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In These Times of Compassion When Conformity's in Fashion: How Therapeutic Jurisprudence Can Root out Bias, Limit Polarization and Support Vulnerable Persons in the Legal Process

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"IN THESE TIMES OF COMPASSION WHEN CONFORMITY'S IN FASHION": HOW THERAPEUTIC JURISPRUDENCE CAN ROOT OUT BIAS, LIMIT POLARIZATION, AND SUPPORT VULNERABLE PERSONS IN THE LEGAL PROCESS

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This Article considers the extent to which caselaw has—either explicitly or implicitly—incorporated the precepts of therapeutic jurisprudence ("TJ"), a school of legal thought that focuses on the law's influence on emotional life and psychological well-being, and that asks us to assess the actual impact of the law on people's lives. Two of the core tenets of TJ in practice are commitments to dignity and to compassion. I conclude ultimately that with these principles as touchstones, TJ can be an effective tool—perhaps the most effective tool—in rooting out bias, limiting polarization, and supporting vulnerable persons in the legal process. But this cannot and will not happen until more judges and practicing attorneys understand the potentially reformative (and transformative) role of TJ. My review of some relevant caselaw (both domestic and international)—a review that, to the best of my knowledge, has never previously been undertaken—suggests that an incorporation of TJ principles is by no means a sure thing.

First, I briefly consider the creation and dynamic growth of therapeutic jurisprudence over the past 30 years, looking specifically at the interplay between TJ and values of dignity and compassion. Then, I assess the role of TJ in dealing with issues most central to this Article: bias, polarization, and vulnerability. I next review court decisions—both domestic and from other nations—in which TJ is explicitly mentioned (and in some cases, relied upon). Following this, I look at some other relevant caselaw in which (1) TJ implicitly helped bring about a solution that minimized bias or polarization, or offered support to vulnerable persons or classes; (2) the failure to employ TJ led to decisions that

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reinforced bias and ignored the needs of those who are vulnerable; or (3) a determination of one's perspective is needed to determine if one sees the case as "pro-TJ" or "anti-TJ." I then, in conclusion, offer some modest suggestions as to how TJ can best be employed to ensure decisions that are, optimally, bias free via approaches that improve therapeutic functioning and do not sacrifice civil liberties.

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I. INTRODUCTION

I recently wrote an article with two practicing forensic psychologists about the practical and ethical implications of what we referred to as "trauma-informed forensic mental health assessment."[1] As part of our analysis of the implications of therapeutic jurisprudence (sometimes, "TJ") principles for such assessments,[2] we said this: "TJ seeks to ferret out biases, and to deal with the vulnerabilities of so much of the population in question[, and] is a means of potentially avoiding the polari-

1. Julie Goldenson, Stanley L. Brodsky & Michael L. Perlin, *Trauma-Informed Forensic Mental Health Assessment: Practical Implications, Ethical Tensions, and Alignment with Therapeutic Jurisprudence Principles*, 28 PSYCH. PUB. POL'Y & L. 226, 226 (2022), https://doi.org/10.1037/law0000339.

2. *See infra* Part II.

zation that is often the hallmark of traditional litigation."[3] Although there is TJ literature about each of these factors,[4] no article has yet considered the TJ implications of dealing with all of them. This is my aim here.

My thesis is relatively simple and straight-forward. Two of the core tenets of TJ in practice are adherences to *dignity* and to *compassion.* I believe that with these principles as touchstones, TJ can be an effective tool—perhaps the *most* effective tool—in rooting out bias, limiting polarization, and supporting vulnerable persons in the legal process. I believe that these ends affirmatively "inject[ ] therapeutic concerns into legal and policy reasoning and analysis,"[5] and flow directly from the earliest writings in this area by the two founders of the TJ school[6]—David Wexler[7] and Bruce Winick.[8] But as I discuss subsequently, this cannot and will not happen until more judges understand the potentially reformative (and transformative) role that TJ may have in the entire legal process. My review of some relevant caselaw—a review that, to the best of my knowledge, has never previously been undertaken in this manner—suggests that this is by no means a sure thing.

This Article will proceed in this manner. First, I will briefly consider the "creation and dynamic growth"[9] of TJ over the past 30 years, looking specifically at the interplay between TJ and the values of dignity and compassion.[10] Then, I will assess the role of TJ in dealing with the issues most central to this Article: bias, polarization, and vulnerability.[11] I next review court decisions—both domestic and from other nations—in which TJ is explicitly mentioned (and in some cases,

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3. Goldenson et al., *supra* note 1, at 227.

4. *See infra* Part II.

5. David C. Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, 75 U. MIA. L. REV. 660, 694 (2021) (discussing Nigel Stobbs, *Therapeutic Jurisprudence as Theoretical and Applied Research*, *in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE 29, 44 (Nigel Stobbs et al. eds., 2019)).

6. *See, e.g.*, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990) [hereinafter THERAPEUTIC AGENT]; LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter THERAPEUTIC KEY].

7. *See, e.g.*, 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), https://doi.org/10.1016/j.ijlp.2018.07.001.

8. *See, e.g.*, David B. Wexler, *Mental Health Law and the Seeds of Therapeutic Jurisprudence*, *in* THE ROOTS OF MODERN PSYCHOLOGY AND LAW: A NARRATIVE HISTORY 78, 91–92 (Thomas Grisso & Stanley L. Brodsky eds., 2018) (discussing Wexler's close collaborator, Bruce Winick, and Winick's contributions to TJ).

9. Alison J. Lynch & Michael L. Perlin, *"I See What Is Right and Approve, but I Do What Is Wrong": Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging*, 25 LEWIS & CLARK L. REV. 453, 481–82 (2021) (citing nearly three decades of TJ scholarship).

10. *See infra* Part II.

11. *See infra* Part III.

relied upon).[12] Following this, I will look at some relevant caselaw (both domestic and from other nations) in which (1) TJ—either explicitly or implicitly—helped bring about a solution that minimized bias or polarization, or offered support to vulnerable persons or classes;[13] (2) the failure to employ TJ led to decisions that reinforced bias and ignored the needs of those who are vulnerable;[14] or (3) a determination of one's perspective is needed to determine if one sees the case as "pro-TJ" or "anti-TJ."[15] I then, in conclusion, offer some modest suggestions.[16]

My title comes from a truly obscure Bob Dylan song, "Foot of Pride,"[17] on which I have drawn once before.[18] The song is significantly under-analyzed in the Dylan literature, but critical references do discuss how it reflects "the decline and fall of human decency"[19] as well as "today's iniquities."[20] This is the only song in which Dylan mentions *compassion*, and he does so in the same line in which he discusses the fashionability of conformity.[21] Therapeutic jurisprudence has never been the most *fashionable* of legal schools of thought (as it is certainly nonconformist),[22] but there is no question that it describes "a movement towards dealing with legal problems in a more restorative and healing fashion."[23]

12. *See infra* Part IV.
13. *See infra* Part V.
14. *See infra* Part VI.
15. *See infra* Part VII.
16. *See infra* Part VIII.
17. *See* BOB DYLAN, *Foot of Pride*, *on* THE BOOTLEG SERIES, VOLUMES 1–3: RARE AND UNRELEASED 1961–1991 (Columbia Records 1991) (releasing "Foot of Pride" on this album in 1991 after it was recorded and considered for a previous album in 1983).
18. *See* Michael L. Perlin, *"Ain't No Goin' Back": Teaching Mental Disability Law Courses Online*, 51 N.Y.L. SCH. L. REV. 991, 1000–01 (2006/07).
19. JIM BEVIGLIA, COUNTING DOWN BOB DYLAN: HIS 100 FINEST SONGS 118 (2013).
20. MICHAEL GRAY, SONG & DANCE MAN III: THE ART OF BOB DYLAN 472 (2000). Elsewhere, Gray speculates that this may be Dylan's "most deranged song." *Id.* at 480.
21. *See Foot of Pride*, BOB DYLAN, https://www.bobdylan.com/songs/foot-pride/ [https://perma.cc/237L-5E63] (song lyrics).
22. *See* Yamada, *supra* note 5, at 665.
23. Thomas F. Asbury, *Spiritual Outputs Approach to Rehabilitation: Alternative Sentencing Theory*, 3 FLA. COASTAL L.J. 41, 42 n.12 (2001).

II. THERAPEUTIC JURISPRUDENCE, IN BRIEF[24]

Therapeutic jurisprudence focuses on the law's influence on emotional life and psychological well-being,[25] and "asks us to look at law as it actually impacts people's lives."[26] It requires that we look at the "real world" implications of the way the legal system regulates individuals' behavior—most importantly, the way it regulates the lives and behaviors of those who are marginalized.[27]

TJ's aim is to determine whether legal rules, procedures, and lawyers' roles "can or should be reshaped . . . to enhance their therapeutic potential, *while not subordinating due process principles*."[28] There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] imping[e] upon justice concerns."[29] To be clear, "an inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[30]

TJ, rather, seeks "to use the law to empower individuals, enhance rights, and promote well-being."[31] It is "a sea-change in ethical think-

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24. This section is generally adapted from Part V of Michael L. Perlin et al., *"The Distant Ships of Liberty": Why Criminology Needs to Take Seriously International Human Rights Laws That Apply to Persons with Disabilities*, 31 S. CAL. REV. L. & SOC. JUST. 373, 394–96 (2022). It also distills the work of the author over the past thirty years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

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

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

27. *See, e.g.*, Michael L. Perlin & Heather Ellis Cucolo, *"Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER RACE & JUST. 431 (2017).

28. *See, e.g.*, Michael L. Perlin, *"And My Best Friend, My Doctor/Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005) (emphasis added); Heather Ellis 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*, 18 U. PA. J.L. & SOC. CHANGE 125, 165 (2015).

29. *See* David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993), https://doi.org/10.1002/bsl.2370110103; *see also* David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCH. 179 (1996), https://doi.org/10.1016/S0962-1849(96)80010-2.

30. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); 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) (emphasis omitted).

31. *See, e.g.*, 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, 278 (2014).

ing about the role of law, . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism."[32] It supports an ethic of care,[33] and it is inherently "collaborative and interdisciplinary."[34]

It is clear that TJ—in theory and practice—far transcends the boundaries of the legal system.[35] As the criminologists Kimberly A.

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32. Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); *see also* Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 341 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006).

On how to practice law from a TJ perspective, see articles and essays collected in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION, *supra* note 25.

On "relationship-centered lawyering," consider how Professor Susan Brooks argues that there are "three broad areas of competency [that] every effective lawyer needs, regardless of his or her type of practice: (a) understanding theories about the person-in-context, (b) promoting procedural justice, and (c) appreciating interpersonal, cultural, and emotional issues." Susan L. Brooks, *Teaching Relational Lawyering*, 19 RICH. J.L. & PUB. INT. 401, 402 (2016) (emphasis omitted), *discussed and quoted in* Mehgan Gallagher & Michael L. Perlin, *"The Pain I Rise Above": How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities*, 29 FLA. J. INT'L L. 271, 299 n.181 (2018).

33. *See, e.g.*, Winick & Wexler, *supra* note 32, at 605–07; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006); *see also* BARBARA A. BABB & JUDITH D. MORAN, CARING FOR FAMILIES IN COURT: AN ESSENTIAL APPROACH TO FAMILY JUSTICE 46 (2019) (proposing reconstructing family courts as "care centers" that blend existing theories surrounding court reform in family law with an ethic of care and narrative practice). The use of the phrase "ethic of care" dates to CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

34. Nigel Stobbs et al., *Therapeutic Jurisprudence—A Strong Community and Maturing Discipline*, in THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE, *supra* note 5, at 15, 18.

35. Although virtually all the examples I give in this Article are from cases involving the criminal law, mental disability law, or both, that should not lead the reader to assume that these are the only areas of the law to which therapeutic jurisprudence applies. For a full list of TJ scholarship involving dozens of other areas, see 1 MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2-6, at 2-45 to 2-84.1 (3d ed. 2016) (Autumn 2022 update). One of the most important of these is the area of family law. *See, e.g.*, Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998); Lenore E. A. Walker & Brandi N. Diaz, *Nonjudicial Influence on Family Violence Court Cases*, *in* JUSTICE OUTSOURCED: THE THERAPEUTIC JURISPRUDENCE IMPLICATIONS OF JUDICIAL DECISION-MAKING BY NONJUDICIAL OFFICERS 227 (Michael L. Perlin & Kelly Frailing eds., 2022); *see also* Dana E. Prescott & Diane A. Tennies, *Bias Is a Reciprocal Relationship: Forensic Mental Health Professionals and Lawyers in the Family Court Bottle*, 31 J. AM. ACAD. MATRIM. LAWS. 427 (2019). In an e-mail to the

Kaiser and Kristy Holtfreter have stressed, a primary goal of TJ "is to apply and incorporate insights and findings from the psychology, criminology, and social work literature to the legal system."[36] TJ co-creator David Wexler has explained:

> Developments in areas of psychology—such as the elements of procedural justice, such as the reinforcement of desistance from crime, such as the techniques of relapse prevention planning, such as the principles of health psychology used to promote compliance with medical (or judicial) orders—can be brought into the legal realm and used as the new wine of TJ.[37]

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author, Professor Walker has enumerated multiple examples of staggeringly anti-TJ behavior on the part of trial judges before whom she appeared as an expert witness in custody and family violence cases. *See* E-mail from Lenore E. Walker, Professor Emerita, Nova Southeastern Univ. Coll. of Psych., to author (Aug. 21, 2021) (on file with author).

36. Kimberly A. Kaiser & Kristy Holtfreter, *An Integrated Theory of Specialized Court Programs: Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation*, 43 CRIM. JUST. & BEHAV. 45, 48 (2016), https://doi.org/10.1177/0093854815609642.

37. David B. Wexler, *Guiding Court Conversation Along Pathways Conductive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence*, 1 INT'L J. THERAPEUTIC JURIS. 367, 369 (2016) (quoting David B. Wexler, *Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law*, *in* THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES, at v, ix (Warren Brookbanks ed., 2015)) [hereinafter Wexler, *Guiding Court Conversation*]. Wexler explained further:

> [W]hile [procedural justice] is of great importance, there are other practices and techniques—captured by TJ— that are crucially important for judges to employ, and thus TJ should surely be integrated in court proceedings (specialized or otherwise). This is a dynamic area and requires ongoing attention to developments in psychology, criminology, and social work and to their integration into the legal system.

Id. at 371–72; *see also* David B. Wexler, Essay, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence*, 44 CT. REV. 78 (2008); Michael L. Perlin, *"I Hope the Final Judgment's Fair": Alternative Jurisprudences, Legal Decision-Making, and Justice*, *in* THE CAMBRIDGE HANDBOOK OF PSYCHOLOGY OF LEGAL DECISION-MAKING (Monica Miller et al. eds., forthcoming 2023). On procedural justice in general, see E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988). On procedural justice in the context of persons with mental disabilities, concluding that individuals with mental disabilities are affected in the same way by such process values as all others, see Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 443 (1992), *discussed in this context in* 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, 955 (2018) [hereinafter Perlin, *Who Will Judge the Many?*])

On Wexler's views on how TJ "has gone beyond the typical boundaries of procedural justice, by its embrace of psychological insights," see Michael L. Perlin, *"Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence*, 27 N.Z. Us. L. REV. 1135, 1158 (2017) [hereinafter Perlin, *Have You Seen Dignity?*] (citing Wexler, *Guiding Court Conversation*, *supra*, at 370).

My colleague Dr. Kenneth Weiss has astutely pointed out to me that Professor Wexler's statement quoted here implies a vertical integration of criminological principles: "crime prevention, individual case resolution, management of the individual dy-

For the purposes of this Article, I will focus on two of TJ's central principles: compassion and dignity, beginning first with an examination of TJ's commitment to dignity.[38] Here, Professor Amy Ronner identifies the "prime ingredients of a therapeutic experience" as "three Vs": voice, validation, and voluntariness.[39] 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 litigant[']s 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 pronunciation 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.[40]

These "three Vs" perfectly reflect the relationship between TJ and dignity, to which TJ is committed.[41] Writing about dignity in the important context of civil commitment,[42] Professors Jonathan Simon and Stephen Rosenbaum embrace therapeutic jurisprudence as a modality of analysis, and focus specifically, per Professor Ronner's observa-

namics of deviance, and good will over oppression." Comments from Kenneth Weiss to author (Nov. 6, 2021) (on file with author). Adoption of these principles could help us escape the retributive mode in criminal law. *See id.*

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

39. *See, e.g.*, Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of "voice," see Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 588 (2008).

40. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence,* Miranda *and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002) (footnotes omitted). Wexler has raised the provocative question of "voice as to what?" in noting that TJ goes beyond procedural justice as it draws on insights from other disciplines (psychology, social work, criminology) in the context of the legal process. *See* PowerPoint Presentation, David B. Wexler, Law Reform the TJ Way: Integrating the Therapeutic Design and Application of the Law (Apr. 16, 2020) (presented at the Univ. of Plymouth) (on file with the author).

41. Michael L. Perlin & Naomi M. Weinstein, *"Friend to the Martyr, a Friend to the Woman of Shame": Thinking About the Law, Shame and Humiliation*, 24 S. CAL. REV. L. & SOC. JUST. 1, 11 (2014). I characterize dignity as the "core of the entire therapeutic jurisprudence enterprise." Michael L. Perlin, *Dignity and Therapeutic Jurisprudence: How We Can Best End Shame and Humiliation*, *in* HUMAN DIGNITY: PRACTICES, DISCOURSES, AND TRANSFORMATIONS: ESSAYS ON DIGNITY STUDIES IN HONOR OF EVELIN G. LINDNER 113, 118 (Chipamong Chowdhury et al. eds., 2020).

42. On TJ and the civil commitment process in general, see PERLIN & CUCOLO, *supra* note 35, § 2-6.1, at 2-84.1 to 2-87.

tions, on the 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."[43] As Professor Carol Zeiner notes, "[t]herapeutic jurisprudence highlights the worth and dignity of the individual human being."[44]

Importantly, the notion of individual dignity is "at the heart of a jurisprudential and moral outlook that resulted in the reform, not only of criminal procedure, but of the various institutions more or less directly linked with the criminal justice system, including juvenile courts, prisons, and mental institutions."[45] Again, dignity is at the "core" of TJ,[46] meaning 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."[47] In the context of the issues of bias and vulnerability, "if we embrace the dignity-enhancing principles of TJ[,] . . . we enhance the likelihood that shame and humiliation will diminish and that greater dignity will be provided."[48]

I have written elsewhere that TJ "ach[es] with compassion."[49] Justice with compassion is another of the central premises of TJ,[50] and a

43. Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIA. L. REV. 1, 51 (2015). *See generally* Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145 (1997).

44. Carol L. Zeiner, *Should Therapeutic Jurisprudence Be Used to Analyze Impacts of Legal Processes on Government?*, 28 ST. THOMAS L. REV. 1, 6 (2015); *see also* Alison J. Lynch, Michael L. Perlin & Heather Cucolo, *"My Bewildering Brain Toils in Vain": Traumatic Brain Injury, The Criminal Trial Process, and the Case of Lisa Montgomery*, 74 RUTGERS U. L. REV. 215, 218–19 (2021) ("TJ doctrine emphasizes giving an individual client dignity, voice, validation and voluntariness of action and decision.").

45. Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1569 n.463 (2004).

46. Perlin, *Have You Seen Dignity?*, *supra* note 37, at 1137.

47. Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009), *quoted in* Michael L. Perlin & Heather Ellis Cucolo, *"Something's Happening Here/But You Don't Know What It Is": How Jurors (Mis)Construe Autism in the Criminal Trial Process*, 82 U. PITT. L. REV. 585, 617–18 (2021).

48. Michael L. Perlin & Alison J. Lynch, *"She's Nobody's Child/The Law Can't Touch Her at All": Seeking to Bring Dignity to Legal Proceedings Involving Juveniles*, 56 FAM. CT. REV. 79, 88–89 (2018), https://doi.org/10.1111/fcre.12324 (footnote omitted).

49. Perlin, *Who Will Judge the Many?*, *supra* note 37, at 962 (internal quotation marks omitted) (quoting OLNER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 521 (2004)).

50. Lorie Gerkey, *Legal Beagles, a Silent Minority: Therapeutic Effects of Facility Dogs in the Courtroom*, 1 INT'L J. THERAPEUTIC JURIS. 405, 415 (2016). Of course, the value and importance of compassion is one of the animators of Jewish-Christian ethics. For one example, see the *avinu malkeinu* prayer, asking God to have compassion on us. *Text of Avinu Malkeinu*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/text-of-avinu-malkeinu/ [https://perma.cc/W7QD-89LC].

judge who demonstrates compassion best "represent[s] the goals of therapeutic jurisprudence."[51] Professors Anthony Hopkins and Lorana Bartels make this explicit:

> The argument we make here is that TJ is founded upon the psychology of compassion, understood as a sensitivity to and concern for the suffering of others and a commitment to alleviating and preventing it. The "other" in the context of TJ is any person upon whom the law acts or any actor within the legal process.[52]

Indeed, in David Wexler's two-pronged framework for engaging in TJ inquiries—modalities he characterizes as Therapeutic Design of the Law ("Therapeutic Design" or "TDL") and Therapeutic Application of the Law ("Therapeutic Application" or "TAL")[53]—compassion is front and center. David Yamada's analysis of Wexler's framework emphasizes this point: "Therapeutic Design suggests that we should also regard well-being, dignity, compassion, and psychological health as desirable outcomes in law and legal procedures."[54]

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51. LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 287–88 (2001); *see also* Jamey H. Hueston, *The Compassionate Court: Reforming the Justice System Inside and Outside*, 57 CT. REV. 108 (2021).

52. Anthony Hopkins & Lorana Bartels, *Paying Attention to the Person: Compassion, Equality, and Therapeutic Jurisprudence*, *in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE, *supra* note 5, at 107, *quoted verbatim in* Yamada, *supra* note 5, at 682. Nigel Stobbs, also in the context of TJ, writes of compassion:

> Compassion is a virtue, value or disposition to act which can be held by individuals or groups. . . . Compassion is generally defined as having two elements. First is empathy—the capacity to sense that another is suffering, and to know what it might feel like to be subjected to that kind of suffering. . . . The second element of compassion is a felt need to try and alleviate that sensed suffering of others.

Nigel Stobbs, *Compassion, the Vulnerable and COVID-19*, 45 ALT. L.J. 81, 81 (2020), https://doi.org/10.1177/1037969X20927806.

53. *See* David B. Wexler, *The DNA of Therapeutic Jurisprudence*, *in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE, *supra* note 5, at 3, 6–8. On how TJ "empowers practitioners to design emotionally intelligent and remedial strategies to either minimise harmful consequences or enhance restorative legal goals and outcomes," see Anna Kawalek, *A Tool for Measuring Therapeutic Jurisprudence Values During Empirical Research*, 71 INT'L J.L. & PSYCHIATRY, no. 101581, 2020, https://doi.org/10.1016/j.ijlp.2020.101581. Professor Kawalek also considers the philosophical underpinnings of Professor Wexler's TDL and TAL insights in another recent manuscript. *See generally* Anna Kawałek, Strengthening the Theoretical Commitments Underpinning Therapeutic Jurisprudence Research: Ontology and Epistemology 29–41 (unpublished manuscript) (on file with author) (explaining the epistemology of both TDL and TAL).

54. David C. Yamada, *Teaching Therapeutic Jurisprudence*, 50 U. BALT. L. REV. 425, 431 (2021). There is certainly more of a move toward incorporating compassion values in the justice process in general. *See, e.g.*, Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO ST. J. CRIM. L. 575, 600–02 (2021) (citing recent (and growing) examples of "presumptive compassion" in efforts at criminal justice reform); *see also* Angela P. Harris, *Toward Lawyering as Peacemaking: A Seminar on Mindfulness, Morality, and Professional Identity*, 19 RICH. J.L. & PUB. INT. 377, 381 (2016) ("The restorative justice movement—and

As part of this consideration, it is also vital to consider the relationship between TJ and counsel. As Judge Juan Ramirez and Professor Amy Ronner flatly state, "[t]he right to counsel is . . . the core of therapeutic jurisprudence."[55] More than 20 years ago, I wrote that "any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to [e]nsure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective."[56] I have returned to this relationship—TJ, death penalty cases, and adequacy of counsel—on multiple occasions since,[57] but I believe that in *any* consideration of TJ and either criminal law or mental disability law, the adequacy of counsel must be placed under a microscope.[58]

'new lawyer' practices such as holistic lawyering, collaborative lawyering and therapeutic justice—all seek to build compassion directly into the legal process."). On the role of compassion in the "parallel" school of "integrative law," see Carol L. Zeiner, *Getting Deals Done: Enhancing Negotiation Theory and Practice Through a Therapeutic Jurisprudence/Comprehensive Law Mindset*, 21 HARV. NEGOT. L. REV. 279, 282–83 (2016).

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

56. 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) (criticizing interpretations of Strickland v. Washington, 466 U.S. 668, 687–88 (1984), which set the standard for effectiveness of counsel and held that a defendant is entitled to a "reasonably competent attorney" whose advice is "within the range of competence of attorneys in criminal cases").

57. *See, e.g.*, Michael L. Perlin et al., *"A World of Steel-Eyed Death": An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J.L. REFORM 261 (2019) [hereinafter Perlin et al., *Steel-Eyed Death*]; Michael L. Perlin et al., *"Man Is Opposed to Fair Play": An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously* Atkins v. Virginia, 11 WAKE FOREST J.L. & POL'Y 451 (2021) [hereinafter Perlin et al., *Fair Play*]; Michael L. Perlin & Talia Roitberg Harmon, *"Insanity Is Smashing up Against My Soul": An Empirical Assessment of Competency to Be Executed Cases After* Panetti v. Quarterman, 60 U. LOUISVILLE L. REV. 557 (2022); Michael L. Perlin et al., *"The World of Illusion Is at My Door": Why* Panetti v. Quarterman *Is a Legal Mirage*, 59 CRIM. L. BULL. (forthcoming 2023), https://doi.org/10.2139/ssrn.4172316 [hereinafter Perlin et al., *World of Illusion*].

58. *See generally* MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES, 123–38 (2013) (discussing the significance of adequate counsel in death-penalty cases, especially in those cases involving defendants with mental disabilities).

It should be noted that in its last term, the Supreme Court further limited the scope of inquiries that could be made under *Strickland v. Washington* in cases involving federal habeas corpus filings following state court convictions; it ruled, in *Shinn v. Ramirez,* that a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on the ineffective assistance of state postconviction counsel. *See* Shinn v. Ramirez, 142 S. Ct. 1718, 1739–40 (2022).

Inevitably, this will make *Strickland* relief even less likely in cases involving defendants with mental disabilities, and will "require advocates to turn to the state court process (and the systems of assigning counsel in state court jurisdictions) to a greater extent than before." Perlin et al., *World of Illusion*, *supra* note 57, manuscript at 53.

In short, any consideration of TJ must take into account the questions of whether the legal practice/process being analyzed enhances dignity and reflects compassion, and whether counsel assigned to persons at risk is, truly, adequate.

III. On Bias, Vulnerability, and Polarization

A. *Bias*

There are two groupings of bias that we need to consider: biases toward groups (usually marginalized groups, often referred to as "the other") and cognitive biases,[59] which reflect the misuse of heuristic reasoning in the law and in society. TJ is the best tool that I know of to deal with both of these.

1. Group Bias

Generally, "[b]ias refers to the tendency to react differently to stimuli based on particular characteristics of the stimuli."[60] For example, "if one tends to react more positively to White persons than Black persons, then one is *biased* in favor of Whites and against Blacks."[61] Contrarily, "'[i]n-group bias . . . leads people to exhibit favoritism for members of their own group, such that the same performance elicits a more favorable evaluation; the same interactions elicit a greater reported feeling of camaraderie; and most relevantly, the same need elicits greater allocation of resources."[62]

In prior articles, I have written frequently about what I refer to as "sanism," which I consistently define as "an irrational prejudice" toward persons with mental illness, which is "of the same quality and character as other irrational prejudices," often "reflected[ ] in prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry."[63] However, lack of attention to this condition has resulted in

59. Shawn J. Bayern, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law*, 97 Calif. L. Rev. 943, 948 (2009) ("A towering body of psychological research highlights the many cognitive biases that humans experience—everything from loss aversion and confirmation biases to implicit racial prejudices." (footnotes omitted)).

60. Gregory Mitchell, *An Implicit Bias Primer*, 25 Va. J. Soc. Pol'y & L. 27, 30 (2018). On group biases, see Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. Rev. 333 (2008) (examining whether discrimination litigation increases employer-defendants' negative views toward protected classes).

61. Mitchell, *supra* note 60, at 30.

62. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 Ga. L. Rev. 499, 518 (2014) (footnote omitted) (discussing, *inter alia*, the findings reported in Marilynn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive–Motivational Analysis*, 86 Psych. Bull. 307, 307–08 (1979), https://doi.org/10.1037/0033-2909.86.2.307).

63. Perlin, *supra* note 56, at 225; *see also* Michael L. Perlin, *On "Sanism,"* 46 SMU L. Rev. 373, 374 (1992); Michael L. Perlin, *"Everybody Is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized*

the reality that individuals with mental disabilities "are frequently marginalized to an even greater extent than are others who fit within the *Carolene Products* definition of 'discrete and insular minorities.'"[64] Further:

> Sanism is as insidious as other "isms" and is, in some ways, more troubling, because it is (a) largely invisible, (b) largely socially acceptable, and (c) frequently practiced (consciously and unconsciously) by individuals who regularly take "liberal" or "progressive" positions decrying similar biases and prejudices that involve sex, race, ethnicity, or sexual orientation. It is a form of bigotry that "responsible people can express in public." Like other "isms," sanism is based largely upon stereotype, myth, superstition and deindividualization. To sustain and perpetuate it, we use prereflective "ordinary common sense" and other cognitive-simplifying devices such as heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.[65]

As I noted above, I believe TJ is the best tool available to us to "ferret out" sanist biases.[66] This applies to the legal system in general, to jury behaviors, to the attitudes of lawyers, to judicial decision-mak-

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Because of Mental Disability in Forensic Hospitals and in Asia, 83 WASH. L. REV. 481, 486 (2008); Michael L. Perlin & Naomi M. Weinstein, *Said I, 'But You Have No Choice': Why a Lawyer Must Ethically Honor a Client's Decision About Mental Health Treatment Even If It Is Not What S/he Would Have Chosen*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 73, 82 (2016) ("Decision-making in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decision-making." (footnote omitted)). On how, from a TJ perspective, sanism is "a form of prejudice or bias akin to racism or sexism," see Yamada, *supra* note 5, at 671–72.

64. MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 23 (2000) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)). This footnote from *Carolene Products* "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." Michael L. Perlin, *"Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947, 948 (1997).

65. Michael L. Perlin, *"What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top, You're on the Bottom": Are the Americans with Disabilities Act (and* Olmstead v. L.C.*) Anything More than "Idiot Wind?,"* 35 U. MICH. J.L. REFORM 235, 236 (2001–2002) (quoting PERLIN, *supra* note 64, at 22). For a discussion of the "meretricious allure of a false 'ordinary common sense' (OCS) that has long pervaded our jurisprudence in this area—a 'self-referential and non-reflective' way of constructing the world '("I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is")'," see Perlin & Cucolo, *supra* note 27, at 453 (quoting, in part, 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, 38 (2012)). Heuristics are cognitive-simplifying devices that "frequently lead to distorted and systematically erroneous decisions through ignoring or misusing rationally useful information." Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 57 n.115 (1992), https://doi.org/10.1007/BF02351048.

66. Goldenson et al., *supra* note 1, at 227.

ing, and to the behavior of all participants in the judicial system. TJ "targets sanism, sets up a legal system where the therapeutic benefit of legal solutions is not just discussed but actually made to be a targeted outcome, and teaches attorneys and judges how to appropriately interact with individuals with mental disabilities in all types of representation."[67] Importantly, from this perspective, "TJ enhances the likelihood that counsel will provide authentically effective representation for clients with mental disabilities."[68] In an article that I wrote with a colleague about the intersection between mental disability law and international human rights law, I note that "the application of TJ, by promoting dignity and ensuring therapeutic effects in the implementation of the [UN Convention on the Rights of Persons with Disabilities], and by mandating 'voice,' enhances the likelihood that sanism will be eradicated, and that the 'silenced' voices will finally, if tardily, be heard."[69]

I believe also that the pervasiveness of sanism makes it obligatory for lawyers, using TJ principles, to educate jurors about both sanism and why sanism may be driving their decision-making. Writing with a colleague about juror bias in cases involving sexually violent predators, I underscore "the need for lawyers to understand the potential extent of jury bias (making the ideal of a fair trial even more difficult to accomplish)—thus demanding a therapeutic jurisprudence approach to representation and to litigation."[70]

There is no question that lawyers are susceptible to sanism[71] and that "lawyers who represent persons with mental disabilities reflect 'sanist practices.'"[72] Elsewhere, a colleague of mine and I stress that

67. Michael L. Perlin et al., *"Some Things Are Too Hot to Touch": Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses*, 35 TOURO L. REV. 405, 432 (2019). Such biases also appear regularly in non-judicial decision-making in matters involving probation, modes of capital punishment, correctional disciplinary proceedings, administrative placement of migrant children, and more. *See generally* JUSTICE OUTSOURCED, *supra* note 35.

68. Michael L. Perlin & Alison J. Lynch, *"Mr. Bad Example": Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root Out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYO. L. REV. 299, 322 (2016).

69. Michael L. Perlin & Naomi M. Weinstein, *"There's Voices in the Night Trying to Be Heard": The Potential Impact of the Convention on the Rights of Persons with Disabilities on Domestic Mental Disability Law*, 84 BROOK. L. REV. 873, 904 (2019).

70. Cucolo & Perlin, *supra* note 28, at 167; *see also* Michael L. Perlin, *"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 AM. CRIM. L. REV. 477, 517 (2017) [hereinafter Perlin, *God Said*]; 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*, 33 INT'L J.L. & PSYCHIATRY 475, 477–78 (2010), https://doi.org/10.1016/j.ijlp.2010.09.017.

71. *See* 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, 604–05 (2008).

72. *Id.* at 604 (citing Perlin, *supra* note 28, at 742).

"TJ provides a ready-made toolkit for lawyers representing this population, as it allows and encourages them to focus on the critical concepts of voluntariness, voice, and validation, and is buttressed by what has been referred to in other contexts as the 'ethic of care."[73] Lawyers must understand how therapeutic jurisprudence is a means—perhaps the best and only means—of rebutting the effects of sanism in criminal trials.[74]

In an earlier work, a co-author and I discuss the sanist attitudes of judges and jurors:

> In attitudes that strikingly mirror attitudes of jurors in assessing mental disability in death penalty cases, judges conceptualize mental disability as an "all or nothing" absolute construct, demand a showing of mental disability that approximates the amount needed for an exculpatory insanity defense, continue to not "get" distinctions between mental illness, insanity, and incompetency, repeat sanist myths about mentally disabled criminal defendants, and engage in pretextual decision-making.[75]

One potential, partial remedy for the reduction of sanist biases may be the establishment of mental health courts,[76] staffed by a "sensitive" judiciary. Judges in such courts would, presumably, be trained in the

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73. Perlin & Lynch, *supra* note 68, at 300.

74. *See generally* Michael L. Perlin, *"Infinity Goes Up on Trial": Sanism, Pretextuality, and the Representation of Defendants with Mental Disabilities*, 16 QUT L. REV. 106 (2016), https://doi.org/10.5204/qutlr.v16i3.689.

75. Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 452 (1995) (footnotes omitted). I elsewhere define pretextuality—a force that, along with sanism, "utterly dominate[s] and drive[s] this area of the law," *see* 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, 3 (1999) [hereinafter Perlin, *Half-Wracked*], as the way that that "courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decisionmaking, specifically where witnesses, especially *expert* witnesses, show a 'high propensity to purposely distort their testimony in order to achieve desired ends.'" *Id.* at 5 (citing 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) [hereinafter Perlin, *Morality and Pretextuality*]). I have recounted "the most chilling" example of such judicial hostility I had ever heard from a sitting judge:

> Sometime after the trial court's decision in *Rennie* [*v. Klein*, a case finding a right to refuse treatment for involuntarily committed psychiatric patients in New Jersey], I had occasion to speak to a state court trial judge about the *Rennie* case. He asked me, "Michael, do you know what I would have done had you brought *Rennie* before me?" (The *Rennie* case was litigated by counsel in the N.J. Division of Mental Health Advocacy; I was director of the Division at that time). I replied, "No," and he then answered, "I'd've taken the son-of-a-bitch behind the courthouse and had him shot."

Perlin, *supra* note 28, at 752 (footnote omitted) (quoting Perlin, *Half-Wracked*, *supra*, at 16 n.70).

76. On mental health courts in general, see Perlin, *supra* note 28. *See also* 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). On TJ-inspired problem-

principles of TJ.[77] As Professor Bernard Perlmutter underscores in a TJ-focused article, "judges in problem solving courts [can] offer valuable prescriptive tools to spark motivation in our client to make the right choice."[78] A community court judge has thus noted that "the problem-solving court model has 'broadened the judicial horizon' and 'given judges more choices than [they] have ever had.'"[79]

A study of Judge Ginger Lerner-Wren's mental health court in Broward County, Florida, concluded that participants reported levels of coercion lower than almost any score on a comparable measure previously,[80] demonstrating that the court process "can be a non-coercive, dignified experience that provides procedural justice and therapeutic jurisprudence to those before it."[81] Consider Professor Vicki Lens's conclusion: "[E]ven a well-resourced problem-solving court may not work if the judge fails to adopt TJ and other problem-solving strategies effectively."[82] Professor Ruby Dhand and her colleagues conclude on this point, in a Canadian context:

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solving courts in general, see Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003).

77. Sana Loue, *The Involuntary Civil Commitment of Mentally Ill Persons in the United States and Romania*, 23 J. LEGAL MED. 211, 235 n.120 (2002), https://doi.org/10.1080/01947640252987303.

78. Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 612 (2005).

79. Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U. CAL. DAVIS L. REV. 1573, 1599 (2021) (alteration in original) (quoting, in part, JAMES L. NOLAN JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 141 (2009)).

80. Norman G. Poythress et al., *Perceived Coercion and Procedural Justice in the Broward Mental Health Court*, 25 INT'L J.L. & PSYCHIATRY 517, 529 (2002), https://doi.org/10.1016/S0160-2527(01)00110-8. On the significance of the relationship of the participant with the judge in the context of procedural justice, see Maria Slater, *Revolving Doors of Hospitalization and Incarceration: How Perceptions of Procedural Justice Affect Treatment Outcomes*, 27 WM. & MARY J. RACE GENDER & SOC. JUST. 261, 284–87 (2021).

81. Perlin, *Have You Seen Dignity?*, *supra* note 37, at 1153. For like examples of the impact of TJ in other areas of the law, see Astrid Birgden, *Policy and Practice: Therapeutic Jurisprudence and Offender Rehabilitation in Australia*, *in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE, *supra* note 5, at 227; Ian Freckelton, *Death Investigation and Therapeutic Jurisprudence*, *in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE, *supra* note 5, at 149; and Michael L. Perlin et al., *A TJ Approach to Mental Disability Rights Research: On Sexual Autonomy and Sexual Offending*, *in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE, *supra* note 5, at 129.

82. Vicki Lens, *Against the Grain: Therapeutic Judging in a Traditional Family Court*, 41 LAW & SOC. INQUIRY 701, 704 (2015). For examples of how judges in problem-solving courts employ TJ, see Michael S. King, *Therapeutic Jurisprudence's Challenge to the Judiciary*, 2011 ALASKA J. DISP. RES. 1; Matthew J. D'Emic, *Mental Health Courts: Bridging Two Worlds*, 31 TOURO L. REV. 369 (2015); Alex Calabrese, *Neighborhood Justice: The Red Hook Community Justice Center*, JUDGES' J., Winter 2002, at 7; GINGER LERNER-WREN WITH REBECCA A. ECKLAND, A COURT OF REFUGE: STORIES FROM THE BENCH OF AMERICA'S FIRST MENTAL HEALTH COURT (2018); and Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Special-*

> Mental health courts should be actively working towards reducing barriers to systemic discrimination and reducing systemic injustices experienced by people [with] mental health and substance use issues, while also destigmatizing mental health and addictions issues within the community. There must be a focus on creating sustained and integrated positive relationships within the justice system, health and social services, service providers, community organizations and communities.[83]

Beyond this, TJ can be used to root out other group-related biases in the legal system.[84] Professor Amy Ronner discusses its value in protecting the rights of sexual minorities.[85] Also, "TJ's emphasis on the

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ized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms, 69 UMKC L. REV. 139 (2000). All authors in this footnote, other than Professors Lens and Simon, are or were sitting judges in problem-solving courts at the times these works were written.

The significance of the individual judge who sits in such courts cannot be overstated. *See, e.g.*, Buddy Nevins, *Broward Judge Ginger Lerner-Wren's 20 Years of Helping the Mentally Ill*, BROWARDBEAT.COM, https://www.browardbeat.com/broward-judge-ginger-lerner-wrens-20-years-of-helping-the-mentally-ill/ [https://perma.cc/3VBN-S7QQ]. Judge Randal Fritzler (who has presided over domestic violence and mental health courts) described one case in an e-mail that demonstrates this significance:

> [A] woman in mental health court became agitated, pulled out a razor blade and slashed her arm. One security guard pulled his gun and the other charged at her. I yelled at them to stop. They were so surprised they did and my clerk who was gutsy, trained and specially selected for MHC [mental health court], went down to her, put her arm around her, took her to the jury room and called for a nurse to bandage her. Probably saved her from having an assault on an officer charge. We all knew each other in MHC and there is some magic in the black robe thing.

E-mail from Randal Fritzler, J., to author (Nov. 4, 2021, 12:53 AM) (on file with author).

Also significant are the roles and duties of court personnel in problem-solving courts. *See, e.g.*, Description of the qualifications and job duties of the Jud. Assistant for Mental Health Ct., Clark Cnty., Wash. (on file with author).

83. LAVERNE JACOBS ET AL., LAW AND DISABILITY IN CANADA: CASES AND MATERIALS § 10.27, at 265 (2021).

84. *See generally* Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 136 (2004) (discussing "how TJ might be used to uncover key aspects of racial and ethnic disparities in the legal process").

85. AMY D. RONNER, HOMOPHOBIA AND THE LAW 9, 16–17 (2005) (noting that therapeutic jurisprudence has been applied to estate planning, counseling, and transactional work to help empower sexual minorities). On how Ronner's insights apply to multiple substantive areas of the law, see, for example, Zeiner, *supra* note 44, at 10–12; Michael L. Perlin & Alison J. Lynch, *"My Brain Is So Wired": Neuroimaging's Role in Competency Cases Involving Persons with Mental Disabilities*, 27 B.U. PUB. INT. L.J. 73, 86–87 (2018); Carol L. Zeiner, *Marching Across the Putative Black/White Race Line: A Convergence of Narratology, History, and Theory*, 33 B.C. J.L. & SOC. JUST. 249, 315–16 (2013); Jennifer Marie Sanchez, *Therapeutic Jurisprudence and Due Process in the Juvenile Parole Revocation Process: An Arizona Illustration*, 7 FLA. COASTAL L. REV. 111, 115–16 (2005); Kelsey Geary, Comment, *A Warmer Welcome Home: The Need for Incorporating Therapeutic Jurisprudence in Reentry Courts*, 27 ST. THOMAS L. REV. 268, 273–75 (2015).

individual and preserving dignity in the courtroom can act as a protective barrier against racial and class-based stereotyping."[86] In an article about the involuntary civil commitment process, written with my colleague and frequent co-author Professor Heather Ellis Cucolo, I ask rhetorically:

> The question we must confront is this: do our practices related to the commitment process and institutional treatment of racial minorities, women and those from other cultures comport with the "3V's" seen by Professor Ronner as the sine qua nons of therapeutic jurisprudence? We believe the answer is, sadly, "absolutely not."[87]

2. Cognitive Biases

TJ is also vital in the eradication of the heuristic biases that dominate so much of the legal system: "Heuristics refers to a cognitive psychology construct describing implicit thinking devices used to simplify complex, information-processing tasks. The use of such heuristics frequently leads to distorted and systematically erroneous decisions, and it leads decision-makers to ignore or misuse items of rationally useful information,"[88] thereby contaminating the judicial process.[89]

Judges thus focus on information that confirms their preconceptions (i.e., confirmation bias), to recall vivid and emotionally charged aspects of cases (i.e., the availability heuristic), and to interpret information that reinforces the status quo as legitimate (i.e., system justification bias).[90] However, therapeutic jurisprudence can most ef-

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86. Tricia N. Stephens et al., *The View from the Other Side: How Parents and Their Representatives View Family Court*, 59 FAM. CT. REV. 491, 505 (2021), https://doi.org/10.1111/fcre.12590. Note that Vicki Lens, one of the authors of the just-cited article, has also recently noted, "To be sure, TJ and procedural fairness are not a substitute for anti-racist training, which addresses bias and discrimination at its source. Instead, they act as protective barriers against bias by inviting and standardizing judicial behaviors that ensure all parents are treated well and fairly." Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 FAM. CT. REV. 72, 85 (2019), https://doi.org/10.1111/fcre.12397.

87. Perlin & Cucolo, *supra* note 27, at 456. Elsewhere, in discussing juvenile justice issues, I noted, with sadness, the following:

> Subjecting juveniles with mental disabilities to sexual assaults, environments that spike suicide rates, and incarceration with adults speaks to conditions that, again, are anti-therapeutic per se, and reflect the reality that, by and large, there has been very little penetration of therapeutic jurisprudence concepts and principles into the 'on the ground' practice of juvenile justice in a criminal law setting.

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, 334 (2013) (footnotes omitted).

88. Perlin et al., *Steel-Eyed Death*, *supra* note 57, at 280 (citing 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, 212 (2013)).

89. *See* Perlin, *supra* note 71, at 602–03.

90. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207 (1973), https://doi.org/

fectively deal with heuristics such as the hindsight bias[91] and attribution bias;[92] in doing so, it can best redeem a heuristics-driven jurisprudence.[93] By way of caselaw example, Paul Appelbaum's analysis of the Supreme Court's decision in *Barefoot v. Estelle*[94] "persuasively demonstrates that the Court's use of heuristic devices leads it to misinterpret some significant empirical data, to disparage other data, and to ignore yet other data."[95] In addition, consider how expert witnesses "succumb to the seductive allure of simplifying cognitive devices in their thinking and employ such heuristic gambits as the vividness effect or attribution theory in their testimony."[96] These fail-

10.1016/0010-0285(73)90033-9. *See generally* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982).

91. David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations*, 7 BEHAV. SCI. & L. 485 (1989), https://doi.org/10.1002/bsl.2370070406; Michael L. Perlin, *"I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 98–99 (2017). Under the hindsight bias, we exaggerate how easily we could have predicted an event beforehand. *See generally* Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCH.: HUM. PERCEPTION & PERFORMANCE 288 (1975), https://doi.org/10.1136/qhc.12.4.304.

92. Eva Chipiuk, *Overcoming the Attribution Bias: Incorporating Restorative Justice Processes into the Canadian Criminal Justice System*, 74 REVISTA JURÍDICA UPR [REV. JUR. UPR] 967 (2005) (P.R.). Under attribution bias, when observers attempt to explain an actor's behavior, they are likely to overestimate the importance of personal or dispositional factors and to underestimate the influence of situational or environmental factors. Icek Ajzen & Martin Fishbein, *Relevance and Availability in the Attribution Process*, *in* ATTRIBUTION THEORY AND RESEARCH: CONCEPTUAL, DEVELOPMENTAL, AND SOCIAL DIMENSIONS 63, 81 (Jos Jaspars et al. eds., 1983).

93. Michael L. Perlin, *"Deceived Me into Thinking/I Had Something to Protect": A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in Which Fact-Finders Rely on Heuristic Reasoning and "Ordinary Common Sense,"* 13 LAW J. SOC. JUST. 88, 115 (2020).

94. Barefoot v. Estelle, 463 U.S. 880 (1983). I critique *Barefoot* extensively in 3 PERLIN & CUCOLO, *supra* note 35, § 17-2.2, at 17-11 to 17-16, and Michael L. Perlin, *The Supreme Court, 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 (1985).

95. Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIA. L. REV. 625, 668 (1993) (citing to Paul S. Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 AM. J.L. & MED. 335, 341 (1987), https://doi.org/10.1017/S009885880000839X).

96. Michael L. Perlin, *"They Keep It All Hid": The Ghettoization of Mental Disability Law and Its Implications for Legal Education*, 54 ST. LOUIS U. L.J. 857, 875 (2010) [hereinafter Perlin, *Keep It All Hid*] (quoting Perlin, *supra* note 71, at 602). *See generally supra* note 58 and accompanying text. Through the "attribution" heuristic, we interpret a wide variety of additional information to reinforce pre-existing stereotypes. 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, 892 (2009). Through the "vividness heuristic," we allow a "single vivid, memorable case [to] overwhelm[ ] mountains of abstract, colorless data upon which rational choices should be made." Michael L. Perlin, *"The Borderline Which*

ures can be remediated by the adoption of TJ, a topic that, sadly, is rarely taught in U.S. law schools.[97]

Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment, 82 IOWA L. REV. 1375, 1417 (1997).

There are many other heuristics as well. For instance, "through the *availability* heuristic, [we] judge the probability or frequency of an event based upon the ease with which [we] recall it." *Id.* Another is "confirmation bias," whereby "people tend to favor information that confirms their theory over disconfirming information." Cucolo & Perlin, *supra* note 88, at 214.

As I always point out to my classes, the general public's view of whether persons with mental illness are inherently and disproportionately dangerous comes from an oh-my-God story at the end of an Action News broadcast rather than an empirically valid and reliable study.

97. I envision this "adoption" as having multiple aspects. First, TJ should be taught more regularly in the law school curriculum so that it becomes part of young lawyer's vocabularies as they begin practice. This is not being done regularly now at all, *see* Michael L. Perlin, *"A Self-Ordained Professor's Tongue": Therapeutic Jurisprudence in the Classroom* 9–10 (Int'l Soc'y for Therapeutic Juris., Occasional Papers Series No. 1, 2020), https://doi.org/10.2139/ssrn.3704764, and that is seriously problematic. David Wexler has argued persuasively that the students who make up these courses should be interdisciplinary. *See* David B. Wexler, *Training in Law and Behavioral Sciences: Issues from a Legal Educator's Perspective*, 8 BEHAV. SCI. & L. 193, 203 (1990), https://doi.org/10.1002/bsl.2370080303 ("Given its interdisciplinary content, a Mental Health Law course taking a truly law and behavioral science approach might profit considerably from the participation of faculty and students from other departments (psychology, psychiatry, social work, public health, criminal justice, philosophy, etc)."). We have known for years that both lawyers and judges have an on-going need for more training in all aspects of mental disability law. *See* Douglas Mossman & Marshall B. Kapp, *Attorneys' and Judges' Needs for Continuing Legal Education on Mental Disability Law: Findings from a Survey*, 25 J. PSYCHIATRY & L. 327 (1997), https://doi.org/10.1177/009318539702500302.

Second, it needs be the foundation of *all* problem-solving courts. Recent studies of both certain drug courts and certain mental health courts make clear that that is not the case. *See, e.g.*, E. Lea Johnston & Conor P. Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685, 693 (2017) (empirical study of mental health courts in Erie County, Pennsylvania, concluding that anticipated treatment court sentences—for all grades of offense—typically exceed county court sentences by more than a year); Amy Shipley et al., *Broward Court Fails Mentally Ill People*, S. FLA. SUN SENTINEL (Jan. 7, 2016, 3:00 AM), https://www.sun-sentinel.com/local/fl-mental-health-1-20160107-story.html (reporting that people charged with minor felonies in Broward County's *felony* mental health court "face punishment even if they are never found guilty, and spend more than six times longer in the criminal justice system than those in regular court"); Richard Gebelein, *Reflections from a Retired Drug Court Judge*, DEL. LAW., Spring 2017, at 8, 10 (quoting SHELLI B. ROSSMAN ET AL., 4 THE MULTI-SITE ADULT DRUG COURT EVALUATION 260 (2011), https://www.ojp.gov/pdffiles1/nij/grants/237112.pdf [https://perma.cc/N58F-MB3Q]) ("Assigning judges who fundamentally do *not* believe in engaging offenders in an interpersonal relationship or who do *not* support the concept of therapeutic jurisprudence virtually ensures a lack of success for the drug court." (emphasis added)).

Third, a far greater effort must be made in mainstreaming TJ in traditional non-problem-solving courts. *See, e.g.*, Michael D. Jones, *Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners*, 5 PHX. L. REV. 753, 758 (2012). Finally, there must be a concerted effort to teach TJ concepts in collateral academic areas—psychology, psychiatry, criminology, social work, sociology, and more. *See, e.g.*, Ian D. Marder & David B. Wexler, *Mainstreaming Restorative Justice and Therapeutic Jurisprudence Through Higher Education*, 50 U. BALT. L. REV. 399 (2021).

Beyond this, therapeutic jurisprudence can be an important tool in dealing with stigmatizing, essentialist biases that relate to a judge's knowledge of an offender's genetic characteristics, and how that knowledge can amplify existing stigmatization of that characteristic, and also hinder the offender's potential treatment opportunities.[98] In short, the legal landscape is peppered with examples of how group bias contaminates decision-making. I believe that therapeutic jurisprudence is the most effective way to counteract these biases.[99]

B. *Vulnerability*

Although the word "vulnerability" is often used in the law, there is surprisingly little in the way of precise definitions.[100] Professor Lois Weithorn's characterization—"susceptibility to physical or emotional harm and susceptibility to coercion or other external sources of influence"[101]—serves as a helpful beginning focus.[102]

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98. Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 LAW & SOC'Y REV. 202, 209 (2019). These "essentialist definitions 'seek to determine those attributes for the members of a class of phenomena which are most important for yielding an enhanced understanding of the phenomena.'" Barbra Bennett, *Twentieth Century Approaches to Defining Religion: Clifford Geertz and the First Amendment*, 7 U. MD. L.J. RACE RELIGION GENDER & CLASS 93, 95 (2007) (quoting Martin Southwold, *Buddhism and the Definition of Religion*, 13 MAN 362, 369 (1978), https://doi.org/10.2307/2801935).

99. *See* Tess M.S. Neal et al., *The Law Meets Psychological Expertise: Eight Best Practices to Improve Forensic Psychological Assessment*, 18 ANN. REV. L. & SOC. SCI. 169, 177 (2022), https://doi.org/10.1146/annurev-lawsocsci-050420-010148 (noting that many forensic practitioners (incorrectly) consider themselves bias-free); *see also* Tess M.S. Neal & Stanley L. Brodsky, *Forensic Psychologists' Perceptions of Bias and Potential Correction Strategies in Forensic Mental Health Evaluations*, 22 PSYCH. PUB. POL'Y & L. 58 (2016), https://doi.org/10.1037/law0000077 (listing strategies through which such practitioners could best insulate their decision-making from potential bias, including, for example, the following: embracing conditions that introduce structure and reduce discretion in their decision process, such as using actuarial or structured clinical judgment methods rather than unstructured methods; seeking independent peer review; and engaging in archival self-monitoring).

100. *See* Lois A. Weithorn, *A Constitutional Jurisprudence of Children's Vulnerability*, 69 HASTINGS L.J. 179, 189 (2017) ("For a concept used so frequently in both lay and scholarly discourse, there is remarkably little written to elucidate the nature of the concept of vulnerability as it relates to human beings.").

101. *Id.* at 190.

102. Professor Weithorn also quotes public health professor Marc A. Zimmerman and his colleague Revathy Arunkuma on how vulnerability can arise from external circumstances: "Vulnerability refers to an individual's predisposition to develop[, or the] susceptibility to negative developmental outcomes that can occur under high-risk conditions." *Id.* (alteration in original) (quoting Marc A. Zimmerman & Revathy Arunkumar, *Resiliency Research: Implications for Schools and Policy*, 8 SOC. POL'Y REP. 1, 2 (1994), https://doi.org/10.1002/j.2379-3988.1994.tb00032.x). Professor Weithorn further highlights Zimmerman and Arunkumar's observations of potential sources of vulnerability, including "genetic [makeup], temperament, health or disability status, or other factors that we might view as characteristics of the individual." *Id.* (citing Zimmerman & Arunkumar, *supra*, at 2).

There is some important literature on how TJ approaches can best help heal vulnerable cohorts, such as abused children,[103] inmates with serious mental disabilities,[104] psychiatric patients who seek to enforce their constitutional right to refuse medication,[105] juveniles subject to police interrogations[106] or incarceration,[107] individuals with mental illness subject to involuntary hospitalization,[108] victims or alleged perpetrators of sexual abuse,[109] ex-felons,[110] and juvenile witnesses of domestic abuse.[111] There is also significant literature on how TJ can be incorporated into the teaching of clinical law to best serve vulnerable populations.[112]

In an important article about the denial of health care to gender minorities, Professor Kathy Cerminara focuses on the "beauty of [TJ] as a foundation for analysis and improvement of laws and procedure" in matters related to "laws governing access to health care for a vul-

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On markers that may suggest the existence of quantifiable factors on the question of vulnerability, see Kenneth J. Weiss & Alisa R. Gutman, *Balancing Vulnerability and Resilience in Damage Prognostication*, 49 J. AM. ACAD. PSYCHIATRY & L. 1, 2 (2021), https://doi.org/10.29158/JAAPL.200108-20.

103. Amy D. Ronner, *Dostoevsky as Juvenile Justice Advocate and Progenitor of Therapeutic Jurisprudence*, 30 ST. THOMAS L. REV. 5, 22–24 (2017).

104. Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Commitment: Kendra's Law as Case Study*, 9 PSYCH. PUB. POL'Y & L. 183, 205–07 (2003), https://doi.org/10.1037/1076-8971.9.1-2.183.

105. Goldenson et al., *supra* note 1, at 227 (discussing Warren Brookbanks, *Therapeutic Jurisprudence and Its Role in Corrections*, *in* THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES, *supra* note 37, at 163, 170–71); Michael L. Perlin & Deborah Dorfman, *"The Sources of This Hidden Pain": Why a Class in Race, Gender, Class, and Mental Disability?*, *in* VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER 313 (Soc'y of Am. L. Tchrs. & Golden Gate Univ. Sch. of L. eds., 2011); Alfredo Garcia, *Foreword: St. Thomas Law Review Volume 30 Anniversary Issue*, 30 ST. THOMAS L. REV. 1 (2017)).

106. Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 846 n.58 (2006) (citing Ronner, *supra* note 40, at 102–03, and characterizing that section of Ronner's article as a discussion of "police interview tactics designed to make child feel powerless and vulnerable by confining child in isolated setting, away from friends and family").

107. Jacob L. Zerkle, *Rehabilitate the Community by Rehabilitating Its Youth—How Cognitive Science, Incarceration, and Jurisprudence Relate to the Criminal Justice System's Treatment of Juveniles*, 36 CHILD.'S LEGAL RTS. J. 201, 210–11 (2016).

108. Emily R. Edwards et al., *Connecting Mental Health Court Participants with Services: Process, Challenges, and Recommendations*, 26 PSYCH. PUB. POL'Y & L. 463, 465–66 (2020), https://doi.org/10.1037/law0000236.

109. Perlin et al., *supra* note 67, at 422.

110. Tamara F. Lawson, *Powerless Against Police Brutality: A Felon's Story*, 25 ST. THOMAS L. REV. 218, 242–43 (2013) (discussing the "particular vulnerabilities of ex-felons such as their diminished social status and lack of credibility, political power, and financial resources" in excessive force suits against police officers).

111. Andrienne C. Walters, *The Forgotten Children: Victims of Domestic Violence, Victims of the System*, 12 ALB. GOV'T L. REV. 286, 399–01 (2019).

112. Evelyn Cruz, *Through the Clinical Lens: A Pragmatic Look at Infusing Therapeutic Jurisprudence into Clinical Pedagogy*, 30 T. JEFFERSON L. REV. 463, 476 (2008).

nerable population."[113] And even in situations in which legal intervention or proceedings might not lead to legal vulnerability, they may still cause "anxiety, distress [or] depression" to those involved.[114]

C. *Polarization*

One of the plusses of TJ is its potential to avoid "the polarization that is often a hallmark of traditional litigation and of much legal scholarship."[115] Susan Daicoff, by way of example, discusses the connection between TJ and collaborative law,[116] noting how, in tandem, conflict can be minimized, making it "arguably much more therapeutic for the individuals and families involved" as "compared to the hostility, adversarialism, posturing, and polarization involved in traditional litigation.[117] Elsewhere, Professor Marsha B. Freeman notes that the biggest challenge for family law attorneys is changing the family's perception of divorce as "a continuing contested battle."[118]

Wexler favorably quotes linguist Deborah Tannen, who has observed that the legal system both "reflects and reinforces our assumption that truth emerges when two polarized, warring extremes are set

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113. Kathy L. Cerminara, *Today's Crusades: A Therapeutic Jurisprudential Critique of Faith-Based Civil Rights in Health Care*, 13 ALB. GOV'T L. REV. 1, 18 (2020).

114. Marc W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439, 441–42 (1998) (David Wexler among the co-authors).

115. Goldenson et al., *supra* note 1, at 227 (citing Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL'Y 113 (2009)); *see also* David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999).

116. North Carolina law, for example, defines "collaborative law," in the family law context, as

> [a] procedure in which a husband and wife who are separated and are seeking a divorce, or are contemplating separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis. The procedure shall include an agreement by the parties to attempt to resolve their disputes without having to resort to judicial intervention, except to have the court approve the settlement agreement and sign the orders required by law to effectuate the agreement of the parties as the court deems appropriate. The procedure shall also include an agreement where the parties' attorneys agree not to serve as litigation counsel, except to ask the court to approve the settlement agreement.

N.C. GEN. STAT. ANN. § 50-71(1) (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.).

117. Daicoff, *supra* note 115, at 133.

118. Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215, 216 (2008). For one such disastrous example, see VDZ v. VEA, [2020] SGCA 75 (C.A.) (Sing.), *discussed infra* notes 167–71 and accompanying text.

against each other,"[119] noting himself that therapeutic jurisprudence seeks to end the practices of "the legal system and its lawyers put[ting] aside natural inclinations toward human compassion,"[120] and that "therapeutic jurisprudence scholarship has consistently followed Tannen's prescriptions."[121] He also notes that TJ scholars must undertake the necessary intellectual endeavors "in the spirit of engaging in a dialogue, and not in a polarized, demonizing debate."[122]

In a very different substantive context, a South African law professor argues that TJ is the tonic needed for contemporary international criminal justice, which "pays little or no attention to the rehabilitation needs of perpetrators of mass atrocities or to the reconciliation of those embittered, polarized, and suspicious societies from which the much-stigmatized culprits emerge."[123] Such a turn to TJ "will serve higher goals of justice than one that contents itself with the punishment of offenders."[124]

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119. Wexler, *supra* note 115, at 266 (quoting DEBORAH TANNEN, THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE 131 (1998)). Tannen reflected on the adversarial nature of this "argument culture" in an earlier part of her book:

> [Argument culture] rests on the assumption that opposition is the best way to get anything done: The best way to discuss an idea is to set up a debate; the best way to cover news is to find spokespeople who express the most extreme, polarized views and present them as "both sides"; the best way to settle disputes is litigation that pits one party against the other; the best way to begin an essay is to attack someone; and the best way to show you're really thinking is to criticize.

TANNEN, *supra*, at 3–4.

120. Wexler, *supra* note 115, at 266.

121. *Id.* at 268.

122. *Id.* at 272. Although there is no mention of therapeutic jurisprudence, Professor Carrie Menkel-Meadow focuses on the problems with polarization (a topic rarely discussed in traditional law school classes) in this manner:

> Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies. More significantly some matters . . . are not susceptible to a binary (i.e. right/wrong, win/lose) conclusion or solution. The inability to reach a binary resolution of these disputes may result because in some cases we cannot determine the facts. . . . Courts, with what I have called their "limited remedial imaginations," may not be the best institutional settings for resolving some of the disputes that we continue to put before them.

Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6–7 (1996) (footnotes omitted); *see also* Nigel Stobbs, *The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence*, 4 WASH. U. JURIS. REV. 97, 140 & n.147 (2011) (quoting Menkel-Meadow, *supra*, at 6–7) (discussing, in the context of TJ, Menkel-Meadow's observations regarding polarization).

123. 'Dejo Olowu, *Therapeutic Jurisprudence: An Inquiry into Its Significance for International Criminal Justice*, 76 REV. JUR. UPR 129, 147 (2007).

124. *Id.*

D. *Conclusion*

I believe—and I have honed this belief through decades of practice, decades of legal teaching and writing, and decades of advocacy on behalf of persons with mental disabilities—that it is only through the active and conscious use of TJ that we do what we must to, to the greatest extent possible: reduce and eliminate bias (both cultural and cognitive), end polarization, and provide support for vulnerable populations. In the next Part, I will consider how judges and other judicial "players" have (and have not) used TJ in their decision-making, with an eye toward determining the extent to which TJ has had the impact that it should be having on the legal process.

IV. THE CASELAW

Considerations of both "famous" and "unknown" cases reflect wildly divergent judicial approaches to questions that have (or should have had) therapeutic jurisprudence perspectives. Interestingly, some of the cases that best reflect TJ approaches were decided before "therapeutic jurisprudence" formally existed.[125] Other cases, both those officially reported and those not so reported, postdating the creation of

125. This leads to the collateral question: Have some judges practiced TJ without actually knowing that they were doing it? Australian Magistrate Michael King has written that "[s]ome judicial officers when first encountering therapeutic jurisprudence say that it is something that they already practice." King, *supra* note 82, at 3; *see also* Ian Dearden, Therapeutic Jurisprudence and the District Court 2 (May 7, 2010) (unpublished manuscript) (Austl.), https://aija.org.au/wp-content/uploads/2017/08/Dearden.pdf (explaining how Judge Dearden "intuitively approached the exercise of sentencing criminal defendants utilising a range of techniques and strategies which, in hindsight, [he] consider[ed] reflect[ed] TJ principles"). Researchers have identified 58 ways that judges employ TJ in their decision-making, whether or not they so articulate it. *See* CARRIE J. PETRUCCI WITH DAVID B. WEXLER & BRUCE J. WINICK, BRIEF RESEARCH REPORT: KEY ELEMENTS OF JUDGING USING THERAPEUTIC JURISPRUDENCE (Nov. 2005) (unpublished research report) (on file with author) (using the methodology described in Carrie J. Petrucci & Kathleen M. Quinlan, *Bridging the Research-Practice Gap: Concept Mapping as a Mixed-Methods Strategy in Practice-Based Research and Evaluation*, 34 J. SOC. SERV. RSCH. 25 (2007), https://doi.org/10.1300/J079v34n02_03).

Often, in presentations, I cite to the line in Molière's play *Le Bourgeois Gentilhomme* in which M. Jourdain, the lead character, notes, "I've been speaking prose for forty years without even knowing it," *see* MOLIÈRE, LE BOURGEOIS GENTILHOMME (1670) (Fr.), *reprinted and translated in* MOLIÈRE, FOUR PLAYS 13, 37 (Carl Milo Pergolizzi trans., Int'l Pocket Libr. 1999), and suggest there are significant parallels to the practice of TJ. Others have employed the same gambit. *See, e.g.*, MARTINE HERZOG-EVANS, FRENCH REENTRY COURTS AND REHABILITATION: MISTER JOURDAIN OF DESISTANCE 11 n.1 (2013) ("[The book's] title was inspired by the interviews of several JAPs, such as JAP 40 who told the author: 'Oh I am a little bit like Mr. Jourdain: I do prose without being aware of it.'"); *see also* E-mail from Carol L. Zeiner, Professor, to author (Sept. 28, 2021) (on file with author); E-mail from David B. Wexler, Professor, to author (Sept. 28, 2021) (on file with author); E-mail from Kathy Cerminara, Professor, to author (Sept. 28, 2021) (on file with author).

TJ do not refer to it. A few do.[126] Contrarily, there are many important cases that reject—either explicitly or implicitly—the teachings of TJ, and again, these include both officially reported cases and others not to be found in the reporters. I will review several cases from each of the above categories in an effort to determine the extent to which the TJ values I have discussed here—dignity and compassion—are or are not reflected, and the extent to which the issues of bias, vulnerability, and polarization are addressed.[127]

A. *U.S. Cases*

As just noted, the phrase "therapeutic jurisprudence" appears in only 34 reported cases from the United States,[128] and 17 of these merely cite to an article that includes the words in its title but instead use the article to make substantive points unrelated to TJ.[129] Most of

126. Remarkably, there are few cases that actually cite to "therapeutic jurisprudence," a low number that stands in stark contrast to the discussions in legal scholarship. A recent Westlaw search on August 23, 2022, revealed that the phrase is only mentioned in 34 U.S. cases, but in 2,844 "secondary sources," primarily law review articles. *See infra* text accompanying notes 128–33. An earlier search of mine revealed 28 cases as of 2017. *See* Perlin, *Have You Seen Dignity?*, *supra* note 37, at 1148.

127. On how some judges consciously have incorporated TJ into their decision-making, see King, *supra* note 82; Dearden, *supra* note 125, and SUSAN GOLDBERG, PROBLEM-SOLVING IN CANADA'S COURTROOMS: A GUIDE TO THERAPEUTIC JUSTICE (2011).

For a case from another nation that focuses on dignity values in a related context, see Tareen v. Government of Punjab, (2018) PLJ (High Ct. Lahore) 508, ¶ 13 (Pak.), *quoted in* Beena v. Muhammad, Civil Petition No. 4129/2019 & C. M. A. No. 10406/2019, at 6 (SC July 17, 2020) (Pak.):

> Dignity has its roots in the simple idea that justice consists of the refusal to turn away from suffering. Most central of all human rights is the right to dignity. Dignity unites the other human rights into a whole. The right to dignity reflects the "recognition that a human being is a free agent, who develops his body and mind as he wishes, and the social framework to which he is connected and on which he depends. Human dignity is therefore the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice. Human dignity is infringed if a person's life or physical or mental welfare is harmed."

128. One of the U.S. cases merely sets out the credentials of an expert witness as having "a concentration in therapeutic jurisprudence and forensic psychology." E.C.D. v. A.D.D., No. CK14-01989, 2018 WL 7020496, at *1 n.1 (Del. Fam. Ct. Oct. 16, 2018). Another is available only in Spanish, which I was unable to adequately translate. *See* Pueblo v. Ramos Álvarez, No. DBD2012G0369 (705) KLAN201201657, 2014 WL 7745368 (P.R. Cir. Dec. 31, 2014).

129. See *In re* Leon G., 18 P.3d 169, 174 (Ariz. Ct. App. 2001) (citing Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCH. PUB. POL'Y & L. 505, 520–21 (1998), https://doi.org/10.1037/1076-8971.4.1-2.505), *vacated*, 59 P.3d 779 (Ariz. 2002) (en banc); United States v. D.W., No. 13-CR-0173, 2015 WL 3892643, at *4 (E.D.N.Y. June 25, 2015) (citing Cucolo & Perlin, *supra* note 65); Llamas v. State, No. 65589, 2015 WL 3849069, at *3 (Nev. June 18, 2015) (citing Jeffrey A. Klotz et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process*, 15 U. PUGET SOUND L. REV. 579, 591 n.53 (1992)); *In re* Adoption of B.M.J.F., No. 104,008, 2010 WL 3665154, at *2 (Kan. Ct. App. Sept. 10, 2010) (Leben, J., concurring) (citing Amy D.

the other U.S. cases substantively illustrate two things: (1) how early drug courts were inspired by therapeutic jurisprudence principles[130] (this cohort consisting primarily of Pennsylvania cases,[131] but also in-

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Ronner, *Therapeutic Jurisprudence on Appeal*, CT. REV., Spring 2000, at 64); Winning Streak, Inc. v. Winning Streak Sports, LLC, No. 100,725, 2010 WL 348272, at *7 (Kan. Ct. App. Jan. 22, 2010) (Leben, J., concurring) (citing Ronner, *supra*); *In re* Ronald B., No. D-11300-07/09B, 2009 WL 2340701, at *7 n.7 (N.Y. Fam. Ct. July 10, 2009) (citing both Patrick Geary, Note, *Juvenile Mental Health Courts and Therapeutic Jurisprudence: Facing the Challenges Posed by Youth with Mental Disabilities in the Juvenile Justice System*, 5 YALE J. HEALTH POL'Y L. & ETHICS 671, 677–78 (2005), and Gene Griffin & Michael J. Jenuwine, *Using Therapeutic Jurisprudence to Bridge the Juvenile Justice and Mental Health Systems*, 71 U. CIN. L. REV. 65, 71 (2002)); *In re* Luis T., No. D-5693-10/11A, 2012 WL 1034526, at *55 (N.Y. Fam. Ct. Mar. 14, 2012) (citing Griffin & Jenuwine, *supra*); Kansas v. Crane, 534 U.S. 407, 412 (2002) (citing Winick, *supra*); Lee v. State, 854 So. 2d 709, 718 n.11 (Fla. Dist. Ct. App. 2003) (Casanueva, J., concurring specially) (citing Winick, *supra*), *receded from in In re* Commitment of DeBolt. 19 So. 3d 335 (Fla. Dist. Ct. App. 2009) (en banc) (per curiam); United States v. Irey, 612 F.3d 1160, 1200–01 (11th Cir. 2010) (quoting Winick, *supra*, at 524); *id.* at 1264 (Tjoflat, J., specially concurring in part and dissenting in part) (citing Winick, *supra*, at 524); Terry v. Superior Ct., 86 Cal. Rptr. 2d 653, 655 (Ct. App. 1999) (citing Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999)); *In re* Ivy, 374 P.3d 374, 391 n.13 (Alaska 2016) (Fabe, C.J., dissenting) (citing Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 108 (2000)); State v. Doe, 333 P.3d 858, 871 n.11 (Idaho Ct. App. 2014) (citing Bernard P. Perlmutter, *"Unchain the Children":* Gault, *Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1, 37 (2007)); Miller v. Kozel, No. 10 C 5381, 2011 WL 5024554, at *13 (N.D. Ill. Oct. 9, 2011) (citing Jan C. Costello, *"The Trouble Is They're Growing, the Trouble Is They're Grown": Therapeutic Jurisprudence and Adolescents' Participation in Mental Health Care Decisions*, 29 OHIO N.U. L. REV. 607, 615–21, 630–32 (2003)); Jankee v. Clark County, 612 N.W.2d 297, 318 n.26 (Wis. 2000) (citing Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409, 419–20 (1992)); A.M. v. Holmes, 830 F.3d 1123, 1156 n.18 (10th Cir. 2016) (citing Perlmutter, *supra*, at 6); *In re* Jonathon C.B., 958 N.E.2d 227, 259 (Ill. 2011) (Freeman, J., dissenting) (citing Perlmutter, *supra*, at 37).

130. The standard text is Hora et al., *supra* note 129. On the relationship between TJ and mental health courts, see, for example, 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); Perlin, *Who Will Judge the Many?*, *supra* note 37. For an empirical consideration, see Allison D. Redlich & Woojae Han, *Examining the Links Between Therapeutic Jurisprudence and Mental Health Court Completion*, 38 LAW & HUM. BEHAV. 109 (2014), https://doi.org/10.1037/lhb0000041, which finds a significant, direct relationship between TJ and completion of Mental Health Court programs, such that higher levels of TJ were associated with higher rates of success. On the relationship between TJ and problem-solving courts in general, see Winick, *supra* note 76.

131. *See, e.g.*, Off. of Disciplinary Couns. v. Pozonsky, 177 A.3d 830, 832–33 (Pa. 2018) ("Employing principles of 'therapeutic jurisprudence,' these courts combine intensive judicial supervision, drug testing, and comprehensive treatment to assist offenders in overcoming the substance abuse problems that enmeshed them in the criminal justice system." (citing Hora et al., *supra* note 129)); Commonwealth v. Leonard, No. 1985 MDA 2019, 2020 WL 4660380, at *1 n.1 (Pa. Super. Ct. Aug. 11, 2020) (quoting *Pozonsky*, 177 A.3d at 832–33); Commonwealth v. Slatoff, No. 1792 EDA

cluding a Florida case that cites to a state statute specifiying therapeutic jurisprudence as a *sine qua non* of drug treatment programs[132]); and (2) how proposed amendments to Florida procedural rules in juvenile courts were inspired by TJ.[133]

Two cases consider the relationship between TJ and adequacy of counsel.[134] In one, the court cites a TJ-based article in remanding a civil commitment case that raised the question of adequacy of coun-

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2018, 2019 WL 2453875, at *4 n.4 (Pa. Super. Ct. June 11, 2019) (Strassburger, J., dissenting) (quoting *Pozonsky*, 177 A.3d at 832–33); *see also* State v. Drum, 225 P.3d 237, 241 (Wash. 2010) (en banc) (discussing drug courts, and citing Pamela L. Simmons, Comment, *Solving the Nation's Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence*, 35 GONZ. L. REV. 237, 238 (1999/00)).

132. Lawson v. State, 969 So. 2d 222, 231 (Fla. 2007) (citing FLA. STAT.§ 397.334(2) (2005)); *see also* Maderi v. State, 311 So. 3d 235, 236–37 (Fla. Dist. Ct. App. 2020) (discussing how veterans' treatment courts and diversion programs need to be modeled after therapeutic jurisprudence principles).

On TJ and diversion programs in general, see State v. Dopart, No. 13CA010486, 2014 WL 2985574, at *5 (Ohio Ct. App. June 30, 2014) (Moore, J., concurring in part and dissenting in part) ("Years of experience have demonstrated that diversion programs, sometimes referred to as 'therapeutic jurisprudence,' serve a vital function in the criminal justice system."). The relationship between TJ and diversion programs was apparently first noted in an article by Bruce Winick:

> The therapeutic jurisprudence/preventive law approach also can be highly advantageous in the context of attorney–client conversations about the client's participation in diversion programs and negotiations with probation departments and prosecutors concerning the terms of such participation and their willingness to allow the client to enter a program as an alternative to prosecution.

Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCH. PUB. POL'Y & L. 1034, 1078 (1999), https://doi.org/10.1037//1076-8971.5.4.1034.

133. In one lengthy commentary, the Florida Supreme Court noted the following:

> The second major theme raised by the comments is that of therapeutic jurisprudence. According to the comment filed by Judge Ginger Wren and Professor Bruce Winick, "Therapeutic jurisprudence is an interdisciplinary field of legal scholarship and approach to law reform that focuses attention upon law's impact on the mental health and psychological functioning of those it affects." According to Judge Wren and Professor Winick, the dependent child's perception as to whether he or she is being listened to and whether his or her opinion is respected and counted is integral to the child's behavioral and psychological progress. Their comment also explains that feelings of voluntariness rather than coercion in children facing placement tend to produce more effective behavior. Thus, Judge Wren and Professor Winick contend that "[e]ven when the result of a hearing is adverse, people treated fairly, in good faith and with respect are more satisfied with the result and comply more readily with the outcome of the hearing." As such, a child who feels that he or she has been treated fairly in the course of the commitment proceedings will likely be more willing to accept hospitalization and treatment.

Amend. to the Rules of Juv. Proc., Fla. R. Juv. P. 8.350, 804 So. 2d 1206, 1210–11 (Fla. 2001); *see also In re* Rep. of the Fam. Ct. Steering Comm., 794 So. 2d 518, 524 (Fla. 2001) ("[T]he goal of therapeutic jurisprudence does not rule out retribution for criminal acts such as domestic violence and delinquent behavior.").

134. On the role of counsel in the implementation of TJ, see *supra* text accompanying notes 55–58. *See also* Ramirez & Ronner, *supra* note 55.

sel.[135] In the other[136]—perhaps the most TJ-focused case in which the words "therapeutic jurisprudence" appear[137]—the Supreme Court of Montana held that the standard for adequacy of counsel in a civil commitment case was more stringent than the standard for criminal cases set out by the U.S. Supreme Court in *Strickland*.[138] Here, the Montana case observes and relies upon several points from an article by Professor Bruce Winick:

- "'[p]erhaps nothing can threaten a person's belief that he or she is an equal member of society as much as being subjected to a civil commitment hearing' and when 'legal proceedings do not treat people with dignity, they feel devalued as members of society'";[139]
- "because people with a mental illness 'already have been marginalized and stigmatized by a variety of social mechanisms, self-respect and their sense of their value as members of society are of special importance to them' throughout legal proceedings";[140] and
- "the legislated involuntary commitment process must, as a matter of public policy, strive to maintain the 'therapeutic influence' of the legal system on the individual,"[141] further "discussing the need to 'reconceptualize' the attorney-client relationship in civil commitment proceedings to 'augment the potential therapeutic effects.'"[142]

The *In re Mental Health of K.G.F.* case reflects the TJ commitment to dignity; also, it repudiates sanist-based biases, and offers judicial support to vulnerable persons.[143]

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135. *In re* MH2010–002637, 263 P.3d 82, 91 n.6 (Ariz. Ct. App. 2011) (citing Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37 (1999)).

136. *In re* Mental Health of K.G.F., 29 P.3d 485 (Mont. 2001), *partially overruled by In re* J.S., 401 P 3d 197, 205 (Mont. 2017) (calling for adherence to the standard established in Strickland v. Washington, 466 U.S. 668 (1984)).

137. Some years ago—before the subsequent decision in *J.S.*—I referred to *K.G.F.* as "the most important case ever litigated in this area" of the law. *See* Michael L. Perlin, *"I Might Need a Good Lawyer, Could Be Your Funeral, My Trial": Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases*, 28 WASH. U. J.L. & POL'Y 241, 246 (2008).

138. *K.G.F.*, 29 P.3d at 491.

139. *Id.* at 495 (quoting Winick, *supra* note 135, at 44–45).

140. *Id.* at 496 (quoting Winick, *supra* note 135, at 45).

141. *Id.* (citing generally Winick, *supra* note 135, at 52–60).

142. *Id.* (quoting Winick, *supra* note 135, at 54). Writing with a colleague about *K.G.F.* after the *J.S.* decision, I said this: "Although, on one hand, *K.G.F.* had provided an easily transferable blueprint for courts that want to grapple with adequacy of counsel issues in this context but were reluctant to explore totally uncharted waters, the decision remains the exception to the usual practice." PERLIN & CUCOLO, *supra* note 35, § 6-3.3.4, at 6-47.

143. *See K.G.F.*, 29 P.3d at 495. ("The use of stereotypical labels—which, as numerous commentators point out, helps create and reinforce an inferior second-class of citizens—is emblematic of the benign prejudice individuals with mental illnesses face,

Some cases rebuff TJ. One rejects the argument that TJ is required as a vehicle through which to provide procedural justice to mental health respondents in civil commitment appeals,[144] and another rejects the argument that TJ supports the creation of a cause of action for "psychiatric coercion."[145] One favorably cites an article by a prominent TJ *critic* that argues that the collaborative approach that is essential to drug courts is "fundamentally inappropriate for the judiciary."[146] And one case states, astonishingly to my mind (and without citation), "The Court cannot engage in a therapeutic jurisprudence which compromises its duty to protect the legitimacy of the federal courts."[147]

B. *Cases from Other Nations*

Five other cases are worthy of mention—one from Canada,[148] two from Singapore,[149] and two from Pakistan[150]—as they all articulate TJ principles, and all rely on these principles in their ultimate deci-

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and which are, we conclude, repugnant to our state constitution.") In support of that point, the Court cites generally Perlin's *On "Sanism"* and observes that the article "identif[ies] prejudice toward the mentally ill among 'well-meaning citizens' as the same 'quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry,' which in turn is reflected in our legal system." *K.G.F.*, 29 P.3d at 495–96 (citing and quoting Perlin, *supra* note 63, at 374).

144. *In re* Alfred H.H., 910 N.E.2d 74, 84–85 (Ill. 2009) (citing to WINICK, *supra* note 38, at 146–47).

145. Johnson v. Lucent Techs., Inc., No. CV 08-6002 CAS (CTx), 2009 WL 10671937, at *1 (C.D. Cal. Jan. 26, 2009), *aff'd in part, rev'd in part & remanded*, 653 F.3d 1000 (9th Cir. 2011).

146. State v. Sykes, 339 P.3d 972, 977 (Wash. 2014) (citing Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2068, 2088, 2093 (2002)).

147. Del Rosario Ortega v. Star Kist Foods, Inc., 213 F. Supp. 2d 84, 95 (D.P.R. 2002), *aff'd in part, vacated in part & remanded*, 370 F.3d 124 (1st Cir. 2004).

148. R. v. Briscoe, 2019 ONSC 2471 (Ont. Super. Ct.) (Can.). For a discussion of this case, see *infra* notes 153–61 and accompanying text.

149. For a discussion of Praveen s/o Krishnan v. Pub. Prosecutor, [2017] SGHC 324 (High Ct.) (Sing.), see *infra* notes 162–66 and accompanying text. For a discussion of VDZ v. VEA, [2020] SGCA 75 (C.A.) (Sing.), the second Singaporean case, see *infra* notes 167–71 and accompanying text.

150. State v. Ali, Case F.I.R. No. 295/21, U/Ss.302/109/506-II PPC, P.S. Qadirabad (Sessions Ct. Punjab Dec. 13, 2022) (Pak.) [hereinafter *Ali*] (on file with author); State v. AM, Case F.I.R. 15/2023, U/s 376(iii)/511PPC, P.S. Bhagat (Special Ct. Punjab Mar. 29, 2023) (Pak.), https://courtingthelaw.com/wp-content/uploads/ChatGPT-4-Abdul-Moaiz-v-State.-FIR-No.-15-2023.-Offence-376iii-511-P.S-Bhagat..allowed.-29.03.2023.pdf [https://perma.cc/Y9G5-S8G6] [hereinafter *AM*]. For a discussion of these cases, see *infra* notes 172–74 and accompanying text.

sions.[151] Four are criminal law cases, and one a family law case; in all instances, the judges take TJ's teachings seriously.[152]

The Canadian case explains why a trial court judge sentenced a defendant to a term of 12 months' imprisonment for charges of cocaine possession and distribution, and violations of his bail conditions.[153] After noting how the law has had an anti-therapeutic effect on the defendant's life,[154] the trial judge underscores that "the law can be applied in a manner that increases prospects for [the defendant's] rehabilitation. In other words, the law can be applied in a manner that maximizes the therapeutic benefits to [the defendant],"[155] concluding that the law must be viewed "through a therapeutic lens."[156] Subsequently, the opinion makes the connection to TJ explicit:

> Therapeutic jurisprudence provides a conceptual framework for tackling what can be an unwieldy analysis. Therapeutic jurisprudence is an analytical framework that seeks to assess the therapeutic and anti-therapeutic consequences of law and how it is applied. The objective is to "examine the law's therapeutic values and minimize the anti-therapeutic consequences without sacrificing due process or other judicial values." Therapeutic jurisprudence:
>
> > seeks to use the application of law to produce therapeutic outcomes of accused within the criminal justice system. It is a process

151. One other Canadian case—on insurance indemnification—cites a TJ article, but otherwise does not mention or discuss therapeutic jurisprudence. *See* Henderson v. Northbridge Gen. Ins. Corp., 2021 BCSC 1841, para. 15 (B.C. Sup. Ct.) (Can.) (quoting Non-Marine Underwriters v. Scalera, [2000] S.C.R. 551, 590–91 (Can.) (citing Bruce Feldthusen, *The Civil Action for Sexual Battery: Therapeutic Jurisprudence?*, 25 OTTAWA L. REV. 203, 233 (1993)), for the proposition that "denying coverage has the undesirable effect of precluding recovery against a judgment-proof defendant, thus perhaps encouraging sexual assault victims from bringing claims")). A New Zealand case cites an article on *ifoga,* a Samoan custom in which the family of an offender seeks forgiveness pursuant to a formal process, that was published in a book about therapeutic jurisprudence. *See* Vea v. R. [2020] NZCA 68 at [20 n.17] (N.Z.) (citing James Bruce Lutui, *Apology: A Moral, Cultural and Restorative Perspective, in* THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES, *supra* note 37, at 82–85). Another New Zealand case quotes a TJ-focused article on legislation relating to compulsory care for persons with intellectual disabilities. *See* RIDCA Cent. v. VM [2011] NZCA 659 at [83] (N.Z.) ("[T]here is [the] danger that legislation of this type will be use[d] for purely preventive purposes, regardless of its potential for therapeutic benefit." (quoting Warren J. Brookbanks, *New Zealand's Intellectual Disability (Compulsory Care) Legislation, in* INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT 529, 533 (Kate Diesfeld & Ian Freckelton eds., 2003))).

152. In a case from New Zealand, an appellate court partially relied on a sentencing report (in support of mitigation) by a professor "whose areas of speciality include criminal law and youth justice, family law, restorative justice and therapeutic jurisprudence with a particular focus on Māori engagement in justice." *See* Campbell v. R. [2020] NZCA 356 at [22] (N.Z.).

153. *Briscoe*, 2019 ONSC at para. 1.

154. *See id.* at para. 22 ("Since his first encounter with the law his drug addiction has worsened and the severity of his criminal behaviour has increased.").

155. *Id.* at para. 23.

156. *See id.* at para. 28.

> based and multidisciplinary approach to law that focuses on the underlying contributors of crime, seeking to address them by implementing effective therapeutic initiatives. It aims to take advantage of the historically underappreciated therapeutic potential in law. The law is not neutral—it can be applied in a manner that can benefit the accused [and hence society].[157]

The opinion continues by discussing the need for and theoretical bases of problem-solving courts,[158] and focuses extensively on the defendant's past experiences in drug treatment programs,[159] adding that the "link" between the defendant's drug addiction and criminal behavior is "obvious."[160] It concludes: "The overwhelming evidence of his significant drug addiction and its inextricable link to his criminal behavior indicate that this is an appropriate case [for] which, on balance, rehabilitation is also an important sentencing objective."[161]

It is important to note the impact of TJ on the Singaporean legal system. A recent article is crystal clear: It is "patently clear that moving forward, the use of TJ in family law [in Singapore] is here to stay."[162] As noted above, one of these two cases arose from criminal law, on the question of whether a term of probation or a custodial sentence is more appropriate for a 17-year-old drug offender who pleaded guilty to both the use of cannabis and the possession of it for purposes of trafficking.[163] In weighing the appropriate sentence, the court specifically points to therapeutic jurisprudence as providing a rationale for its decision:

> One important facet of the court's duty is to choose the sentencing option that is most likely to achieve the objective of helping the offender become a good and productive citizen. This is broadly in line with the growing attention to the notion of "therapeutic jurisprudence" within juvenile justice settings, which sees judges as being key players in applying the law in a way that has "therapeutic"

157. *Id.* at para. 31 (footnotes omitted) (first restating THERAPEUTIC KEY, *supra* note 6, at xvii ("Therapeutic jurisprudence proposes that we be sensitive to those consequences, and that we ask whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values."); and then quoting RICHARD D. SCHNEIDER ET AL., MENTAL HEALTH COURTS: DECRIMINALIZING THE MENTALLY ILL 65 (2007)).

158. *Id.* at para. 32–37; *see also supra* text accompanying notes 76–83.

159. *Id.* at para. 63–65.

160. *Id.* at para. 70.

161. *Id.* at para. 71.

162. Tricia Ho & Aaron Yoong, *Therapeutic Justice: For Practitioners, by Practitioners?*, 2021 SAL PRAC., no. 29, Oct. 21, 2001, at para. 3 (Sing.); *see also infra* text accompanying notes 167–71 (discussing VDZ v. VEA, [2020] SGCA 75 (C.A.) (Sing.) (contempt case arising from acrimonious divorce proceeding)).

163. Praveen s/o Krishnan v. Pub. Prosecutor, [2017] SGHC 324, para. 1, 6–7 (High Ct.) (Sing.).

> or beneficial consequences for the behaviour of the young offender.[164]

Here, the court notes that a custodial sentence "may very well have a counterproductive or 'anti-therapeutic' effect on the appellant, with a high risk that he would become disenchanted with the legal process and turn bitter or resentful rather than take charge of his own reintegration and rehabilitation."[165] It thus lays out extensive requirements for his probationary term:

> In assessing the suitability of a sentence of probation, I reiterate that I do not for the moment propose to ignore the indisputable need for deterrence given the serious nature of the offences that the appellant has committed. But on the unique facts of this case, the proposed conditions for the appellant's probation are, in my assessment, sufficient to meet the objective of deterrence. The duration of probation recommended in the first and second supplementary probation reports is 36 months [the statutory maximum]. The period of hostel residence at Hope House is recommended to be 12 months [the statutory maximum]. The appellant will have to perform a considerable 240 hours of community service. He will also be required to undergo regular urine tests at the Central Narcotics Bureau. While he is at Hope House, [his school schedule will be closely monitored] as well as his compliance with time restrictions and with urine tests. Even after he leaves Hope House, he will be electronically monitored for a substantial period of time. These strict conditions, in my mind, would be effective in deterring the appellant and other like-minded potential offenders from repeating the errant behaviour presented in this case.[166]

The other Singaporean case involved a contempt sentence (brought on by violations of court orders) that arose in a vicious custody case.[167] Noting that "the backdrop that gave rise to the present proceedings . . . epitomised everything that the family justice system is

164. *Id.* at para. 69 (citing Kelly Richards et al., *Children's Court Magistrates' Views of Restorative Justice and Therapeutic Jurisprudence Measures for Young Offenders*, 17 YOUTH JUST. 22, 25 (2017), https://doi.org/10.1177/1473225416665612.

165. *Praveen*, [2017] SGHC at para. 71.

166. *Id.* at para. 75 (footnotes omitted); *see also* David B. Wexler, *TJ, the Singapore Sentencing Conference, and Beyond*, ISTJ BLOG (Jan. 22, 2018), https://mainstreamtj.com/2018/01/22/tj-the-singapore-sentencing-conference-and-beyond/ [https://perma.cc/8SF6-YQ3S] (lauding Judge Steven Chong, the author of *Praveen*, for his "careful and nuanced TJ thinking," as reflected in the opinion).

167. *See VDZ*, [2020] SGCA at para. 2 ("The backdrop to this appeal was an extremely ugly one," with the mother "employing a scorched-earth policy that involved utilising the two children of the marriage as pawns in attacking their father" and irreparably damaging "what was originally a loving relationship between father and children . . . by . . . poisoning the children's minds.").

intended to assiduously avoid,"[168] the appellate court focuses on what it characterizes as "Therapeutic Justice,"[169] stressing:

> TJ is not merely an ideal; it is a necessity. It is not merely theoretical but is intensely practical. It is axiomatic that *relationships* constitute the very pith and marrow of a family. When familial relationships break down, those relationships (between spouses and between each spouse and the children) are damaged. Such damage cannot be repaired (completely at least) by way of material recompense; *healing* needs to take place. It is both logical and commonsensical that healing cannot even begin to take place if the parties (in particular, the former spouses) are in an antagonistic relationship—still less when one or both parties wage war against each other.[170]

The court thus found that, given the circumstances, the imposition of a sentence of incarceration was justified.[171]

Finally, the *Ali* case from Pakistan is remarkable.[172] In the course of the opinion, after the court acquits the defendant in a murder case, the trial judge (Judge Muhammad Amir Munir) directly addresses the victim's children "to make or create some healing impact on them."[173] Notably, in the case, Judge Munir uses emojis "to make the dialogue between the court and the children more direct . . . ."[174]

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168. *Id.* at para. 75.

169. *Id.* Its discussion suggests that the court's use of this phrase is identical to that of therapeutic jurisprudence practitioners. By way of example, the opinion cites Singapore Family Court Justice Debbie Ong's speech *Today Is a New Day* that focuses—in words almost identical to words used in the therapeutic jurisprudence literature—on "a lens of 'care', a lens through which we can look at the extent to which substantive rules, laws, legal procedures, practices, as well as the roles of the legal participants, produce *helpful* or *harmful* consequences." Debbie Ong, J., Today Is a New Day at Family Justice Courts Workday 2020, ¶ 43 (May 21, 2020), https://www.judiciary.gov.sg/docs/default-source/news-docs/fjc-workplan-2020.pdf?sfvrsn=8b619dc0_0 [https://perma.cc/ZTS7-8GRE]. In a subsequent article adapting her own speech, Justice Ong specifies that "[t]herapeutic jurisprudence, what we are calling Therapeutic Justice, is the study of the role of law as a therapeutic agent." Debbie Ong, *Singapore Family Justice Courts Workplan 2020: Today Is a New Day*, 59 FAM. CT. REV. 414, 419 (2021), https://doi.org/10.1111/fcre.12586; *see also* Chen Siyuan & Joel Fun, *Achieving Therapeutic Justice in Divorce Proceedings*, 2021 SAL PRAC., no. 31, Nov. 21, 2021, at para. 20 (Sing.) ("[T]he failure to deliver TJ may result in irretrievably broken relationships, and deleterious consequences for generations to come."); Ho & Yoong, *supra* note 162, at para. 34 ("Incorporating TJ into all levels of legal advice and client management would go a long way towards achieving a more holistic state of affairs for the family."); Tan Ming Ren, *More Than a Numbers Game: Approaching the Division of Matrimonial Assets:* VJP v VJQ, 2022 SING. J. LEGAL STUD. 464, 470 (Sing.) (noting how the *VDZ* court recognized in its opinion "the notion of therapeutic justice").

170. *VDZ*, [2020] SGCA at para. 77.

171. *Id.* at para. 52.

172. *See Ali*, *supra* note 150.

173. Posting of Muhammad Amir Munir, J., bionic4@hotmail.com, to tjlist@googlegroups.com (Dec. 29, 2022, 01:12 PM) (on file with author).

174. *Id.* In the opinion, Judge Munir notes:

C. *Conclusion*

In short, very few courts, in published opinions, cite directly to the phrase "therapeutic jurisprudence," although, as noted above, many judges indicate they use it regularly.[175] However, as I explore next, many of the most important cases in mental disability law jurisprudence employ therapeutic jurisprudence, often years before the concept first appears in the academic literature.[176]

V. CASES THAT REFLECT THERAPEUTIC JURISPRUDENCE

A. *Introduction... "like human beings"*

I start out this Section with a case I litigated that reflects, as I have previously noted, "as concise and perfect an expression of TJ as exists in the legal canon."[177] That case, *Falter v. Veterans' Administration*,[178] dealt with the way that veterans with mental illness were treated at a veterans' hospital located in New Jersey, where I practiced law at the time.[179] In it, the trial judge, Harold Ackerman, writes: "[In this opinion], I am referring to how [plaintiffs] are treated as human beings."[180] This insight, I wrote earlier, "contains the roots of what has come to

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> As this court has found that the prosecution is not able, beyond reasonable doubts, to establish its case against the accused for considering any conviction, therefore, this court wants to address the minors directly in this judgment so that once they are grown up, and able to read this decision about the fate of the case, they can understand the outcome themselves in a simple way and in plain language. I am seeking guidance to do this exercise from the principles of Therapeutic Jurisprudence (TJ) in this regard. This will create a healing impact in them.

Ali, *supra* note 150, at para. 50 (footnote omitted). In his opinion, Judge Munir cites Yamada, *supra* note 5, and David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000). *Ali*, *supra* note 150, at para. 50 n.1, para. 51 n.2.

In the other case from Pakistan, *see AM*, *supra* note 150, the same judge emphasized that a "Therapeutic Jurisprudence (TJ) lens is required for all the above legal actors while dealing with a juvenile," *id.* at 1 n.4, and subsequently explored what TJ principles were applicable in cases involving juvenile bail applications, *see id.* at 9–10.

175. *See* GOLDBERG, *supra* note 127, at 107; PETRUCCI ET AL., *supra* note 125, at 4.

176. The first mention of TJ was apparently in a paper presented by Wexler to the National Institutes of Mental Health in 1987. *See* Wexler, *supra* note 8, at 79; *see also* Constance Backhouse, *An Introduction to David Wexler, the Person Behind Therapeutic Jurisprudence*, 1 INT'L J. THERAPEUTIC JURIS. 1, 7–9 (2016); Wexler, *supra* note 53, at 3.

177. 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, 12 (2008/09).

178. Falter v. Veterans' Admin., 502 F. Supp. 1178 (D.N.J. 1980). This case, of course, predates the use of TJ in the literature.

179. Following this litigation, the VA promulgated the first Patients' Bill of Rights on behalf of persons in its facilities. *See* Falter v. Veterans Admin., 632 F. Supp. 196, 203 (D.N.J. 1986) (noting the date of promulgation as "December 1982").

180. *Falter*, 502 F. Supp. at 1185. I have written elsewhere: "[When] I read that line in the slip opinion . . . for a moment, my breath stopped." Perlin & Douard, *supra* note 177, at 10.

be known as therapeutic jurisprudence ('TJ'),"[181] and allows "[t]he TJ filter [to] be used to shine light on the presence of sanism and pretextuality."[182] The opinion reflects both the lodestars of TJ—dignity and compassion.

B. *Constitutional/Civil Rights Cases*

An examination of cases litigated in the 1970s on behalf of persons institutionalized (or facing institutionalization) by reason of mental disabilities shows that the principles of TJ were already—most likely, unconsciously—in the minds of the judges who authored some of these opinions. Here, I look first at the case of *Lessard v. Schmidt*,[183] "the forerunner of a generation of involuntary civil commitment cases."[184] *Lessard* and its progeny all found that there must be a "'real and present danger of doing significant harm' to show dangerousness sufficient to support . . . [an involuntary civil] commitment."[185]

Much of the *Lessard* court's opinion appears to have been based on a therapeutic jurisprudence perspective (years before that perspective was ever articulated in the scholarship). It looks carefully at the potential impact of civil commitment on those subject to the commitment power, weighing evidence that lengthy hospitalization, particularly involuntary hospitalization, "may greatly increase the symptoms of mental illness and make adjustment to society more difficult,"[186] and assessing the substantive civil rights losses suffered by the population in question. One passage in *Lessard* may "qualify as one of the true judicial forerunners of therapeutic jurisprudence"[187]:

181. Perlin & Douard, *supra* note 177, at 12.

182. *Id.* at 28. On sanism and pretextuality in this context, see Perlin, *supra* note 74.

183. Lessard v. Schmidt, 349 F. Supp. 1078, 1093–97, 1093 n.24 (E.D. Wis. 1972) (examining the standards for involuntary civil commitment).

184. PERLIN & CUCOLO, *supra* note 35, § 2-6.1, at 2-85; *see also, e.g.*, Thomas K Zander, *Civil Commitment in Wisconsin: The Impact of* Lessard v. Schmidt, 1976 WIS. L. REV. 503, 559 ("The *Lessard* decision will find its place in history not merely as the first comprehensive federal court decision on the constitutionality of civil commitment, but also as one of the first major judicial recognitions of civil commitment as more than a court authorized medical decision."). On how *Lessard*, *O'Connor v. Donaldson*, 422 U.S. 563 (1975), and *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), are the "'grandparents' of mental disability law," see Keri K. Gould & Michael L. Perlin, *"Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE U. L. REV. 339, 347 (2000).

185. Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCH. PUB. POL'Y & L. 80, 89 (1995), https://doi.org/10.1037/1076-8971.1.1.80 (citing as an example Doremus v. Farrell, 407 F. Supp. 509, 514–15 (D. Neb. 1975)).

186. *Lessard*, 349 F. Supp. at 1087. *Lessard* also endorsed the concept of the least restrictive alternative in civil commitment decision-making. *See id.* at 1095–96, *as discussed in* Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 214 (2000).

187. Perlin et al., *supra* note 185, at 90.

> [The] conclusion [that due process is mandated at involuntary civil commitment hearings] is fortified by medical evidence that indicates that patients respond more favorably to treatment when they feel they are being treated fairly and are treated as intelligent, aware, human beings. In [the named plaintiff's] case, for example, Dr. Kennedy testified that her improvement had occurred "following a period of involvement with not only hospital individuals and hospital staff influence, but an involvement with other environmental influences that have included a number of judicial involvements, legal involvements."[188]

Similarly, in *O'Connor v. Donaldson*,[189] a majority of the Supreme Court concluded that courts should "legitimately [be] involved in what was previously considered solely the domain of the state's mental health professionals."[190] Concerning explicitly the interplay between mental illness and constitutional rights, Justice Stewart writes:

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . [T]here is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.[191]

The Court also rejected the state's argument of nonjusticiability: "Where 'treatment' is the sole asserted ground for depriving a person of liberty, it is *plainly unacceptable* to suggest that the courts are powerless to determine whether the asserted ground is present."[192]

Wyatt v. Stickney—characterized as "the most significant case in the annals of forensic psychiatry" and "the foundation of modern psychiatric jurisprudence"[193]—declares a broad constitutional right to treatment, stating unequivocally:

> The purpose of involuntary hospitalization for treatment purposes is treatment and not mere custodial care or punishment. This is the only justification from a constitutional standpoint, that allows civil commitment to [a state hospital].
>
> . . . To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.[194]

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188. *Id.* (quoting and adapting *Lessard*, 349 F. Supp. at 1101–02).

189. *O'Connor*, 422 U.S. 563.

190. PERLIN & CUCOLO, *supra* note 35, § 2-6.1, at 2-86.

191. *O'Connor*, 422 U.S. at 575, *as quoted and altered in* PERLIN & CUCOLO, *supra* note 35, at § 2-6.1, at 2-86.

192. *Id.* at 574 n.10 (emphasis added).

193. Milton Greenblatt, *Foreword*, *in* WYATT V. STICKNEY: RETROSPECT AND PROSPECT ix, x (L. Ralph Jones & Richard R. Parlour eds., 1981).

194. Wyatt v. Stickney, 325 F. Supp. 781, 784–85 (M.D. Ala. 1971) (emphasis omitted).

In an opinion supplementing *Wyatt*, the court also significantly ordered the creation of a human rights committee to "safeguard the personal rights and dignity of the residents" in a state hospital in Alabama.[195]

When two co-authors and I analyzed Wyatt some years ago, we concluded that "[a]n examination of the transcript, briefs, and court documents in *Wyatt* . . . reveals that therapeutic motivations drove each and every important aspect of the litigation in question."[196] We concluded that "the history of right-to-treatment litigation *is* about a therapeutic jurisprudence."[197]

This trilogy of cases—which I have noted "still form the foundation" of mental disability law practice[198]—is imbued with notions of dignity and compassion, always keeping in mind the vulnerability of those who were the subjects of the cases.[199] *Wyatt* speaks directly to dignity, and *Lessard* and *O'Connor* do so indirectly.[200] Donaldson's lawyer has written about how the case reflected the reality that the hours spent by persons in psychiatric hospitals "are filled not with

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195. Wyatt v. Stickney, 344 F. Supp. 387, 389, 394 (M.D. Ala. 1972), *aff'd in part, rev'd in part & remanded sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

196. Perlin et al., *supra* note 185, at 99; *see also id.* at 102 ("On appeal, *amici* supporting *Wyatt* plaintiffs stressed the precise link between therapeutic outcome and constitutional rights.").

197. *Id.* at 110. *See generally* 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 & PSYCH. REV. 121 (2011).

198. Michael L. Perlin et al., *"On Desolation Row": The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means to All of Us*, 24 TEX. J. ON C.L. & C.R. 59, 69 (2018).

199. Consider the court's findings highlighted in one of the amicus briefs in *Wyatt*:

> [T]he dormitories are barn-like structures with no privacy for the patients. For most patients there is not even a space provided which he can think of as his own. The toilets in the restrooms seldom have partitions between them. There are dehumanizing factors which degenerate the patients' self-esteem. Also contributing to the poor psychological environment are the shoddy wearing apparel furnished the patients, the non-therapeutic work assigned to patients, and the degrading and humiliating admissions procedures which creates in the patient an impression of the hospital as a prison or as a crazy house.

Perlin et al., *supra* note 185, at 102 (quoting, with minor alternations, *Brief of Amicus Curiae on Appeal to the Fifth Circuit in* Wyatt v. Stickney, *in* 1 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 333, 354 (Bruce J. Ennis & Paul Friedman eds., 1973) (quoting Wyatt v. Stickney, 334 F. Supp. 1341, 1343 (M.D. Ala. 1971), *aff'd sub nom. Aderholt*, 503 F.2d 1305)).

200. *See, e.g.*, Bruce A. Arrigo & Jeffrey J. Tasca, *Right to Refuse Treatment, Competency to Be Executed, and Therapeutic Jurisprudence: Toward a Systematic Analysis*, 23 LAW & PSYCH. REV. 1, 39 (1999) (*Lessard* "protect[s] the dignity and civil rights of persons thought to be in need of involuntary civil confinement."); Kristina M. Campbell, *Blurring the Lines of the Danger Zone: The Impact of Kendra's Law on the Rights of the Nonviolent Mentally Ill*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173, 188 (2002) ("*O'Connor* was a watershed case in affirming the rights of the mentally ill to be treated with fairness and dignity.").

compassion, but with neglect."[201] Again, these are the foundations of TJ.[202]

In addition to these cases, we must also keep in mind Justice Blackmun's dissent in *DeShaney v. Winnebago County Department of Social Services*,[203] perhaps the most compassionate opinion by any U.S. Supreme Court justice. In *DeShaney*, the plaintiff's mother and son alleged that once the State took the son into custody to protect him from his abusive father, it owed an affirmative duty to protect him in a reasonably competent manner.[204] However, the Supreme Court held that the Due Process Clause did not obligate the State to protect its citizens from one another; the State's affirmative act of restraining an individual's freedom to act on his own behalf—through institutionalization or other similar restraint on personal liberty—was a prerequisite to any state obligation to provide care.[205]

Dissenting, Justice Blackmun says the following:

> Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy." But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. . . .
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> • • •
>
> Like the antebellum judges who denied relief to fugitive slaves, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine.[206]

Famously, he concludes his dissent in this manner:

> Poor Joshua![207] Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by [the

201. BRUCE J. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS, AND THE LAW 81–82 (1972).

202. It should be clear that the use of therapeutic jurisprudence should not be limited to test case/law reform cases such as those discussed in this section, but should also be looked at as "a perspective from which to view the daily practice of law and justice." *See* Peggy Fulton Hora & William G. Schma, *Therapeutic Jurisprudence*, 82 JUDICATURE 8, 9 (1998); *see also* Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 431 (2012) ("[T]herapeutic jurisprudence should be a part of the traditional law school curriculum, the daily practice of law, and the legal culture generally.").

203. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 212–13 (1989) (Blackmun, J., dissenting).

204. *Id.* at 193 (majority opinion).

205. *Id.* at 195–97.

206. *Id.* at 212–13 (Blackmun, J., dissenting) (citations omitted).

207. A Westlaw search on May 7, 2023, revealed that this phrase had been cited in at least 207 law review articles and at least three times in article titles, at least as of the date of the search. *See* Michele Miller, *Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context*, 11 HASTINGS WOMEN'S L.J. 243 (2000); Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, a Four-Year-Old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543 (2009); Lori DeMond, Note, DeShaney*'s Effect on Future "Poor Joshuas"—Whether a State Should Be Lia-*

> social service workers] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except . . . "dutifully record[ ] these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all"—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.[208]

This advocacy of "a compassionate reading of the expansive provisions of the Constitution"[209] is representative of multiple opinions of Justice Blackmun, mostly in the area of reproductive rights.[210] As his colleague, Justice Breyer, writes in a posthumous tribute, Blackmun's "vision as a Justice grows out of that compassion, which reveals itself in his effort, through imagination and will, to understand the individual human beings whose lives his opinions would affect."[211]

Justice Blackmun never used the phrase "therapeutic jurisprudence" in any of his opinions, but TJ principles resonate in so many of them.

C. *On the Criminal Procedure Side*—Indiana v. Edwards

Consider next the Supreme Court's decision in *Indiana v. Edwards*, in which the Court weighed whether a trial court could override a mentally-ill-but-competent-to-stand-trial criminal defendant's wishes to represent himself pro se.[212] There, the Court distinguished its earlier decision in *Godinez v. Moran*,[213] which held that the standard for competency to stand trial, waive counsel, and plead guilty were identi-

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ble Under the Fourteenth Amendment for Harm Inflicted by a Private Individual, 1990 BYU L. REV. 685.

208. *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting).

209. Radhika Rao, *The Author of* Roe, 26 HASTINGS CONST. L.Q. 21, 37 (1998); *see also* Benjamin Zipursky, Note, DeShaney *and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1102–03 (1990) (arguing that "compassion has a proper role in jurisprudence").

210. Lois Shepherd, *Face to Face: A Call for Radical Responsibility in Place of Compassion*, 77 ST. JOHN'S L. REV. 445, 449 n.15 (2003). Shepherd cites and quotes several examples from Justice Blackmun's opinions in that footnote, including the following: (1) "By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part and dissenting in part). (2) "Of the aspirations and settled understandings of American women, of the inevitable and brutal consequences of what it is doing, the tough-approach plurality utters not a word. This silence is callous." Webster v. Reprod. Health Servs., 492 U.S. 490, 558 (1989) (Blackmun, J., dissenting).

211. Stephen Breyer, *Justice Harry A. Blackmun: Principle and Compassion*, 99 COLUM. L. REV. 1393, 1396 (1999).

212. Indiana v. Edwards, 554 U.S 164, 167 (2008). *See generally* 3 PERLIN & CUCOLO, *supra* note 35, § 13-2.4, at 13-144 to 13-145.

213. *See* Godinez v. Moran, 509 U.S. 389 (1993). I critique *Godinez* in Michael L. Perlin, *"Dignity Was the First to Leave":* Godinez v. Moran, *Colin Ferguson, and the*

cal,[214] concluding in *Edwards* that the states may "insist upon representation by counsel for those who are competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[215]

Here, the Court relies on concepts that are fundamental to both procedural justice and therapeutic jurisprudence[216]:

> Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways. The history of this case . . . illustrates the complexity of the problem. In certain instances an individual may well be able to satisfy *Dusky's* mental competence standard,[217] for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.[218]

Questions of dignity are central to the Court's decision here, as it relies upon its earlier decision in *McKaskle v. Wiggins*[219] for the proposition that "'[d]ignity' and 'autonomy' of [the] individual underlie [the] self-representation right."[220] Importantly, the *Edwards* opinion underscores that in a case such as the one before the Court, "the spectacle that could well result from [the defendant's] self-representation at trial is at least as likely to prove humiliating as ennobling."[221] The Court also stresses that not only must proceedings *be* fair, they must "*appear* fair to all who observe them."[222]

Elsewhere, I have written that "this focus on dignity and the perception of justice" was the Court's "first implicit endorsement of important principles of therapeutic jurisprudence in a criminal

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Trial of Mentally Disabled Criminal Defendants, 14 BEHAV. SCI. & L. 61 (1996), https://doi.org/10.1002/(SICI)1099-0798(199624)14:1<61::AID-BSL226>3.0.CO;2-G.

214. *Godinez*, 509 U.S. at 399. Dissenting in *Godinez*, Justice Blackmun archly noted that "[a] person who is 'competent' to play basketball is not thereby 'competent' to play the violin. . . . Competency for one purpose does not necessarily translate to competency for another purpose." *Id.* at 413 (Blackmun, J., dissenting). On how *Edwards* implicitly concedes the correctness of Justice Blackmun's dissent in *Godinez*, see 3 PERLIN & CUCOLO, *supra* note 35, § 13-2.4, at 13-146 to 3-147.

215. *Edwards*, 554 U.S. at 178.

216. 3 PERLIN & CUCOLO, *supra* note 35, § 13-2.4, at 13-147.

217. In *Dusky v. United States*, the Supreme Court set out the substantive standard for competency to stand trial: 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 a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960).

218. *Edwards*, 554 U.S. at 175–76.

219. McKaskle v. Wiggins, 465 U.S. 168, 187–88 (1984) (finding appointment of standby counsel over self-represented defendant's objection is permissible).

220. *Edwards*, 554 U.S. at 176 (citing *McKaskle*, 465 U.S. at 176–77).

221. *Id.*

222. *Id.* at 177 (emphasis added) (quoting Wheat v. United States, 486 U.S. 153, 160 (1988)).

procedure context."[223] The Court's insight into the conceptual diversity of mental illness[224] reflects an understanding of the multiple textures of mental disability that coincide perfectly with TJ principles.

D. *Conclusion*

The cases just discussed—"the major building blocks of almost fifty years of constitutional, statutory, regulatory, and customary development"[225]—all reflect that same *esprit* that subsequently has animated thirty years of therapeutic jurisprudence developments. By underscoring the essentiality of dignity and compassion in the legal process—especially in cases involving vulnerable populations in areas of the law and society highly infected by bias—these cases are the forerunners of the therapeutic jurisprudence movement.

VI. Cases and Opinions Reflecting a Lack of Therapeutic Jurisprudence[226]

One of the most important cases that, implicitly, rejects the principles of TJ is *Youngberg v. Romeo*,[227] a case that declined to follow *Wyatt*'s lead[228] and failed to declare a constitutional right to treatment.[229] The Court's decision to adopt a pallid "substantial departure from accepted professional judgment" standard[230] had the impact of significantly limiting judicial inquiries into the adequacy of a patient's treatment.[231] Elsewhere, I have noted that "[t]he presumption of validity given to institutional decision making [in *Youngberg*], in effect, signals lower courts to close their eyes to the landscape upon which *Wyatt* was litigated as well as to the history of American public psychiatric institutions."[232]

Further, *Youngberg*'s abandonment (though, importantly, not outright rejection) of the "least restrictive alternative" construction[233]

223. Perlin, *God Said*, *supra* note 70, at 491 (footnote omitted).

224. *See supra* text accompanying notes 202–03.

225. *See* Perlin et al., *supra* note 198, at 70.

226. Generally beyond the scope of this paper are the topics related to judges simply refusing to follow the law. On the issue of how judges in the state of Washington failed to cooperate and enforce criminal record expungement laws, see Pamela B. Loginsky, Expunging, Vacating and Sealing Misdemeanor Records (undated and unpublished manuscript) (on file with the author). My thanks to Judge Randal Fritzler for sending me this piece.

227. Youngberg v. Romeo, 457 U.S. 307 (1982).

228. *See supra* text accompanying notes 193–95.

229. *See Youngberg*, 457 U.S. at 324 (substituting a "reasonably nonrestrictive confinement conditions" standard).

230. *Id.* at 323; *see also, e.g.*, Perlin, *supra* note 64, at 952–53 (1997) (citing *Youngberg*, 457 U.S. at 323).

231. Perlin, *supra* note 65, at 258. *See generally* Susan Stefan, *Leaving Civil Rights to the 'Experts': From Deference to Abdication Under the Professional Judgment Standard*, 102 Yale L.J. 639 (1992).

232. Perlin et al., *supra* note 185, at 105–06.

233. *See Youngberg*, 457 U.S. at 324.

(embracing, instead, the "reasonably nonrestrictive confinement conditions" standard, a phrase that had never previously mentioned in caselaw)[234] is, at best, curious. As I have written elsewhere, "its use as a *replacement* for the other standard, again, sends a crystal-clear message that the therapeutic values that underlay the application of the 'least restrictive alternative' test to mental disability law cases have been abandoned."[235] This position *was* subsequently altered by the Supreme Court's later *statutory* decision in *Olmstead v. L.C.*,[236]

> finding a limited right to community treatment under the Americans with Disabilities Act, and incorporating a least restrictive alternative methodology, . . . *Youngberg* [still] sent "a crystal-clear message that the therapeutic values that underlay the application of the 'least restrictive alternative test to [constitutional] mental disability law cases [has] been abandoned."[237]

In *Kahler v. Kansas*,[238] the Supreme Court much more recently found that the abolition of the insanity defense—retaining only a limited mens rea exception—does not violate the Due Process Clause. It reasons that, as the defendant was still permitted to offer whatever evidence of mental health he deemed relevant at sentencing, there would still be provided "an individualized determination of how mental illness, in any or all of its aspects, affects culpability."[239]

Dissenting, Justice Breyer sharply disagreed, concluding that Kansas's law "offends . . . principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[240] and that consideration of moral incapacity at sentencing was an insufficient remedy.[241]

From a perspective of TJ, *Kahler* fails miserably. As Professor Stephen J. Morse notes, a "person with mental disorder who is unaware of a risk that a reasonable person should be aware of is by definition unreasonable."[242] Three years prior to the *Kahler* decision, I con-

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234. *Id.*

235. PERLIN & CUCOLO, *supra* note 35, § 2-6.2, at 2-88.

236. Olmstead v. L.C., 527 U.S. 581 (1999).

237. PERLIN & CUCOLO, *supra* note 35, § 2-6.2, at 2-88 (footnotes omitted) (first citing 42 U.S.C. §§ 12101–12213; then citing *Olmstead*, 527 U.S. at 587; and then citing Michael L. Perlin, *"Their Promises of Paradise": Will* Olmstead v. L.C. *Resuscitate the Constitutional "Least Restrictive Alternative" Principal in Mental Disability Law?*, 37 HOUS. L. REV. 999 (2000); and quoting Perlin et al., *supra* note 185, at 106).

238. Kahler v. Kansas, 140 S. Ct. 1021 (2020).

239. *Id.* at 1026.

240. *Id.* at 1038 (Breyer, J., dissenting) (quoting Leland v. Oregon, 343 U.S. 790 (1952)).

241. *Id.* at 1049–50.

242. Stephen J. Morse, *Internal and External Challenges to Culpability*, 53 ARIZ. ST. L.J. 617, 627 (2021). This is not the first time that the Supreme Court has turned its back on TJ principles in an insanity defense case. *See* Clark v. Arizona, 548 U.S. 735, 742 (2006) (holding that a state's insanity test that was couched "solely in terms of capacity to tell whether an act is right or wrong" did not violate due process). Elsewhere, I have said that *Clark* reflects how the "Supreme Court came perilously close

cluded an article—criticizing the insanity defense abolition movement—in this manner:

> [T]he abolition of the insanity defense . . . violates every precept of TJ. TJ sees three values as essential elements of the legal process: voice, validation, and voluntariness. Elimination of the insanity defense . . . makes it virtually impossible that these values will be privileged, and makes it more likely that sanist behavior on the part of jails, prison administrators, and line staff will fester to an even greater extent than it does now.[243]

Subsequently, I discussed how the result of abolition "would be the long-term incarceration of the population in question in prisons that we know are dangerous and life-threatening to this population."[244] Nothing could be more opposed to TJ principles.

Justice Alito's dissent in *Hall v. Florida* similarly shows how some members of the judiciary implicitly reject TJ principles. In *Hall,* the Supreme Court expanded on its prior decision in *Atkins v. Virginia* (which declared unconstitutional capital punishment in the case of persons with intellectual disabilities),[245] making it clear that inquiries into defendants' intellectual disabilities for the purpose of determining whether they are potentially subject to the death penalty cannot be limited to a bare numerical "reading" of an IQ score.[246] In its decision in *Hall*, the Court relies on the "medical community's opinions" on this issue, noting that that community defined intellectual disability according to three criteria: "significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period."[247] Thus, the Florida law that forbade Florida sentencing courts from considering "even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances,"[248] could not pass constitutional muster.[249]

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to condoning the punishment of . . . non-responsible defendants." Perlin, *God Said*, *supra* note 70, at 514.

243. Perlin, *God Said*, *supra* note 70, at 484 (footnotes omitted).

244. *Id.* at 505; *see also id.* at 480 (explaining that abolition of the insanity defense "will likely lead to torture of this population in the jails and prisons").

245. Atkins v. Virginia, 536 U.S. 304, 321 (2002); *see also* Michael L. Perlin, *"Life Is in Mirrors, Death Disappears": Giving Life to* Atkins, 33 N.M. L. REV. 315 (2003).

246. Hall v. Florida, 572 U.S. 701, 712–13 (2014).

247. *Id.* at 710.

248. *Id.* at 712.

249. *See generally* Perlin et al., *Fair Play*, *supra* note 57, at 464–65. Subsequently, the Supreme Court expanded on *Hall* in Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017), an opinion focusing on how Texas state practices perpetuated bias by "advanc[ing] lay perceptions of intellectual disability." *Id.* at 1051. These percep-

In his dissent, Justice Alito disagrees, arguing that the positions of professional associations "at best[,] represent the views of a small professional elite," concluding that Florida's standard was "sensible," comporting with the "longstanding belief that IQ tests are the best measure of intellectual functioning."[250]

Writing elsewhere, I have observed that "Justice Alito's dissent is, at best, curious. His *faux* populist charge that the professional associations relied upon by the majority reflect nothing but a 'small, professional elite' flies in the face of reality."[251] At the time of the opinion, there was "not a shred of expert support"—nor has one emerged in the past nine years—"that suggests that a strict numerical cutoff can or should be the 'be all and end all' of assessing intellectual disability."[252] This dissent reflects "an outcome-determinative approach, [with some justices] 'uncritically' accepting social science data bolstering opinions when they are in the majority, but 'debunk[ingl' it when they are in the minority."[253] Opinions such as this are the antithesis of TJ values. I cannot conjure up a criminal law/procedure opinion that is more violative of dignity values and devoid of compassion than this dissent by Justice Alito.

VII. A "TWEENER" CATEGORY

Some cases, paradoxically, can be (and have been) characterized as both "pro-TJ" and "anti-TJ." One such case is *Rogers v. Commissioner of the Department of Mental Health*,[254] a state court decision that followed a remand by the U.S. Supreme Court in *Mills v. Rogers*,[255] which considered the extent to which an involuntary patient at

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tions—the residue of what I have referred to often as false "ordinary common sense," *see, e.g.*, Perlin & Cucolo, *supra* note 27, at 453—frontally violate TJ. *Moore I* was subsequently reinforced in Moore v. Texas (*Moore II*), 139 S. Ct. 666 (2019), the Court noting that, on remand, the state court in Moore's case persisted in relying on the same "lay stereotypes of the intellectually disabled." *Id.* at 672 (quoting *Moore I*, 137 S. Ct. at 1052). *See generally* 3 PERLIN & CUCOLO, *supra* note 35, §§ 17-4.5, at 17-133 to 7-142.

250. *Hall*, 572 U.S. at 731, 733–34.

251. 3 PERLIN & CUCOLO, *supra* note 35, § 17-4.2.3, at 17-130.

252. *Id.*; *see also id.* ("At trial, the state produced no expert to assert that it was."); *Hall*, 572 U.S. at 722 (Florida's rule "goes against unanimous professional consensus." (quoting Brief for Am. Psych. Ass'n et al. as Amici Curiae Supporting Petitioner at 15, Hall v. Florida, 572 U.S. 701 (2014) (No. 12-10882), 2013 WL 6805688)).

253. Perlin, *supra* note 91, at 85 (citing Perlin, *Morality and Pretextuality*, *supra* note 75, at 137 (quoting Norbert L. Kerr, *Social Science and the U.S. Supreme Court*, *in* THE IMPACT OF SOCIAL PSYCHOLOGY ON PROCEDURAL JUSTICE 56, 65 (Martin F. Kaplan ed., 1986)).

254. Rogers v. Comm'r of the Dep't of Mental Health, 458 N.E.2d 308 (Mass. 1983).

255. Mills v. Rogers, 457 U.S. 291, 291 (1982).

a psychiatric hospital can refuse the imposition of certain medications.[256] The remand decision in *Rogers* held:

> (1) that a committed mental patient is competent to make treatment decisions "until the patient is adjudicated incompetent by a judge"; (2) that, where there is such an incompetency adjudication, the judge, "using a substituted judgment standard, shall decide whether the patient would have consented to the administration of antipsychotic drugs"; and (3) that "no state interest" justified the use of such drugs "in a non-emergency situation without the patient's consent." On the other hand, a patient *could* be treated against his will and without prior court approval to prevent the "immediate, substantial, and irreversible deterioration of a serious mental illness."[257]

In subsequent litigation in the same case, the First Circuit remanded the case to the district court so that the court could "issue a declaration stating that the Massachusetts Supreme Judicial Court's recognition of substantive and procedural rights of involuntarily committed mentally ill patients in Massachusetts has created for those patients a liberty interest under the Fourteenth Amendment of the federal Constitution."[258]

Rogers and parallel litigation in New Jersey[259] and New York[260] were the subject of intensive scholarship, both in legal and psychiatric journals,[261] and this scholarship was divided between those who tended to favor an approach with more judicial oversight of the treat-

256. *See* 2 PERLIN & CUCOLO, *supra* note 35, §§ 8-5.4–.9.1, at 8-55 to 8-94 (discussing the full litigation in the *Rogers* case).

257. *Id.* § 8-5.9.1, at 8-89 to 8-90 (footnotes omitted) (first quoting *Rogers*, 458 N.E.2d at 310; then quoting *id.*; then quoting *id.* at 311; and then quoting *id.*). In such cases, if the doctor expects to continue to treat the patient over the latter's objections, "the doctor[ ] must seek [a]n adjudication of incompetency, and, if the patient is adjudicated incompetent, the court must formulate a substituted judgment plan." *Rogers*, 458 N.E.2d at 311.

258. Rogers v. Okin, 738 F.2d 1, 9 (1st Cir. 1984).

259. *See* Rennie v. Klein, 462 F. Supp. 1131, 1147 (D.N.J. 1978), *supplemented by*, 476 F. Supp. 1294 (D.N.J. 1979), *stay granted by*, 481 F. Supp. 552 (D.N.J. 1979), *modified*, 653 F.2d 836 (3d Cir. 1981), *vacated*, 458 U.S. 1119 (1982), *on remand to*, 720 F.2d 266 (3d Cir. 1983).

260. *See* Rivers v. Katz, 495 N.E.2d 337 (N.Y. 1986).

261. *See, e.g.*, Alexander D. Brooks, *The Right to Refuse Antipsychotic Medications: Law and Policy*, 39 RUTGERS L. REV. 339, 339–42 (1987); Ronald Schouten & Thomas G. Gutheil, *Aftermath of the* Rogers *Decision: Assessing the Costs*, 147 AM. J. PSYCHIATRY 1348 (1990), https://doi.org/10.1176/ajp.147.10.1348; Jonathan Brant, Pennhurst, Romeo, *and* Rogers*: The Burger Court and Mental Health Law Reform Litigation*, 4 J. LEGAL MED. 323, 344–47 (1983), https://doi.org/10.1080/01947648309513387; J. Richard Ciccone et al., *Medication Refusal and Judicial Activism: A Reexamination of the Effects of the* Rivers *Decision*, 44 HOSP. & CMTY. PSYCHIATRY 555 (1993); Paul S. Appelbaum & Thomas G. Gutheil, *"Rotting with Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients*, 7 BULL. AM. ACAD. PSYCHIATRY & L. 306 (1979), *responded to in* George E. Dix, *Realism and Drug Refusal: A Reply to Appelbaum and Gutheil*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 180 (1982).

ment refusal process (predominantly law professors and lawyers representing patients), and those who tended to favor an approach more deferential to medical decision-making (predominantly psychiatrists).[262]

Thus, some empirical evidence shows that the right to refuse has therapeutic value because "it expands the due process rights of mentally disabled individuals by providing them a judicial or administrative hearing on the issue of their capacity to refuse treatment."[263] An important study by John Ensminger and Thomas Liguori found that more formal court proceedings may have therapeutic value because they force the individual to face reality and also have an opportunity to present and hear evidence in a meaningful court procedure.[264] I have noted elsewhere that "[t]hese same benefits can be attributed to medication hearings, particularly as these hearings are often more formal than commitment hearings."[265]

Another benefit of due process is that it provides the *appearance* of fairness, contributing to the individual's sense of dignity and making the individual feel as though he or she is being taken seriously.[266] Such proceedings can be therapeutic if they allow patients the opportunity to better discuss the medications and their attendant benefits and risks with their doctors.[267] By holding a medication hearing, the doctor must again discuss the medications, their purpose, and potential side effects.[268] At the same time, patients have the opportunity to explain the reasons why they do not want the medication and ask questions about the drugs.[269]

On the other hand, some assert that allowing mental health patients this right unfairly extends these patients' involuntary commitments,

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262. On the split in this literature, see Rodney J.S. Deaton, *Neuroscience and the In Corpore-Ted First Amendment*, 4 FIRST AMEND. L. REV. 181, 182 n.2 (2006).

263. PERLIN & CUCOLO, *supra* note 35, § 2-6.3.2, at 2-90.

264. John J. Ensminger & Thomas D. Liguori, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, 6 J. PSYCHIATRY & L. 5 (1978), *reprinted in* THERAPEUTIC AGENT, *supra* note 6, at 245.

265. PERLIN & CUCOLO, *supra* note 35, § 2-6.3.2, at 2-90.

266. *See, e.g.*, Tyler, *supra* note 37, at 444.

267. *See, e,g.*, Francine Cournos et al., *A Comparison of Clinical and Judicial Procedures for Reviewing Requests for Involuntary Medication in New York*, 39 HOSP. & CMTY. PSYCHIATRY 851 (1988); Julie Magno Zito et al., *Drug Treatment Refusal, Diagnosis, and Length of Hospitalization in Involuntary Psychiatric Patients*, 4 BEHAV. SCI. & L. 327 (1986), https://doi.org/10.1002/bsl.2370040308.

268. Cournos et al., *supra* note 267, at 854.

269. *Id.* The research also shows that the right to refuse treatment and the legal procedures surrounding these rights also help to prevent the inappropriate use of psychiatric medication, such as using it as a means of punishment or convenience. *See, e.g.*, Davis v. Hubbard, 506 F. Supp. 915, 926–27 (N.D. Ohio 1980); *see also* Mary C. McCarron, *The Right to Refuse Antipsychotic Drugs: Safeguarding the Mentally Incompetent Patient's Right to Procedural Due Process*, 73 MARQ. L. REV. 477, 484 (1990).

perhaps up to twice as long as those who consent to treatment.[270] Also, empirically, judges regularly defer to experts,[271] almost always approving involuntary medication applications.[272] I have noted in an earlier work that "[a]utomatic deference without a careful assessment of the evidence presented can render the right to refuse treatment meaningless and antitherapeutic."[273] Finally, the most recent research concludes that such hearings (under the *Rogers* model) "generate[ ] a degree of delay that ironically deprives patients of the liberation from illness that is the common goal of all stakeholders."[274]

There has been little academic scholarship about this issue in recent years, with the few law review articles written concluding that the right to refuse has a strong TJ component.[275] A piece by two psychiatrists and a lawyer-psychologist suggests several potential approaches that might, potentially, add a different measure of TJ to the process.[276] But either way, it is certain that more attention must be paid to the relationship between this right and therapeutic jurisprudence.

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270. *See* Steven K. Hoge et al., *A Prospective, Multicenter Study of Patients' Refusal of Antipsychotic Medication*, 47 ARCHIVES GEN. PSYCHIATRY 949, 954 (1990), https://doi.org/10.1001/archpsyc.1990.01810220065008; Shelley Levin et al., *A Controlled Comparison of Involuntarily Hospitalized Medication Refusers and Acceptors*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 161, 169 (1991).

271. *See, e.g.*, Cournos et al., *supra* note 267, at 855; *see also* Michael G. Farnsworth, *The Impact of Judicial Review of Patients' Refusal to Accept Antipsychotic Medications at the Minnesota Security Hospital*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 33, 40 (1991).

272. Pascal Sauvayre, *The Relationship Between the Court and the Doctor on the Issue of an Inpatient's Refusal of Psychotropic Medication*, 36 J. FORENSIC SCIS. 219, 221 (1991). In one study, every application that was sought was approved. *See* Jorge Veliz & William S. James, *Medicine Court:* Rogers *in Practice*, 144 AM. J. PSYCHIATRY 62 (1987), https://doi.org/10.1176/ajp.144.1.62.

273. PERLIN & CUCOLO, *supra* note 35, § 2-6.3.3, at 2-93.

274. Jhilam Biswas et al., *Treatment Delayed Is Treatment Denied*, 46 J. AM. ACAD. PSYCHIATRY & L. 447, 447 (2018), https://doi.org/10.29158/JAAPL.003786-18; *see also id.* at 452 ("Patients who reject treatment on the basis of disorganized or paranoid thought processes and impaired insight and judgment ironically live without freedom and in confinement.").

275. *See, e.g.*, Jennifer Fischer, *A Comparative Look at the Right to Refuse Treatment for Involuntarily Hospitalized Persons with a Mental Illness*, 29 HASTINGS INT'L & COMP. L. REV. 153, 158 (2006); Mehgan Gallagher, *No Means No, or Does It? A Comparative Study of the Right to Refuse Treatment in a Psychiatric Institution,* 44 INT'L J. LEGAL INFO. 137, 144 (2016), https://doi.org/10.1017/jli.2016.16.

276. See, for example, the following:

> Some remedies to address delays might include special appointment and training of "medical judges," sophisticated in the nature of psychotropic medications; acceleration of the process for inpatients; mediation outside of the court setting with both doctors and lawyers; use of video conferencing in the courtroom to help remote parties be available for earlier hearings; and use of administrative law procedures and settings that might be able to act more promptly. All stakeholders stand to benefit from such changes.

Biswas et al., *supra* note 274, at 452.

VIII. CONCLUSION

I believe that it is essential that all participants in the legal system—judges, lawyers, court administrators (as well as those who frequently testify)—take seriously the conception of therapeutic jurisprudence as well as its key characteristics.[277] Because of TJ's focus on dignity and compassion, it is the best tool that I know of to root out bias,[278] limit polarization,[279] and support vulnerable persons[280] in the legal process. As I have sought to demonstrate in this Article, although there have been some important and vivid examples of courts—both in the United States and elsewhere[281]—employing TJ principles and techniques to serve this purpose (both before and since TJ was "created" as a topic of legal analysis), I remain saddened that it still remains off the radar for so many lawyers and judges (and law professors).[282]

I have written frequently before about how TJ is the best "tool" in our toolkit to combat sanism[283] and pretextuality[284] in the law, to minimize heuristic decision-making,[285] and to shine a light on decisions that flow from faulty "ordinary common sense."[286] It is tragic that so few judges have embraced its principles and employed them in ways that truly empower litigants and lead to unbiased decisions, which in turn lead to authentic justice for vulnerable individuals in ways that are less polarizing than so much of what goes on in the legal system, both on the parts of lawyers and litigants.[287] Ironically, so many of the

277. On parallels between judicial and attorney attitudes in this context, see, for example, Karni Perlman, *It Takes Two for TJ: Correlation Between Bench and Bar Attitudes Toward Therapeutic Jurisprudence—An Israeli Perspective*, 30 T. JEFFERSON L. REV. 351 (2008). *See also* Perlin & Lynch, *supra* note 61.

278. See, for example, the focus on sanist biases in *In re* Mental Health of K.G.F., 29 P.3d 485, 491–92 (Mont. 2001), *partially overruled by In re* J.S., 401 P.3d 197 (Mont. 2017).

279. See, for example, the description of the custody battle that led to the decision in VDZ v. VEA, [2020] SGCA 75 (C.A.) (Sing.).

280. See, for example, the characterization of the conditions of confinement in Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

281. It must be repeated that some of the most important TJ-infused decisions come from other nations. *See* discussion *supra* Section IV.B (Canada, Singapore, Pakistan, and New Zealand).

282. *See* Perlin, *Keep It All Hid*, *supra* note 96, (listing the few TJ courses being taught at U.S.-based law schools); *see also* Perlin, *supra* note 97 (compiling and presenting results from an informal survey of national and international professors who are teaching or have taught TJ or TJ-based law classes).

283. Perlin, *supra* note 71, at 591.

284. Perlin & Weinstein, *supra* note 69, at 903.

285. Perlin, *Keep It All Hid*, *supra* note 96, at 876.

286. Michael L. Perlin & Alison Lynch, *"Some Mother's Child Has Gone Astray": Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing*, 59 FAM. CT. REV. 478, 478 (2021), https://doi.org/10.1111/fcre.12589.

287. *See* VDZ v. VEA, [2020] SCGA 75 (C.A.) (Sing.). For a recent evaluation of the quality of judging in a mental health tribunal in Australia (in part from a therapeutic jurisprudence perspective), see Sam Boyle & Tamara Walsh, *Procedural Fairness in Mental Health Review Tribunals: The Views of Patient Advocates*, 28

most TJ-in-spirit cases were decided before the idea of TJ was ever articulated.[288]

In *In re Mental Health of K.G.F.*,[289] the Montana Supreme Court found that state residents had a right to receive compassion from the state, relying on the dignity clause of the state constitution.[290] It is hard to fathom an opinion more supportive of therapeutic jurisprudence principles than this one, albeit one that was, for the most part, subsequently discarded 16 years later.[291] But this is such a rarity. In stark contrast, there is the dissent of Justice Alito in *Hall v. Florida*.[292] It is hard to fathom an opinion that is more devoid of compassion and more dismissive of the concept of the dignity of persons who come before the courts.[293] If TJ is relied on by counsel and employed by courts, this will best ensure decisions that are optimally free of bias via approaches that improve therapeutic functioning without sacrificing civil rights and civil liberties.

In "Foot of Pride," Bob Dylan sang about "these times of compassion when conformity's in fashion."[294] Immediately after that, he sings the chorus of the song:

> Well, there ain't no goin' back
> When your foot of pride come down
> Ain't no goin' back.[295]

In an earlier article about law school teaching methods, I concluded, "Too many law schools have a 'foot of pride' when it comes to rethinking the curriculum, rethinking teaching methods, rethinking how we do things."[296] I believe the same conclusion holds true for judges and for lawyers as well.[297] If we do cast aside our everyday practices and adopt TJ ones instead, then, there truly will be "no goin' back."

PSYCHIATRY PSYCH. & L. 163, 178 (2021), https://doi.org/10.1080/13218719.2020.1767715, which points out that "'rubber stamping' the decision of a doctor, such that it appears that the tribunal has abdicated its decision-making role, may constitute an error of law."

288. *See* discussion *supra* Part V.

289. *In re* Mental Health of K.G.F., 29 P.3d 485 (Mont. 2001), *partially overruled by In re* J.S., 401 P.3d 197 (Mont. 2017); *see supra* text accompanying notes 136–43.

290. *Id.* at 495 (citing Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301, 330–32 (2000)).

291. *In re* J.S., 401 P.3d at 205.

292. Hall v. Florida, 572 U.S. 701, 724–43 (2014) (Alito, J., dissenting).

293. On the role of TJ in the context of its concern for "the other," see Hopkins & Bartels, *supra* note 52.

294. *See* DYLAN, *supra* note 17; *see also Foot of Pride*, *supra* note 21. Dylan has sung about dignity often. See, for example, the titles of both Perlin, *Have You Seen Dignity?*, *supra* note 37, and Perlin, *supra* note 213 (*"Dignity Was the First to Leave"*), which incorporate Dylan song lyrics about dignity.

295. *Foot of Pride*, *supra* note 21.

296. Perlin, *supra* note 11, at 1001.

297. *See* Mossman & Kapp, *supra* note 97.