

**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,”<sup>1</sup> and concluded that, if scholars dealing with

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<sup>1</sup> 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*<sup>2</sup> -- 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*.<sup>3</sup> 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.

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<sup>2</sup> Bruce Arrigo & Heather Bersot, eds. 2013, in press.

<sup>3</sup> Ashgate Press, 2013, in press. I also consider dignity in the context of the death penalty in another in-press book, *MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES* (Rowman & Littlefield publ. 2013 (in press)).

## A. Therapeutic jurisprudence<sup>4</sup>

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> There is an inherent tension in this

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<sup>4</sup> See generally, Michael L. 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: LAW AND POLICY (Bernadette McSherry & Penelope Weller, eds. 2013) (Routledge) (in press).

<sup>5</sup> See e.g., DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990) ; DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 2D-3, at 534-41 (2d ed. 1998). Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 L. & HUM. BEHAV. 27, 27, 32-33 (1992).

<sup>6</sup> See 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, 912 (2009); see Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in DISPUTES AND DILEMMAS IN HEALTH LAW 91 (I. Freckelton & K. Peterson eds., 2006), for a transnational perspective.

<sup>7</sup> Michael L. Perlin, *"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching*, 9 CLINICAL L. REV., 683-729 (2003); 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 (2005); Michael L. Perlin, *Everybody Is Making Love/Or Else Expecting Rain@: Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 U. WASH. L. REV. 481 (2008).

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.”<sup>8</sup> As I have written elsewhere, “An inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”<sup>9</sup>

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives”<sup>10</sup> and focuses on the law’s influence on emotional life and psychological well-being.<sup>11</sup> 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.”<sup>12</sup> 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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<sup>8</sup> David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

<sup>9</sup> Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); (Perlin, *Healing*); Michael L. Perlin, *Where the Winds Hit Heavy on the Borderline: Mental Disability Law, Theory and Practice, Us and Them*, 31 LOYOLA L.A. L. REV. 775, 782 (1998).

<sup>10</sup> Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

<sup>11</sup> David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in DANIEL P. STOLLE, DAVID B. WEXLER & BRUCE J. WINICK, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (2000) (STOLLE et al).

<sup>12</sup> 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 Freckelton, eds. 2003).

punishment.”<sup>13</sup> 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.”<sup>14</sup>

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 pronouncement that affects their own lives can initiate healing and bring about improved

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<sup>13</sup> Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 59 (2010).

<sup>14</sup> Claire B. Steinberger, *Persistence and Change In The Life Of The Law: Can Therapeutic Jurisprudence Make A Difference?* 27 LAW & PSYCHOL. REV. 55, 65 (2003). The most thoughtful sympathetic critique of TJ remains Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y & L. 193 (1995).

behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.<sup>15</sup>

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<sup>16</sup>

"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."<sup>17</sup> The research is consistent: "the principal factor shaping their reactions is

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<sup>15</sup> 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).

<sup>16</sup> See generally, PERLIN, *supra* note 3, Chapter 6B.

<sup>17</sup> Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 200 (2012), quoting, in part, Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 26 (2007); see also, Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585 n. 85 (2008) (same); Larry Heuer, *What's Just About the Criminal Justice System? A Psychological Perspective*, 13 J. L. & POL'Y 209, 213 (2005) ("procedural fairness concerns, rather than outcomes, are the best predictors of people's trust and confidence in the courts"). Outcomes are similar in other cultures as well. See Freckelton, *supra*, at 585 n. 85, discussing findings reported in MARK PEEL, THE

whether law enforcement officials exercise authority in ways that are perceived to be fair.”<sup>18</sup>

And, the fairness of the process used to reach a given outcome is critical to perceptions of legitimacy.<sup>19</sup> An important question to be asked is this: does the justice system treat litigants

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LOWEST RUNG: VOICES OF AUSTRALIAN POVERTY 182 (2003) (discussing attitudes of individuals in subsidized housing projects in Australia).

See generally, Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 133-34 (2011) (footnotes omitted):

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.

<sup>18</sup> Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 346 (2011), citing, *inter alia*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING COOPERATION WITH THE POLICE AND THE LAW (2002); Kimberly Belvedere, John L. Worrall & Stephen G. Tibbetts, *Explaining Suspect Resistance in Police-Citizen Encounters*, 30 CRIM. JUST. REV. 30 (2005); Ben Bradford, Jonathan Jackson & Elizabeth A. Stanko, *Contact and Confidence: Revisiting the Impact of Public Encounters with the Police*, 19 POLICING AND SOC'Y 20 (2009); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 431 (2003); see also, e.g., David B. Rottman, *Procedural Fairness as a Court Reform Agenda*, 44 CT. REV. 32 (2007); Victoria Weisz, Twila Wingrove & April Faith-Slaker, *Children and Procedural Justice*, 44 CT. REV. 36(2007).

<sup>19</sup> David Welsh, *Procedural Justice Post-9/11: The Effects of Procedurally Unfair Treatment of Detainees on Perceptions of Global Legitimacy*, 9 U. N.H. L. REV. 261, 274 (2011).

fairly and respectfully regardless of the substantive outcome reached?<sup>20</sup>

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.”<sup>21</sup> 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.”<sup>22</sup> Perceptions of systemic fairness are driven, in large part, by “the degree to which people judge that they are treated with dignity and respect.”<sup>23</sup> 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

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<sup>20</sup> Erin A. Conway, *Ineffective Assistance of Counsel: How Illinois Has Used the “Prejudice” Prong of Strickland to Lower The Floor on Performance When Defendants Plead Guilty*, 105 NW. U. L. REV. 1707, 1732 (2011).

<sup>21</sup> 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).

<sup>22</sup> E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 70 (1988).

<sup>23</sup> Tyler, *supra* note 18, at 442, as discussed Perlin, *Healing*, *supra* note 9, at 415.

For other important related readings on procedural justice in this context, see, e.g., Norman G. Poythress, *Procedural Preferences, Perceptions of Fairness, and Compliance with Outcomes*, 18 LAW & HUM. BEHAV. 361 (1994); P. Christopher Earley & E. Allan Lind, *Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments*, 52 J. PERSONAL. & SOC'L PSYCHOL. 1148 (1987); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONAL. & SOC'L PSYCHOL. 72 (1985); Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163 (1997). Cf. James H. Liu & Gerald H. Shure, *Due Process Orientation Does Not Always Mean Political Liberalism*, 17 LAW & HUM. BEHAV. 343 (1993).



public's willingness to engage in and comply with the system.<sup>24</sup> If, procedural justice is the conception of people as rights-bearing individuals who demand to be treated fairly and with dignity and respect<sup>25</sup> (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<sup>26</sup>

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.”<sup>27</sup> 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

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<sup>24</sup> Conway, *supra* note 20, at 1732, citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 76-81 (1988).

<sup>25</sup> See e.g., Justice Tankebe, *Self-Help, Policing, and Procedural Justice: Ghanaian Vigilantism and the Rule of Law*, 43 *LAW & SOC'Y REV.* 245, 249 (2009).

<sup>26</sup> See generally, PERLIN, *supra* note 3, Chapter 6C.

<sup>27</sup> 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.”<sup>28</sup> Tali Gal and Vered Shidlo-Herzoni 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.<sup>29</sup> At the core of restorative justice is a focus on the “restoration of human dignity.”<sup>30</sup>

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

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<sup>28</sup> Susan Daicoff, *The Role of Therapeutic Jurisprudence Within The Comprehensive Law Movement*, in STOLLE ET AL, *supra* note 11, at 365, 376; see also, LEONARD RISKIN ET AL, *DISPUTE RESOLUTION AND LAWYERS* 537 (3d ed. 2006) (same). On the synergy between therapeutic jurisprudence and restorative justice, and how “TJ calls for the expansion of the use of RJ [in cases involving] child victims,” see Tali Gal & Vered Shidlo-Hezroni, *Restorative Justice as Therapeutic Jurisprudence: The Case of Child Victims*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE, 139, 153 (Edna Erez, Michael Kilchling & Jo-Anne Wemmers eds. 2011). On some key differences between therapeutic jurisprudence and restorative justice, see James L. Nolan, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1547-48 (2004) (focusing on the emphasis on “reintegrative shaming” that is part of the restorative justice movement, see John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 257-58 (2002), and is *not* part of the therapeutic jurisprudence movement, Nolan, *supra*, at 1548, quoting Bruce Winick (“shame .. throws a lot of people off track”).

<sup>29</sup> Gal & Shidlo-Hezroni, *supra* note 28, at, 148-49.

<sup>30</sup> Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL'Y 225, 252 (2003).

<sup>31</sup> HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 181 (1990).

with the aftermath of the offense and its implications for the future.”<sup>32</sup> Its core values are “healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends.”<sup>33</sup> 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.<sup>34</sup> Our colleague Howard Zehr is one of the fathers of the RJ movement.<sup>35</sup> Our founder, Evelin Lindner, has written about procedural justice in the context of international human rights.<sup>36</sup> But there is very little in the literature that examines the social issues on which

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<sup>32</sup> 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)

<sup>33</sup> John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 5 (1999). On how the restorative justice discourse must be “broaden[ed]” around the issue of international human rights, see Ann Skelton & Makubetse Sekhonyane, *Human Rights and Restorative Justice*, IN HANDBOOK, *supra* note 32, at 591-93.

<sup>34</sup> 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).

<sup>35</sup> See e.g., ZEHR, *supra* note 31.

<sup>36</sup> See e.g., Evelin Lindner, *How Globalisation Transforms Gender Relations: The Changing Face of Humiliation* (2001), accessible at <http://humiliationstudies.org/documents/evelin/GlobalisationTransformsGenderRelations.pdf>; Evelin Lindner, *How Humiliation Creates Cultural Differences and Political Divisions: The Psychology of Intercultural Communication – Germany, Somalia, Rwanda/Burundi, and the International Community*

we focus from all three perspectives. In one of two of my books currently in press -- A 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.<sup>37</sup>

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.

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as Cases (2000), accessible at

<http://www.humiliationstudies.org/documents/evelin/HumiliationCulturalDifferences.pdf>

<sup>37</sup> See generally, 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)(describing the "three Vs": voice, validation and voluntariness).