2019

A TJ Approach to Mental Disability Rights Research: On Sexual Autonomy and Sexual Offending

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Chapter 7

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Introduction

We believe it is impossible to understand the development and the power of therapeutic jurisprudence (TJ) without acknowledging that its roots in mental disability law have continued to expand and flourish over the decades and that there is no other substantive area of the law in which every aspect—substantive and procedural, civil and criminal, statutory and constitutional, domestic and international—has been weighed and evaluated using a TJ lens. In this chapter, we will consider how those roots have shaped the last three decades of research and the implications of what has developed. We will look carefully at two sub-sets of mental disability law developments: the law of sexual autonomy and the law of sexually violent predators.[1]

1. The three of us, writing together, have recently considered these two topics in another context in Perlin, Cucolo & Lynch 2017. We have also represented individuals in cases involving these substantive issues in our careers as Public Defenders (MLP & HEC), Public Advocates (MLP) and Disability Rights staff attorneys (AJL). The TJ principles we discuss in this chapter informed our work (although, in the case of MLP, much of that work was done before the concept of "therapeutic jurisprudence" was overtly articulated: see Perlin 2017; 2018).

We conclude that, while TJ has spread far and wide (substantially through David Wexler's dual focus on the therapeutic design of the law (TDL) and the therapeutic application of the law (TAL) (Wexler 2015)), it is still the area of mental disability law that is its heart and soul. We believe that all TJ practitioners ought to take seriously the scholarship that has developed in this specific area so as to shed light on TJ's potential application to all other aspects of the law—substantive, procedural and structural. In this chapter, we will focus primarily on its application to questions of sexual autonomy and sexual offending.

TJ's Developments in Mental Disability Law

Over the past three decades, TJ principles have been applied to virtually every aspect of mental disability law. These principles continue to inform the law in this area,[2] and scholars have thus considered the application of TJ to every aspect of mental disability law, as informed by TJ principles (for a full list, see Perlin & Cucolo 2017a):

- the involuntary civil commitment process (Ensminger & Liguori 1978; Winick 1999; Szeli 2000);
- the relationship between voluntary and involuntary commitment (Winick 1991);
- the right to treatment (Winick 2002);
- competency to consent to treatment (Drogin 2004);
- institutional conditions in general (Gruber 2013);
- the interplay between mental disability and the *Americans with Disabilities Act* (Daly-Rooney 1993);
- deinstitutionalization and the criminalization of persons with mental illness (Risdon 2017);
- international human rights law (Winick 1991);
- the right to refuse medication (Dorfman 1993);
- mental health courts (Kondo 2000);
- competency to stand trial (Gould 1995);
- the insanity acquittee conditional release hearing (Wexler 1991);
- competency to be executed (Winick 1992);
- oral competence of those charged with crime (Bartels & Richards 2013);
- forensic testimonial issues (Sadoff 1993);

2. For recent examples by the co-authors on a range of mental disability law topics, see, e.g., Lynch & Perlin 2017; Perlin & Lynch 2016a; 2016b; 2017; Perlin & Cucolo 2017c.

- forensic psychological evaluations (Dickie 2008);
- juror decision making in malpractice litigation (Kapp 1997); and
- standards of psychotherapeutic tort liability (Schopp & Wexler 1989).

In addition to these areas—which cover so many aspects of mental disability law—there is a profound connection between TJ and those areas of mental disability law that deal with sexuality, including issues of sexual autonomy and sex offender laws. Although these areas appear to raise seemingly disparate questions, our professional experiences and research work have led us to believe that society's responses to the issues raised flow from similar attitudes about sexuality and disability. We believe that "twinning" developments in these areas, through the prism of TJ, may give us some insights to both the roots of these attitudes and potential means of remediation (Perlin, Cucolo & Lynch 2017). It is to these issues that we now turn.

Sexual Autonomy, Patients' Rights and TJ

As the field of mental disability law has grown over the past 45 years, very few topics involving persons with mental illness remain taboo or off limits to scholars or to judges who face these issues daily (see generally Perlin & Lynch 2014). However, discussions of whether persons with mental disabilities have a right to voluntary sexual interaction often touch a raw nerve in conversations about mental disability law, even among those who are practicing in the field. The discomfort that people feel in considering this topic is further exacerbated when discussing individuals who are institutionalized. As a society, it seems that our attitudes toward the sexuality of persons with mental disabilities are seemingly at odds with our understanding—in virtually all other realms of life—of the importance of human sexuality and autonomy to engage in consensual sexual activity.

Society tends to infantilize the sexual urges, desires and needs of persons with mental disabilities. Alternatively, they are regarded as possessing an animalistic hypersexuality, which warrants the imposition of special protections and limitations on their sexual behavior to stop them from acting on these "primitive" urges. By focusing on alleged "differentness," we deny these people's basic humanity and shared physical, emotional and spiritual needs. By asserting that theirs is a primitive morality, we allow ourselves to censor their feelings and their actions. By denying their ability to show love and affection, we justify this disparate treatment (Perlin 1993–1994).

All these tensions are heightened in cases involving institutionalized persons, in which patient desires and provider discomforts must be acknowledged and recalibrated (Doyle 2010: 133; Tennille & Wright 2013). We must face the

reality that patients have sexual desires and that providers want to avoid that reality (Perlin 2005; Perlin & Lynch 2014).

An article published in early 2014 in a peer-reviewed scientific journal began with this startling comment: "The recognition that individuals with disabilities have a *desire* for sexual relationships with other people is a relatively new concept in the scientific community." (Gilmour, Smith & Schalomon 2014); emphasis added. This observation — wildly at odds with much of the literature in the field (Perlin & Lynch 2015a) — exemplifies the confusion and misinformation that permeate this area of law and policy. Additionally, it emphasizes the anti-therapeutic attitude about expression of sexual autonomy that permeates any discussion of rules and regulations governing institutionalized people. The baseline, rather, for any scholarly inquiry into this subject must be that "individuals [with disabilities] have the same needs for intimate relationships and sexual expression as everyone else" (Werner 2012: 16).[3] This not only ensures that institutionalized persons are placed on the same spectrum as those not institutionalized, but also allows for recognition that expression of personal autonomy is a therapeutic tool that should be given to any person who is able to safely make decisions in this realm.

Although this is often a difficult subject to raise (see Perlin & Lynch 2016c), even among those familiar and comfortable with other aspects of mental disability, it is one that must be raised so as to comport with both TJ *and* legal standards. Dignity concerns and rights violations will occur if there is not a full understanding of the importance of the ability for persons with mental disabilities to practice free sexual expression.

In this discussion, it is critical to start with the assumptions that *all* individuals have the capacity to consent to sexual relations and the presence of a mental disorder alone does not mean that the individual lacks this capacity (Mental Welfare Commission of Scotland 2007: 4). With this as a "given," it is first necessary to understand the different modes of analysis to be engaged in determining capacity and competency. Capacity "refers to an individual's actual ability to understand, appreciate and form a relatively rational intention with regard to some act" (Bisbing 2007: 325; see also Dimopoulos 2012). Competency is a *legal* assessment that varies based on the act or decision-making that is being considered (Perlin 2008). Both of these concepts are intertwined

3. Professor Werner's focus was on persons with intellectual disabilities, but there is nothing in the literature that suggests persons with mental illness/psychosocial disabilities are any different in this regard. We use the phrase "mental disabilities" to encompass both groups.

in assessing the extent to which a person can exercise informed consent (this applies to all the permutations of the exercise of sexual autonomy: see Perlin, Cucolo & Lynch 2018; Perlin, Lynch & McClain 2018).

The reality is, however, that we too often fail to take any of this into account and instead superimpose a societal presumption of incompetency (see Rodham 1973; Perlin 2008; Lucas 2013), a "damaging message" when applied to any aspects of a person with a mental disability (Best 2012). This, more than anything else, leads to the confusion, dissonance and tension in this area of law, society and personhood. This type of presumption is directly at odds with a TJ-based perspective on this issue. The question to be addressed here is whether persons with mental disabilities are given this sort of autonomy in their sexual decision-making. Are the "3 Vs"—voice, validation and voluntariness—identified by Ronner (2008) complied with? In this context, it is relevant to note her observation that:

> 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 (Ronner 2008: 627).

Generally, where incompetency is presumed and individuals who are institutionalized are treated either as asexual or hypersexual, based only on their diagnosis of mental illness (see generally Perlin & Lynch 2016b), we are far from establishing an ethos of care that takes into account the importance of sexuality for everyone and keeps the sensitive nature of the topic in mind while crafting policies and procedures that empower and educate, rather than demonize or demoralize, this population.

Sexual Predator Laws and TJ

The origins and development of sex offender laws have had a profoundly anti-therapeutic effect, a direct result of the conceptualization of and response to high-impact, media-driven depictions of sex offenders and their offending behavior (see generally Cucolo & Perlin 2012). Rejection of a therapeutic approach to offending begins with public outrage over high-profile offenders and ends with strict and demeaning legislation that continuously shows little to no benefit to the public or to the individual offender (Perlin & Cucolo 2017b). Within those constraints are anti-therapeutic approaches to assessment, treatment, containment and integration. The absence of meaningful and effective treatment during confinement, combined with inhumane conditions upon re-

lease, make it far less likely that this cohort of individuals will ever become productive members of society, if they are, in fact, even released from institutionalization (see *Karsjens v Jesson*, 109 F.Supp.3d 1139, 1144 (D. Minn. 2015)). Only through TJ, a focus on rehabilitation and the humane treatment of individuals who have committed sexual offenses, will it be possible to reduce recidivism and facilitate successful community reintegration.

First, we must, in regarding the issue through the lens of TJ, overtly consider the anti-therapeutic effect of sensationalized media accounts. Media reporting has always been more interested in the shock value of child homicides that include an element of sexual victimization (see Simon 2003). Notorious sex offenders such as Earl Shriner, whose case "precipitated the first new generation sex offender law" (Cucolo & Perlin 2013: 188), and Jesse Timmendequas, whose case led to the enactment of "Megan's Law," which served as the "model community notification law" followed in many US states (Cucolo & Perlin 2013: 188), led society to equate the phrase "sex offender" with murderer and "monstrous imminent evil" (Kennedy 2000: 873–876; 881–887). The result was the unsupported presumption that every offender is a recidivist, a rapist and murderer unfamiliar to the victim (Winick 2003: 218) and should be automatically classified as dangerous for the rest of his life (Noroian & Saleh 2006; Chrysanthi 2011). Exaggerated media accounts over stranger-danger easily silenced any rational consideration of the valid and reliable evidence that incest and familial offenses are the most common occurrences of sexual violence (see Presser & Gunnison 1999). Thus, a reactionary response to the widely feared, but statistically rare, violent, child-directed and stranger-perpetrated sex crime fueled the enactment of our sex offender legislation and laws (Simon 2003). This unsubstantiated belief that future recidivism is high, and most sex offenders will re-offend, prompted state and federal legislators to enact anti-therapeutic statutes that keep such offenders locked up indefinitely (e.g., *Call v Gomez*, 535 N.W.2d 312, 319 (Minn. 1995)). Using TJ as a basis for evaluating these statutes, it is clear that there are significant decisions on law and policy being made based on heuristics,[4] rather than an actual understanding of the complex issues faced when evaluating recidivism in this population (on the "pernicious power" of heuristics in sex offender cases, see Cucolo & Perlin 2013: 212–216).

Second, the case law upholding sex offender civil commitment and containment statutes has generally rejected challenges of unconstitutionality and

4. "'Heuristics' is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks" (Perlin 1994: 254).

continues to be dominated by punitive undertones (Carlsmith, Monahan & Evans 2007). Under the prevailing statutory schemes (e.g., *Kansas Statutes Annotated* §59-29a et seq. (2009); *Washington Revised Code Annotated* §71.09 et seq. (West 2009))—many of which have been patterned after the statute upheld by the United States Supreme Court in *Kansas v Hendricks* (521 US 346 (1997), Kansas' *Sexually Violent Predator Act*)—individuals who have committed sexual offenses or certain qualifying offenses deemed to have a sexual component (e.g., *Washington Revised Code Annotated* §71.09.020(15) (West 2009)) may be civilly committed for care and "treatment" at the conclusion of their prison sentence (e.g., *Kansas Statutes Annotated* §59-29a01 (providing for post-prison civil commitment of sexually violent predators (SVPs)). Such a civil commitment, although originally intended to apply only to the most heinous and dangerous offenders, has become a widely-used tool, designed to contain large numbers of offenders, whether or not their sexually motivated crimes were severe or frequent. This broad application flies in the face of the Supreme Court's mandate in upholding these statutes, noting that they only apply to a narrow class of individuals (see, e.g., *Hendricks*, 521 US at 364; State of Minnesota, Office of the Legislative Auditor (2011). See also State of West Virginia (2007)).

Third, the laws that developed were based on the unsubstantiated belief of high recidivism, reinforced by expert opinions supporting empirical, then-current "risk determinative" instruments and controversial science (Miller *et al.* 2012). Given the subsequent data that demonstrates the low recidivism rates for sex offenders (as compared with other criminals) (Agudo 2008: 307–308), it appears that bias and stigma surrounding the type of crime committed—sexual offenses—is what fuels our legislation (Agudo 2008: 308). Thus, we ignore and disregard current studies and instead act based on unfounded myths (see Freeman-Longo 2000). Various states use different methods to make discretionary risk assessments of sexual offenders (Logan 2000). These assessments are made by courts, executive agencies, prosecutors, judges and/or hybrid combinations of these cohorts (Logan 2000: 606–619). The tools used to assess offenders for risk and civil commitment had indeterminate accuracy and yielded inaccurate results when applied to individual offenders being evaluated for the likelihood of future re-offenses. One study found that populations designated as high-risk future sexual offenders, upon release, had only between a three and ten percent chance of re-offending (Franklin 2012; Wilson *et al.* 2012: 12–16). Despite the fact that these underlying tools that support confinement and containment continue to be flawed (Fabian 2005: 85–87) and experts drastically disagree on offender statistics and the reliability of actuarial instruments designed to show recidivism, they are continually used

to justify restricting offenders' liberty. By way of example, when the designers of the original Static-99 sexual offense recidivism actuarial tool analyzed newer Static-99 studies, they found that the recidivism rates reported in the original Static-99 norms were not holding firm because they were based on recidivism rates from the 1970s and 1980s, which were higher than current rates. The Static-99 designers then determined that re-norming was warranted in order to create a more accurate actuarial tool (Sreenivasan *et al.* 2010: 400–401).

Because many of the common tools deal with "static" factors, once an offender is assigned a risk level, it remains attached to them as an anti-therapeutic brand of inaccurately assessed dangerousness.

Fourth, meaningful treatment in and out of confinement for this population remains uncertain in its availability and debatable as to its effectiveness (see, e.g., *In re Young*, 857 P.2d 989, 1003 n.7 (Wash. 1993) superseded by statute as stated *In re Det. of Thorell*, 72 P.3d 708, 720–21 (Wash. 2003)). Treatment has never been deemed a constitutional right by the US Supreme Court (see *Youngberg v Romeo*, 457 US 307, 324 (1982)), but most states—in an effort to quash challenges alleging punitive detainment—consider it a duty to provide treatment and a "right" of the offender to participate (Miller 2010: 2101). Relatively little is known about which sex offenders will benefit from treatment, what treatment is most effective and how treatment affects recidivism (Rice & Harris 2003: 103).

The question then becomes: does treatment hold any verifiable outcome of effectiveness for this population; and, if not, then at what point does it become clear that this detention offers no other purpose than continued confinement post-sentence, thus implicating a punitive statutory design? (See, e.g., *Hendricks*, 521 US at 372 (Kennedy, J., concurring). For a discussion on effective (and ineffective) methods of treatment for sex offenders and sexual predators, see Winick (1998).) The treatment model thus far has been a treatment-as-management approach (Birgden & Cucolo 2011: 295), "includ[ing] cognitive behavioral treatment to recondition thoughts, feelings and behaviors, relapse prevention to support and monitor self-management skills in avoiding high risk situations and places" (Birgden & Cucolo 2011: 299).

Commentators have stated that sex offender "civil commitment, in particular, has been described by civil libertarians as preventive detention masquerading as coerced treatment that threatens rehabilitation, justice and constitutional values and legitimizes warehousing" (Birgden & Cucolo 2011: 303; for discussion, see Cucolo & Perlin 2012; Kelly 2009; McSherry & Keyzer 2009). Additionally, treatment providers in these institutions may lack competency and relevant qualifications, which supports the notion that treatment is only in place to make the case for continued confinement after prison

(Winick 1998: 505–506). It is clear that little attention is paid to actual rehabilitation. A review of the treatment offered and the facilities designed to contain individuals who have committed sexual offenses (Spierling 2001) seems to confirm the answer that society has no intention or desire to return these individuals to the community.

Fifth, only if the risk to re-offend is perceived to be sufficiently reduced are committed offenders considered for release back into the community (e.g., *Washington Revised Code Annotated* §71.09.090 (West 2009)). However, even once allowed back into society, these defendants are forever branded with a "scarlet letter" and every aspect of their lives—including personal life choices, such as place of residence, employment and Internet use—has the potential to be intruded upon, scrutinized and judged (Farley 2008: 502). Upon release, community containment laws impose strict and demeaning post-release restrictions that track offenders and undermine their (re)integration into society. The state and federal governments' enactment of registration and notification statutes has widened the net over vast numbers of individuals who have committed a wide range of offenses, sexually-motivated or otherwise. Under a rational basis standard, the sex offender registration statute was upheld as constitutional, though it required persons convicted of non-sex crimes to register (see, *e.g.*, *State v Smith*, 780 N.W.2d 90, 105–06 (Wis. 2010))(see also Wangenheim 2010). The present system of registering offenders does not distinguish those who will be dangerous in the future from those who were formerly dangerous (see Bialik 2008, noting that the majority of sex offenders are unlikely to reoffend, while others commit "unusually harmful" acts when they do, but statutory schemes make all offenders comply with registration laws), to the extent that actuarial risk assessment tools can be relied upon (Agudo 2008). It bundles statutory rape cases that deal with sexual interactions between teenagers—interactions that would otherwise be consensual, but for the age of one or both of the partners—with cases of individuals who have committed violent pedophilic offenses (James 2009; Birgden & Cucolo 2011).

States have also enacted residency restrictions that banish undesirable individuals from certain communities (Sloan 2005: A1). As a result, sex offenders are banished to neighboring counties or states and often corralled into poor neighborhoods and placed in boarding houses to reside solely with other sex offenders (Duster 2005: 712). Scholars have proposed that residency restriction laws are, in fact, counterproductive in their strict application and can result in homelessness and isolation and have the opposite effect of promoting safe communities; instead, they actually heighten the risk of reoffending (Human Rights Watch 2007: 9–10; Koffman 2009) and—combined with their effects of isolation and humiliation—can provoke feelings of hopelessness and un-

worthiness and cause both a lack of dignity and feelings of being "less than human" among sex offenders (Cohen 1995: 153). Hardships placed on individuals seeking to reintegrate into the community serve to break down protective measures and increase stressors, two of the major catalysts claimed by experts to fuel relapse. The psychological stress from "isolation, disempowerment, shame, depression, anxiety [and] lack of social supports ... can trigger some sex offenders to relapse" (Levenson & Cotter 2005b: 169). Clearly, the end result of our efforts serves no benefit to the offender or the community. TJ, at its core, is a blend of several disciplines, and this is clear when we bring in discussions of psychology, criminology, sociology and social work doctrines. TJ is made stronger by its application of interdisciplinary perspectives, and this knowledge, used by those who are creating policy, can better serve the populations we are trying to reach.

Even treatment while in the community has been criticized as anti-therapeutic. Public pressure on politicians calls for sex offenders to be effectively managed through deterrence-based methods (Crimaldi 1995: 172), though the academic community offers alternative therapeutic methods (Robinson 2003: 2). When designing community containment laws, legislative goals have been directed towards making the public feel safer, rather than helping the offender live successfully and thrive as a member of the community upon his release (Scott & Holmberg 2003: 503). Community notification and residency restriction laws have been criticized as immoral, cruel, inhumane and detrimental to the goal of reducing sexual offending (Levenson & Cotter 2005a: 62). The efficacy of these laws has been sharply debated, with many questions surrounding the legality and morality of ostracizing offenders after release, as well as the weight of the expense generated by these laws, measured against the degree to which they protect the community (see, e.g., *State v Kedging*, 571 N.W.2d 450, 453 (Wis. Ct. App. 1997); *McCreary v State*, 582 So. 2d 425, 428 (Miss. 1991); Minnesota Department of Corrections (2003: 9)). In the Western hemisphere, at least, any focus on human rights and rehabilitation for sex offenders has been put forth on a limited basis by the academic community and has been severely neglected in the legislatures and courts (Birgden & Cucolo 2011: 304).

There are, however, alternatives to our current approaches. We suggest that adherence to TJ principles will ameliorate the current state of affairs, including an expansion of reliance on problem-solving courts and a reallocation of state resources, with a focus on fostering rehabilitation and reintegration into the community. There needs to be a shift in our conceptualization and inevitable interaction with this population, in order to be successful in combating the

inherent problems of sex offender punishments. Specifically, we need to confront and analyze our fears and construct solutions that account for the human rights of *all* persons. Our approach to change must begin by examining these issues through the lens and application of TJ.

TJ instructs us to step back from myths and prevailing attitudes and to carefully consider the prescriptions of TJ principles (Winick 1998: 507–508; Birgden & Cucolo 2011: 306). The current sex offender laws honor none of these principles. We must educate ourselves, confront our fears and resist the urge to succumb to reactionary responses. These emotionally charged issues must be dealt with through rational solutions directed towards protecting potential victims while preserving the human rights of all.

In the courtroom context, we need to think more seriously about the role of problem-solving courts in dealing with this phenomenon and how, if properly conceived of and conducted, such courts can be the best assurance that TJ will be an important and integral part of the decision-making process (Horowitz 2007: 154). TJ can potentially re-educate judges to aid them in "identify[ing] alternatives to harsh punishments … particularly since the punitive response often leads to recidivism in most cases" (Sellers & Arrigo 2009: 480). Scholars have crafted potential ameliorative suggestions using TJ tools and methods. One TJ approach would involve Sex Offender Courts for sentencing (see Lovering 2011 for discussion of sex offender courts in Pennsylvania; New York and Ohio have similar regimes). These courts would employ a non-confrontational system in order to encourage acceptance of responsibility, allow high-risk offenders to be reevaluated throughout the terms of their sentence, provide positive reinforcement for changes in behavior and attitude during treatment, allow for early release with intensive parole supervision and sanction the placement of low-risk offenders in the community for monitoring and treatment (La Fond & Winick 2004: 1196–1197). In addition, reforms need to extend to the correctional system and to the monitoring of the offender in the community (La Fond & Winick 2004: 1194).

Given the limited effectiveness and knowledge of treatment, combined with the lengthy and indefinite time spent in sex offender civil commitment, states should re-allocate their resources and focus on fostering rehabilitation and reintegration into the community. If we continue to support civil commitment under the guise of treatment and the hope that individuals can be treated, then, ethically, we must tailor treatment to assist in re-entering society (La Fond 2000: 163; Wakefield 2006:146). Our focus should follow TJ ideals and aim to promote sex offenders' self-respect and dignity, while teaching these individuals to engage in emotionally mature intimate relationships with others (see Prentky

& Schwartz 2006: 10). Preparation for release should also include job training, education and life skills (Sammon 2008: 926). We must support the transition back into the community by fostering family and community relationships, not driving them further apart.

Conclusion

Over twenty years ago, writing about the laws governing civil commitment and the right both to treatment and to refuse treatment, one of the co-authors (MLP), writing with others, said, "We believe that therapeutic jurisprudence analyses may be a strategy to redeem civil rights litigation in this area and to reinvigorate this body of mental disability law" (Perlin, Gould & Dorfman 1995: 84; see also Cucolo & Perlin 2017: 316–320, from which this section is adapted). A few years later, this thought was expanded to argue that TJ "carries with it the potential to offer redemption for all mental disability law," (Perlin 2013: 301) and then, "to redeem the law for [all] persons who have been marginalized" (Perlin & Douard 2008–2009: 14).

There are no groups more marginalized than the persons about whom we write here. This marginalization consistently causes shame, humiliation and lack of dignity for these individuals and may in turn "diminish their investment in mainstream social values and increase their resentment toward society" (Levenson, D'Amora & Hern 2007: 598). We have confronted these issues as litigators, as teachers and as authors (Perlin & Lynch 2015b). Remarkably (or, perhaps not), our attitudes toward those who wish to be sexually autonomous in consensual situations and those who are accused of committing sexual crimes are perilously nearly identical. Our hope is that this chapter inspires both lawyers and policy-makers to take seriously the ways that shame and humiliation have contaminated how we treat persons with mental disabilities seeking such sexual autonomy and those involved in processes that institutionalize those who are allegedly "sexually violent predators" (Perlin & Cucolo 2017b). We believe that a turn to the principles of TJ is the best way that we can do this.

References

Agudo, S.E. (2008). Irregular passion: the unconstitutionality and inefficacy of sex offender residency laws. *Northwestern University Law Review*, **102**(1), pp. 307–338.

Bartels, L., & Richards, K. (2013). Talking the talk: therapeutic jurisprudence and oral competence. *Alternative Law Journal*, **38**(1), pp. 31–33.

Best, E. (2012). Atypical actors and tort law's expressive function. *Marquette Law Review*, **96**(2), pp. 461–488.

Bialik, C. (2008). How Likely Are Sex Offenders to Repeat Their Crimes, *The Wall Street Journal*. 24 January 2008. Available at: https://blogs.wsj.com/numbers/how-likely-are-sex-offenders-to-repeat-their-crimes-258/.

Birgden, A., & Cucolo, H.E. (2011). The treatment of sex offenders: evidence, ethics and human rights. *Sexual Abuse: A Journal of Research and Treatment*, **23**(3), pp. 295–313.

Bisbing, S.B. (2007). Competency and Capacity: A Primer. In S.S. Sanbar, M.H. Firestone, S.F. Fiscina, T.R. LeBlang, C.H. Wecht & M.J. Zaremski, eds., *Legal Medicine*, 7th edn. Philadelphia, PA: Mosby Elsevier, pp. 325–335.

Carlsmith, K.M., Monahan, J., & Evans, A. (2007). The function of punishment in the "civil" commitment of sexually violent predators. *Behavioral Sciences & The Law*, **25**(4), pp. 437–448.

Chrysanthi. S. (2011). *Sex Fiends, Perverts and Pedophiles: Understanding Sex Crime Policy in America*, New York, NY: New York University Press.

Cohen, F. (1995). From the editor: sex offender registration laws; constitutional and policy issues. *Criminal Law Bulletin*, **31**(2), pp.151–160.

Crimaldi, K. (1995). "Megan's Law": election-year politics and constitutional rights. *Rutgers Law Journal*, **27**(1), pp. 169–204.

Cucolo, H.E., & Perlin, M.L. (2012). Preventing sex-offender recidivism through therapeutic jurisprudence approaches and specialized community integration. *Temple Political & Civil Rights Law Review*, **22**(1), pp.1–42.

Cucolo, H.E., & Perlin, M.L. (2013). "They're planting stories in the press": the impact of media distortions on sex offender law and policy. *University of Dever Criminal Law Review*, **3**(1), pp.185–246.

Cucolo, H.E., & Perlin, M.L. (2017). Promoting dignity and preventing shame and humiliation by improving the quality and education of attorneys in sexually violent predator (SVP) civil commitment cases. *University of Florida Journal of Law and Public Policy*, **28**(2), pp. 291–328.

Daly-Rooney, R. (1993). Designing reasonable accommodations through co-worker participation: therapeutic jurisprudence and the confidentiality provision of the Americans with Disabilities Act. *Journal of Law and Health*, **8**(1), pp. 89–104.

Dickie, I. (2008). Ethical dilemmas, forensic psychology and therapeutic jurisprudence. *Thomas Jefferson Law Review*, **30**(2), pp. 455–461.

Dimopoulos, A. (2012). Let's Misbehave: Intellectual Disability and Capacity to Consent to Sex. *Society of Legal Scholars*, 1 September. Available at SSRN: https://ssrn.com/abstract=2332259.

Dorfman, D. (1993). Through a therapeutic jurisprudence filter: fear and pretextuality in mental disability law. *New York Law School Journal of Human Rights*, **10**(3), pp. 805–824.

Doyle, S. (2010). The notion of consent to sexual activity for persons with mental disabilities. *Liverpool Law Review*, **31**(2), pp. 111–135.

Drogin, E. (2004). Jurisprudent therapy and competency. *Law and Psychology Review*, **28**, pp. 41–51.

Duster, M.J. (2005). Out of sight, out of mind: state attempts to banish sex offenders. *Drake Law Review*, **53**(2), pp. 711–779.

Eisenberger, N.I., Lieberman, M.D., & Williams, K.D. (2003). Does rejection hurt? An fMRI study of social exclusion. *Science*, **302**, pp. 290–292.

Ensminger, J.J., & Liguori, T.D. (1978). The therapeutic significance of the civil commitment hearing: An unexplored potential. *Journal of Psychiatry & Law*, **6**(1), pp. 5–44.

Fabian, J.M. (2005). The risky business of conducting risk assessments for those already civilly committed as sexually violent predators. *William Mitchell Law Review*, **32**(1), pp. 81–159.

Farley, L.G. (2008). The Adam Walsh Act: the scarlet letter of the twenty-first century. *Washburn Law Journal*, **47**(2), pp. 471–503.

Franklin, K. (2012). Treatment and Risk among the Most Dangerous Sexual Offenders. *In the News: Forensic Psychology, Criminology and Psychology-Law*. Available at: http://forensicpsychologist.blogspot.com/2012/02/treatment-and-risk-among-most-dangerous.html.

Freeman-Longo, R. (2000). Myths and Facts about Sex Offenders. *Center for Sex Offender Management* (CSOM). Available at: http://www.csom.org/pubs/mythsfacts.html.

Gilmour, L. Smith, V., & Schalomon, M. (2014). Sexuality and ASD: Current State of the Research. In V.B. Patel et al., eds., *Comprehensive Guide to Autism*. New York, NY: Springer-Verlag New York Inc., pp. 569–584.

Gould, K. (1995). A therapeutic jurisprudence analysis of competency evaluation requests: the defense attorney's dilemma. *International Journal of Law and Psychiatry*, **18**(1), pp. 83–100.

Gruber, R. (2013). A civil prison: fear or reason? Unbiased reform of involuntary commitment proceedings for non-criminals admitted into mental facilities. *University of Detroit Mercy Law Review*, **90**(2), pp. 203–235.

Horowitz, E. (2007). Growing media and legal attention to sex offenders: more safety or more injustice?. *Journal of the Institute of Justice and International Studies*, **7**, pp. 143–158.

Human Rights Watch. (2007). No Easy Answers: Sex Offender Laws in the US. *Human Rights Watch*. Available at: https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf.

James, S. (2009). Romeo and Juliet were sex offenders: an analysis of the age of consent and a call for reform. *University of Missouri-Kansas City Law Review*, **78**(1), pp. 241–262.

Kapp, M. (1997). Medical error versus malpractice. *DePaul Journal of Health Care Law*, **1**(4), pp. 751–772.

Kelly, M. (2009). Lock them up—and throw away the key: the preventive detention of sex offenders in the United States and Germany. *Georgetown Journal of International Law*, **39**(3), pp. 551–572.

Kennedy, J.E. (2000). Monstrous offenders and the search for solidarity through modern punishment. *Hastings Law Journal*, **51**(5), pp. 829–908.

Koffman, J. (2009). Sex Offenders Live in Village under Miami Bridge, *ABC News*, 3 September. Available at: http://abcnews.go.com/Nightline/sex-offenders-live-miami-bridge/story?id=8420696.

Kondo, L. (2000). Advocacy of the establishment of mental health specialty courts in the provision of therapeutic justice for mentally ill offenders. *Seattle University Law Review*, **24**(2), pp. 373–465.

La Fond, J.Q. (1998). The costs of enacting a sexual predator law. *Psychology, Public Policy and Law*, **4**(1-2), pp. 468–504.

La Fond, J.Q. (2000). The future of involuntary civil commitment in the USA after Kansas v Hendricks. *Behavioral Sciences & the Law*, **18**(2), pp.153–167.

La Fond, J.Q., & Winick, B.J. (2004). Sex offender reentry courts: a proposal for managing the risk of returning sex offenders to the community. *Seton Hall Law Review*, **34**(4), pp. 1173–1212.

Levenson, J.S., & Cotter, L.P. (2005a). The effect of Megan's Law on sex offender reintegration. *Journal of Contemporary Criminal Justice*, **21**(1), pp. 49–66.

Levenson, J.S., & Cotter, L.P. (2005b). The impact of sex offender residence restrictions: 1,000 feet from danger or one step from absurd?. *International Journal of Offender Therapy and Comparative Criminology*, **49**(2), pp. 168–178.

Levenson, J.S., D'Amora, D.A., & Hern, A.L. (2007). Megan's Law and its impact on community re-entry for sex offenders. *Behavioral Sciences & the Law*, **25**(4), pp. 587–602.

Logan, W.A. (2000). A study in "actuarial justice": sex offender classification practice and procedure. *Buffalo Criminal Law Review*, **3**(2), pp. 593–637.

Lovering, D. (2011). Pennsylvania to be the Third State with Dedicated Sex Offender Court, *Thomson Reuters News & Insight*, 8 May 2011. Available at: https://www.reuters.com/article/us-court-sexoffender/pennsylvania-to-be-third-state-with-dedicated-sex-offender-court-idUSTRE74557N20110506.

Lucas, L.S. (2013). A dilemma of doctrinal design: rights, identity and the work-family conflict. *Florida International University Law Review*, **8**(2), pp. 379–404.

Lynch, A.J., & Perlin, M.L. (2017). "Life's hurried tangled road": a therapeutic jurisprudence analysis of why dedicated counsel must be assigned to

represent persons with mental disabilities in community settings. *Behavioral Sciences & the Law*, **35**(4), pp. 353–363.

McGuire, J. (2000). Can the criminal law ever be therapeutic?. *Behavioral Sciences & The Law*, **18**(4), pp. 413–426.

McSherry, B.M., & Keyzer, P. (2009). *Sex Offenders and Preventive Detention: Politics, Policy and Practice*, Sydney, NSW: Federation Press.

Mental Welfare Commission of Scotland. (2007). *Consenting Adults? Guidance for Professionals and Careers when Considering Rights and Risks in Sexual Relationships Involving People with a Mental Disorder*. Edinburgh: Mental Welfare Commission of Scotland.

Miller, C.S., Kimonis, E.R., Otto, R.K., Kline, S.M., & Wasserman, A.L. (2012). Reliability of risk assessment measures used in sexually violent predator proceedings. *Psychological Assessment*, **24**(4), pp. 944–953.

Miller, J.A. (2010). Sex offender civil commitment: the treatment paradox. *California Law Review*, **98**(6), pp. 2093–2128.

Minnesota Department of Corrections. (2003). *Level Three Sex Offenders: Residential Placement Issues, Report to the Legislature*. Available at: http://www.csom.org/pubs/MN%20Residence%20Restrictions_Lvl%203%20SEX%20OFFENDERS%20report%202003%20(revised%202-04).pdf.

Noroian, P., & Saleh, F.M. (2006). Residency restrictions for convicted offenders. *Journal of the American Academy of Psychiatry and the Law*, **34**(3), pp. 422–425.

Perlin, M.L. (1993–1994). Hospitalized patients and the right to sexual interaction: beyond the last frontier?. *New York University Review of Law and Social Change*, **20**(3), pp. 517–548.

Perlin, M.L. (1994). The sanist lives of jurors in death penalty cases: the puzzling role of "mitigating" mental disability evidence. *Notre Dame Journal of Law, Ethics & Public Policy*, **8**(1), pp. 239–279.

Perlin, M.L. (2005). "Limited in sex, they dare": attitudes toward issues of patient sexuality. *American Journal of Forensic Psychiatry*, **26**(3), pp. 1–19.

Perlin, M.L. (2008). "I might need a good lawyer, could be your funeral, my trial": a global perspective on the right to counsel in civil commitment cases and its implications for clinical legal education. *Washington University Journal of Law and Social Policy*, **28**(1), pp. 241–264.

Perlin, M.L. (2013). *Mental Disability and the Death Penalty: The Shame of the States*, Lanham, MD: Rowman & Littlefield Publishers.

Perlin, M.L. (2017). "Have you seen dignity?": the story of the development of therapeutic jurisprudence. *New Zealand Universities Law Review*, **27**(4B), pp. 1135–1161.

Perlin, M.L. (2019). "Changing of the guards": David Wexler, therapeutic jurisprudence and the transformation of legal scholarship. *International Journal of Law and Psychiatry*.

Perlin, M.L., & Cucolo, H.E. (2017a). *Mental Disability Law: Cases and Materials*, 3rd edn, Durham, NC: Carolina Academic Press.

Perlin, M.L., & Cucolo, H.E. (2017b). *Shaming the Constitution: The Detrimental Results of Sexually Violent Predator Legislation*, Philadelphia, PA: Temple University Press.

Perlin, M.L., & Cucolo, H.E. (2017c). "Tolling for the aching ones whose wounds cannot be nursed": the marginalization of racial minorities and women in institutional mental disability law. *Gender, Race & Justice*, **20**(3), pp. 431–458.

Perlin, M.L., & Douard, J. (2008–2009). Equality, I spoke that word/as if a wedding vow: mental disability law and how we treat marginalized persons. *New York Law School Law Review*, **53**(1), pp. 9–29.

Perlin, M.L., & Lynch, A.J. (2014). "All his sexless patients": persons with mental disabilities and the competence to have sex. *Washington Law Review*, **89**(2), pp. 257–300.

Perlin, M.L., & Lynch, A.J. (2015a). "Love is just a four-letter word": sexuality, international human rights and therapeutic jurisprudence. *Canadian Journal of Comparative and Contemporary Law*, **1**(1), pp. 9–48.

Perlin, M.L., & Lynch, A.J. (2015b). How teaching about therapeutic jurisprudence can be a tool of social justice and lead law students to personally and socially rewarding careers: sexuality and disability as a case example. *Nevada Law Journal*, **16**(1), pp. 209–225.

Perlin, M.L., & Lynch, A.J. (2016a). "In the wasteland of your mind": criminology, scientific discoveries and the criminal process. *Virginia Journal of Criminal Law*, **4**(2), pp. 304–360.

Perlin, M.L., & Lynch, A.J. (2016b). "Mr bad example": why lawyers need to embrace therapeutic jurisprudence to root out sanism in the representation of persons with mental disabilities. *Wyoming Law Review*, **16**(2), pp. 299–323.

Perlin, M.L., & Lynch, A.J. (2016c). *Sexuality, Disability and the Law: Beyond the Last Frontier?*, New York, NY: Palgrave Macmillan.

Perlin, M.L., & Lynch, A.J. (2017). "Toiling in the danger and in the morals of despair": risk, security, danger, the constitution and the clinician's dilemma. *Indiana Journal of Law and Social Equality*, **5**(2), pp. 409–440.

Perlin, M.L., & Lynch, A.J. (2018). "She's nobody's child/the law can't touch her at all": seeking to bring dignity to legal proceedings involving juveniles. *Family Court Review*, **56**(1), pp. 79–99.

Perlin, M.L., Cucolo, H.E. & Lynch, A.J. (2017). Sex, sexuality, sexual offending and the rights of persons with mental disabilities. *Laws*, **6**(4), pp. 20–31.

Perlin, M.L., Cucolo, H.E., & Lynch, A.J. (2018). "I met another man who was wounded with hatred": how we ignore the sexual needs and the sexual actions of persons with intellectual disabilities. *Academy of Criminal Justice Sciences*, 15 February. New Orleans, LA.

Perlin, M.L., Gould, K.K., & Dorfman, D.A. (1995). Therapeutic jurisprudence and the civil rights of institutionalized mentally disabled persons: hopeless oxymoron or path to redemption?. *Psychology, Public Policy and Law*, **1**(1), pp. 80–119.

Perlin, M.L., Lynch, A.J., & McClain, V.R. (2019). "Some things are too hot to touch": competency, the right to sexual autonomy and the roles of lawyers and expert witnesses. *Touro Law Review*.

Prentky, R., & Schwartz, B. (2006). Treatment of Adult Sex Offenders. *Vawnet: National Online Resource Center on Violence against Women*. Available at: https://www.niwrc.org/sites/default/files/documents/Resources/Treatment-of-Adult-Sex-Offenders.pdf.

Presser, L., & Gunnison, E. (1999). Strange bedfellows: is sex offender notification a form of community justice?. *Crime and Delinquency*, **45**(3), pp. 299–315.

Ramsey, C.B. (1999). California's sexually violent predator act: the role of psychiatrists, courts and medical determinations in confining sex offenders. *Hastings Constitutional Law Quarterly*, **26**(2), pp. 469–504.

Rice, M.E., & Harris, G.T. (2003). What We Know and Don't Know About Treating Adult Sex Offenders. In B.J. Winick & J.Q. La Fond, eds., *Protecting Society from Sexually Dangerous Offenders: Law, Justice and Therapy*. Washington DC: American Psychological Association, pp.101–117.

Risdon, S. (2017). Deinstitutionalization, criminalization of mental illness and the principle of therapeutic jurisprudence. *Southern California Interdisciplinary Law Journal*, **26**(2), pp. 341–356.

Robinson, L. (2003). Sex offender management: the public policy challenges. *Annals of the New York Academy of Sciences*, **989**, pp.1–7.

Rodham, H. (1973). Children under the law. *Harvard Educational Review*, **43**(4), pp. 487–514.

Ronner, A.D. (2008). The learned-helpless lawyer: clinical legal education and therapeutic jurisprudence as antidotes to Bartleby Syndrome. *Touro Law Review*, **24**(4), pp. 601–696.

Sadoff, R. (1993). Therapeutic jurisprudence: a view from a forensic psychiatrist. *New York Law School Journal of Human Rights*, **10**(3), pp. 825–833.

Sammon, K.C. (2008). Therapeutic jurisprudence: an examination of problem-solving justice in New York. *Saint John's Journal of Civil Rights and Economic Development*, **23**(3), pp. 923–969.

Schopp, R.F., & Wexler, D.B. (1989). Shooting yourself in the foot with due care: psychotherapists and crystallized standards of tort liability. *Journal of Psychiatry & Law*, **17**(2), pp. 163–203.

Scott, C.L., & Holmberg, T. (2003). Castration of sex offenders: prisoners' rights versus public safety. *Journal of the American Academy of Psychiatry and the Law*, **31**(4), pp. 502–509.

Sellers, B.G., & Arrigo, B.A. (2009). Adolescent transfer, developmental maturity and adjudicative competence: an ethical and justice policy inquiry. *Journal of Criminal Law and Criminology*, **99**(2), pp. 435–488.

Simon, L.M.J. (2003). Matching Legal Policies with Known Offenders. In B.J. Winick & J.Q. La Fond, eds., *Protecting Society from Sexually Dangerous Offenders: Law, Justice and Therapy*. Washington DC: American Psychological Association, pp. 149–164.

Sloan, K. (2005). Towns Fear an Influx of Offenders, *Omaha World-Herald*, Omaha, 4 October, pp. A1.

Spierling, S.E. (2001). Lock them up and throw away the key: how Washington's violent sexual predator law will shape the future balance between punishment and prevention. *Journal of Law and Policy*, **9**(3), pp. 879–928.

Sreenivasan, S., Weinberger, L.E., Frances, A., & Cusworth-Walker, S. (2010). Alice in actuarial-land: through the looking glass of changing static-99 norms. *Journal of the American Academy of Psychiatry and the Law*, **38**(3), pp. 400–406.

State of Minnesota, Office of the Legislative Auditor. (2011). *Civil Commitment of Sex Offenders*. Available at: https://www.auditor.leg.state.mn.us/ped/2011/ccsosum.htm.

State of West Virginia. (2007). *West Virginia Sexually Violent Predator Management Task Force: Final Report. A Comprehensive Report on the Findings and Recommendations of the Legislatively Enacted West Virginia Sexually Violent Predator Management Task Force*. Available at https://pds.wv.gov/Reports/Documents/WV%20SVP%20Mgt%20TF%20Rpt.pdf.

Szeli, É. (2000). Ex parte civil commitment, family care-givers and schizophrenia: a therapeutic jurisprudence analysis. *Seattle University Law Review*, **24**(2), pp. 529–554.

Tennille, J., & Wright, E. (2013). Addressing the Intimacy Interests of People with Mental Health Conditions: Acknowledging Consumer Desires, Provider Discomforts and System Denial. *Temple Collaborative on Community Inclusion of Individuals with Psychiatric Disabilities*. Available

at: http://tucollaborative.org/wp-content/uploads/2017/04/Addressing-the-Intimacy-Interests-of-Persons-with-Mental-Health-Conditions.pdf.

Wakefield, H. (2006). The vilification of sex offenders: do laws targeting sex offenders increase recidivism and sexual violence?. *Journal of Sexual Offender Civil Commitment: Science and the Law*, **1**, pp. 141–149.

Wangenheim, M. (2010). "To catch a predator," are we casting our nets too far?: constitutional concerns regarding the civil commitment of sex offenders. *Rutgers Law Review*, **62**(2), pp. 559–598.

Werner, S. (2012). Individuals with intellectual disabilities: a review of the literature on decision-making since the convention on the rights of persons with disabilities. *Public Health Reviews*, **34**(2), pp. 1–27.

Wexler, D.B. (1991). Health care compliance principles and the insanity acquittee conditional release process. *Criminal Law Bulletin*, **27**(5), pp. 18–41.

Wexler, D.B. (2015). Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law. In W. Brookbanks, ed., *Therapeutic Jurisprudence: New Zealand Perspectives*. New Zealand: Thomson Reuters, pp. v–xiv.

Wilson, R.J., Loopman, J., Abracen, J., & Pake, D.R. (2012). Comparing sexual offenders at the regional treatment centre (Ontario) and the Florida civil commitment center. *International Journal of Offender Therapy and Comparative Criminology*, **57**(3), pp. 1–19.

Winick, B.J. (1991). Competency to consent to voluntary hospitalization: a therapeutic jurisprudence analysis of Zinermon v Burch. *International Journal of Law and Psychiatry*, **14**(3), pp. 169–214.

Winick, B.J. (1992). Competency to be executed: a therapeutic jurisprudence perspective. *Behavioral Sciences & the Law*, **10**(3), pp. 317–337.

Winick, B.J. (1998). Sex offender law in the 1990s: a therapeutic jurisprudence analysis. *Psychology, Public Policy and Law*, **4**(1-2), pp. 505–570.

Winick, B.J. (1999). Therapeutic jurisprudence and the civil commitment hearing. *Journal of Contemporary Legal Issues*, **10**(37), pp. 37–60.

Winick, B.J. (2002). Therapeutic jurisprudence and the treatment of people with mental illness in Eastern Europe: construing international human rights law. *New York Law School Journal of International and Comparative Law*, **21**(3), pp. 537–572.

Winick, B.J. (2003). A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws. In B.J. Winick & J.Q. La Fond, eds., *Protecting Society from Sexually Dangerous Offenders: Law, Justice and Therapy*. Washington, DC: American Psychological Association, pp. 213–229.

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CAROLINA ACADEMIC PRESS
Durham, North Carolina

ISBN 978-1-5310-0819-2
e-ISBN 978-1-5310-0820-8

Library of Congress Cataloging-in-Publication Data

Names: Stobbs, Nigel, editor. | Bartels, Lorana, editor. | Vols, Michel, editor.
Title: The methodology and practice of therapeutic jurisprudence / edited by Nigel Stobbs, Lorana Bartels, Michel Vols.
Description: Durham, North Carolina : Carolina Academic Press, LLC, 2018.
Identifiers: LCCN 2018037333 | ISBN 9781531008192 (alk. paper)
Subjects: LCSH: Therapeutic jurisprudence.
Classification: LCC K346 .M48 2018 | DDC 340/.19--dc23
LC record available at https://lccn.loc.gov/2018037333

Carolina Academic Press
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America