

**“Friend to the Martyr, A Friend to the Woman Of Shame”: How the
Adoption of Therapeutic Jurisprudence Best Ensures Dignity and Ends
Humiliation**

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Introduction

Six years ago, I gave my first talk at an HDHS conference, and its title -- **“Friend to the Martyr, a Friend to the Woman of Shame”**: Thinking About The Law and Humiliation – reflected my first thoughts about this topic. At the time, I spoke about “scarlet letter” punishments that allowed for or encouraged humiliation or humiliating behavior on the part of the legal system: sentences in criminal cases in which trial judges order, by way of example, an individual convicted of aggravated battery to post a sign on his property line that read "Warning: A Violent Felon Lives Here. Travel at Your Own Risk," or variously require other convicted defendants to affix bumper stickers to their car, take out newspaper ads or wear sandwich signs to publicize their offense; sex offender zoning laws that bar certain individuals convicted of certain crimes (commonly known, though often incorrectly, as sexually violent predator laws), from (a) residing in certain communities, or (b) residing within a certain number of feet of schools, parks, churches, recreational areas, or libraries, or the passive or active sanctioning by governments of conditions in institutions in which persons with mental disabilities are housed that shock the conscience and humiliate the persons who live there.

After I presented that paper, I knew that there was much more here than met the eye, but, as happens, I turned my scholarly attention in other directions, and never came back to it. Until these past few months. Along with my co-author, Naomi Weinstein, Esq, a former research assistant who is now a lawyer with the Mental Hygiene Legal Services in NYC, I am now 99% done with a *long* (how long? As of now, 70

pp and 332 footnotes) article about the law, shaming, humiliation, these topics *plus* others (how elderly persons are treated in nursing homes; police stop-and-frisk tactics) article on these questions.¹ But more significantly, I think, we went off in other theoretical directions as well, considering how humiliation and shame detrimentally lead to recidivism, inhibit rehabilitation, discourage treatment, and injure victims. And, more to the point of what I wish to discuss today, they also directly contravene the guiding principles of therapeutic jurisprudence, especially in the context of its relationship to the importance of dignity in the law, and potentially violate international human rights law principles as well.

I have discussed all these topics here over the past few years, and here I want to look mostly at therapeutic jurisprudence. Therapeutic jurisprudence is one of the most important legal theoretical developments of the past two decades. Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences. The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles. There is an inherent tension in this inquiry, but

¹ See Michael L. Perlin & Naomi Weinstein, *Error! Main Document Only. "Friend to the Martyr, a Friend to the Woman of Shame": Thinking About The Law, Shame and Humiliation* (manuscript in progress)

David Wexler clearly identifies how it must be resolved: “the law's use of “mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.”²

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives,”³ and focuses on the law’s influence on emotional life and psychological well-being. It suggests that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness”.⁴ And one of the central principles of therapeutic jurisprudence is a commitment to dignity.⁵ Prof. Carol Sanger suggests that dignity means that people “possess an intrinsic worth that should be recognized and respected,” and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth.⁶

So, what is the connection between therapeutic jurisprudence and the law’s use of shame and humiliation in this context? Nothing so clearly violates the dignity of

² David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993). See also, e.g., David Wexler, *Applying the Law Therapeutically*, 5 APPL. & PREVENT. PSYCHOL. 179 (1996).

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

⁴ Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT, 23, 26 (Kate Diesfeld & Ian Freckelton, eds., 2003).

⁵ See BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005).

⁶ Carol Sanger. *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009).

persons than treatment that demeans or humiliates them.⁷ Scarlet letter punishments are per se violations of therapeutic jurisprudence principles as they are meant to be shaming and humiliating. Thus, the treatment of persons with mental disabilities and the elderly must be radically changed.⁸ Persons with mental disabilities have a right to receive treatment in a way that does not isolate them and invoke feelings of shame. The elderly deserve to be given the most opportunity to make decisions regarding their personal needs and property and afforded the greatest amount of independence.

Instead of laws whose purpose it is to shame, isolate and humiliate, sex offenders, focus must be placed instead on reintegrating sex offenders into society and promoting sex offenders' self-respect and dignity while fostering family and community relationships.⁹ There is no question that the humiliation and shame that is at the foundation of the sex offender laws have a counterproductive impact on what they ostensibly are set out to do.

International human rights law declares a right to "freedom from degrading punishment,"¹⁰ and a "respect for inherent dignity."¹¹ It promotes "awareness

⁷ R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV 527, 549 (2006).

⁸ On the application of TJ to nursing home conditions, see MARSHALL KAPP, *THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC?* (2003).

⁹ Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 40 (2013).

¹⁰ UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, Article 15 (2008) (CRPD). On the relationship between this Convention and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see Michael L. Perlin & Meredith R. Schriver,

throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities.”¹² The punishments described in this paper – when applied to persons with mental disabilities – clearly contravene international human rights law. They deprive individuals of dignity via degrading means in ways that similarly violate therapeutic jurisprudence.

We hope that our article will bring into sharper focus the ways that the law regularly shames and humiliates those who come before it, and how this shame and humiliation are antithetical to the principles that therapeutic jurisprudence seeks to uphold. We hope that, by calling attention to these rights violations, our paper will cause those who support them to think more carefully about the impact that the tactics in question have on the persons being shamed and humiliated, and, ultimately, on all of us.

“You That Hide Behind Walls”: The Relationship between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients, in TORTURE AND ILL-TREATMENT IN HEALTH- CARE SETTINGS: A COMPILATION (American University Center on Humanitarian Law ed. 2013).

¹¹ CRPD, Article 3(a).

¹² *Id.*, Article 8.