2 "I Hope the Final Judgment's Fair"

Alternative Jurisprudences, Legal Decision-Making, and Justice

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Introduction

Are there readers of this chapter who cannot think back to a time when they were teenagers and said to a parent "But mom [or dad], it's not fair!" (followed by "Jimmy's parents let *him* stay up 'til midnight!," or "Janie's parents are letting *her* go to the dance!," or any other grievance that best resonates)? This notion of "fairness" is not simply a vehicle for a teenage complaint; Professor Norman Finkel's studies of this phenomenon found them to be consistent across college students, tots and teens, adults, and elderly participants (Finkel, 2000).[1]

In this chapter, I consider "fairness" in the context of what are referred to as "alternative jurisprudences." At the core of any legal decision is an assumption that the decision will be "fair" (an elusive term, and one which, strangely, has not often been defined). It is axiomatic that fair processes are considered more acceptable (Kitai-Sangero, 2016; Tyler, 2011; Tyler & Huo, 2002). In a legal context, the notion of *fundamental fairness* includes individual rights that are foundational to the American tradition of justice – a requirement "whose meaning can be as opaque as its importance is lofty" (Lassiter v. Dep't of Soc'l Servs., 1981, p. 24) – and that encompasses fundamental rights deeply rooted in this nation's history and traditions (Duncan v. Louisiana, 1968; Kim, 2013).

The key question is this: To what extent is the legal system authentically "fair" in cases involving criminal defendants with mental disabilities, and what alternatives can be adopted to best remediate the situation? Many (perhaps, most) of the decisions involving this cohort are not "fair" in the contexts of due process and justice (see, generally, Perlin & Cucolo, 2016, spring 2023 update). All too often, judges make decisions based on a sanist[2] application of morality and behave

1 Finkel notes (2000, p. 914): "These unfairnesses are not petty whines, but something more fundamental: They incite heat which does not cool much, even though, for the adults, many of their instances occurred years or decades ago."

2 Sanism is "an irrational prejudice [toward persons with mental disabilities or who are alleged to have mental disabilities] of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry" (Perlin, 1994, p. 257).

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prejudicially and pretextually[3] toward people with mental illness and professionals in the mental health field (Perlin, 1997a, b). Thus, a popular sanist myth is that people with mental disabilities lack self-control, self-discipline, and a work ethic (Perlin, 1992). Many of the cases decided by the Supreme Court in this area of law and policy undermine justice and fairness in cases involving defendants with mental disabilities (Perlin, 1994; see also Chapter 25 of this volume). By way of example, the potential near-total abolition of the insanity defense – countenanced by the Supreme Court's decision in *Kahler* v. *Kansas*, 2021 – "will make a mockery of any modicum of fair-trial rights for the population in question" (Perlin, 2017, p. 480).

In addition to sanism and pretextuality,[4] the use of heuristic devices and false "ordinary common sense" (OCS) similarly "permeate and poison" all of mental disability law (Perlin & Cucolo, 2017, p. 443). Heuristics in this context are cognitive-simplifying devices that distort the ability to rationally consider information (Perlin & Cucolo, 2021), which lead to ignoring or misusing items of rationally useful information (Cucolo & Perlin, 2013) and frequently to systematically erroneous decisions through ignoring or misusing rationally useful information (Perlin, 1992; see also Chapter 4 of this volume). As a result, one single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made (Perlin, 1997b).

In such instances, a false OCS has long pervaded the 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").' It is supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information" (Cucolo & Perlin, 2019, p. 38). Jurors rely on this false OCS – by way of example, in cases of defendants with autism – to define remorse and empathy (Perlin & Cucolo, 2021, p. 605). Or, a trial judge might say "he [the defendant] doesn't look sick to me," or, even more revealingly, "he is as healthy as you or me" (Perlin & Weinstein, 2016, p. 88). Suchs approaches lead to jurists determining whether defendants conform to "popular images of 'craziness'" (Perlin, 2003, p. 25). It strains credulity to imagine that a judicial proceeding can be "fair" if the judge decides cases as just discussed. It is essential to incorporate fair process norms (such as a robust right to counsel) to ensure a defendant's dignity and act as checks and balances on state power (Perlin & Cucolo, 2021; Arenella, 1983). Moreover, perceptions of fairness will likely increase compliance with and belief in the system's principles and reduce reoffending (Fisler, 2015; Tyler, 2007).

3 Pretextuality describes the ways in which courts accept testimonial dishonesty – especially by expert witnesses – and engage similarly in dishonest (and frequently meretricious) decision-making (Perlin & Weinstein, 2016, p. 85).

4 See notes 2 and 3.

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The Alternative Jurisprudences

In order to best remediate this situation, it is essential to turn vigorously to "alternative jurisprudences" so as to treat defendants more humanely and make it more likely that their actions in the legal system are authentically voluntary (Ronner, 2008). These include therapeutic jurisprudence, procedural justice, and restorative justice.[5]

Therapeutic Jurisprudence

Therapeutic jurisprudence (TJ) is an emerging school of thought that recognizes that the law has therapeutic or antitherapeutic consequences (Perlin, 2009). It requires looking at the practical implications of the way the legal system regulates behavior and, most importantly, the way it regulates the lives and behavior of those who are marginalized (Perlin & Cucolo, 2017).

The aim of TJ is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential without undermining due process (Perlin, 2005). 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] impinge upon justice concerns" (Wexler, 1993, p. 21). To be clear, "An inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties" (Perlin, 2000, p. 412).

Rather, TJ seeks to use the law to prioritize rights, individual value, and well-being in a way that places a central, relational focus on fairness and collaboration (Brookbanks, 2001; Perlin & Lynch, 2014; Stobbs et al., 2019; Winick & Wexler, 2006).The use of TJ would make it more likely that defendants would be satisfied with the outcome of court proceedings, and, in cases involving therapeutic intervention, this outcome satisfaction would lead to greater compliance and "success" (Perlmutter, 2005). For example, it would give richer textures to sentencing procedures, and would more likely bring about the sort of reconciliation that can only be positive for mental health purposes (see, generally, Erez, 2004; Perlin, 2013). Importantly, fairness in legal proceedings is therapeutic in that it enhances people's feelings of dignity and respect (Perlin & Cucolo, 2021; Perlin et al., 1995).

Procedural Justice

Procedural justice shifts emphasis to the fairness of the process rather than the outcome, influencing people's perceptions of system legitimacy (Hafemeister et al., 2012; Tyler, 2007). People are more motivated to be legally obedient by the

5 For other alternative jurisprudences in this context (some of which are beyond the scope of this chapter), see Daicoff, 2009, p. 142, n. 209, listing these alternatives: (1) creative problem-solving, (2) holistic justice, (3) preventive law, (4) problem-solving courts (including drug treatment courts, unified family courts, mental health courts, and community courts), (5) procedural justice, (6) restorative justice, (7) therapeutic jurisprudence, (8) therapeutically oriented preventive law, and (9) transformative mediation.

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belief that they are legitimate and worthy of deference than by deterrence and other instrumental considerations (Gallagher & Ashford, 2021). Further, it proposes that providing fair and transparent court procedures increase satisfaction, irrespective of outcome (Leben, 2020; Mather, 2008; see also, generally, Perlin, 2013).

"The principal factor shaping [the] reactions [of the general public] is whether law enforcement officials exercise authority in ways that are perceived to be fair" (Schulhofer et al., 2011, p. 346, citing Tyler & Huo, 2002). Moreover, the fairness of the *process* used to reach a given outcome is critical to perceptions of legitimacy (Welsh, 2011). Thus, the following question is posed: Does the criminal justice system treat defendants fairly and respectfully regardless of the substantive outcome reached (Conway, 2011, p. 1732)? 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" (Hafemeister et al., 2012, p. 200, quoting O'Hear, 2009, p. 478). On the other hand, experiencing arbitrariness in procedure leads to "social malaise and decreases people's willingness to be integrated into the polity, accepting its authorities, and following its rules" (Tyler, 1992, p. 443).

Restorative Justice

Restorative justice (RJ) is rooted in efforts to seek healing and accountability from harm (Shea, 2020). Professor John Braithwaite defines RJ as a means by which to restore victims, restore offenders, and restore communities in an agreed-upon and just manner (Braithwaite, 1999, p. 1743). The objectives of an RJ approach are "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 restoring social support" (Braithwaite, 1999, p. 6). Tali Gal and Vered Shidlo-Hezroni (2011, pp. 148–149) further identify the following as the "critical RJ values": participation, reparation, community involvement, deliberation, flexibility of practice, equality, a forward-looking approach, victims' involvement, and "most important[ly]", respect (Gal & Shidlo-Hezroni, 2011, p. 139; see, generally, Perlin, 2013).

At the core of RJ is a focus on the "restoration of human dignity" (Butcher, 2003, p. 252). Optimally, it involves "the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance" (Zehr, 1990, p. 181). Its core values are "healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends" (Braithwaite, 1999, p. 4). The "centerpiece of restorative justice" is a meeting that brings all parties to a case together (Roche, 2003, p. 20). Restorative justice emphasizes "community involvement and citizen engagement" and supplements community services by contributing to reintegration (Burns, 2014, p. 447, quoting Nicholl, 1999, p. 3, and citing Garner & Hafemeister, 2003, p. 84).

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How the Alternative Jurisprudences Can Work Together

The adoption of alternative jurisprudences would treat defendants more humanely, would better ensure their "voice," and would make it more likely that their actions in the criminal trial process were voluntary (see, generally, Perlin, 2013).[6] These points will be addressed in turn.

Focusing on Therapeutic Jurisprudence

The use of TJ would make it more likely that the defendants would be satisfied with the outcome of court proceedings and, in cases involving therapeutic intervention, this outcome satisfaction would lead to greater compliance and "success." As Professor Bernard Perlmutter (2005, p. 596) has underscored, "Even when the hearing outcome is negative, people treated fairly, in good faith, and with respect, experience greater satisfaction with the result and are more likely to comply with the decision rendered by the court."

This is a far-reaching inquiry. Wexler (2014) – one of the founders of TJ – encourages lawyers and scholars to employ TJ to examine "the therapeutic and antitherapeutic impact of 'legal landscapes' (legal rules and legal procedures) and of the 'practices and techniques' (legal roles) of actors such as lawyers, judges, and other professionals operating in a legal context" so as to determine the extent to which they are "TJ-friendly" or unfriendly (Wexler, 2014, p. 463). If this challenge is taken seriously, TJ will be incorporated into *all* aspects of the criminal trial process, a decision that cannot help but benefit persons with mental disabilities at all stages of that process.[7]

This is not to say that TJ is limited to considerations that arise from mental disability law and criminal law/procedure. In recent years it has spread across all areas of law, including family law, health law, torts law, contracts and commercial law, and trusts and estates law, and this trend shows no sign of abating (Perlin & Cucolo, 2016, spring 2023 update, § 2–6, at pp. 2-42 to 2-86). Reinforcing the linkage to the other schools of thought under consideration here, one of the sine qua nons of TJ is a commitment to dignity.[8] Consider here the teachings of professors Jonathan Simon and Stephen Rosenbaum (2015, p. 51), as part of their embrace of TJ as a modality of analysis: "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."

6 Professor David 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 Wexler, 2020).

7 In a series of articles, I have sought to apply to TJ to such aspects of criminal law and procedure as insanity (Perlin, 2017), incompetency (Perlin, 2010), sex offender law (Cucolo & Perlin, 2013), the death penalty (Perlin, 2016), trials of defendants with traumatic brain injury (Lynch et al., 2021), trials of defendants with autism (Perlin & Cucolo, 2021), juvenile sentencing (Perlin & Lynch, 2021), adequacy of counsel (Perlin et al., 2019), and mental health courts (Perlin, 2018a).

8 On TJ's commitment to compassion, see Perlin (2022).

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Focusing on Procedural Justice

Procedural justice principles must apply globally to cases involving persons subject to the criminal trial process and the mental disability law process. Equally clearly, it must apply specifically to inquiries as to incompetency (Kondo, 2001), insanity (Kondo, 2001), and sentencing in all cases involving defendants with serious mental disabilities (Lamparello, 2009). Further, in such relevant areas of the law as the potential success of problem-solving courts such as mental health courts (Hafemeister et al., 2012; Perlin et al., 2018), and the enforcement of international human rights law, procedural justice is key (Garrity-Roukos & Brescia, 1993).

Focusing on Restorative Justice

The use of RJ principles in cases involving these cohorts of defendants will increase dignity.[9] To fulfill its mandate, RJ must ensure that offenders "should be treated in a humane, egalitarian way that values their worth as human beings and respects their right to justice and dignity" (Johnstone, 2002, p. 11, as quoted in Harris, 2011, p. 48, n. 211). It emphasizes its core values of "healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends" (Braithwaite, 1999, p. 5). On the interrelationship between RJ and mental health courts, see Fritzler (2003, pp. 14–18).

Focusing on Fairness

Scholars have frequently linked these jurisprudences with notions of fairness. In an important article about mainstreaming TJ in mainstream courts, the late Michael Jones, a retired Arizona state judge, emphasized in this context that "exercising procedural fairness is an essential characteristic of judicial behavior" (Yamada, 2021, pp. 460–461, citing Jones, 2012). Professor Ida Dickie (2008) has stressed how a TJ emphasis on procedural fairness and respect for autonomy can help all stakeholders in the criminal justice system. In an article about TJ and mediation, Professor Omer Shapira (2008, p. 254) has focused on how "TJ attaches great therapeutic value to fair treatment of individuals and argues that the feeling of being treated fairly can promote individuals' psychological well-being."

Procedural justice, of course, focuses on how people *experience* fairness, and, as already noted, the research tells us that procedural justice influences people's impressions of fair outcomes (Quintanilla, 2017; Tyler & Lind, 2001). By way of example, the late Professor Bruce Winick argued that assisted outpatient

9 Not coincidentally, dignity is recognized as one of the "cores of the entire therapeutic jurisprudence enterprise" (Perlin, 2019, p. 113; see, generally, Perlin, 2022).

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commitment hearings must be "structured in ways that accord patients a sense of procedural justice, treating them with fairness, dignity, and respect, attempting to motivate them to accept treatment rather than coercing them to do so" (Winick, 2003, p. 135). Additionally, a focus on procedural justice and fairness is also *instrumentally* valuable. In a major article considering both the legal and psychological research on procedural justice, Professor Rebecca Hollander-Blumoff (2011, pp. 177–178) concludes:

> Looking at specific legal rules and structures through the lens of procedural justice provides a multifaceted way to explore whether those rules and structures are effective in producing perceptions of fair processes that motivate people to obey and respect the law and legal system.

Finally, empirical studies of RJ programs reveal that victims and offenders in such programs were more likely to believe that the mediator was fair than victims and offenders in court were to believe the same thing about the judge (Gabbay, 2005; Poulson, 2003, p. 185), a finding replicated in multiple studies (see, e.g., Lanni, 2021, p. 644, noting that multiple randomized control studies have found that RJ outperformed the criminal process on a variety of metrics related to victims' psychological well-being and a sense of fairness). Moreover, offenders who have taken part in RJ processes have reported feelings of fairness, attentive listening, neutrality, and the ability to influence, which encouraged them to fulfill their undertakings (Dancig-Rosenberg & Gal, 2013, p. 2327). In short, the research is clear that the adoption of these alternative jurisprudences maximizes fairness (and *perceptions* of fairness) in the judicial process.

Combining the Alternative Jurisprudences: Achieving a Synergy

How, then, can and should these alternative jurisprudences be combined to work synergistically to better assure (or, at least, *seek* to assure) fairness in the legal process? It is disappointing that there has been so little legal scholarship in recent years that seeks to connect these three schools of thought. Other than a recent piece by professors David Wexler and Ian Marder (2021) that argues persuasively that RJ and TJ can and should be taught at the university level so as to optimally mainstream these concepts in social discourse, and an editorial by Professor Tali Gal that urges those in the RJ "camp" to collaborate with TJ-focused scholars and practitioners (Gal, 2020), the legal academic literature has been bereft of any connective contributions for the past five years.[10]

Earlier analyses offered more to consider. Professors Brian Sellers and Bruce Arrigo (2009, p. 439) linked RJ and TJ so as to reflect the "cultivation of an integrity-based society . . . in which the moral fiber of individuals is more fully embraced and the flourishing prospects for human justice are more completely realized." And

10 Prior to the Marder–Wexler piece, the most recent related works were Fraser (2017) (discussing the applications of these doctrines in New Zealand), Johnsen & Robertson (2016), and Wexler (2015). In a recent blog entry, Wexler and Margetic (2021) build on Professor Gal's editorial, focusing on the "myopia" in both communities (in terms of their failure to acknowledge the contributions of the other).

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Professor Natalie Des Rosiers (2000, p. 173, n. 18) saw TJ "as a companion to all the new questions surrounding the re-thinking of the adversarial model and the emergence of a restorative justice or transformative justice model."

In the past, I have asked "how can we synergistically take what we have learned from all of these movements in such a way as to maximize the presence of dignity in the criminal justice practice as it affects persons with mental disabilities?" (Perlin, 2013, p. 98). An embrace of these alternative schools of jurisprudence will make it far more likely that the result will be procedures that *are* fair and that *appear* fair, and that the salutary outcomes of this adoption will extend far beyond the boundaries of mental disability law and/or criminal law and procedure.

Future Research Ideas

Professor Wexler has, in recent years, focused on considerations of what he refers to as Therapeutic Application of the Law (practices and techniques) and Therapeutic Design of the Law (rules, laws, and processes; Wexler, 2019; see also, e.g., Loi & Chin, 2021). However, other than one article coauthored by Wexler (Marder & Wexler, 2021), there is only one piece of academic scholarship that makes the connection between these concepts and RJ (Triggs & Sharp, 2018), and one between these concepts and procedural justice (Petrucci, 2021). There is much for other researchers to consider here.[11]

I have written about sanism frequently over the past 30 years (beginning with Perlin, 1992), and continue to write about it regularly in the context of TJ (e.g., Perlin & Lynch, 2016; Perlin et al., 2019, Perlin, 2020). Although there are more than 1,700 references to sanism in the literature,[12] other than in my own work (e.g., Perlin, 2018a; Perlin et al., 2018), there has apparently been only one article that considers it in the context of procedural justice and RJ (Hafemeister et al., 2012). Research on both of these topics is sorely needed.

Conclusion

"Therapeutic jurisprudence can be an effective and dramatic tool for ferreting out sanism" (Perlin et al., 2019, p. 210), and the adoption of TJ as a dominant school of legal thought "will allow lawyers to engage in meaningful collaborative conversations with their clients and provide lawyers with skills and strategies

11 See also Sellers & Arrigo (2018, pp. 538–539) arguing that TJ and RJ should be considered by scholars of "psychological jurisprudence" as "a pragmatic response to the ethic of citizenship." A recent valuable book (see Stobbs, Bartels & Vols, 2019) contains three chapters urging additional TJ research in substantive areas. See Stobbs (2019), Perlin, Cucolo, & Lynch (2019), and Gelb (2019). This follows by nearly 25 years Professor Christopher Slobogin's (1995) major analysis of TJ, calling on TJ scholars "to rely on . . . theory and research" (p. 204; see also Petrila, 1993).

12 This number was derived by a simple search on scholar.google.com (Jan. 5, 2022).

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through which they can effectively rebut sanism in the courtroom" (Perlin & Lynch, 2016, p. 323).

In addition, the deployment of the principles of procedural justice and RJ will optimally serve to create far fairer systems of justice and social policy, and to best ensure that both courts' ultimate decisions *and* the process of legal decision-making (by all fact-finders: i.e., judges and jurors) will come closer to the goal of fairness to which a mature and coherent legal system must aspire (see, e.g., Freckelton, 2008). More than 30 years ago, Professors Wexler and Winick argued that "Legal decision-making should consider not only economic factors, public safety, and the protection of patients' rights; it should also take into account the therapeutic implications of a rule and its alternatives" (Wexler & Winick, 1991, p. 982). This conclusion holds true today as well.

The goal of fairness, in the context of these cases, can never be met absent a consideration of the virulence of sanism and pretextuality, and the misuse of heuristics and false OCS all of which leads society to willfully blind itself to gray areas of human behavior, and predispose people to endorse beliefs in accord with their prior experiences.

The title of this chapter is drawn, in part, from Bob Dylan's shimmering song "Workingman's Blues #2" (Dylan, 2006), and the line in the title comes from this verse:

> I'll lift up my arms to the starry skies
> And pray the fugitive's prayer
> I'm guessing tomorrow the sun will rise
> I hope the final judgment's fair.

An analysis of the lyrics by a Dylan critic characterizes the song as reflecting "a love of humanity that fills a human heart when it tries to make the world a better place" (Bushnell, 2017). Those committed to infusing TJ, procedural justice, and RJ into the law have precisely the same commitment.

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