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Justice Outsourced: The Therapeutic Jurisprudence Implications of Judicial Decision-Making by Nonjudicial Officers (2022)

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EDITED BY MICHAEL L. PERLIN
AND KELLY FRAILING

Justice Outsourced

*The Therapeutic Jurisprudence Implications of Judicial
Decision-Making by Nonjudicial Officers*



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MLP:

*To Linda, for her love, her partnership, her spirit of joy,
exploration, and creation, and for making every day worth
living.*

*To Alex, Liz, and Sam, and to Julie, Ben, and Sophie, for
bringing laughter into my heart, smiles to my face, and
happiness to my entire being.*

KF:

*To Kyle Taylor, who has so thoroughly enriched my life.
You are extraordinary, and I love you very much.*

*MLP and KF would like to recognize and deeply thank
Jamara Rowley for her indispensable assistance in creating
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Introduction

Hiding in Plain View

*How the Extensive Use of Nonjudicial Officers
Corrupts the Criminal Justice System*

MICHAEL L. PERLIN AND KELLY FRAILING

In the early 1970s, I was a practicing lawyer in Trenton, New Jersey, just across the Delaware River from Morrisville, Pennsylvania.¹ One of the bridge crossings was a toll bridge with—this being before EZ Pass and other systems—a toll collector.

One day, I got home from work to find a traffic ticket in the mail, the alleged infraction being that I had crossed the bridge without paying the toll. I was puzzled because this was something I would never do. I looked more closely at the ticket and noted that at the time of the alleged infraction, I was actually in court in Trenton at the Mercer County Courthouse. I checked my calendar to verify this. I assumed that a car with a license plate similar to mine (with one different number or letter) did avoid the toll, and that the collector made a transcription error.

I decided that I would fight the ticket. At the time, I was a public defender and represented many defendants in many serious felony cases; going to traffic court on my own behalf thus caused me no concern or apprehension. I looked again at the ticket, and the accompanying letter said, "If you plan to contest, call 215-555-1000 to schedule your hearing."

1. This is Michael Perlin's story. Kelly Frailing's comes later. See text that begins "As was Kelly" and ends "a failed drug test cannot provide."

I called that number, and a man answered, "Malinowski Plumbing Company."² I immediately said, "Oh, I'm sorry. I must have misdialed." The man at the other end responded, "Wait. Are you calling about a traffic ticket?" I said that I was. He said, "You dialed the right number. I'm Joe Malinowski, the JP³ in Morrisville. I'll be hearing your case. When would be a good time for you to appear?"

Still surprised, I told him I was a public defender in Trenton and thus was in court almost every day, but I did have some free Friday afternoons. He asked about evenings, and I told him most were free. He then said that he would let me know on which evening the case would be scheduled.

And that was it. I never heard back. A day. A week. A month. A year. Several years. By this time, I was wondering whether the court date notice he had sent me had gone astray, and whether there was a bench warrant out for my arrest for not appearing in court, but I figured that wouldn't be the case because I was pretty easy to find (being in court in Trenton five days a week). I never got a call back.

In retrospect, it became clear to me that the "judge"—who was not a lawyer—had no desire to have a "real lawyer"⁴ before him, so he simply dismissed the ticket. And that was, for me, a good thing. But it also made me think—truly for the first time—about what happens when nonlawyers (and non-"real judges") hear cases.⁵

A few years later, I became director of the Division of Mental Health Advocacy in the New Jersey Department of the Public Advocate. We were statutorily tasked with the representation of persons facing civil commitment to the state's psychiatric institutions. These were before "real judges,"

2. This wasn't the name, but it was fairly close. In the category of no-one-could-make-this-up, I did some home cleaning during the quarantine and went through a collection of miscellaneous papers that was under a desk in my daughter's room (she has lived away from home for the past twenty years). Among the treasures I found was the traffic ticket I am writing about here!

3. At this time in Pennsylvania, justices of the peace (JPs) heard such cases.

4. There is some irony here, as many people, including many public defender clients, do not think public defenders are actual lawyers. See, e.g., *People v. Holliday*, 2016 WL 3126467 (Ill. App. Ct. 2016) (the fact that, quoting defense counsel, the jury was advised that "the defendant has a public defender, rather than a 'real lawyer' as most of society puts it," not a reversible error).

5. Of possible interest: At about the same time, the New Jersey Supreme Court had decided that indigent defendants in municipal court (where all cases were heard by judges who were lawyers) had an absolute right to counsel if the disposition of their case could lead to potential incarceration or "any other consequence of magnitude." *Rodriguez v. Rosenblatt*, 277 A.2d 216, 223 (N.J. 1971).

albeit often bored or disinterested ones,⁶ but at the least they were "real judges."

Then I learned some time after I assumed this job how lucky we were in New Jersey to have "real judges" doing these cases, because in many states, it has been held that it is not constitutionally objectionable for an administrative hearing tribunal—composed of nonjudicial officers—to decide such matters.⁷ These individuals—including "court clerks"—were vested with the power to commit persons to locked facilities (often including maximum security facilities) for terms often lasting years or decades.⁸

And in all the interim years—the years that I litigated (or supervised litigation) on behalf of psychiatric patients on matters involving their institutional treatment and conditions of confinement⁹—I was always puzzled when decisions that, to my mind, should have been made by judges were made instead by administrative officials (again, often nonlawyers and never judges) in cases involving issues of medication, other treatments, conditions of confinement, release restrictions, and more. I was also struck by the ab-

6. See, e.g., Michael L. Perlin and Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47, 54–55 (1993) ("Mental disability law generally regulates powerless individuals represented by passive counsel in invisible court proceedings conducted by bored or irritated judges").

7. See MICHAEL L. PERLIN AND HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* (3d ed. 2016) (spring 2021 update), §4-2.2.1.3, at 4–33, citing, inter alia, e.g., *Doremus v. Farrell*, 407 F. Supp. 509, 516 (D. Neb. 1975); *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 127–28 (W. Va. 1974). See also N.C. GEN. STAT. § 122C-261 (1997) (authorizing magistrate or court clerk to order emergency evaluation); UTAH CODE ANN. § 62A-12-233 (1997) (court may appoint any attorney as "mental health commissioner" to make commitment recommendations).

8. See *Salt Lake City v. Ohms*, 881 P.2d 844 (Utah 1994), declaring unconstitutional (under state constitutional grounds) state law (UTAH CODE ANN. § 62A-12-233) that had vested court commissioners with the exercise of judicial authority of courts of record.

9. See, e.g., *Doe v. Klein*, No. L12088-74 P.W. (N.J. Super. Ct. Law Div. 1977) (final order), reprinted in 1 MENT. DIS. L. REP. 475 (1977) (right to treatment); *Schindenwolf v. Klein*, No. L41293-75 P.W. (N.J. Super. Ct. Law Div. 1975) (right of patients to participate in voluntary, therapeutic compensated work programs as an aspect of the right to treatment); *Dixon v. Cahill*, No. L30977/y-71 P.W. (N.J. Super. Ct. Law Div. 1973) (implementing *Jackson v. Indiana*, 406 U.S. 715 [1972], applying Due Process Clause to incompetent-to-stand-trial defendants); *Rennie v. Klein*, 462 F. Supp. 1131, 1147 (D.N.J. 1978), suppl., 476 F. Supp. 1294 (D.N.J. 1979), modified, 653 F.2d 836 (3d Cir. 1981), vacated, 458 U.S. 1119 (1982) (granting involuntarily committed mental patients a limited right to refuse medication). See generally, Michael L. Perlin and 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), and Michael L. Perlin, "John Brown Went Off to War": *Considering Veterans' Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445 (2013) (discussing cases).

solute absence of legal academic literature on the role of what we call here nonjudicial officers and the implications of their proliferation.¹⁰

Then one day in 2019, my son (a public defender in New York state) told me about a New York law¹¹ that allows judges to outsource certain pretrial motions (including search and seizure hearings) to nonjudges to hold hearings and file reports with the courts. In such cases, the actual judge thus has no opportunity to weigh the credibility or the motivations of the testifying witnesses, always the most critical aspect of a contested search-and-seizure case.¹² Soon after this, I learned about a South Dakota law¹³ that was interpreted to allow a “court services officer” (a nonjudicial probation officer) to modify the terms of a sex offender’s judicial sentence. When I presented about this issue at a conference at Nova Law School in September 2019,¹⁴ a Broward County (Fort Lauderdale, Florida) judge who was in the audience told me that in her county, sheriff’s officers, *sua sponte*, modified court orders in terms of frequency of defendants’ meetings with probation officers.¹⁵ I was aghast.

As was Kelly. Here are her thoughts on how her interest in this subject matter evolved.

Sadly, my foray into this area does not involve calling about a ticket and reaching a plumber. Instead, it comes from my second real job after college. I had no idea what I wanted to do when I finished college, so I fumbled around in a variety of social service jobs. That second one had me supervising a group home for people with mental illness who had been justice system-involved. The other staff and I made a variety of decisions for the people in the house, as did their case managers, probation officers, and so on. I got so interested in the nexus of mental health and criminal justice that I went to graduate school

10. There is, to the best of our knowledge, only one journal article—Deborah J. Chase and Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 CT. REV. 12 (2000)—that discusses the ways that judicial officers and nonjudicial officers in drug courts differ in their attitudes toward court outcomes.

11. NY CRIMINAL PROCEDURE LAW § 255.20(4).

12. See, e.g., Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994).

13. SDCL § 23A-27-12.1.

14. My substantive chapter in this volume (“But I Ain’t a Judge”: *The Therapeutic Jurisprudence Implications of the Use of Nonjudicial Officers in Criminal Justice Cases*), addresses the practices in New York and South Dakota and their consequences in more detail.

15. See, e.g., Dan Christensen, *BSO Changes Court’s Probation Orders; Broward Judge Blows the Whistle*, MIAMI HERALD (Nov 10, 2014), accessible at <https://www.miamiherald.com/news/local/community/broward/article3686226.html>. I discuss this in “But I Ain’t a Judge”: *The Therapeutic Jurisprudence Implications of the Use of Non-Judicial Officers in Criminal Justice Cases*, 64 AM. BEHAV. SCI. 1686 (2020), and am indebted to Judge Ginger Lerner-Wren for bringing this to my attention.

with the idea of studying that very thing. When I started my master’s program, I read what seemed like every study on specialty courts and realized just how little scholarship there was that was directly focused on perceptions of people under supervision, both generally and in these courts specifically. When I went to my doctoral program and planned my study on two mental health courts in the United States, I made participant perceptions a central focus of my work. At that time, most studies on mental health courts were focused on criminal justice outcomes, that is, recidivism, almost to the exclusion of anything else.

Since that time, I have worked to better understand the perceptions of people under supervision, including how they feel about their judge, their probation officer, their case manager, the services they are required to engage with, and so on. And I have come to realize that when participants perceive the manifestation of therapeutic jurisprudence across these domains, they are more likely to stay engaged with their programs. Of course, the programming is important, but there is something special about, say, hearing praise from a judge or a probation officer, that the threat of a sanction resulting from a failed drug test cannot provide.¹⁶

And thus the idea for this book was born. In short, it tackles a topic that has never been written about before: the hidden role of nonjudicial officers (NJOs) in the criminal justice system (defined broadly to include aspects of correctional law and forensic law as well), a role that is sanctioned, variously, by case law, statute, regulations, and customs. What is clear is that nonjudicial officers permeate the criminal justice system (and the forensic mental health system), almost always in hidden ways. When we discussed this book idea with friends, so many said something to the effect of, “Gee, you’re right. And I really never thought about that before. Wow!”

It isn’t at all clear how this began. In some cases, it appears it was a means of off-loading work of judges with heavy caseloads. In others, it appears that the questions weren’t seen as “really” legal.¹⁷ In at least one case, it was done

16. The chapter by Kelly and her colleagues in this volume, *Therapeutic Jurisprudence in Swift and Certain Probation*, flows from these experiences.

17. E.g., in *Savastano v. Nurnberg*, 567 N.Y.S.2d 618 (1990), the court rejected a due process challenge to the nonconsensual transfer of involuntarily committed, mentally ill patients from local acute-care facilities to long-term state institutions without prior judicial approval. The court noted that as the transfers at issue involved primarily medical judgments about the patients’ therapeutic needs that, such decisions were better left to psychiatrists. *Id.* at 621. See Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review*, 1990, 12 PACE L. REV. 1, 36–37 (1992).

ex parte without the knowledge of the presiding court.¹⁸ But what is so striking is how little concern has been shown about this phenomenon—one that, again, pervades the criminal trial process and the forensic mental health system—over the years.¹⁹ The common thread here is that decisions that involve due process rights, decisions that may lead to extended incarceration, and decisions that implicate multiple constitutional rights are being made by those who are not judges (and in many cases, not lawyers).

We also decided that it was mandatory that this book be written from the perspective of therapeutic jurisprudence (TJ).²⁰ We conclude that often the use of these NJOs—especially, their hidden use—violates every precept of TJ.²¹ Professor David Wexler—one of the creators of this school of thought—has clearly identified how the tension inherent in this inquiry must be resolved: “The law’s use of “mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.”²² As one of the coauthors (MLP) has written elsewhere, “An inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”²³

TJ “asks us to look at law as it actually impacts people’s lives”²⁴ and “focuses on the law’s influence on emotional life and psychological well-

18. See Christensen, *supra* note 15.

19. It also has a significant impact on the correctional system. See, e.g., Henry Dlugacz, *Correctional Disciplinary Proceedings and Incarcerated People with Mental Disabilities* (this volume); Talia Harmon, Michael Cassidy, and Richelle Kloch, *A Critique of Texas Lethal Injection Cases: An Examination of “Decision-Making” and the Risk of Botches in Texas Lethal Injection Protocols Since 1982* (this volume).

20. We use a standard definition of therapeutic jurisprudence: “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.” See e.g., Michael L. Perlin, “Who Will Judge the Many When the Game is Through?: Considering the Profound Differences between Mental Health Courts and “Traditional” Involuntary Civil Commitment Courts, 41 SEATTLE U. L. REV. 937, 957 (2018).

21. See generally, Michael L. Perlin, “Have You Seen Dignity?: The Story of the Development of Therapeutic Jurisprudence, 27 U.N.Z. LAW REV. 1135 (2017).

22. David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993). On Wexler’s role in the creation of the school of thought of therapeutic jurisprudence, see Michael L. Perlin, “Changing of the Guards”: David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship, 63 INT’L J. L. & PSYCHIATRY 3 (2019).

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

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

being.”²⁵ 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.”²⁶

One of the central principles of TJ is a commitment to dignity.²⁷ Professor Amy Ronner describes the “three Vs” as follows:

- Voice: Litigants must have a sense of voice or a chance to tell their story to a decision maker.
- Validation: The decision-maker needs to take seriously the litigant’s story.
- Voluntariness: In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.²⁸

As one of the coeditors (MLP) has written with others, “the perception of receiving a fair hearing is therapeutic because it contributes to the individual’s sense of dignity and conveys that he or she is being taken seriously.”²⁹ Writing about dignity and the civil commitment process, Professors Jonathan Simon and Stephen Rosenbaum embrace therapeutic jurisprudence as a modality of analysis, and focus specifically on this issue of voice: “When procedures give people an opportunity to exercise voice, their words are given respect, decisions are explained to them their views taken into account, and they substantively feel less coercion.”³⁰

TJ also focuses on the role of counsel. Again, Professor Ronner, writing with Judge Juan Ramirez, has underscored that the right to counsel is “the

25. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis P. Stolle et al., eds., 2000). See generally, Perlin, *Healing*, *supra* note 23.

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

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

28. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002). It is no coincidence that Ronner’s “three Vs” are discussed in multiple chapters in this book.

29. Michael L. Perlin, Keri K. Gould, and Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL’Y & L. 80, 114 (1995).

30. Jonathan Simon and Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIAMI L. REV. 1, 51 (2015).

core of therapeutic jurisprudence.³¹ As one of the coauthors (MLP) wrote twenty-five years ago in a consideration of the death penalty (a topic under discussion in this book),³² “Any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to insure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective.”³³

In short, therapeutic jurisprudence values are intertwined with both dignitarian values and effectiveness-of-counsel values.³⁴ In this book, we explore how the omnipresent use of nonjudicial officers robs the legal processes of this needed dignity in direct violation of therapeutic jurisprudential values.³⁵ Think of some of the additional questions that are raised. Can we be sure that the nonjudicial officer knows the law? In so many areas of the law that our authors address, the law is ever changing. By way of example, on the same day as we started initial revisions of this chapter, a mail blast arrived with the information that federal executions were being halted because of challenges to the drugs used for the purposes of imposing the death penalty.³⁶ One of the chapters in this book deals explicitly with this issue as

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

32. See Harmon, Cassidy, and Kloch, *supra* note 19; Valerie McClain, *Navigating Judicial Hurdles for Effective Legal Solutions: The Agony and the Ecstasy* (this volume).

33. Michael L. Perlin, “The Executioner's Face Is Always Well-Hidden”: *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 235 (1996). See also Michael L. Perlin, “Merchants and Thieves, Hungry for Power”: *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1542 (2016) (same).

34. See, e.g., Heather Ellis Cucolo and Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 FLA. J. L. & PUB. POL'Y 291 (2017); Michael L. Perlin and Naomi M. Weinstein, “Friend to the Martyr, a Friend to the Woman of Shame”: *Thinking About the Law, Shame and Humiliation*, 24 SO. CAL. REV. L. & SOC'L JUST. 1 (2014). In this volume, specifically on counsel issues, see Heather Ellis Cucolo, *Reconstructing the Ethics Code to Remedy the Failures of Strickland v. Washington*; Bernard Perlmutter, “Give Me My Allowance or I'll Run!” *Everyday Resistance by Foster Children and Justice Outsourced*.

35. See David Wexler and Bruce Winick, *Patients, Professionals, and the Path of Therapeutic Jurisprudence: A Response to Petrila*, 10 N.Y.L. SCH. J. HUM. RTS. 907, 914 (1993) (therapeutic jurisprudence calls for a “healthy skepticism toward claims of clinical expertise”). This “healthy skepticism” must make us especially wary of nonjudges exercising judicial power.

36. See Bernie Pazanowski, *Federal Executions Again Halted for Challenge to Drug Efficacy*, U.S. LAW WEEK (July 15, 2020), accessible at <https://news.bloomberglaw.com/us-law-week/federal-executions-again-halted-for-challenge-to-drug-efficacy>.

it is dealt with by the state of Texas;³⁷ can we be confident that the nonjudicial officers who oversee the administration of such drugs in every state in which the death penalty is being imposed will be familiar with this decision? A recent report by the US Office of Inspector General poignantly described the challenges of meeting the needs of mentally ill migrant children in custody.³⁸ Can we be confident that this report has been read by all staff at all ICE detention facilities in which such children are housed?³⁹

As noted earlier, one of the lodestars of therapeutic jurisprudence is a commitment to dignity. The “track record” has been woefully clear for decades that persons with mental disabilities in jails and prisons are routinely deprived—by administrative staff and officers—of even a modicum of such dignity.⁴⁰ Another lodestar is independence.⁴¹ Those in the foster care system often do not reflect this independence in their dealing with youth in foster care.⁴²

We have written this book to demonstrate the omnipresence of these issues. We have assembled a cohort of scholars from a full range of disciplines (lawyers (including professors, practitioners and a judge), criminologists, psychologists, sociologists, and several graduate students), all of whom are positioned to offer uniquely expert perspectives on the full range of questions that are raised by our systemic reliance on NJOs, their decision making, consequences for people involved in the criminal justice and mental health systems, and implications for therapeutic jurisprudence.

We have divided this book into four parts, first on nonjudicial officers in the courtroom, second on such officers in administrative settings, third on ethical and practical considerations in the use of nonjudicial officers, and in a brief fourth and final section, a word from the bench.

The courtroom-focused chapters deal with the issues we discuss earlier in this introduction—how nonjudges decide important (often outcome-determinative) Fourth and Fifth Amendment-based motions and make criti-

37. See Harmon, Cassidy, and Kloch, *supra* note 19.

38. See CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY (Sept. 2019), full report accessible at <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf>.

39. See Alison J. Lynch, *The Role of Therapeutic Jurisprudence in Non-Judicial/Administrative Placement of Migrant Children with Mental Illness* (this volume).

40. See Deborah A. Dorfman, *Doing Time in “The Devil's Chair”: Evaluating Nonjudicial Administrative Decisions to Isolate and Restrain Prisoners and Detainees with Mental Health Disabilities in Jails and Prisons* (this volume); Dlugacz, *supra* note 19.

41. See, e.g., Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328 (2001).

42. See Perlmutter, *supra* note 34 (this volume).

cal decisions as to defendants' sentences;⁴³ how such nonjudges, very often untrained in these areas, have the power to make consequential decisions for people with mental illness and people who use substances who are justice system involved;⁴⁴ the roles of nonjudges in mental health court decision making;⁴⁵ how therapeutic jurisprudence can manifest in specialized probation programs and how that manifestation impacts participants' perceptions;⁴⁶ how often perceptions by nonjudicial decision makers as to offenders' remorse is dispositive in the ultimate disposition of their cases;⁴⁷ the role of nonjudges in decision-making about whether certain individuals face institutionalization in mental hospitals;⁴⁸ the role of nonjudges in decision making related to a wide array of issues including treatment, where one lives, and sexual autonomy in the cases of individuals with dual diagnoses;⁴⁹ and the role of nonjudges in decision-making in reentry courts.⁵⁰ In many of these areas, the use of nonjudges demeans the "judicial" process and violates the basic precepts of therapeutic jurisprudence.⁵¹

The chapters whose primary focus is on administrative matters include investigations of the use of nonjudges in isolation and restraint decision-making for inmates and detainees,⁵² in disciplinary cases in correctional settings,⁵³ the role of counsel in cases involving criminal responsibility and persons

43. See Perlin, *supra* note 14 (this volume).

44. See Meghan Gallagher, *The Role of Nonjudicial Officers and Their Impact on Therapeutic Jurisprudence in the Context of Alcohol and Substance Abuse and Mental Health* (this volume).

45. See Karen Snedker, *Therapeutic Jurisprudence in Action: Applying Goffman's Dramaturgical Theory to Mental Health Courts* (this volume).

46. See Frailing, Alfonso, and Taylor, *Therapeutic Jurisprudence in Swift and Certain Probation*, *supra* note 16 (this volume).

47. See Colleen Berryessa and Ashley Balavender, *The Therapeutic Value of Remorse and Apologies for Probation Decision-Making* (this volume).

48. See Shelley Kolstad, *It's Time to Shine: Understanding the Implications of Commitment Decision-Making by Nonjudicial Officers and Embracing Change* (this volume).

49. See Naomi Weinstein, *The Role of Nonjudicial Officers in the Disparity of Treatment for Persons with Dual Diagnoses and How TJ Can Improve Outcomes* (this volume).

50. See Victoria Rapp, *Therapeutic Jurisprudence in the Jefferson Parish, Louisiana Reentry Court* (this volume).

51. We should note that there are times when non-judges may have a salutary and positive impact on the proceedings in question when they work in authentic partnership with members of the judiciary. See e.g., in this volume, Snedker, *supra* note 45 (discussing mental health courts) Berryessa & Balavender, *supra* note 47 (probation); Frailing, Alfonso & Taylor, *supra* note 46 (same); Rapp, *supra* note 50 (reentry courts).

52. See Dorfman, *supra* note 37 (this volume).

53. See Dlugacz, *supra* note 19 (this volume).

with intellectual disabilities,⁵⁴ cases involving the placement of migrant children with mental disabilities,⁵⁵ cases involving children in foster care,⁵⁶ and matters related to the selection of drugs used for capital punishment schemes in Texas.⁵⁷ Similarly, in each of these instances, there is virtually no attention paid to TJ principles in the processes discussed.

The chapters that deal with ethical and practical considerations assess the role of lawyers in pretrial negotiations,⁵⁸ constitutional requirements in the assessment of adequacy of counsel,⁵⁹ and the role of nonjudges in the evaluation of custody disputes.⁶⁰ Finally, the book ends with a chapter looking at the actions of nonlawyer judges, from both therapeutic jurisprudence and procedural justice perspectives.⁶¹

We hope that these chapters will explain the relationships between these various uses of nonjudicial officers, how they are alike, how they are different, and how, if crafted carefully and with foresight, they may have positive impacts.⁶² This, we also hope, will lead to a greater understanding of this hidden aspect of the law, its practice, and the consequences for people who are justice involved, as well as why, on a daily basis, we—giving this decision little or no thought—outsource important justice decision-making. The extensive involvement of those who are not judges in important human decision-making often leads to the development of a system that is neither just nor fair, especially when it is hidden,⁶³ and can truly corrupt the adminis-

54. See Lisa Whittingham and Voula Marinou, *The Complexities of Criminal Responsibility and Persons with Intellectual and Developmental Disabilities: How Can Therapeutic Jurisprudence Help?* (this volume).

55. See Lynch, *supra* note 36 (this volume).

56. See Perlmuter, *supra* note 34 (this volume).

57. See Harmon, Cassidy, and Kloch, *supra* note 19 (this volume).

58. See McClain, *supra* note 32 (this volume).

59. See Heather Ellis Cucolo, *Reconstructing the Ethics Code to Remedy the Failures of Strickland v. Washington* (this volume).

60. See Lenore Walker and Brandi Diaz, *Nonjudicial Influence on Family Violence Court Cases* (this volume).

61. See Kevin Burke, *Procedural Fairness Is the Foundation for Making Nonlawyer Judges Effective* (this volume).

62. See Perlin, *supra* note 20 (concluding that mental health courts provide more due process using therapeutic jurisprudence principles than do traditional involuntary civil commitment courts). See also Meghan Winter, *Courts of Dignity: Replacing Punishment with Compassion*, PSYCHOTHERAPY NETWORKER (May/June 2021), accessible at <https://www.psychotherapynetworker.org/magazine/article/2547/courts-of-dignity> (discussing the work of Judge Ginger Lerner-Wren, pioneering mental health court judge in Broward County, Florida).

63. On how the act of "hiding" demeans all mental disability law, see MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000). On how agendas and doctrines are—and always have been—often hidden in this area of the law, see, e.g., Michael L. Perlin, *Hidden Agendas and Ripple Effects: Implications of Four Recent Supreme Court Deci-*

tration of criminal justice. To counter this, we must consider the extent to which “outsourced” justice can be done—by nonjudicial actors such as specially trained probation officers and mental health court “teams”—in ways that are consonant with therapeutic jurisprudence principles.

Some might think that our approach here is somewhat ironic, as many of the supporters of therapeutic jurisprudence also endorse what some call the nonadversarial approach to justice,⁶⁴ and some take the position that “TJ posits that the court system *can be* a non-adversarial setting that addresses specific underlying issues for those engaged in it.”⁶⁵ A closer look, however, shows that there is no irony in this position.

Over twenty-five years ago, the late Professor Bruce Winick—along with Professor David Wexler, one of the founders of TJ—looked at TJ as a new way to consider the lawyer’s role: “a non-adversarial, psychologically beneficial, and humanistic ways to solve legal problems, resolve legal disputes, and prevent legal difficulties.”⁶⁶ And we agree. But the systems that are described by the authors of chapters in this book—to name a few, isolation and restraint decision-making for inmates and detainees, disciplinary cases in correctional settings, cases involving the placement of migrant children with mental disabilities, cases involving children in foster care, matters related to the selection of drugs used for capital punishment schemes—in no way reflect, in Winick’s words, “psychologically beneficial and humanistic ways to solve legal problems.” We hope and expect this book will shed light on all of these and additional, equally important issues and prompt new questions about the way forward.

sions for Forensic Psychiatrists, 2 J. FORENSIC PSYCHOLOGY PRACTICE 33 (2001); Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or Doctrinal Abyss?* 29 ARIZ. L. REV. 1 (1987).

64. See, e.g., MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE (2009).

65. Jason Matejkowski, Woojae Han, and Aaron Conrad, *Voluntariness of Treatment, Mental Health Service Utilization, and Quality of Life Among Mental Health Court Participants*, 26 PSYCHOL. PUB. POL’Y & L. 185, 185 (2020) (emphasis added).

66. Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 433 (2005).