¹⁷ Michael King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, Faculty of Law, Monash University, Research Paper No. 2009/11 (2009), downloadable at <http://ssrn.com/abstract=no.1498923>.

¹⁸ Rotman, *supra* note 12, at 547-49.

¹⁹ Salisbury, *supra* note 10, at 654.

satisfaction and comply more willingly with the ultimate outcome of the proceedings, even if adverse to them.”²⁰

The lessons that we can take away from these teachings should be clear. A recent article about domestic violence – written by a law professor who herself was the victim of domestic abuse – brings home the sad reality of how humiliation and the legal process are often intertwined. Wrote Prof. Sarah Buel: “I was determined to ensure that other victims did not share my experiences of shame, humiliation, sorry excuses, and endangerment by my abuser and the legal system.”²¹ Similarly, Dorothy Roberts writes about how the legal system silences African-American welfare mothers as a “part of a ritual of humiliation by the bureaucrats who supervise them.”²² Others write about the humiliation that is frequently a part of attempted reconciliation of workplace disputes.²³ Although progressive lawyers “dignify their clients by giving voice to their clients: by ‘telling the client’s story and interpreting the law from the client’s viewpoint,’ and ‘by giving the client voice and sparing the client the humiliation of being silenced and ignored,’”²⁴ these stories are all too often ignored, subordinated and trivialized.

²⁰ Winick, *supra* note 15, at 1089.

²¹ Sara Buel, *Domestic Violence and the Law: an Impassioned Exploration for Family Peace*, 33 FAM. L. Q. 719, 719 (2009).

²² Dorothy E. Roberts, *The Paradox of Silence: Some Questions About Silence as Resistance*, 33 U. MICH. J.L. REFORM 343, 347-49 (2000).

²³ E.g., Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 76-92 (2001) (describing harms caused by humiliation at work for all persons and advocating for the law to play a remedial role in workplace disputes).

²⁴ Katherine Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1348 (2008), quoting, in part, David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, in DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 70, 72 (2007).

When I sat down to write this paper, I looked quickly at the topics that my colleagues on this Roundtable were going to be discussing: emotional awareness and humiliation; teaching humiliation in graduate programs; the role of dignity and humiliation indigenous cultures ; moral authority and the exertion of violence; impact of violence on childhood development; national and religious identities; religious terrorism, and sexual violence. Consider again the structure and spirit of therapeutic jurisprudence. Some of the topics on this panel have been squarely confronted in the past by TJ scholars; the others all form a perfect “fit.”

I have been writing about TJ for years, mostly in the contexts of criminal procedure and mental disability law, often combining the two.²⁵ One of my most recent articles deals with imagined conversations that a TJ-savvy criminal defense lawyer might have with a client in a case in which the incompetency status or the insanity defense might be raised.²⁶ I am currently working on a chapter for a book on pathological altruism, looking at issues such as organ

²⁵ See e.g., Michael L. Perlin, *“His Brain Has Been Mismanaged with Great Skill”: How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885 (2009); Michael L. Perlin & Astrid Birgden, *“Where The Home In The Valley Meets The Damp Dirty Prison”: A Human Rights Perspective On Therapeutic Jurisprudence And The Role Of Forensic Psychologists In Correctional Settings*, 14 AGGRESSION & VIOLENT BEHAVIOR 256 (2009); Michael L. Perlin & John Douard, *“Equality, I Spoke That Word/As If a Wedding Vow”: Mental Disability Law and How We Treat Marginalized Persons*, 53 N.Y.L. SCH. L. REV. 9 (2008-09) ; Michael L. Perlin, *“Baby, Look Inside Your Mirror”: The Legal Profession’s Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589 (2008); Michael L. Perlin, *“You Have Discussed Lepers and Crooks”: Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683 (2003); Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Commitment: Kendra’s Law as Case Study*, 9 PSYCHOL. PUB. POL’Y & L. 183 (2003); Michael L. Perlin, *“For the Misdemeanor Outlaw”: The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALABAMA L. REV. 193 (2000).

²⁶ Michael L. Perlin, *“Too Stubborn to Ever Be Governed by Enforced Insanity”: Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases*, -- INT’L J. L. & PSYCHIATRY – (2010) (in press).

donation, suicide bomber and “cultural defenses” to violent crimes from a TJ perspective.²⁷ I am about to devote my attention to a book-length manuscript on the intersection between international human rights law and mental disability law, and in this book, I will consider each sub-topic from a TJ perspective.²⁸ In each instances, the issues of dignity and humiliation can never be far from the forefront.

My hope in giving this presentation is that humiliation/dignity scholars from all disciplines will begin to immerse themselves in the TJ literature in an effort to better understand the fuller implications of legal processes (caselaw, statutes, administrative rulings, lawyering practices) – and how these legal processes are either humiliating or dignity-affirming -- from this perspective. I expect that, if this can be done, we will all be the richer for it.

²⁷ See Michael L. Perlin, *Considering Pathological Altruism in the Law from Therapeutic Jurisprudence and Neuroscience Perspectives*, in *PATHOLOGICAL ALTRUISM* -- (Barbara Oakley et al eds.) (2010) (article in preparation).

²⁸ MICHAEL L. PERLIN, "THE CHIMES OF FREEDOM FLASHING": EXPLORING THE INTERSECTION BETWEEN INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW (2011) (book in preparation).