Considering the “Alternative Jurisprudences” as a Tool of Social Change to Reduce Humiliation and Uphold Dignity

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Three years ago, I spoke to this group about “A Therapeutic Jurisprudence Inquiry Into the Roles of Dignity and Humiliation in the Law,”¹ and concluded that, if scholars dealing with

¹ Accessible at http://www.humiliationstudies.org/documents/PerlinNY09meeting.pdf.
all aspects of humiliation and dignity were to immerse themselves in the therapeutic jurisprudence (TJ) literature, we would all be the richer for it. That presentation formed the core of a book chapter that I’ve just written – “Understanding the Intersection Between International Human Rights and Mental Disability Law: The Role of Dignity, that will appear in the forthcoming book, THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES\(^2\) -- and it also led to the core of a new “solo” book of mine that is now in press, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY.\(^3\) When I wrote this latter book, I began to think even more seriously about the relationship between dignity and, not just TJ, but also, two of the other “alternative jurisprudences”: the school of procedural justice and the school of restorative justice. I believe that similar immersion in these approaches to the law and to society will also reveal new strategies through which humiliation can be subordinated and dignity privileged.

In my time this morning, I will briefly discuss each of the schools of thought, and will then explain why I think all of us – not just the few lawyers in the room, but all of us to whom these issues truly matter – need to think about them carefully as we look for new ways of reducing humiliation and enhancing dignity in every aspect of human behavior.

\(^2\) Bruce Arrigo & Heather Bersot, eds. 2013, in press.

A. Therapeutic jurisprudence

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ). Therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences. The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles. There is an inherent tension in this

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inquiry, but David Wexler clearly identifies how it must be resolved: “the law’s use of “mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.”” As I have written elsewhere, “An inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives” and focuses on the law’s influence on emotional life and psychological well-being. It suggests that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness.” TJ understands that, “when attorneys fail to acknowledge their clients' negative emotional reactions to the judicial process, the clients are inclined to regard the lawyer as indifferent and a part of a criminal system bent on

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12 Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT, 23, 26 (Kate Diesfeld & Ian Freckleton, eds. 2003).
punishment.”¹³ By way of example, therapeutic jurisprudence “aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage.”¹⁴

One of the central principles of therapeutic jurisprudence is a commitment to dignity. Professor Amy Ronner describes the “three Vs”: voice, validation and voluntariness, arguing:

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.\textsuperscript{15}

The question before us is this: how can we use TJ as a means of minimizing humiliation and maximizing dignity? Taking as a given the accuracy and importance of Professor Ronner’s “three V’s,” it follows that a litigant must feel that the tribunal has genuinely listened to, heard, and taken seriously his story. To what extent have we absorbed TJ values and incorporated them into the way that we treat each other? These are questions that all of us must ask each other.

B. Procedural justice\textsuperscript{16}

“Procedural justice” asserts that “people's evaluations of the resolution of a dispute (including matters resolved by the judicial system) are influenced more by their perception of the fairness of the process employed than by their belief regarding whether the ‘right’ outcome was reached.”\textsuperscript{17} The research is consistent: “the principal factor shaping their reactions is

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\textsuperscript{15} Amy D. Ronner, Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles, 71 U. CIN. L. REV. 89, 94-95 (2002); See generally, AMY D. RONNER, LAW. LITERATURE AND THERAPEUTIC JURISPRUDENCE (2010).
\textsuperscript{16} See generally, PERLIN, supra note 3, Chapter 6B.
whether law enforcement officials exercise authority in ways that are perceived to be fair.”

And, the fairness of the process used to reach a given outcome is critical to perceptions of legitimacy. An important question to be asked is this: does the justice system treat litigants

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Procedural justice research has shown that procedural justice effects are present in a wide range of settings. Civil litigants in court care about their treatment by a judge, criminal defendants care about their treatment by judge and jury, disputing parties in arbitration and mediation care about their treatment by an arbitrator or mediator, and even disputing parties in negotiation care about their treatment by the other party. Research outside the legal dispute resolution system has demonstrated that people care about their treatment by other authority figures, such as police officers, work supervisors, and health-care administrators. Beyond both the legal dispute-resolution context and the third party context, research has suggested that individuals care about procedural justice in highly relational settings like the family and even in classic economic settings like markets. Effects are found in field studies, simulations and experimental settings, and in situations with both low and very high stakes.

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When those affected by decision-making processes perceive the process to be just, “they are much more likely to accept the outcomes of the process, even when the outcomes are adverse.” There is a growing body of research showing that the experience of procedural justice not only enhances evaluations of persons, institutions, and specific outcomes, but also leads to greater overall satisfaction with the legal experience and more positive affect with respect to an encounter with the justice system. \footnote{Hafemeister, Garner & Bath, *supra* note 17, at 200, quoting, in part, Michael M. O’Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 478 (2009).}

Perceptions of systemic fairness are driven, in large part, by “the degree to which people judge that they are treated with dignity and respect.” \footnote{E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 70 (1988).}

And, the public’s perception of procedural justice—whether the justice system treats litigants fairly and respectfully regardless of the substantive outcome reached—determines the

\footnote{Tyler, *supra* note 18, at 442, as discussed Perlin, *Healing, supra* note 9, at 415.}

public's willingness to engage in and comply with the system. If, procedural justice is the conception of people as rights-bearing individuals who demand to be treated fairly and with dignity and respect (and I believe it is), then we must begin to consider it in the context of every substantive topic on which we focus our attention.

C. Restorative justice

What is restorative justice (RJ)? Professor John Braithwaite defines restorative justice as a means by which to restore victims, restore offenders, and restore communities “in a way that all stakeholders can agree is just.” Susan Daicoff has characterized it as is “a movement in criminal law in which criminal justice and criminal sentencing are carried out by the community, the victim, and the offender in a collaborative process.” Elsewhere, Professor Braithwaite lists the objectives of a restorative justice approach as “restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberative democracy, restoring harmony based on a feeling that justice has been done, and


26 See generally, Perlin, supra note 3, Chapter 6C.

27 John Braithwaite, A Future Where Punishment Is Marginalized: Realistic or Utopian?, 46 UCLA L. Rev. 1727, 1743 (1999). See also, e.g, John Braithwaite, Restorative Justice & Responsive Regulation 11 (2002) (Responsive Regulation) (“Restorative justice is a process whereby all the parties with a stake in the offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”).
restoring social support.”28 Tali Gal and Vered Shidlo-Hezroni identify these as the “critical RJ values”: participation, reparation, community involvement, “crime as belonging to individuals,” deliberation, flexibility of practice, equality, a forward-looking approach, victims’ involvement, and, “most important[ly]”, respect.29 At the core of restorative justice is a focus on the “restoration of human dignity.”30

Optimally, it involves “the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.”31 It is “a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal


with the aftermath of the offense and its implications for the future." Its core values are “healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends.” And here the question is this: have we sufficiently considered the use of RJ principles in our efforts to maximize dignity and minimize humiliation?

I believe that it is essential that all of us engaged in our common enterprise – the subordination of humiliation and the privileging of dignity – begin to think seriously about all of these schools of thought. Our colleague David Yamada has written frequently from a TJ perspective. Our colleague Howard Zehr is one of the fathers of the RJ movement. Our founder, Evelin Lindner, has written about procedural justice in the context of international human rights. But there is very little in the literature that examines the social issues on which

32 RESPONSIVE REGULATION, supra note 27, at 11. On process values in restorative justice, see Kay Pranis, Restorative Values, in Human Rights and Restorative Justice, in HANDBOOK OF RESTORATIVE JUSTICE 59, 60-63 (Gerry Johnstone & Daniel W. Van Ness, eds. 2007) (HANDBOOK)


34 See e.g., David C. Yamada, Therapeutic Jurisprudence and the Practice of Legal Scholarship, 41 U. MEM. L. REV. 121 (2010); David C. Yamada, Employment Law as if People Mattered: Bringing Therapeutic Jurisprudence into the Workplace, 11 FLA. COASTAL L. REV. 257 (2010).

35 See e.g., ZEHR, supra note 31.

we focus from all three perspectives. In one of two of my books currently in press -- A P
PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY -- I do focus on all three, and conclude, in that context:

The adoption of alternative jurisprudences would treat defendants more humanely, would better insure their "voice" and would make more likely that their actions in the criminal trial process were voluntary.37

I believe that this conclusion “works” in the context of all of the issues we have been discussing in this group for all these years. I hope some of you will consider the applications of these jurisprudences to the many other issues we take seriously in this group. I believe it will enhance the dignity of all of us.
