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

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One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).1 TJ presents a new model by which we can assess the ultimate impact of case law and legislation that affects mentally disabled individuals, studying the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or anti-therapeutic consequences, and questioning whether such rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles.2 It “asks us to look law as it actually impacts people’s lives.”3 In recent years,

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1 See e.g., THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed. 1990); ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds. 1991); LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds. 1996); THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (Bruce J. Winick ed. 1997).

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

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

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigants story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial 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.

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


6 Id. at 576.

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

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\(^9\) See Winick, *supra* note 3.


\(^14\) See Ronner, *supra* note 8.


\(^16\) Freckelton, *supra* note 5, at 579, 594.


\(^18\) Rotman, *supra* note 12, at 547-49.

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

The lessons that we can take away from these teachings should be clear. A recent article about domestic violence – written by a law professor who herself was the victim of domestic abuse – brings home the sad reality of how humiliation and the legal process are often intertwined. Wrote Prof. Sarah Buel: “I was determined to ensure that other victims did not share my experiences of shame, humiliation, sorry excuses, and endangerment by my abuser and the legal system.” Similarly, Dorothy Roberts writes about how the legal system silences African-American welfare mothers as a “part of a ritual of humiliation by the bureaucrats who supervise them.”

Others write about the humiliation that is frequently a part of attempted reconciliation of workplace disputes. Although progressive lawyers “dignify their clients by giving voice to their clients: by ‘telling the client's story and interpreting the law from the client's viewpoint,’ and ‘by giving the client voice and sparing the client the humiliation of being silenced and ignored’,” these stories are all too often ignored, subordinated and trivialized.

20 Winick, supra note 15, at 1089.


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

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

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

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

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

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