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There's a Dyin Voice Within Me Reaching Out Somewhere: How TJ Can Bring Voice to the Teaching of Mental Disability Law and Criminal Law

Michael L. Perlin
New York Law School

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**“There’s A Dyin’ Voice Within Me Reaching Out Somewhere:”
How TJ Can Bring Voice to the Teaching of Mental Disability
Law and Criminal Law**

Prof. Michael L. Perlin*

I. INTRODUCTION

In this short essay, I will discuss my historical involvement with therapeutic jurisprudence (TJ), how I use it in my classes (both in the free-standing TJ class and in all the others that I teach), its role in my written scholarship, and its role in conferences that I regularly attend. Although this will all be positive and will certainly be supportive of all efforts to widen the appeal of TJ as well as its applicability in the classroom, in scholarship, and in “real life,” I will also be sharing some information that is far from optimistic with regard to how law students and teachers react to TJ. I am deeply saddened by this but feel that this must also be “on the table” in any reflective conversation about TJ.

My title is from a Bob Dylan song, *Every Grain of Sand*, one of his most beautiful and poignant masterpieces.¹ I chose this lyric because sometimes, when I am at a low point, I feel as if all my TJ cheerleading and proselytizing is simply a “dyin’ voice” that is “reaching out somewhere.” I so hope that I am wrong.

II. HISTORY

I have known and worked with David Wexler since the late 1970s. When we would meet at conferences in the late 1980s, he was clearly dissatisfied with the way that the legal academy was approaching mental disability law as a topic, especially after the Supreme Court’s decisions in *Youngberg v. Romeo*² and *Pennhurst State School & Hospital v. Halderman*³ seemed to put the brakes on the vector of constitutional litigation as a means of making

* Professor of Law and Director of the International Mental Disability Law Reform Project and the Online Mental Disability Law Program, New York Law School. My thanks to Shelley Kierstead for her thoughtful comments on this piece.

1. I actually read the last verse of it as the end of the eulogy at my mom’s funeral.

2. 457 U.S. 307 (1982) (establishing “substantial professional judgment” test in analyzing institutional liability in patients’ rights cases).

3. 465 U.S. 89 (1984) (holding Eleventh Amendment bars federal courts from ordering state officials to conform their actions to state law).

significant ameliorative change in state mental health systems.⁴ In fact, in one of David's earliest TJ pieces, he called attention to an article I had written⁵ as a sign that (federal) constitutional mental health law was dead.⁶ I actually never thought it was, but by that time, it *did* appear to be in its death throes.

So, what happened? Well, as we know, David and the late Bruce Winick—in a stroke of absolute brilliance—created what we now know as “therapeutic jurisprudence,” and the future of mental disability law (and some aspects of criminal law and criminal procedure) would be changed for all time.⁷ I was one of the first “fellow travelers,” and relatively early on, sought to expand the TJ community and TJ awareness:

- I added a TJ course to New York Law School (NYLS)'s curriculum in 1992. Not coincidentally, Debbie Dorfman (who has written often about TJ, with me, with others, and as a solo)⁸ was a student in that first class.
- A year later, in 1993, I put on the first law school-based TJ conference (ever) at NYLS.⁹ David, Bruce, the late Dan Shuman, Bob Sadoff, Joel Dvoskin, Murray Levine, and others contributed to the symposium issue that followed. The articles in this symposium continue to be cited to this day.¹⁰
- We added TJ as a regular part of the mental disability law

4. See Michael L. Perlin, “Make Promises by the Hour”: *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947, 953 (1997) (stating decisions such as *Youngberg* and *Pennhurst* “seemed to clarify that the federal courts were no longer going to be the forum of choice for litigants representing persons with mental disabilities”).

5. Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A. L. REV. 1249 (1987).

6. See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992).

7. For a sampling of TJ works by Wexler and Winick, see, e.g., LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); see also Wexler, *supra* note 6, at 27, 32-33 (citing first instance where Wexler used the term in paper he presented to National Institute of Mental Health in 1987).

8. See, e.g., Deborah A. Dorfman, *Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 805 (1993); 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 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).

9. See Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

10. See E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 528 n.52 (2012) (citing Dorfman, *supra* note 8, at 808); Robert L. Sadoff, *Therapeutic Jurisprudence: A View From a Forensic Psychiatrist*, 10 N.Y.L. SCH. J. HUM. RTS. 825 (1993); see also Michael L. Perlin, “Justice’s Beautiful Face”: *Bob Sadoff and the Redemptive Promise of Therapeutic Jurisprudence*, 40 J. PSYCHIATRY & L. 265, 269 (2012) (discussing significance of Bob Sadoff’s article and his singular contributions as forensic psychiatrist to therapeutic jurisprudence).

curriculum in 1994, and I taught it regularly for a decade. The class was always filled to capacity and often oversubscribed. After being gussied up a bit, student term papers were often published as stand-alone articles in peer-reviewed journals.¹¹

- Some years later, coinciding with my own turn towards the intersection of international human rights law and mental disability law, we put on another conference that linked TJ to international human rights law in the context of mental disability law.¹² Importantly, Bruce Winick's article—the first published piece on this precise topic—also continues to be cited to this day.¹³
- At the same time, NYLS expanded its mental disability law curriculum from four courses in 2004 to 13 courses in 2011. TJ was included as a stand-alone course but, just as importantly, there was a TJ component in each of the others.
- I also regularly teach Criminal Law and Criminal Procedure-Investigation. Since 1990 or so, I have always included TJ pieces in both courses.

Now, this all sounds wonderful. But, sadly, this is not the entire story. I have other news to share:

- In three of the last four years, TJ courses have been canceled because of lack of enrollments.
- This year, we are offering TJ but all the students are in our Masters program; not a single JD student registered for the course.
- When I have spoken to other law schools about “partnering” with us through our online program,¹⁴ not a single dean has ever raised the issue of TJ being the course we offer.

III. SCHOLARSHIP

What about scholarship? Since my first TJ article in 1992, I have built TJ into most of my scholarship, including articles and books about criminal law and procedure, mental disability law, and international human rights law. My last three books (one on each of these topics) each has a significant TJ focus,¹⁵

11. See Janet B. Abisch, *Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Counsel Role Dilemma*, 1 PSYCHOL. PUB. POL'Y & L. 120 (1995); Brian J. Gorman, *Facilitated Communication: Rejected in Science, Accepted in Court—A Case Study and Analysis of the Use of FC Evidence Under Frye and Daubert*, 17 BEHAV. SCI. & L. 517 (1999).

12. See Hungary: *The Social Care Home Report*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 361, 381 (2002).

13. See Janos Fiala-Butora, *Disabling Torture: The Obligation To Investigate Ill-Treatment of Persons with Disabilities*, 45 COLUM. HUM. RTS. L. REV. 214, 228 n.71 (2013) (citing 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, 538 (2002)).

14. See Michael L. Perlin, *Online, Distance Legal Education as an Agent of Social Change*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 95 (2011).

15. See, e.g., MICHAEL L. PERLIN, *A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND*

and randomly, my last nine law review articles and book chapters all have this same focus.¹⁶

But again, there is another side to this story. Heather Ellis Cucolo—my friend and colleague with whom I have written multiple TJ-based articles¹⁷—and I presented a new paper with a TJ piece¹⁸ to a faculty workshop in January. Two colleagues—one very conservative, one very progressive—suggested that we delete the TJ piece, as it “added nothing.” Not a single colleague disagreed with them. I should note, however, that other than Heather and I, none of the other mental disability law teachers were present.

There are few conversations less fruitful and more irritating than the one that considers how law reviews choose the articles they publish. It is enough to say that no one has ever seriously challenged the jaw-dropping “Three Rules of Acquisition” articulated 17 years ago. I learned from a senior colleague that the Three Rules of Acquisition followed by Articles Editors at the Top Six or so law reviews were: “Rule 1) Something by Someone. Rule 2) Nothing by Someone. Rule 3) Something by No One.”¹⁹

MENTAL DISABILITY LAW (2013); MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD (2012); MICHAEL L. PERLIN, THE SHAME OF THE STATES: MENTAL DISABILITY AND THE DEATH PENALTY (2013).

16. See, e.g., Michael L. Perlin, “John Brown Went Off to War”: *Considering Veterans Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445 (2013) [hereinafter Perlin, *John Brown*]; Michael L. Perlin, “Striking for the Guardians and Protectors of the Mind”: *The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159 (2013) [hereinafter Perlin, *Striking*]; Michael L. Perlin, “The Judge, He Cast His Robe Aside”: *Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL’Y J. 1 (2013) [hereinafter Perlin, *Robe*]; Michael L. Perlin, “There Must Be Some Way Out of Here”: *Why the Convention on the Rights of Persons with Disabilities Is Potentially the Best Weapon in the Fight Against Sanism*, 20 PSYCHIATRY PSYCHOL. & L. 462 (2013); Michael L. Perlin, “Wisdom Is Thrown into Jail”: *Using Therapeutic Jurisprudence To Remediate the Criminalization of Persons with Mental Illness*, 17 MICH. ST. U. J. MED. & L. 343 (2013) [hereinafter Perlin, *Wisdom*]; Michael L. Perlin, “Yonder Stands Your Orphan with His Gun”: *The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH L. REV. 301 (2013) [hereinafter Perlin, *Yonder*]; see also Michael Perlin, “There Are No Trials Inside the Gates of Eden”: *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in COERCIVE CARE: RIGHTS, LAW AND POLICY 193 (Bernadette McSherry & Ian Freckelton eds., 2013); Michael L. Perlin, *Understanding the Intersection Between International Human Rights and Mental Disability Law: The Role of Dignity*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191 (Bruce A. Arrigo & Heather Y. Bersot eds., 2013); 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 (2012) [hereinafter Cucolo & Perlin, *Preventing Recidivism*]; Heather Ellis Cucolo & Michael L. Perlin, “They’re Planting Stories in the Press”: *The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185 (2013) [hereinafter Cucolo & Perlin, *Stories in the Press*].

17. See Cucolo & Perlin, *Preventing Recidivism*, *supra* note 16; Cucolo & Perlin, *Stories in the Press*, *supra* note 16.

18. Heather Cucolo & Michael L. Perlin, “Far from the Turbulent Space”: *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators* (Jan. 24, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384899 [hereinafter Cucolo & Perlin, *Far from the Turbulent Space*].

19. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law*

Because so few introductory law school classes discuss TJ professors (i.e., the only way that law students think they know who “someone” is), it is unsurprising that “elite journals” rarely publish TJ articles as stand-alone pieces (as solely students make those selections). Contrarily, *other professors* regularly solicit TJ articles for symposia and other special law review issues.²⁰ When professors do make the decisions about article acceptance, TJ is privileged; when students do, it is subordinated.

This is especially frustrating because TJ is so rich as an interdisciplinary topic. Shelley Kierstead begins a recent article about TJ and child protection in this manner: “An intricate weave of public/private, legal/emotional, and interdisciplinary elements make child protection law capable of attracting rich analyses from a therapeutic jurisprudence perspective.”²¹ All scholars writing about all areas of public law should consider these elements. If only it were so.

IV. CONFERENCES

In 2014, I attended two criminal law panels and one mental disability law panel (topics included false confessions, improper eyewitness identification, and firearm possession) at the annual conference of the Association of American Law Schools. Not one of the 15+ speakers uttered the words “therapeutic jurisprudence.”

Heather Ellis Cucolo and I have presented papers for the past four years at the Academy of Criminal Justice Sciences (ACJS), and we presented last year at the American Society of Criminology (ASC).²² Each of our papers had a TJ focus. I believe Professor Tali Gal—an Israeli lawyer/criminologist—was the only other person at ASC to do a TJ presentation;²³ there were no TJ-focused

and Legal Theory, 77 S. CAL. L. REV. 1103, 1109 (2004) (quoting Robert A. Williams Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741, 744-45 (1997)).

20. This past year, my TJ articles on a variety of topics were solicited. See, e.g., Michael L. Perlin, “Abandoned Love”: *The Impact of Wyatt v. Stickney on the Intersection Between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121 (2011) (covering international human rights); Perlin, *Striking*, *supra* note 16 (discussing guardianship law); Perlin, *Wisdom*, *supra* note 16 (discussing relationship between mental illness and criminality); Perlin, *Yonder*, *supra* note 16 (focusing on juvenile punishment law); Michael L. Perlin & Alison J. Lynch, “All His Sexless Patients”: *Persons with Mental Disabilities and the Competence To Have Sex*, 89 WASH. L. REV. 257 (2014); Michael L. Perlin & Alison J. Lynch, “Love Is Just a Four-Letter Word”: *Sexuality, International Human Rights, and Therapeutic Jurisprudence*, 1 CANADIAN J. COMP. & CONTEMP. L. 9 (2015) (discussing sexuality). All of these have significant TJ components and no one suggested that I delete the TJ sections from them.

21. Shelley Kierstead, *Therapeutic Jurisprudence and Child Protection*, 17 BARRY L. REV. 31, 31 (2011).

22. See Cucolo & Perlin, *Far from the Turbulent Space*, *supra* note 18; Cucolo & Perlin, *Preeventing Recidivism*, *supra* note 16; Cucolo & Perlin, *Stories in the Press*, *supra* note 16; Michael L. Perlin et al., *Online Mental Disability Law Education, a Disability Rights Tribunal and the Creation of an Asian Disability Law Database: Their Impact on Research, Training and Teaching of Law, Criminology and Criminal Justice in Asia*, 1 ASIAN J. LEGAL EDUC. 15 (2014).

23. See Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313 (2013).

presentations at ACJS this past February (though, in a veterans courts panel, one of the speakers, seeing me in the audience, said something like, “Michael, you’ll like this,” and proceeded to a TJ analysis of the issues involving veterans’ courts, a topic I have considered from a TJ perspective—I have no idea if this had been in her prepared remarks).²⁴ I was elated when I learned that there was a TJ question on the American Board of Forensic Psychology certification examination this past year, but last month, when I spoke to the American College of Forensic Psychology’s annual meeting, the only audience members who had heard of TJ were co-authors and personal friends of mine.

V. COGNITIVE DISSONANCE

What to make of this? In the past few years, the TJ LISTSERV has flourished, I have made good friends from other nations where TJ is taken seriously, and there are SSRN pieces galore with TJ perspectives. Globally, the outlook is excellent. But, when I put together the three points that I started with—curriculum, conferences, and scholarship—I am a bit more pessimistic. Our core group has expanded and that is wonderful (though, as I noted in a piece I wrote a couple of years ago, Bob Sadoff remains the only forensic *psychiatrist* authentically interested in these issues).²⁵ But, despite any positive spin, I simply do not believe that we have succeeded in reaching out beyond our core, not just to the legal professoriate in general, but to other professors who focus on mental disability law and criminal law and procedure. I am a regular participant on the CRIMPROFs LISTSERV. Since 2009 (as far back as my email goes on this), the *only* posts involving TJ are mine. Simply stated, we need to do more.²⁶

24. See Perlin, *John Brown*, *supra* note 16.

25. See *supra* note 10. Few other psychiatrists publish articles discussing TJ. See Richard Barnum & Thomas Grisso, *Competence To Stand Trial in Juvenile Court in Massachusetts: Issues of Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 321 (1994); Bill Glaser, *Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs*, 4 W. CRIMINOLOGY REV. 143 (2003); Douglas Mossman, *Veterans Affairs Disability Compensation: A Case Study in Countertherapeutic Jurisprudence*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 27 (1996); see also MICHAEL L. PERLIN ET AL., *PSYCHIATRIC ETHICS AND THE RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN INSTITUTIONS AND THE COMMUNITY* (2008) (discussing TJ values in book co-authored with forensic psychiatrist Harold Bursztain, law professor Kris Gledhill, and lawyer-psychologist Eva Szeli).

26. A simple search of “therapeutic jurisprudence” on WESTLAW’s JLR database reveals 2058 hits, though if that is modified to <“therapeutic jurisprudence” & TJ> (to winnow out other articles that simply cite to an article with the words “therapeutic jurisprudence” in the title), that number drops to 211. A fascinating and important research project would be to study those 211 articles, to see how many relate to mental disability law, criminal law, domestic relations law, and other areas of the law and to see how many different authors are represented. (My thanks to my colleague Shelley Kierstead for leading me down this path.)

VI. CONCLUSION

This all raises some important questions.²⁷ Given the challenges of placing TJ scholarship, what does this bode for the raising of important issues of mental disability law? Even though TJ has spread far beyond the borders of disability law,²⁸ so much of the important TJ work—by Winick, Wexler, and others—exists in the area of mental disability law. TJ adherents must create strategies so that the substantive insights and perspectives of TJ-related scholarship become known to the legal academy and practitioners in this area of law and policy. Furthermore—and this, to my knowledge, is a topic rarely discussed—if we look at TJ from a generational/career development perspective, what does the conventional scholarship/teaching mode say to both junior and senior law professors who want to do TJ-related work? I do not think we can close our eyes to the realities of the marketplace.

I hope this essay does not sound, for want of a better phrase, too grumpy. If it *is* grumpy, that grumpiness arises from *frustration*. I have seen how David Wexler has worked his magic around the world; I see the multiple posts on the TJ LISTSERV from Australia, New Zealand, and much of Europe. I am still frustrated, however, that there is not more traction at home. In his thoughtful and mindful piece about TJ and legal scholarship, David Yamada concluded: “A healthier and more sensible approach is to build inclusive, nurturing, and innovative institutions that encourage people to do their best work, while taking appropriate efforts to share that work with our natural constituencies.”²⁹ I agree 100% with David. But I still do not know how we do that.

Every Grain of Sand, from which I derived my title, is, according to a major encyclopedic work on Dylan, “a portrait of isolation, desolation and failure,” but also one of his “most moving and impassioned testaments.”³⁰ Another critic, Paul Williams, concludes it “is about the moment(s) in which we accept our pain and vulnerability.”³¹ I think we (in TJ world) have been isolated, and at times, I feel pretty desolate. And always vulnerable. But never do I feel like a failure in having taken this path. I prepared these remarks in the hopes that others would have some ideas as to how we can become less isolated and desolate. I hope that these ideas will now emerge.

27. My thanks to David Yamada for focusing on these in a recent email to me.

28. For a discussion on the impact of TJ on domestic relations law, employment law, gay rights law, and tort law, see Michael L. Perlin, “*Things Have Changed:*” *Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 537 (2002-2003); Perlin, *Yonder*, *supra* note 16, at 332.

29. David C. Yamada, *Therapeutic Jurisprudence and the Practice of Legal Scholarship*, 41 U. MEM. L. REV. 121, 155 (2010)

30. OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 181 (2004).

31. PAUL WILLIAMS, BOB DYLAN: PERFORMING ARTIST: THE MIDDLE YEARS: 1974-1986, at 205 (1992).