Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing

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Introduction

It is well-settled that the juvenile brain is not fully developed by age 18.[1] This raises critical concerns about the current state of juvenile sentencing standards, especially in instances in which juveniles are tried as adults and sentenced to adult prisons.[2] The most comprehensive aggregate analysis of transfer policies yields three findings:

> First, transfer appears to be counterproductive: transferred youths are more likely to reoffend, and to reoffend more quickly and more often, than those retained in the juvenile justice system. In addition, research suggests that the differential effects of criminal and juvenile justice processing are not dependent on sentence type or sentence length. That is, the mere fact that

[1] Juvenile brain development is ongoing until at least age twenty-five. See Michael L. Perlin & Alison J. Lynch, *"She's Nobody's Child/The Law Can't Touch Her at All": Seeking to Bring Dignity to Legal Proceedings Involving Juveniles,* 56 FAM. CT. REV. 79, 87 (2018); *see also,* Mark Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N. U.L. REV. 697, 716 (2015) ("The brain does not mature until well into adulthood"); Sarah B. Johnson et al, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216 (2009) (development continues until "well into the 20s").

[2] See e.g., Michael L. Perlin, *"Yonder Stands Your Orphan with His Gun": The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes,* 46 TEXAS TECH L. REV. 301, 319-20 (2013).

juveniles have been convicted in criminal rather than juvenile court increases the likelihood that they will reoffend. Finally, the risk of reoffending is aggravated when a sentence of incarceration is imposed.[3]

While some significant legal strides have been made in cases such as *Miller v. Alabama*,[4] there are still areas in which the law needs – badly -- to catch up to what current neuroscience can tell practitioners about the immaturity of the juvenile brain.[5] We define "practitioners" expansively to include lawyers, judges and mental health professionals. Additionally, attorneys working with the juvenile population need to take special care to not only provide their clients with zealous representation,[6] but to ensure that they do not suffer trauma throughout what can

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[3] *Id.* at 320, citing, inter alia, Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 LAW & POL'Y 77 (1996), and Jeffrey Fagan, *Separating the Men From the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, in SERIOUS, VIOLENT, CHRONIC JUVENILE OFFENDERS: A SOURCEBOOK 238, 245 (James C. Howell et al. eds., 1995)).

[4] 567 U.S. 460 (2012) (mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments). But see People v. Generally, 90 N.E.3d 991, 995 (Ill. Ct. App. 2017) (judge's statement that "[b]y the age of eighteen, individuals have already formed in some cases indelibly the attitudes and outlook toward life that they will carry with them for the rest of their lives" does not violate *Miller* in sentencing the defendant.).

[5] See *infra* Part I.

[6] See e.g., Ellen Marrus, *Best-Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288 (2003). For other literature on the appropriate role of juvenile defense counsel, see, for example, Wallace J. Mlyniec, *Who Decides: Decision Making in Juvenile Delinquency Proceedings, in* ETHICAL

be a grueling legal process.[7] The teachings of therapeutic jurisprudence,[8] combined with knowledge of juvenile brain development,[9] can lead to a more complex understanding of appropriate punishment and, in many cases, treatment to ensure

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PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 105 (Rodney J. Uphoff ed., 1995); Martin Guggenheim, *The Right To Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 76 (1984), as cited in Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 651 n. 10 (2017).

[7] See Perlin & Lynch, *supra* note 1, at 81 ("Both the civil and criminal legal processes to which juveniles are subject are rife with policies and procedures that expose them to shame and humiliation, causing unnecessary trauma"). On shame and humiliation in the context of the legal system in general, see generally, Michael L. Perlin & Naomi M. Weinstein, "*Friend to the Martyr, a Friend to the Woman of Shame": Thinking About the Law, Shame and Humiliation*, 24 SO. CAL. REV. L. & SOC'L JUST. 1 (2014); see also, Michael L. Perlin & Alison J. Lynch, *"To Wander Off in Shame": Deconstructing the Shaming and Shameful Arrest Policies of Urban Police Departments in Their Treatment of Persons with Mental Disabilities, in* SYSTEMIC HUMILIATION IN AMERICA: FINDING DIGNITY WITHIN SYSTEMS OF DEGRADATION 175 (Daniel Rothbart ed. 2018).

[8] See generally Michael L. Perlin, *"I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence,* 24 CARD. J. EQUAL RTS. & SOC'L JUST. 81, 93-95 (2018) (Perlin, *Mind Made Up*); see also, Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304 (2016).

[9] In an article arguing that states should create Commissions to implement *Miller v. Alabama, supra,* Professor Cara Drinan has underscored that "there should be members of the Commission who have a working knowledge of juvenile brain development." Cara H. Drinan, *Juvenile Sentencing Post-Miller: Preventive and Corrective Measures,* 2015 WIS. L. REV. 203, 216.

ongoing psychological well-being throughout this crucial stage of brain development.[10]

In this presentation, we will first give a brief overview about the current neuroscientific findings about juvenile brain development in the context of criminal behavior, and then discuss the current sentencing standards and regulations that are in place, partly due to this enhanced understanding. Then, we will discuss the impact of therapeutic jurisprudence as a framework for advocating for juvenile clients, in order to maximize and preserve their psychological well-being and to mitigate trauma. Finally, we will offer recommendations for how experts can work with attorneys who are presenting sentencing arguments, in order to make the most comprehensive, scientifically persuasive case for leniency in juvenile sentencing.

I. Current neuroscientific state of affairs

Juvenile brain development has been a "hot topic" in recent years, not just in scientific research but in the criminal justice system as well. As judges, attorneys

[10] On how psychological and physical well-being of youth is a "central goal" of therapeutic jurisprudence, see Bernard P. Perlmutter, G*eorge's Story: Voice and Transformation through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 578 (2005). On psychological well-being and therapeutic jurisprudence in general, see e.g., Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009); David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis P. Stolle et al. eds., 2000).

and advocates start to better understand the research about juvenile brains, precedent is being routinely set across the country -- in some cases by the highest courts -- that recognizes distinct brain differences.[11]

The adolescent brain may reach its adult volume by age ten; however, that does not mean that the brain is mature. Rather, that brain will take over a decade to reach what can be considered adult maturity. This means that, even when an individual turns the age of eighteen and is considered to be a legal adult, his brain still has years of development and maturity ahead of it. As more is understood about this process, it will undoubtedly influence policymakers and legislators when considering certain rights granted to those deemed to be able to make reasoned, "adult" decisions.[12] To confuse the issue even further, research has shown that different parts of the brain mature and make connections for a longer period of time than others – the occipital lobe may show a slowdown of these connections by age twenty, but the frontal lobe may continue development into the thirties.[13]

This development can affect both emotion and cognition, playing a key role in how decisions are made that, in some cases, can put a juvenile into the criminal justice system. For example, emotional regulation and impulse control may not be adequately developed in the juvenile brain. Keeping emotions and impulsive actions

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[11] E.g., Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010).

[12] https://www.sciencedirect.com/science/article/pii/S1364661313002660

[13] Rhoshel K. Lenroot, & Jay N. Giedd, *Brain Development in Children and Adolescents: Insights from Anatomical Magnetic Resonance Imaging,* 30 NEUROSCI. & BIOBEHAV. REVS. 718 (2006); 718-729; Elizabeth R. Sowell et al, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions,* 2 NATURE NEUROSCI. 859 (1999).

under control may be the difference between committing a criminal act and remaining out of the juvenile justice system.[14] If juveniles' brains are not adequately able to keep their emotions and impulses in check, researchers (and now many attorneys and advocates for children) argue that this warrants different treatment, or at least a reflection upon the juvenile justice system currently in place.[15] In some cases, as we will discuss later, this has happened – juveniles are no longer able to be sentenced to death or life without parole if their instant offense occurred before the age of eighteen – but there may be other facets of this system that must be re-evaluated.

While researchers are currently hesitant to offer specific policy changes that could influence the law, they do agree that larger studies focusing on these patterns of development that have emerged need to be continued and refined, with the recognition that the results will likely be used to make more reasoned arguments about juvenile brain development by attorneys looking to mitigate their young clients' actions.[16]

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[14] Annemaree Carroll, et al. *Impulsivity in Juvenile Delinquency: Differences among Early-Onset, Late-Onset, and Non-Offenders,* 35 J. YOUTH & ADOLESC. 517 (2006) Don L. Kurtz & Egbert Zavala. *The Importance of Social Support and Coercion to Risk of Impulsivity and Juvenile Offending*, 63 CRIME & DELINQ. 1838 (2017).

[15] https://www.cell.com/neuron/fulltext/S0896-6273(16)30809-1?_returnURL=https%3A%2F%2Flinkinghub.elsevier.com%2Fretrieve%2Fpii%2FS0896627316308091%3Fshowall%3Dtrue

[16] https://www.sciencedirect.com/science/article/abs/pii/S0160252711001087

As we will examine further, therapeutic jurisprudence also provides tools to advocates and practitioners to evaluate individual juvenile offenders and apply neurological and psychological tenets in cases where a court may be unduly treating a youthful offender as an "adult" despite the likelihood of brain development playing a significant role in the instant offense. Recognizing the individuality of the client, both as a whole person and based on individual brain development, will allow for a better-developed case on his or her behalf, and TJ allows for, and advocates for, this kind of investigation.

II. Juvenile sentencing

The Supreme Court's Eighth Amendment jurisprudence has long stressed that youth must matter in sentencing. This position predates the Court's decision in *Roper v. Simmons*[17] -- that the Eighth Amendment forbids execution of juvenile offenders -- by more than two decades, and it flows from the Court's decisions in the importance of mitigation in capital cases. Since the Court decided *Eddings v. Oklahoma*,[18] explaining why an offender's age and maturity is critical to any assessment of just punishment, and stressing that "youth is more than a

[17] 543 U.S. 551 (2005).

[18] 455 U.S. 104 (1982). *Eddings* was decided four years after the Court's decision in Lockett v. Ohio,, 438 U.S. 586, 604 (1978), that had held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be

chronological fact" and that "minors often lack the experience, perspective, and judgment expected of adults,"[19] youth has become relevant – or, at the least, *should have become relevant* -- to sentencing decisions.

Later cases – beginning with *Roper* and continuing through *Montgomery v. Louisiana*[20] -- made clear that "children are constitutionally different from adults for purposes of sentencing";[21] penological justifications for the harshest adult punishments thus "collapse in light of 'the distinctive attributes of youth.'"[22] In *Graham v. Florida,* for example, the Court emphasized, relying on *Roper,* that the "case for retribution is not as strong with a minor as with an adult."[23]

These conclusions are further buttressed by the state-of-the-art scientific research.[24] *First*, there is little doubt that adolescents "are less capable decision

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precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that defendant proffers as a basis for a sentence less than death."

[19] *Eddings*, 455 U.S. at 115–16.

[20] 136 S. Ct. 718, 726 (2016), holding that the Eighth Amendment forbids sentencing a juvenile offender to life without parole unless his crime reflects "irreparable corruption," quoting, in part, *Roper*, 543 U.S. at 573.

[21] *Montgomery,* 136 S. Ct. at 733 (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

[22] *Montgomery*, 136 S. Ct. at 733–34 (quoting *Miller*, 567 U.S. at 472).

[23] *Graham,* 560 U.S. at 71, quoting *Roper,* 543 U.S. at 571.

[24] Much of this research is discussed in an *Amicus Curiae* brief of criminal-sentencing scholars in Support of Appellant's Petition for Rehearing En Banc in United States v. Briones, # 16-10150 (9th Cir. 2018) (on file with authors).

makers than adults in ways that are relevant to their criminal choices."[25] Youths' generic difference from adults in knowledge and experience, time perspective, risk proclivity, and impulsivity render their bad choices categorically less blameworthy.[26] They are less likely to perceive potential risks,[27] and less able to exercise self-control.[28] Also, they are more susceptible to peer pressure than are adults, and often lack the freedom that adults have to extricate themselves from a criminogenic setting."[29] Most importantly, for the purposes of this presentation, neuroscientific research shows that the areas of the brain responsible for higher-order cognitive functions such as planning ahead, weighing risks and rewards, and making complicated decisions are simply not fully developed during adolescence and young adulthood.[30]

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[25] Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008).

[26] Barry Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 116 (2013).

[27] Scott & Steinberg, *supra* note 25, at 21.

[28] *Id.* at 21–22.

[29] Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003), as quoted in *Roper*, 543 U.S. at 569.

[30] https://www.cell.com/neuron/fulltext/S0896-6273(16)30809-1?_returnURL=https%3A%2F%2Flinkinghub.elsevier.com%2Fretrieve%2Fpii%2FS0896627316308091%3Fshowall%3Dtrue

This must be read in the context of the reality that much of the literature that focuses on all the issues that comprise "criminological evidence"[31] makes no mention of neuroscientific tests of evidence.[32] The impact of this lack of attention on juveniles accused of crime, convicted, and often sentenced as if they were adults[33] should be patently clear.[34]

It is also time to start thinking seriously about what actual impact cases such as *Miller* and *Montgomery* have on practice "on the ground." A very recent study by researchers at Duke University and a prisoners' rights legal aid office in North Carolina tells us that life without parole (LWOP) sentences had been concentrated

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[31] E.g., Predictor variables, and recidivism predictions, while considering criminal companions, criminogenic needs, criminal history, race, age, substance abuse history, family structure and criminality, gender, socio-economic status, and a host of other variables.

[32] See Perlin & Lynch, *supra* note 8, at 357.

[33] On the counter-productivity of such transfer policies, see Perlin, *Yonder, supra* note 2, at 320, discussed *supra* at text accompanying notes 2-3. On the question of the health care needs of a juvenile placed in an adult prison, see Ratliff v. Cohn, 693 N.E.2d 530 (Ind. 1998), *reh. denied* (1998). For a radically-different approach to juvenile transfer statutes, see Thomas J. Mescall II, *Legally Induced Participation and Waiver of Juvenile Courts: A Therapeutic Jurisprudence Analysis*, 68 REV. JUR. U.P.R. 707, 719 (1999) ("From a therapeutic jurisprudence perspective, states should enact juvenile-centered waiver statutes that allow juveniles to rebut presumptive waiver by proving they are suited to juvenile rehabilitation").

[34] On the related questions of gender and ethnicity in these contexts, see Stephanie M. Shepherd et al, *Gender and Ethnicity in Juvenile Risk Assessment*, 40 CRIM. JUST. & BEHAV. 388 (2013).

in a small number of counties, and that, in the six-plus years since *Miller* was decided, just 42 of the group of 94 juvenile offenders that had been sentenced to LWOP have since been resentenced to non-LWOP sentences. [35] Of particular interest: Over one third of the juveniles who had been sentenced to LWOP, or 32 individuals, were not the killers, but were convicted under a felony murder theory.[36] Importantly, the authors note that, in *Miller* rehearings, "Expert psychological and psychiatric evaluations may need to be done, as well as, where applicable, assessments regarding child trauma, sexual and physical abuse, *neurological development*, substance abuse, traumatic brain injury, and other conditions."[37] So, these are issues we must keep in mind at all times.

Also, although not directly related to questions of *sentencing*, it is critical to assess the relevance of these neurological findings to issues involving a juvenile's ability to raise the incompetency status or plead insanity. As to competency, it is striking that the criminal justice system has *not* made substantial efforts to clarify the application of the incompetency status to juveniles awaiting trial.[38] Although

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[35] Ben Finholt et al, *Juvenile Life without Parole in North Carolina,* Duke Law School Public Law & Legal Theory Series No. 2019-16, accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3329536, manuscript at 16.

[36] *Id.* at 9.

[37] *Id.* at 19-20 (emphasis added).

[38] MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (3d ed., 2018), § 13-1.8.1, at 13-101 to 13-102.

the standard is generally the same as is that for adults,[39] in one jurisdiction, at least, it has been suggested that, given the inherently reduced ability of juveniles to understand legal proceedings and to cooperate with counsel, the standard for competency in juvenile court might be lower than the applicable adult standard.[40] While this case has been cited approvingly in at least two other jurisdictions,[41] there is, at this time, no national consensus on this point. A turn to the neurological information that we share here may, we hope, bring our focus on this issue more in the future.

On the question of insanity, while there is some case law to the contrary, the majority of courts that have considered the issue have allowed entry of a plea of not guilty by reason of insanity in juvenile cases.[42] Writing recently about this, one of the co-authors (MLP) concluded, "It is reasonable to expect that this issue will grow in importance in the future as evidence continues to accumulate that the juvenile

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[39] W. Lawrence Fitch, *Competency to Stand Trial and Criminal Responsibility in the Juvenile Court*, in JUVENILE HOMICIDE: CLINICAL AND FORENSIC ISSUES 145, 150 (Dewey G. Cornell & Elisa T. Benedek eds. 1989).

[40] State in Interest of Causey, 363 So. 2d 472, 476 (La. 1978), as discussed in PERLIN & CUCOLO, *supra* note 38, § 13-1.8.1, at 13-102.

[41] See e.g., *In re* T.S., 798 N.W.2d 649, 655 (N.D. 2011); SWM v. State, 299 P.3d 673, 682 (Wyo. 2013).

[42] See PERLIN & CUCOLO, *supra* note 38, § 14-1.8.1, at 14- 133, citing, *inter alia,* Perlin & Lynch, supra note 1.

justice system is generally failing in its primary, articulated rehabilitative goals."[43] Certainly, the neurological data we discuss here will accelerate this importance.

III. Therapeutic jurisprudence[44]

Therapeutic jurisprudence recognizes that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.[45] It asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[46] Professor David Wexler clearly identifies how the inherent tension inherent in this inquiry

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[43] PERLIN & CUCOLO, *supra* note 38, § 14-1.8.1, at 14-133.

[44] This section is largely adapted from Perlin, *My Mind Made Up, supra* note 8, at 93-95; see also, Perlin & Lynch, *supra* note 8. *Further*, it distills the work of one of the authors (MLP) over the past 25 years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993). *See generally,* Michael L. Perlin, *"Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence,* 27 U.N.Z. LAW REV. 1135 (2017); Michael L. Perlin, *"Changing of the Guards": David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship,* -- INT'L J. L. & PSYCHIATRY – (2018) (forthcoming).

[45] Michael L. Perlin, **Error! Main Document Only.***"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).**Error! Main Document Only.**

[46] 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, 751 (2005)

must be resolved: "the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[47] As one of the presenters (MLP) has written elsewhere, "An inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[48] Therapeutic jurisprudence "look[s] at law as it actually impacts people's lives,."[49] and TJ supports "an ethic of care."[50] It attempts to bring about healing and wellness,[51] and to value psychological health.[52]

Recently, the two co-authors posed this question: "In those instances in which criminal sentencing decision-making considers neuroscientific tests and evidence, to what extent does it comport with therapeutic jurisprudence principles?"[53] In answering the question, we concluded that "Courts have regularly ignored the

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[47] David B. Wexler*, Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

[48] Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000).

[49] Winick, *supra* note 10, at 535.

[50] Perlin, *Mind Made Up*, *supra* note 8, at 94, quoting, in part, Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605-07 (2006).

[51] *Id.,* citing 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).

[52] *Id.*

[53] Perlin & Lynch, *supra* note8, at 351

potential role of therapeutic jurisprudence in sentencing decisions."[54] It is necessary, we emphasize, for courts to start taking this role seriously.

Although there is, to be sure, a robust TJ literature on sentencing *in general,*[55] and thoughtful critics have focused on the "value in welcoming the perspective of therapeutic jurisprudence in ... sentencing advocacy,"[56] startlingly

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[54] *Id.* at 353.

[55] See e.g., Dana Segev, *The TJ Mainstreaming Project: An Evaluation of the Israeli Youth Act*, 7 ARIZ. SUMMIT L. REV. 527 (2014); David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence*, 44 CT. REV. 78 (2008); David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. 463 (2014); David B. Wexler, *Therapeutic Jurisprudence, Legal Landscapes, and Form Reform: The Case of Diversion*, 10 FLA. COASTAL L. REV. 361 (2009), all as discussed in Michael L. Perlin, *"I Expected It to Happen/I Knew He'd Lost Control": The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5,* 2015 UTAH L. REV. 881, 924 n. 215. See also, e.g., Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?,* 10 N.Y.L. SCH. J. HUM. RTS. 835 (1993); Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1078 (1999); Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 CRIM. L. BULL. 483 (2004),

[56] Robert Ward, *Criminal Defense Practice and Therapeutic Jurisprudence: Zealous Advocacy Through Zealous Counseling: Perspectives, Plans and Policy*, *IN* REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 206, 206-07 (David B. Wexler ed., 2008).

little has been written about TJ and the issues we are considering in this paper.[57] In one of the few pieces, Professor Mark Fondacaro and his colleagues have argued that TJ demands "evidence-based intervention strategies that draw on social ecological theories of human behavior to not only understand the social, psychological, and biological drivers of crime,[58] but to identify intervention strategies that are effective in preventing crime and reducing recidivism."[59]

In another paper, Prof. Georgia Zara has called for the study of "integrative approaches" so as to help "young offenders to change in the direction of where they can realize themselves and their aspirations, without being in need of recycling their previous delinquent means."[60] Certainly, if the positions articulated by Professors Fondacaro and his colleagues and by Professor Zara were to be universally accepted, we would have made great progress. We are, however, puzzled

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[57] For TJ-focused considerations of neuroscience in other contexts, see A.J. Stephani, *Symposium: Therapeutic Jurisprudence and Children*, 71 U. CIN. L. REV. 13, 14 (2002); and Janet Weinstein & Ricardo Weinstein, "*I Know Better Than That": The Role of Emotions and the Brain in Family Law Disputes,* 7 J.L. & FAM. STUD. 351, 383 n.127 (2005).

[58] In the context of sentencing, see Deborah W. Denno, *What Real-World Criminal Cases Tell Us about Genetics Evidence*, 64 HASTINGS L.J. 1591 (2013).

[59] Fondacaro et al, *supra* note 1, at 698 .

[60] Georgia Zara, *Therapeutic Jurisprudence as an Integrative Approach to Understanding the Socio-Psychological Reality of Young Offenders*, 71 U. CIN. L. REV. 127, 140 (2002).

and troubled by the general lack of attention being paid by TJ scholars to this important area of law and social policy.[61]

In a recent TJ-focused article with another colleague, one of the co-presenters (MLP) concluded that it was "imperative to ensure that lawyers working with individuals with trauma-related mental disabilities are sensitive to the rights and needs of such individuals by utilizing a trauma-informed approach to lawyering."[62] Again, the population with which we are concerned has inevitably suffered significant trauma from its involvement in the legal system;[63] we believe that only a TJ approach can possible remediate this reality.[64]

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[61] Compare David Katner, *Eliminating the Competency Presumption in Juvenile Delinquency Cases*, 24 CORNELL J.L. & PUB. POL'Y 403, 433-34 (2015) (discussing the therapeutic jurisprudence implications of a model system that would provide intensive case management for juveniles as they mature into the status of being competent to stand trial).

[62] Mehgan Gallagher & Michael L. Perlin, *"The Pain I Rise Above": How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities,* 29 FLA. J. INT'L L. 271, 296 (2018).

[63] See Eduardo Ferrer, *Transformation Through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 AM. CRIM. L. REV. 549 (2016).

[64] For other inquiries into the application of therapeutic jurisprudence to cases involving trauma in the legal system, see e.g., Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic,* 17 ST. THOMAS L. REV. 623 (2005); Kate Aschenbrenner*, In Pursuit of Calmer Waters: Managing the Impact of Trauma Exposure on Immigration Adjudicators*, 24 KAN. J.L. & PUB. POL'Y 401 (2015).

Certainly, the current system in no way "value[s] psychological health,"[65] nor does it advance an "ethic of care."[66] The conditions that institutionalized juveniles face – especially when they are housed in adult prisons – have been documented on countless occasions. Some five years ago, one of the co-authors (MLP) quoted an article Professor Barry Feld wrote on this matter *twenty years* ago -- "[c]riminological research, judicial opinions, and investigative studies report staff beatings of inmates, the use of medications for social control purposes, extensive reliance on solitary confinement, and a virtual absence of meaningful rehabilitative programs."[67] To suggest that there is *any* attention paid to an "ethic of care" is fatuous.

In short, our current system mocks therapeutic jurisprudence principles and flies in the face of the most important and relevant scientific research.

Conclusion

We think, as should be fairly clear from what we have said, that both attorneys and expert witnesses must keep all these developments -- the scientific ones and the legal ones – in mind when working on cases involving juveniles in the criminal justice system. Much

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[65] See *supra* text accompanying note 52.

[66] See *supra* text accompanying note 50.

[67] Perlin, *supra* note 2, at 316, quoting Barry C. Feld, *The Transformation of the Juvenile Court-Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 378-79 (1999).

here will be cognitively dissonant to jurors and to judges as it will not comport with their flawed self-referential "ordinary common sense"[68] about juveniles who violate the criminal law, especially in cases involving violent crime.[69] The late Dr. Robert Sadoff – a cherished friend and the best expert witness with whom I have ever worked – wrote about how an expert must be an educator on the witness stand. [70]Certainly, it is obligatory that the expert in cases such as we are discussing must do that at all times.

As this field of developmental neuroscience continues to grow and as it becomes more and more entwined with our criminal justice system, attorneys must also learn not just how to work with experts, but how to get at information that an expert can provide that is also scientifically valid for the proposition that is being entered. As attorneys, we know that there are nuances in the law and in evidentiary rules that we must use to build a case for various parts of the criminal trial. However, attorneys are not necessarily familiar with the ways in which scientific advancements progress from the laboratory into the "real world" – there are equal amounts of nuance in scientific research that make it necessary for

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[68] See e.g, Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of Ordinary Common Sense, Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131 (1991); Michael L. Perlin, *Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990).

[69] In a paper MLP is currently working on, he calls for a new policy in which *multiple experts* may be needed in cases where this sort of dissonance is likely. See Michael L. Perlin, *"Deceived Me into Thinking/I Had Something to Protect": A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in which Fact-Finders Rely on Heuristic Reasoning and "Ordinary Common Sense"* (manuscript in progress).

[70] ROBERT L. SADOFF, ETHICAL ISSUES IN FORENSIC PSYCHIATRY: MINIMIZING HARM 186 (2011).

experts to educate attorneys in what may or may not be appropriate to introduce as evidence for a particular proposition, such as what we are discussing in this paper.. Experts need to be prepared to discuss with attorneys not only why a particular test or evaluation may help the client, but why that test or evaluation is appropriate to administer in each individual situation.

We hope and expect that, if this is done, the law will, finally begin to catch up with what we have learned about the juvenile brain, and it will begin to apply that knowledge responsibly to matters in which juveniles are before the court. Therapeutic jurisprudence and authentic common sense demand no less.