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“I Saw Guns and Sharp Swords in the Hands of Young Children”: Why Mental Health Courts for Juveniles with Autism Spectrum Disorder and Fetal Alcohol Spectrum/Disorder Are Needed.

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ABSTRACT

In this Article, we offer—we believe for the first time in the scholarly literature—a potentially (at least partially) ameliorative solution to the problems faced by persons with autism (ASD) and fetal alcohol disorder (FASD) in the criminal justice system: the creation of (separate sets of) problem-solving juvenile mental health courts specifically to deal with cases of juveniles in the criminal justice system with ASD, and with FASD. There is currently at least one juvenile mental health court that explicitly accepts juveniles with autism, but there are, to the best of our knowledge, no courts set up specifically for these two discrete sets of populations.

If mental health courts (or any other sort of problem-solving courts) are to work effectively, they must operate in accordance with therapeutic jurisprudence principles, concluding that law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness.

If such courts are created, we believe this will (1) make it less likely that sanism and other forms of bias affect legal decision-making; (2) make it more likely that those aspects of the defendants’ underlying conditions that may have precipitated (or contributed to) their criminal behavior be placed in a context that understands such conditions, and (3)

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best ensure that therapeutic jurisprudence principles be employed in the dispositions of all cases.

Keywords: Mental disability law, autism, fetal alcohol syndrome, therapeutic jurisprudence, problem-solving courts, mental health courts, juvenile mental health courts, juvenile justice

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INTRODUCTION

Specialized courts that are created to address specific problems and the specific needs of a particular population—or “problem-solving courts”—are a fairly recent addition to the American legal system.¹ They present an interdisciplinary approach to address issues that affect marginalized persons, including, but not limited to, drug use, domestic abuse, sex trafficking, and mental health or disability.² However, there is little scholarship that reckons specifically with the experiences of people/juveniles with autism spectrum disorder (ASD) and fetal alcohol spectrum disorder (FASD) in the criminal justice system. It is essential to recognize the unique challenges these populations face in the court system so as to work toward solutions that more effectively address their needs.

In two recent articles, two of the co-authors have focused on the intersection between the criminal justice system and people with ASD³ and the criminal justice system and people with FASD.⁴ We concluded that “courts have been dismissive of claims that FASD needs to be taken seriously in the criminal law process, whether on questions of capacity to stand trial, responsibility, or sentencing punishment,”⁵ and that “persons with ASD consist of yet another vulnerable population the dispositions of whose cases are at the mercy of the quality and competence of attorneys, experts, judges, juries, and outdated court procedures.”⁶ There is virtually nothing in existing scholarship that would take issue with either of these conclusions.

In this piece, we offer a potentially (at least partially) ameliorative solution to this problem: the creation of (separate sets of) problem-solving courts specifically to deal with cases of juveniles in the criminal justice system with ASD and with FASD.⁷ There is currently at least one juvenile mental health court that explicitly accepts juveniles with ASD,⁸ and some scholarly support for the proposition that persons with an FASD diagnosis should be accepted to juvenile mental health courts.⁹ But there are, to the best of our knowledge, no courts set up specifically to address the unique needs of these populations.

¹ See *infra* Part II.A.

² Michael L. Perlin, “*John Brown Went Off to War*”: *Considering Veterans’ Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445, 456 (2013) [hereinafter Perlin, *Veterans’ Courts*]. See generally Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORD. URB. L.J. 1055, 1060 (2003). For a full list of background materials, see generally 1 MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2-6, at nn.274–281.1 (2016) (fall 2023 update).

³ Michael L. Perlin & Heather Ellis Cucolo, “*Something’s Happening Here/But You Don’t Know What It Is*”: *How Jurors (Mis)Construe Autism in the Criminal Trial Process*, 82 U. PITT. L. REV. 585 (2021) [hereinafter Perlin & Cucolo, *How Jurors (Mis)Construe Autism*].

⁴ Michael L. Perlin & Heather Ellis Cucolo, “*Take the Motherless Children off the Street*”: *Fetal Alcohol Syndrome and the Criminal Justice System*, 77 U. MIAMI L. REV. 561 (2023) [hereinafter Perlin & Cucolo, *Fetal Alcohol Syndrome*]. In this Article, we focus on the specific issue of *juvenile* with these disorders.

⁵ *Id.* at 611.

⁶ Perlin & Cucolo, *How Jurors (Mis)Construe Autism*, *supra* note 3, at 622.

⁷ Mental health courts are contextualized with the entire problem-solving court approach in Caitlin T. Harrington, *Breaking the Cycle and Stepping out of the “Revolving Door”*: *Why the Pre-Adjudication Model Is the Way Forward for Illinois Mental Health Courts*, 2013 U. ILL. L. REV. 319.

⁸ See Morgan Molinoff, *The Age of (Guilt or) Innocence: Using ADR to Reform New York’s Juvenile Justice System in the Wake of Miller v. Alabama*, 15 CARDOZO J. CONFLICT RESOL. 297, 322–24 (2013) (discussing the Court for the Individualized Treatment of Adolescents (CITA), Santa Clara, Cal.).

⁹ This recommendation is made explicitly in Kelly Herrmann, *Filling the Cracks: Why Problem-Solving Courts Are Needed to Address Fetal Alcohol Spectrum Disorders in the Criminal Justice System*, 18 SCHOLAR 241, 244, 264 (2016).

There are two primary rationales for the creation of mental health courts: (1) a police power justification that mental health courts will reduce recidivism and thereby increase public safety, and (2) a *parens patriae* justification that incarcerating offenders with mental illness is ineffective and morally unsound.¹⁰

At their inception, mental health courts were created with “therapeutic jurisprudence” principles in mind to help bridge the justice and mental health systems.¹¹ For mental health courts (or any other problem-solving court) to work effectively,¹² they must operate in accordance with baseline therapeutic jurisprudence principles:¹³ (1) the law should value psychological health, (2) the law should strive to avoid imposing anti-therapeutic consequences whenever possible, and (3) when consistent with other values served by law, the law should attempt to bring about healing and wellness.¹⁴

It is especially important that dedicated mental health courts be created for the populations with ASD and FASD. Mental health courts would make it less likely for sanism (an irrational prejudice towards persons with mental illness) and other forms of bias to affect legal decision-making.¹⁵ Additionally, mental health courts would ensure that

¹⁰ See, e.g., Emily Edwards, D.R. Gina Sissoko, Dylan Abrams, Daniel Samost, Stephanie La Gamma, & Joseph Geraci, *Connecting Mental Health Court Participants with Services: Process, Challenges, and Recommendations*, 26 PSYCH. PUB. POL’Y & L. 463, 465 (2020).

¹¹ See, e.g., Patrick Geary, *Juvenile Mental Health Courts and Therapeutic Jurisprudence: Facing the Challenges Posed by Youth with Mental Disabilities in the Juvenile Justice System*, 5 YALE J. HEALTH POL’Y, L. & ETHICS 671, 700 (2005); Yael Efron & Rinat Kitai-Sangero, *Establishing Non-Legal Aid Units in Criminal Courts*, 12 ALA. C.R. & C.L.L. REV. 249, 252 (2021); Michael L. Perlin, “*There Are No Trials Inside the Gates of Eden*”: *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in COERCIVE CARE: LAW AND POLICY 193 (Bernadette McSherry & Ian Freckelton eds., 2013) [hereinafter Perlin, *Gates of Eden*].

¹² See, e.g., Michael L. Perlin, “*Who Will Judge the Many When the Game is Through?*”: *Considering the Profound Differences between Mental Health Courts and “Traditional” Involuntary Civil Commitment Courts*, 41 SEATTLE U. L. REV. 937, 952 (2018) [hereinafter Perlin, *Profound Differences*] (citing Gregg Goodale, Lisa Callahan, & Henry J. Steadman, *Law & Psychiatry: What Can We Say About Mental Health Courts Today?*, 64 PSYCHIATRIC SERVS. 298, 299 (2013) (citing Henry J. Steadman, Allison Redlich, Lisa Callahan, Pamela Clark Robbins, & Roumen Vesselinov, *Effect of Mental Health Courts on Arrests and Jail Days: A Multisite Study*, 68 ARCHIVES GEN. PSYCHIATRY 167, 167–72 (2011)); Mark R. Munetz, Christian Ritter, Jennifer L.S. Teller, & Natalie Bonfine, *Mental Health Court and Assisted Outpatient Treatment: Perceived Coercion, Procedural Justice, and Program Impact*, 65 PSYCHIATRIC SERVS. 352 (2014); Donna M.L. Heretick & Joseph A. Russell, *The Impact of Juvenile Mental Health Court on Recidivism Among Youth*, 3 J. JUV. JUST. 1 (2013).

In this context it should be noted that studies of the MHCs [mental health courts] referred to here conclude that such courts actually work as they are intended to. Participants in Judge Ginger Lerner-Wren’s MHC had significantly lower arrest rates after enrollment in treatment programs than before enrollment and lower post-enrollment arrest rates than comparison groups; in fact, MHCs evaluated in a multi-site study “were more successful at reducing recidivism-recidivism rates of 25% versus 10%-15%”—than were drug courts. And these statistics are constant when JUVENILE MHCs are studied.

Perlin, *Profound Differences*, *supra*, at 952.

¹³ These principles are discussed extensively *infra* Part V.

¹⁴ See, e.g., Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159, 1185 (2013) [hereinafter Perlin, *Guardianship Law*]; Bruce J. 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).

¹⁵ See *infra* Part IV.

aspects of the defendants' underlying conditions that may have precipitated (or contributed to) their criminal behavior are contextualized in judicial decision making. Mental health courts would minimize the trauma that people with these conditions will inevitably suffer in the criminal justice system.¹⁶ Finally, mental health courts are situated to best ensure that therapeutic jurisprudence principles are employed in the dispositions of all cases.

The authors of this Article have all represented persons with mental disabilities in both civil and criminal processes.¹⁷ We have all represented persons with ASD and persons with FASD, whether or not it was acknowledged at the time.¹⁸ In retrospect,¹⁹ we realize how different these cases may have concluded had our clients been diverted to specialized juvenile mental health courts during their early involvements with the criminal justice system.

The Article will proceed this way. First, in Part I, we consider the range of specific issues that have an impact on juveniles with ASD and FASD face throughout the juvenile court process. We then look in Part II at the importance of problem-solving courts (and both positive and negative responses to them). In Part III, we focus on the specific role of mental health courts as part of the problem-solving court movement and take a closer look at the role of juvenile mental health courts specifically.

In Part IV, we briefly consider jurisprudential filters that contaminate all mental disability law: sanism, pretextuality, heuristics, and false "ordinary common sense."²⁰ In Part V, we consider the meaning of therapeutic jurisprudence (TJ) globally and why we believe adherence to TJ principles is essential to all properly functioning problem-solving courts, especially in the context of mental health courts. In Part VI, we consider why such courts are especially essential for the populations that we discuss here. Finally, we conclude with some recommendations for the future to best maximize the likelihood that juveniles

¹⁶ See generally Alison J. Lynch, Michael L. Perlin, & Heather Ellis Cucolo, "My Bewildering Brain Toils in Vain": Traumatic Brain Injury, the Criminal Trial Process, and the Case of Lisa Montgomery, 74 RUTGERS L. REV. 215, 254 n.252 (2021) [hereinafter Perlin & Cucolo, *Traumatic Brain Injury*].

¹⁷ Before Perlin became a law professor, he spent three years as the Deputy Public Defender in charge of the Mercer County New Jersey (Trenton) Office of the Public Defender, eight years as Director of the Division of Mental Health Advocacy in the New Jersey Department of the Public Advocate, and two years as Special Counsel to the New Jersey Public Advocate. Cucolo litigated for eight years in the NJ Public Defenders Office, Division of Mental Health Advocacy/Alternative Commitment Unit, and currently represents similar vulnerable populations pro bono and as a private practitioner. Dorfman has been a disability justice attorney for over thirty years, during which time she has litigated numerous class actions and other systemic reform cases on behalf of people with disabilities, including adults and children with autism and lived experience in the mental health system throughout the United States on a wide range of disability justice issues. She is currently the executive director at Disability Rights Connecticut and an adjunct professor at the University of Connecticut School of Law.

¹⁸ When Perlin was a Public Defender, FAS still had not been mentioned in any case or in the legal literature. See Perlin & Cucolo, *Fetal Alcohol Syndrome*, *supra* note 4, at 563 (first reported case mentioning it was decided in 1981; first mention in a law review article was 1982).

¹⁹ Two of the co-authors—Cucolo and Dorfman—are still active litigators.

²⁰ See, e.g., Michael L. Perlin, "They Keep It All Hid": The Ghettoization of Mental Disability Law and Its Implications for Legal Education, 54 ST. LOUIS U. L.J. 857 (2010) [hereinafter Perlin, *Ghettoization of Mental Disability Law*].

To teach mental disability law meaningfully, it is necessary to teach about the core characteristics that contaminate it (sanism and pretextuality), to teach about the cognitive approaches that distort it (false [ordinary common sense] and cognitive-simplifying heuristics), and to teach the school of jurisprudence that can optimally redeem it (TJ).

Id. at 876.

with the conditions we discuss be treated with dignity and compassion in the criminal justice system.

Our title comes from Bob Dylan’s brilliant, ferocious and apocalyptic song, *A Hard Rain’s A-Gonna Fall*.²¹ This is the fourth time that one of the co-authors, Perlin, has drawn on this song,²² a masterpiece of “cascading imagery and shimmering power,”²³ that evokes, variously, devastation, vulnerability, and places of lingering death,²⁴ but one that concludes with “suggestions of hope—glimmers of light in a shrouded world.”²⁵ Before that hopefulness, though, comes this verse from which the title of this paper is drawn:

I saw a black branch with blood that kept drippin’
 I saw a room full of men with their hammers a-bleedin’
 I saw a white ladder all covered with water
 I saw ten thousand talkers whose tongues were all broken
 I saw guns and sharp swords in the hands of young children²⁶

As one of the co-authors, Perlin, has noted in another article, when Dylan wrote this song “we had not yet learned about the ‘child soldiers’ [armed with guns and sharp swords] who were to be an integral part of the civil wars that ravaged Africa for decades.”²⁷ But we *do* know that we regularly punish children—some with guns and sharp implements, most with neither—who have ASD or FASD. We hope this Article will change, in some way, the current state of affairs.

I. THE SUBJECT MATTERS

A. “Issues” with Juvenile Defendants with ASD

Autism Spectrum Disorder (ASD) is a “neurodevelopmental condition characterized by social communication difficulties and restricted and repetitive behaviors among

²¹ BOB DYLAN, *A Hard Rain’s A-Gonna Fall*, on THE FREEWHEELIN’ BOB DYLAN (Columbia Records 1963), <https://www.bobdylan.com/songs/hard-rains-gonna-fall/> [<https://perma.cc/6TTL-E8XX>].

²² See Michael L. Perlin, “*The Executioner’s Face Is Always Well-Hidden*”: *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 236 (1996) [hereinafter Perlin, *The Role of Counsel*]; Astrid Birgden & Michael L. Perlin, “*Where the Home in the Valley Meets the Damp Dirty Prison*”: *A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings*, 14 AGGRESSION & VIOLENT BEHAV. 256, 256 (2009); Michael L. Perlin & Valerie R. McClain, “*Where Souls Are Forgotten*”: *Cultural Competencies, Forensic Evaluations and International Human Rights*, 15 PSYCHOL., PUB. POL’Y & L. 257, 258 (2009).

²³ Evan Schlansky, *The 30 Greatest Bob Dylan Songs*: #7, “*A Hard Rain’s A-Gonna Fall*,” AM. SONGWRITER (2009), <https://americansongwriter.com/the-30-greatest-bob-dylan-songs-7-a-hard-rains-a-gonna-fall/> [<https://perma.cc/5AU9-YZBZ>].

²⁴ See, e.g., Oliver Trager, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 233, 233–35 (Bob Nirkind & Marian Appellof eds., 2004).

²⁵ *Id.* at 235.

²⁶ DYLAN, *supra* note 21.

²⁷ Michael L. Perlin, “*You That Build the Death Planes*”: *Bob Dylan, War and International Affairs*, 37 ARIZ. J. INT’L & COMPAR. L. 305, 317 (2020) [hereinafter Perlin, *Bob Dylan*]. For a view on child soldiers in Africa in general, see Naomi Cahn, *Poor Children: Child “Witches” and Child Soldiers in Sub-Saharan Africa*, 3 OHIO ST. J. CRIM. L. 413, 430 (2006).

strengths in varied domains.”²⁸ Research has shown that “ASD results from early altered brain development and neural reorganization,”²⁹ and that symptoms can range from mild to severe.³⁰

The American Psychiatric Association’s *Diagnostic and Statistical Manual*³¹ details the various deficits³² that may be associated with the disorder, including: (1) persistent deficits in social communication and social interaction; (2) deficits in nonverbal communicative behaviors used for social interaction, such as abnormalities in eye contact and body language; (3) deficits in understanding and use of gestures; (4) and even a total lack of facial expressions and nonverbal communication.³³ It is noteworthy that intellectual disability and ASD frequently co-occur, and that co-occurrence further contributes to the challenges in addressing the complex origins of perceived functioning deficits.³⁴ In this context, it is important to know how much structure an individual may need in daily routines, and whether a dual diagnosis of developmental disability and mental illness exists.³⁵

Although there is little evidence that autistic disorders are linked directly to criminal behavior, certain clinical features of ASD can predispose an autistic individual to certain

²⁸ Megha Sharda, Carola Tuerk, Rakhee Chowdhury, Kevin Jamey, Nicholas Foster, Melanie Custo-Blanch, Melissa Tan, Aparna Nadig, & Krista Hyde, *Music Improves Social Communication and Auditory-Motor Connectivity in Children with Autism*, TRANSLATIONAL PSYCHIATRY, Oct. 2018, at 1, <https://www.nature.com/articles/s41398-018-0287-3> [<https://perma.cc/CRW9-WMR5>].

²⁹ Colo. Dep’t of Educ., GUIDELINES FOR THE EDUCATIONAL EVALUATION OF AUTISM SPECTRUM DISORDER 6, 6 (2020), https://www.cde.state.co.us/cdesped/asd_guidelines [<https://perma.cc/E79J-5RXP>].

³⁰ *Autism Spectrum Disorder: Data & Statistics on Autism Spectrum Disorder*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 4, 2023), <https://www.cdc.gov/ncbddd/autism/data.html> [<https://perma.cc/V7A8-66QL>]; see also John D. Lewis & Jeffrey L. Elman, *Growth-Related Neural Reorganization and the Autism Phenotype: A Test of the Hypothesis That Altered Brain Growth Leads to Altered Connectivity*, 11 DEVELOPMENTAL SCI. 135, 143 (2008).

³¹ AM. PSYCHIATRIC ASS’N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2013). See generally AM. PSYCHIATRIC ASS’N, AUTISM SPECTRUM DISORDER (2022), <https://www.psychiatry.org/getmedia/d48f7fa6-b6c8-4f6c-888b-b0adfeb9f5b6/APA-DSM5TR-AutismSpectrumDisorder.pdf> [<https://perma.cc/QV8S-UTHW>] (outlining the American Psychiatric Association’s revised recommendation, included in the DSM-5, its most recent standard Diagnostic and Statistical Manual of Mental Disorders, for a single diagnosis for the four listed disorders. Asperger syndrome (AS) is one of several previously separate subtypes of autism that were recategorized into the single diagnosis ASD).

³² On the source of the use of the word “deficit” in descriptions of autism, see generally Mylène Legault, Jean-Nicolas Bourdon, & Pierre Poirier, *Neurocognitive Variety in Neurotypical Environments: The Source of “Deficit” in Autism*, 9 J. BEHAV. & BRAIN SCI. 246 (2019).

³³ See, e.g., Karen Syma Czapanskiy, *Kids and Rules: Challenging Individualization in Special Education*, 45 J.L. & EDUC. 1, 11 n.42 (2016) (discussing NAT’L AUTISM CTR., FINDINGS AND CONCLUSIONS: NATIONAL STANDARDS PROJECT, PHASE 2, at 12 (2015), <https://nationalautismcenter.org/resources/> [<https://perma.cc/CB8U-T6FH>]).

³⁴ See, e.g., Jane McCarthy, Colin Hemmings, Eugenia Kravariti, Katharina Dworzynski, Geraldine Holt, Nick Bouras, & Elias Tsakanikos, *Challenging Behavior and Co-Morbid Psychopathology in Adults with Intellectual Disability and Autism Spectrum Disorders*, 31 RES. DEVEL. DISAB. 362 (2010).

³⁵ Randy Shively, *Risk Assessment for Individuals with Intellectual Disabilities (ID)*, in THE ARC, SEX OFFENDERS WITH INTELLECTUAL/DEVELOPMENTAL DISABILITIES: A CALL TO ACTION FOR THE CRIMINAL JUSTICE COMMUNITY 1, 11 (2015).

kinds of criminal offenses.³⁶ The presentation of ASD, particularly impulsivity or problems maintaining self-control, can result in juvenile delinquency and entry into the criminal justice system.

Once in the system, those same deficits further place the juvenile at a grave disadvantage. Juveniles on the ASD spectrum have a heightened risk of being treated unfairly in the criminal justice system, because of certain deficits associated with the diagnosis.³⁷ They may experience worse outcomes because of their social communication style and may be perceived unfavorably during proceedings, resulting in harsher penalties.³⁸

Identifying the prevalence and severity of the disorder in juvenile defendants is a challenging endeavor.³⁹ Barriers to accurate assessments exist due to a vast number of factors, including but not limited to, the use of different diagnostic instruments employed by different institutions and assessors, the diversity of the individuals assessed, the high rate of comorbid psychiatric disorders, and the various types of offending behavior.⁴⁰ In addition, the systemic neglect and failure to accommodate juveniles on the autism spectrum often begins in early development and education, as schools and other caretakers frequently merely “write off” these individuals as “troubled,” thus allowing them to fall through the cracks when it comes to effective diagnosis and necessary interventions.⁴¹

B. “Issues” with Juvenile Defendants with FASD⁴²

Fetal alcohol spectrum disorder (FASD) generally refers to the range of birth defects that result from prenatal alcohol exposure and includes several sub-classifications: Fetal Alcohol Syndrome (FAS), partial Fetal Alcohol Syndrome (pFAS), Alcohol-Related Neuro-developmental Disorder (ARND), and Alcohol-Related Birth Defect (ARBD).⁴³

³⁶ See, e.g., David Allen, Carys Evans, Andrew Hider, Sarah Hawkins, Helen Peckett, & Hugh Morgan, *Offending Behaviour in Adults with Asperger Syndrome*, 38 J. AUTISM & DEVELOPMENTAL DISORDERS 748, 748 (2008).

³⁷ See generally Rachel Slavny-Cross, Carrie Allison, Sarah Griffiths, & Simon Baron-Cohen, *Autism and the Criminal Justice System: An Analysis of 93 Cases*, 15 AUTISM RES. 904 (2002) (75% of autistic clients were not given reasonable adjustments during the process; only 43% were offered an appropriate adult during police investigations, even though they had an existing diagnosis of autism).

³⁸ Tammie R. Foster & Robyn L. Young, *Brief Report: Sentencing Outcomes for Offenders on the Autism Spectrum*, 52 J. AUTISM & DEVELOPMENTAL DISORDERS 3314, 3314 (2022).

³⁹ For a comprehensive overview, see DANA LEE BAKER, LAURIE A. DRAPELA, & WHITNEY LITTLEFIELD, *LAW AND NEURODIVERSITY: YOUTH WITH AUTISM AND THE JUVENILE JUSTICE SYSTEMS IN CANADA AND THE UNITED STATES* (2020).

⁴⁰ See generally Alexa Rutten, Robert Vermeiren, & Chijs van Nieuwenhuizen, *Autism in Adult and Juvenile Delinquents: A Literature Review*, 11 CHILD & ADOLESCENT PSYCH. & MENT. HEALTH 45 (2017).

⁴¹ John Bignotti, *The Proactive Model: How to Better Protect the Right to Special Education for Incarcerated Youth*, 98 IND. L.J. SUPPLEMENT 14, 16–17 (2023) (suggesting that the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* [hereinafter IDEA], which guarantees access to a specialized, appropriate public education for youth with disabilities in the United States, could be expanded to correctly identify students with disabilities before they enter the juvenile justice system, including a broader definition of qualifying “autism” disabilities than what is currently listed under the IDEA).

⁴² This Part is largely adapted from Perlin & Cucolo, *Fetal Alcohol Syndrome*, *supra* note 4, at 569–76.

⁴³ Kenneth L. Jones & David W. Smith, *Recognition of the Fetal Alcohol Syndrome in Early Infancy*, 302 LANCET 999 (1973) (coining the phrase “fetal alcohol syndrome”); Larry Burd, Marilyn G. Klug, & Kaylee Husark, *Prevalence of Fetal Alcohol Spectrum Disorder and Screening in the Forensic Context*, in

Significantly, pre-natal alcohol consumption has been documented as one of the main contributors to preventable birth defects and the later onset of lifelong developmental disabilities.⁴⁴ Brain dysfunction in childhood may occur, manifested by a short attention span, low I.Q., perceptual problems, and dysfunctional motor coordination.⁴⁵

Because such stigma attaches to cases of women who drink during pregnancy, it is difficult to present accurate data on this question.⁴⁶ Between one and five percent of people are diagnosed with FASD,⁴⁷ but, “due to under-reporting, unclear diagnostic criteria, and inconsistent clinical presentation, the exact number of infants and children who suffer from fetal alcohol exposure and related abnormalities is unknown.”⁴⁸ Beyond this, the fact that juveniles with FASD often have a normal IQ makes accurate data collection even more difficult.⁴⁹ Thus, juveniles with normal IQ levels most likely would not qualify for early interventions and rarely receive any treatment to address social dysfunction.⁵⁰

People under the FASD umbrella may exhibit poor social judgment and impulsivity.⁵¹ They are often less likely to learn from experiences or understand social

EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS IN THE FORENSIC CONTEXT: A MANUAL FOR MENTAL HEALTH PRACTICE 1, 59 (Natalie Novick Brown ed. 2021) [hereinafter EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS] (discussing the use of the Alcohol Related Neurodevelopmental Disorder Behavioral Checklist (ABC), a screening instrument designed to detect possible FASD in children and adolescents). On how individuals with these disorders are stigmatized and stereotyped, see Emily Bell, Gail Andrew, Nina Di Pietro, Albert E. Chudley, James N. Reynolds, & Eric Racine, *It's a Shame! Stigma Against Fetal Alcohol Spectrum Disorder: Examining the Ethical Implications for Public Health Practices and Policies*, 9 PUB. HEALTH ETHICS 65, 70 (2016).

⁴⁴ Philip A. May, J. Phillip Gossage, Anna-Susan Marais, Colleen M. Adnams, H. Eugene Hoyme, Kenneth L. Jones, Luther K. Robinson, Nathaniel C.O. Khaole, Cudore Snell, Wendy O. Kalberg, Loretta Hendricks, Lesley Brooke, Chandra Stellavato, & Denis L. Viljoen, *The Epidemiology of Fetal Alcohol Syndrome and Partial FAS in a South African Community*, 88 DRUG & ALCOHOL DEPENDENCE 259, 259 (2007); see also, Ann Pytkowicz Streissguth, Jon M. Aase, Sterling K. Clarren, Sandra P. Randels, Robin A. LaDue, & David F. Smith, *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 JAMA 1961, 1961 (1991) (“Fetal alcohol syndrome now is recognized as the leading known cause of mental retardation in the United States, surpassing Down’s syndrome and spina bifida.”).

⁴⁵ Ann Pytkowicz Streissguth, C.S. Herman, & David W. Smith, *Intelligence, Behavior, and Dymorphogenesis in the Fetal Alcohol Syndrome: A Report on 20 Patients*, 92 J. Pediatrics 363, 363 (1978).

⁴⁶ See generally Ernest L. Abel, *Was the Fetal Alcohol Syndrome Recognized by the Greeks and Romans?*, 34 ALCOHOL & ALCOHOLISM 868 (1999). See generally, Aristotle, *Problemata*, in THE WORKS OF ARISTOTLE (Forster, E. S. ed., Oxford Clarendon Press 1927) (observing that “foolish, drunken or hare-brained women, for the most part, bring forth children like unto themselves, difficult and listless”); THE BABYLONIAN TALMUD (500) (warning that “one who drinks intoxicating liquor will have ungainly children.” In fact, the Old Testament of the Hebrew Bible contains a very specific proscription to the wife of Zorah to “beware . . . and drink no wine nor strong drink, and eat not any unclean thing: for, lo, thou shalt conceive, and bear a son.” JUDGES 13:4–5).

⁴⁷ Larry Burd & William Edwards, *Fetal Alcohol Spectrum Disorders: Implications for Attorneys and the Courts*, 34 CRIM. JUST. 21, 21 (2019).

⁴⁸ Adam J. Duso & John Stogner, *Re-Evaluating the Criminalization of in Utero Alcohol Exposure: A Harm-Reduction Approach*, 24 WM. & MARY BILL RTS. J. 621, 628 (2016) (discussing that the causal link between alcohol consumption by pregnant women and birth defects was not fully accepted by the medical community until about the last decade); see also MICHAEL DORRIS, *BROKEN CORD* 145 (1989) (discussing societal responses to the “discovery” of FAS in 1973).

⁴⁹ Herrmann, *supra* note 9, at 243.

⁵⁰ *Id.*

⁵¹ Christopher Fanning, *Defining Intellectual Disability: Fetal Alcohol Spectrum Disorders and Capital Punishment*, 38 RUTGERS L. REV. 1, 2 (2011).

cues.⁵² These characteristics put juveniles with FASD at a greater risk of ending up in the criminal justice system.⁵³ In particular, those who suffer from FASD find themselves in legal trouble at a much higher rate than others⁵⁴ and they are much more likely to recommit their crimes.⁵⁵ Estimations of FASD in correctional settings reveal that “nearly one out of four children in juvenile corrections have FASD, and prevalence estimates range from [twenty-three] percent to [sixty] percent.”⁵⁶

Persons with FASD often do not make connections between cause and effect, have difficulty anticipating consequences, and may fail to exhibit empathy.⁵⁷ These factors may have an impact on all stages of the criminal justice process—from arrest through sentencing and punishment.⁵⁸ By way of example, because of a diminished ability to recognize risk, people with FASD “tend to be suggestible and gullible,” and more likely to be coerced by peer pressure or to succumb to the whim of a more forceful co-conspirator.⁵⁹

There are also relevant attention deficit issues.⁶⁰ This population may have trouble remembering bail conditions or court dates and thus stand on danger of being sanctioned

⁵² *Id.*

⁵³ Herrmann, *supra* note 9, at 244.

⁵⁴ Francesco Sessa, Monica Salerno, Massimiliano Esposito, Nunzio Di Nunno, Giuseppe Li Rosi, Salvatore Rocuzzo, & Cristoforo Pomara, *Understanding the Relationship Between Fetal Alcohol Spectrum Disorder (FASD) and Criminal Justice: A Systematic Review*, 10 HEALTHCARE 84, 85 (2022), (“[I]t is believed that individuals with FASD are overrepresented in correctional facilities: as reported in a study performed in the USA, 60% of adolescents and adults with FASD had been in trouble with the law.”).

⁵⁵ See generally Jeffrey Guina, Camille Hernandez, Jay Witherell, Allison Cowan, David Dixon, Irina King, & Julie P. Gentile, *Neurodevelopmental Disorders, Criminality, and Criminal Responsibility*, 51 J. AM. ACAD. PSYCH. & L. 1 (2023). But see, Charlotte E. Blackmore, Emma L. Woodhouse, Nicola Gillan, Ellie Wilson, Karen L. Ashwood, Vladimira Stoencheva, Alexandra Nolan, Grainne M. McAlonan, Dene M. Robertson, Susannah Whitwell, Quinton Deeley, Michael C. Craig, Janneke Zinkstok, Rob Wichers, Debbie Spain, Ged Roberts, Declan G.M. Murphy, Clodagh M. Murphy, & Eileen Daly, *Adults with Autism Spectrum Disorder and the Criminal Justice System: An Investigation of Prevalence of Contact with the Criminal Justice System, Risk Factors and Sex Differences in a Specialist Assessment Service*, 26 AUTISM 2098, 2106 (2022) (research on the group with ASD and contact with the CJS is mixed, yet this study goes on to show that the prevalence rates of contact with the CJS as a potential suspect are not significantly higher than in a non-ASD sample, and there does not seem to be a relationship with ASD and committing a specific offense).

⁵⁶ Burd & Edwards, *supra* note 47, at 21. On specific issues raised in the juvenile justice system, see, e.g., Dilys Haner, Valerie McGinn, & Kimberly Harris, *Psychological Assessment for Juvenile Courts, in EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS*, *supra* note 43, at 285. See also Claire E. Dineen, *Fetal Alcohol Syndrome: The Legal and Social Responses to Its Impact on Native Americans*, 70 N.D. L. REV. 1, 22 (1994) (noting that there is also a link between FAS and the institutionalization of marginalized minorities, for example, “FAS is the leading major birth defect among Native Americans in the Southwest”).

⁵⁷ Fanning, *supra* note 51, at 11.

⁵⁸ See, e.g., *State v. Taylor*, 161 So. 3d 963, 968 (La. Ct. App. 2015) (in the context of an individual with intellectual disabilities, upon arrest the individual may feel compelled to confess or respond in an agreeable manner without assessing the content of questions or “true” preferences); see also Natalie Novick Brown & Stephen Greenspan, *Diminished Culpability in Fetal Alcohol Spectrum Disorders (FASD)*, 40 BEHAV. SCI. & L. 1, 8 (2022) (people with FASD may make false confessions and may not understand their *Miranda* rights); Kaitlyn McLachlan, Ronald Roesch, Jodi L. Viljoen, & Kevin S. Douglas, *Evaluating the Psychological Abilities of Young Offenders with Fetal Alcohol Spectrum Disorder*, 38 LAW & HUM. BEHAV. 10, 15 (2014).

⁵⁹ Brown & Greenspan, *supra* note 58, at 7 (“In fact, social vulnerability in offenders with ID was one of the reasons cited by Justice Stevens for taking the death penalty off the table in the *Atkins* opinion.”).

⁶⁰ See generally *Capistrano Unified Sch. Dist. v. Wartenberg ex rel. Wartenberg*, 59 F.3d 884 (9th Cir. 1995) (on attention deficit disorder in general).

with breaches of court orders.⁶¹ Deficits that have an impact upon executive functioning⁶² raise important questions as to whether the individual in question has the legal capacity to commit deliberate or intentional crimes.⁶³

Important empirical studies have concluded that persons with FASD may “be at increased risk for misunderstanding, misappreciation, and miscommunication across arrest and trial contexts.”⁶⁴ Such individuals exhibit a broad spectrum of behaviors, and an FASD diagnosis in and of itself does not necessarily strongly predict impairment in police interrogations.⁶⁵ Yet, these factors must be taken into account when analyzing policy suggestions that promote “wide-ranging specialized accommodations for individuals with FASD under the law.”⁶⁶

C. Issues Related to Trauma

In recent years, scholars have begun to focus on the trauma of legal process, especially for people with mental disabilities. We know that trauma-informed services are designed to respond to the impact that past trauma has on individuals, as well as disclose the current harms being done due to system involvement. These services recognize the importance of trust, safety, and respect in relationships between service providers and individuals who have experienced harm.⁶⁷ The consensus is clear that lawyers representing such individuals should be well informed about the effects of trauma.⁶⁸ As two of the co-authors, Perlin and Cucolo, have previously pointed out:

Lawyers need to be trained to understand and incorporate trauma-informed lawyering, as well as the basic language and concepts of mental health law (to understand the possible effects of a mental disability or personality disorder on the client, the significance of diagnoses, and the success/failure rates of common treatment methods with this population).⁶⁹

⁶¹ Jarrod Brown, Don Helmstetter, Diane Harr, & Jay Singh, *Perceptions of FASD by United States District Attorneys*, 7 J. INT. DIS. & OFFEND. BEHAV. 195, 198 (2016).

⁶² See, e.g., *United States v. Rothman*, 2009 WL 426282, *28 (S.D. Fla. 2009) (including one’s planning, organizing, sequencing and abstracting abilities). See generally Stephen J. Morse, *Is Executive Function the Universal Acid?* 16 CRIM. J. & PHIL. 299 (2022) (for a recent reconsideration of this issue).

⁶³ Herrmann, *supra* note 9, at 244.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ McLachlan, *supra* note 58, at 20. For the studies referenced by the American Bar Association, see *FASD Resolution*, ABA (2012), https://www.americanbar.org/groups/public_interest/child_law/resources/attorney_s/fasd-resolution/ [<https://perma.cc/TZF3-N99C>].

⁶⁷ Meghan 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, 297 (2018) (citing Maxine Harris & Roger D. Fallot, *Envisioning a Trauma-Informed Service System: A Vital Paradigm Shift*, 89 NEW DIRECTIONS FOR MENTAL HEALTH SERVS. 3, 20 (2001)).

⁶⁸ See Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 359 (2016).

⁶⁹ Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 FLA. J.L. & PUB. POL’Y 291, 327 (2017).

We know that an ASD diagnosis itself can be traumatic,⁷⁰ and that the decision-making attendant to the development of autism-related policies can be equally traumatic.⁷¹ Both scholarship⁷² and case law⁷³ reveal examples of the trauma of FASD diagnoses.⁷⁴ Thus, one of the co-authors, Perlin, has previously written:

Problem-solving courts—which seek to find individualized alternatives for offenders and increase the likelihood that a person with a mental disability will be diverted out of the criminal justice system—play an important role in protecting the rights of persons with trauma-related mental disabilities, particularly by decreasing the likelihood that “the person with mental disabilities will suffer at the hands of others because of that status.”⁷⁵

II. PROBLEM-SOLVING COURTS

A. History

There is general agreement that the first problem-solving court began in Dade County, Florida in 1989.⁷⁶ Premised significantly on the principles of therapeutic jurisprudence,⁷⁷ problem-solving courts demanded an interdisciplinary approach to address underlying problems—not solely the symptoms—of issues such as drug abuse, domestic abuse, and mental disability.⁷⁸ Such courts “offer individuals accused of criminal conduct the promise of one intensive, extended, and transformative interaction with the

⁷⁰ DANIEL R. UNUMB & LORRI SHEALY UNUMB, *AUTISM AND THE LAW: CASES, STATUTES, AND MATERIALS* 3 (2011).

⁷¹ Edward Feinberg & John Vacca, *The Drama and Trauma of Creating Policies on Autism: Critical Issues to Consider in the New Millennium*, 15 *FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES* 130, 130 (2000).

⁷² See generally Dorothy Badry & Aileen Wight Felske, *An Examination of Three Key Factors: Alcohol, Trauma and Child Welfare: Fetal Alcohol Spectrum Disorder and the Northwest Territories of Canada: Brightening Our Home Fires*, 8 *FIRST PEOPLES CHILD & FAMILY REV.* 130 (2013).

⁷³ See, e.g., *Boggs v. Ryan*, 2017 WL 67522, *4 (D. Ariz. 2017).

⁷⁴ See generally Alan Price, Penny A. Cook, Sarah Norgate, & Raja Mukherjee, *Prenatal Alcohol Exposure and Traumatic Childhood Experiences: A Systematic Review*, 80 *NEUROSCIENCE & BIOBEHAVIORAL REV.* 89 (2017).

⁷⁵ Gallagher & Perlin, *supra* note 67, at 278.

⁷⁶ Mark A. McCormick-Goodhart, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 *PENN ST. L. REV.* 895, 908 n.115 (2013); see also, e.g., James L. Nolan Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 *AM. CRIM. L. REV.* 1541, 1562 (2004). Some date the start of the problem-solving court movement back to the creation of the first juvenile court in 1899. See, e.g., Cynthia Alkon, *Have Problem-Solving Courts Changed the Practice of Law?*, 21 *CARDOZO J. CONFLICT RESOL.* 597, 605 (2020). For the purposes of this Article we are limiting our discussion to the modern problem-solving court movement.

⁷⁷ See *infra* Part V. Two of the co-authors—Perlin & Dorfman—discuss this in Michael L. Perlin, Deborah A. Dorfman, & Naomi M. Weinstein, “*On Desolation Row*”: *The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us*, 24 *TEX. J. ON C.L. & C.R.* 59, 113 (2018) (“[P]roblem-solving courts are all theoretically premised on therapeutic jurisprudence.”). It must be made clear that some have failed in this mission. See, e.g., E. Lea Johnston & Conor Flynn, *Mental Health Courts and Sentencing Disparities*, 62 *VILL. L. REV.* 685, 693 (2017) (criticizing sharply the non-therapeutic jurisprudence operations of mental health courts in Erie County, Pennsylvania).

⁷⁸ Perlin, *Veterans’ Courts*, *supra* note 2. See generally Winick, *supra* note 2.

criminal justice system instead of a lifetime of repeated, brief, and ineffectual encounters.”⁷⁹ Such courts must be responsive to individuals with trauma-related mental disabilities.⁸⁰

These courts are based on the belief and reality “that the one-size-fits-all structure of the American criminal justice system often leaves much to be desired.”⁸¹ They are “a new approach to the rising tide of criminal cases, one that would address the underlying causes of the criminal conduct that brought litigants and victims to the courtrooms in the first place.”⁸² Whereas the first problem-solving courts focused on issues of drug use, more recent ones have expanded significantly to focus on issues of mental health,⁸³ veterans issues,⁸⁴ domestic abuse,⁸⁵ and many other areas of the law.⁸⁶ Of particular note, there are now specialty *juvenile* drug courts,⁸⁷ *juvenile* mental health courts,⁸⁸ and *juvenile* animal violence courts.⁸⁹

B. Pros and Cons

Nearly twenty years ago, Professors Susan Stefan and Bruce Winick engaged in a debate on the pros and cons of mental health courts.⁹⁰ Professor Winick’s position was that

⁷⁹ Paul Holland, *Lawyering and Learning on Problem-Solving Courts*, 34 WASH. U. J.L. & POL’Y 185, 185 (2010). Drug courts, the first problem-solving courts, “emerged from a criminal system plagued by the collateral damage from a war on drugs.” Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1464 (2004).

⁸⁰ See Emma Hetherington, Allison Dunnigan, & Hannah Elias Sbaity, *CSEC Treatment Courts: An Opportunity for Positive, Trauma-Informed, and Therapeutic Systems Responses in Family and Juvenile Courts*, 43 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 200, 215–16 (2022) (discussing generally trauma informed principles in family and juvenile courts).

⁸¹ Perlin, *Gates of Eden*, *supra* note 11, at 207.

⁸² Raymond Brescia, *Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings*, 59 CASE W. RES. L. REV. 305, 312 (2009). Professor Brescia also notes

Problem-solving courts would attempt to ensure that a defendant, whether he or she was an individual with a drug addiction, psychiatric disability, or other problem, would receive treatment and close judicial monitoring of compliance with that treatment in an effort to address the root causes of the criminal conduct. The hope was that by treating the underlying condition, the criminal behavior would stop, or it could at least be managed better, and defendants would not find themselves in the revolving door of the criminal justice system.

Id. (citing Winick, *supra* note 78, at 1060–61).

⁸³ See, e.g., Perlin, *Profound Differences*, *supra* note 12.

⁸⁴ See, e.g., Perlin, *Veterans’ Courts*, *supra* note 2.

⁸⁵ See, e.g., Kathryn Gillespie Wellman, *Taking the Next Step in the Legal Response to Domestic Violence: The Need to Reexamine Specialized Domestic Violence Courts From a Victim Perspective*, 24 COLUM. J. GENDER & L. 444, 446 (2013).

⁸⁶ See generally Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481 (2017). See generally PERLIN & CUCOLO, *supra* note 2, at nn.274–81.1 (for a full list of problem solving courts).

⁸⁷ Jasmine Victoria Idrogo, Logan A. Yelderman, Martha-Elin Blomquist, & Angela D. Broadus, *Perceived and Actual Knowledge Gain Among Juvenile Drug Treatment Court Team Members: A Pre-Post Analysis of On-Site Training and Technical Assistance*, 59 FAM. CT. REV. 769, 769–74 (2021).

⁸⁸ Geary, *supra* note 11.

⁸⁹ See generally Debra L. Muller-Harris, *Animal Violence Court: A Therapeutic Jurisprudence-Based Problem-Solving Court for the Adjudication of Animal Cruelty Cases Involving Juvenile Offenders and Animal Hoarders*, 17 ANIMAL L. 313 (2011).

⁹⁰ See Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCH., PUB. POL’Y & L. 507, 510 (2005).

jail was “the worst possible place” for people with mental illness, because what this population really needed was treatment, and that problem-solving courts could “divert them from the criminal justice system to the mental health treatment that they need.”⁹¹ Professor Stefan opposed problem-solving courts. Stefan reasoned that problem-solving courts “may simply compound the social problems that created them by allowing people to avoid facing those problems and by diverting resources from the successful solution of those problems.”⁹² Most of the debate on these courts has tracked these positions over the intervening years.⁹³

One of the co-authors, Perlin, has written about problem-solving courts extensively over the years.⁹⁴ Most recently, he compared specialized mental health courts to traditional involuntary commitment courts, and found the latter wanting: “I believe that rejecting the traditional civil commitment court model⁹⁵ and embracing the modern mental health court model is the single-best way that [TJ-required] dignity can be provided.”⁹⁶

Keeping this background in mind, the authors align themselves with Professor Winick and believe that our proposal of the creation of specialized mental health courts will be a major first step in resolving the problems that we address later in this Article. In short, it is only through therapeutic jurisprudence-inspired courts⁹⁷ that the necessary dignity and compassion⁹⁸ can be provided, and the taint of sanism (and the stigma it reflects) be rejected.⁹⁹

⁹¹ *Id.* at 510 (Prof. Winick).

The jails lack adequate clinical resources and are often overcrowded, noisy institutions that are incredibly stressful,” and “lawyers should adequately counsel their clients about the advantages and disadvantages of accepting diversion to mental health court As a result, judges and defense counsel in mental health courts should ensure that defendants receive dignity and respect, are given a sense of voice and validation.

Id. at 523.

⁹² *Id.* at 511 (Prof. Stefan).

⁹³ Compare, e.g., Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93 *passim* (2007) (pro problem-solving courts), with Tammy Seltzer, *Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System’s Unfair Treatment of People with Mental Illnesses*, 11 PSYCH. PUB. POL’Y & L. 570 *passim* (2005) (against problem-solving courts).

⁹⁴ See generally Perlin, *Gates of Eden*, *supra* note 11; Michael L. Perlin, “*The Judge, He Cast His Robe Aside*”: *Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL’Y J. 1 (2013) [hereinafter Perlin, *Mental Health Courts*]; Perlin, *Profound Differences*, *supra* note 12; Perlin, *Veterans’ Courts*, *supra* note 2.

⁹⁵ Perlin, *Profound Differences*, *supra* note 12, at 958 (noting that courts that order involuntary commitment “are—virtually across the board—the antithesis of therapeutic jurisprudence”).

⁹⁶ *Id.* at 961. Having said this, Perlin noted that not all mental health courts operate in TJ-compatible ways. *Id.* at 952 n.64 (citing Johnston & Flynn, *supra* note 77, at 693 (empirical study of MHCs in Erie County, Pennsylvania, concluding that anticipated treatment court sentences—for all grades of offense—typically exceed county court sentences by more than a year)).

⁹⁷ See *infra* Part V.

⁹⁸ See Michael L. Perlin, “*In These Times of Compassion When Conformity’s in Fashion*”: *How Therapeutic Jurisprudence Can Root Out Bias, Limit Polarization and Support Vulnerable Persons in the Legal Process*, 10 TEX. A&M L. REV. 219, 223–30 (2023) [hereinafter Perlin, *Therapeutic Jurisprudence*].

⁹⁹ See *id.* at 231–32.

III. MENTAL HEALTH COURTS

Mental health courts (MHC)—as long as they focus on the principles of therapeutic jurisprudence and procedural justice¹⁰⁰—have the potential to be one of the most significant available reforms of the criminal justice system.¹⁰¹ Generically, the goal of an MHC is to divert defendants from the criminal justice system into treatment.¹⁰² As one of the co-authors, Perlin, has previously explained:

MHCs are premised on team approaches[:] representatives from justice and treatment agencies assist the judge in screening offenders to determine whether they would present a risk of violence if released to the community, devising appropriate treatment plans, and supervising and monitoring the individual's performance in treatment. The MHC judge functions as part of a mental health team that assesses the individual's treatment needs and decides whether he or she can be safely released to the community. The team formulates a treatment plan, and a court-employed case manager and court monitor track the individual's participation in the treatment program and submit periodic reports to the judge concerning [their] progress. Participants are required to report to the court periodically so the judge can

¹⁰⁰ “Procedural justice” reveals that “people’s evaluations of the resolution of a dispute ... are influenced more by their perception of the fairness of the process employed than by their belief regarding whether the ‘right’ outcome was reached.” Thomas L. Hafemeister, Sharon G. Garner, & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 *BUFF. L. REV.* 147, 200 (2012) (quoting Tom R. Tyler, *Procedural Justice and the Courts*, 44 *CT. REV.* 26, 26 (2007)); see also John M. Gallagher & José B. Ashford, *Perceptions of Legal Legitimacy in Veterans Treatment Courts: A Test of a Modified Version of Procedural Justice Theory*, 45 *LAW & HUM. BEHAV.* 152 (2021) (concluding that individuals are more motivated to be legally obedient by the belief that they are legitimate and worthy of deference than by deterrence and other instrumental considerations); Steve Leben, *Getting It Right Isn’t Enough: The Appellate Court’s Role in Procedural Justice*, 69 *U. KAN. L. REV.* 13, 21 (2020) (quoting Lynn Mather, *Law and Society*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 681, 691–92 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008)) (discussing how procedural justice proposes that providing fair and transparent court procedures results in “greater satisfaction and compliance regardless of the substantive outcome of their case”). See generally Michael L. Perlin, “*I Hope the Final Judgment’s Fair*”: *Alternative Jurisprudences, Legal Decision-Making, and Justice*, in *THE CAMBRIDGE HANDBOOK OF PSYCHOLOGY OF LEGAL DECISION-MAKING* 17 (Monica K. Miller, Logan A. Yelder, Matthew T. Huss, & Jason A. Cantone eds., 2024) [hereinafter Perlin, *Alternative Jurisprudences*].

¹⁰¹ There is no “one size fits all” mental health court. There are now over 375 such courts in operation in the United States. See, e.g., Ursula Castellano, *Courting Compliance: Case Managers as “Double Agents” in the Mental Health Court*, 36 *LAW & SOC. INQUIRY* 484, 490 (2011) (some courts deal solely with misdemeanors); Julie Grachek, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 *IND. L.J.* 1479, 1495 (2006) (some courts deal solely with nonviolent offenders); Leah Johnston, *Theorizing Mental Health Courts*, 89 *WASH. U. L. REV.* 519, 521 (2012) (some courts have no restriction on the type of cases they can hear). See generally Carol Fidler, *Building Trust and Managing Risk: A Look at a Felony Mental Health Court*, 11 *PSYCH., PUB. POL’Y & L.* 587 (2005) (discussing the expansion of mental health courts to include felony prosecutions); Perlin, *Profound Differences*, *supra* note 12, at 947–48.

¹⁰² See, e.g., Judith S. Kaye, *Inaugural Hon. Joseph W. Bellacosa Distinguished Jurist-In-Residence Lecture*, 81 *ST. JOHN’S L. REV.* 743, 748 (2007).

monitor treatment compliance, and additional status review hearings are held on an as-needed basis.¹⁰³

If mental health courts are to work effectively, the presiding judge must “develop enhanced interpersonal skills and awareness of a variety of psychological techniques that can help the judge to persuade the individual to accept treatment and motivate him or her to participate effectively in it.”¹⁰⁴ MHC judges must have the capacity to build trust; convey empathy and respect; and be culturally competent—a quality especially needed in FASD cases.¹⁰⁵ Additionally, MHC judges must provide a meaningful review process that incorporates an understanding of the specific circumstances of the defendant.¹⁰⁶ It is essential that such courts be free of the “pretextual dishonesty” that is often the hallmark of judicial proceedings that involve individuals with mental disabilities.¹⁰⁷

When mental health courts work, they can work brilliantly in helping reduce some of the sanist biases that plague the legal system.¹⁰⁸ The self-reported experiences of litigants in Judge Ginger Lerner-Wren’s MHC in Ft. Lauderdale reveal lower coercion levels than almost any comparable measure of perceived coercion previously reported in the literature¹⁰⁹ and show what mental health courts can do. Mental health courts critically promote self-determination, a characteristic that is absolutely essential to the individuals for whom we propose these special courts.¹¹⁰ However, MHCs are only effective if the presiding judge “buys into” the principles of therapeutic jurisprudence (TJ): “even a well-resourced problem-solving court may not work if the judge fails to adopt TJ [principles] and other problem-solving strategies effectively.”¹¹¹

The empirical data is striking. Participants in Judge Lerner-Wren’s MHC had significantly lower arrest rates after enrollment in treatment programs than before enrollment and lower post-enrollment arrest rates than comparison groups.¹¹² In fact,

¹⁰³ Perlin, *Profound Differences*, *supra* note 12, at 947–48.

¹⁰⁴ Perlin, *Gates of Eden*, *supra* note 11, at 21.

¹⁰⁵ See Perlin & Cucolo, *Fetal Alcohol Syndrome*, *supra* note 4, at 577. Criminal justice professionals must also acknowledge the cultural and ethnic component to FASD. In the United States, indigenous communities seem to be among those particularly vulnerable to the incidence of FASD. *Id.*

¹⁰⁶ Perlin, *Profound Differences*, *supra* note 12, at 949.

¹⁰⁷ *Id.* at 950. On pretextuality, see *infra* subpart IV.B.

¹⁰⁸ Perlin, *Profound Differences*, *supra* note 12, at 950 (citing Sana Loue, *The Involuntary Civil Commitment of Mentally Ill Persons in the United States and Romania*, 23 J. LEGAL MED. 211, 235 n.120 (2002)).

¹⁰⁹ See, e.g., Norman G. Poythress, John Petrila, Annette McGaha, & Roger Boothroyd, *Perceived Coercion and Procedural Justice in the Broward Mental Health Court*, 25 INT’L J.L. & PSYCHIATRY 517, 529 (2002) (discussing coercion in this context); Michael L. Perlin & Deborah A. Dorfman, “*Is It More Than Dodging Lions and Wastin’ Time?*” *Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCH., PUB. POL’Y & L. 114 (1996); *Garrity v. New Jersey*, 385 U.S. 493, 516 (1967).

¹¹⁰ See Perlin & Cucolo, *Jurors (Mis)Construe Autism*, *supra* note 3, at 621 (focusing on individuals with autism).

¹¹¹ Perlin, *Profound Differences*, *supra* note 12, at 951 (citing Vicki Lens, *Against the Grain: Therapeutic Judging in a Traditional Family Court*, 41 LAW & SOC. INQUIRY 701, 704 (2016)). See generally, GINGER LERNER-WREN, *A COURT OF REFUGE: STORIES FROM THE BENCH OF AMERICA’S FIRST MENTAL HEALTH COURT* (2018).

¹¹² See, e.g., Annette Christy, Norman G. Poythress, Roger A. Boothroyd, John Petrila, & Shabnam Mehra, *The Efficiency and Community Safety Goals of the Broward County Mental Health Court*, 23 BEHAV. SCI. & L. 227 (2005); see also, Sarah Kopelovich, Philip Yanos, Christina Pratt, & Joshua Koerner, *Procedural*

MHCs evaluated in a multi-site study “were more successful at reducing recidivism—recidivism rates of 25% versus 10%-15%”—than drug courts.¹¹³ And, most importantly for the purposes of this Article, these statistics are constant when *juvenile* MHCs are studied.¹¹⁴ Such courts “are the best way to supervise criminal defendants in the community who present with high needs and a high risk to re-offend absent intervention.”¹¹⁵

This is *not* to say that all MHCs follow the model of Judge Wren’s and others that are well known.¹¹⁶ A sobering study by Professor E. Lea Johnston and a colleague has shown us that, in Erie County, Pennsylvania, “anticipated treatment court sentences—for all grades of offense [in MHCs]—typically exceeded county court sentences by more than a year.”¹¹⁷ The disparity between Johnston and Flynn’s findings and the experiences in Judge Lerner-Wren’s court demonstrate that these courts cannot succeed absent a supportive legislature.¹¹⁸ Even with legislative support, mental health courts can differ radically from county to county.¹¹⁹ And we can never close our eyes to the reality that—given the link between these courts and the criminal justice system—the possibility of coercion cannot be ignored.¹²⁰ As one of the co-authors, Perlin, has previously emphasized how:

Many such courts—specifically, some drug courts—do not follow TJ principles, existing instead in a due process-free zone—implicitly rejecting

Justice in Mental Health Courts: Judicial Practices, Participant Perceptions, and Outcomes Related to Mental Health Recovery, 36 INT’L J.L. & PSYCHIATRY 113 (2013). See generally, Gregory L. Acquaviva, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 990 (2006); Amy Carter, *Fixing Florida’s Mental Health Courts: Addressing the Needs of the Mentally Ill by Moving Away From Criminalization to Investing in Community Mental Health*, 10 J.L. SOC’Y 1, 18 (2009).

¹¹³ Goodale *supra* note 12, at 299. See generally Perlin, *Profound Differences*, *supra* note 12 at 952 (listing sources).

¹¹⁴ See Heretick & Russell, *supra* note 12, at 1.

¹¹⁵ See Perlin, *Profound Differences*, *supra* note 12, at 953–54 (citing Kerry Meyer, *Hennepin County Criminal Mental Health Court: Experiences in a Large Metropolitan Mental Health Court*, 42 MITCHELL HAMLINE L. REV. 485, 521 (2016)).

¹¹⁶ See, e.g., Matthew J. D’Emic, *The Promise of Mental Health Courts—Brooklyn Criminal Justice System Experiments with Treatment as an Alternative to Prison*, 22 CRIM. JUST. 24, 25–28 (2007); Mark Fass, *Program Steers Mentally Ill Defendants Away From Jail and Toward Treatment*, N.Y.L.J. (Aug. 4, 2008), [<https://perma.cc/FHK3-DEMG>] (information on Judge D’Emic’s court).

¹¹⁷ Johnston & Flynn, *supra* note 77, at 693; see also E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515 (2019).

¹¹⁸ See Sheila Moheb, Comment, *Jamming the Revolving Door: Legislative Setbacks for Mental Health Court Systems in Virginia*, 14 RICH. J.L. & PUB. INT. 29 (2010).

¹¹⁹ See Monte Staton & Arthur Lurigio, *Mental Health Courts in Illinois: Comparing and Contrasting Program Models, Sanction Applications, Information Sharing, and Professional Roles*, FED. PROB., June 2015, at 21.

¹²⁰ See, e.g., Stacey M. Faraci, *Slip Slidin’ Away? Will Our Nation’s Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QUINNIAC L. REV. 811, 853 (2004) (arguing that mental health court defendants “endure much more liberty restrictions and privacy intrusions” and that labeling the “sentence ‘treatment,’ rather than ‘punishment,’” allows the court to exert more coercion over the participant than would otherwise be available).

the basic TJ “premise that therapeutic outcomes cannot trump due process.”¹²¹

As co-authors, Perlin and Cucolo, have recently written, “TJ is also an integral component of successful mental health courts.”¹²² Elsewhere, Perlin has stated, “TJ has also had a major role in the success of mental health courts.”¹²³ When mental health courts operate as they are intended to, it is because “they are grounded and rooted in TJ, and reflect TJ ‘theory in practice.’”¹²⁴ We believe that there is a robust connection between TJ and MHCs,¹²⁵ and that adherence to TJ principles *is* the key to well-functioning MHCs and the specialized courts we recommend below.¹²⁶

A. Juvenile Mental Health Courts

We start by underscoring that mental illness is even more common among juvenile offenders than it is among adult offenders,¹²⁷ and that the rates of juvenile admission to mental health facilities have greatly increased in the past few decades.¹²⁸ Not coincidentally, rates of child abuse and neglect are also on the rise.¹²⁹

In partial response to these realities, juvenile mental health courts have been launched in at least seventeen states¹³⁰ “to acknowledge the unmet mental health needs of juveniles

¹²¹ Perlin, *Veterans’ Courts*, *supra* note 2, at 449 (quoting Perlin, *Gates of Eden*, *supra* note 11, at 207). *See generally infra* Part V.

¹²² Perlin & Cucolo, *Fetal Alcohol Syndrome*, *supra* note 4, at 606 (focusing on individuals with FAS and FASD).

¹²³ Michael L. Perlin, “Have You Seen Dignity?”: *The Story of the Development of Therapeutic Jurisprudence*, 27 N.Z. U. L. REV. 1135, 1149 (2017) [hereinafter Perlin, *Have You Seen Dignity*].

¹²⁴ Gallagher & Perlin, *supra* note 67, at 292–93 (quoting Michael Cobden & J. Ron Albers, *Beyond the Squabble: Putting the Tenderloin Community Justice Center in Context*, 7 HASTINGS RACE & POVERTY L.J. 53, 56 (2010)).

¹²⁵ *See* Perlin, Dorfman, & Weinstein, *supra* note 77, at 113–14.

¹²⁶ For a recent sharp criticism of the TJ model in mental health courts, see Emanuelle Bernheim, *The Triumph of the “Therapeutic” in Quebec Courts: Mental Health, Behavioural Reform and the Decline of Rights*, 38 WINDSOR Y.B. ACCESS TO JUST. 125, 130–47 (2022).

¹²⁷ Geary, *supra* note 11, at 677. It is estimated that 65 to 70% of juveniles in detention centers have a diagnosable mental illness. *See* NAT’L CTR. FOR YOUTH L., IMPROVING OUTCOMES FOR YOUTH IN JUVENILE JUSTICE SYSTEM: A REVIEW OF ALAMEDA COUNTY’S COLLABORATIVE MENTAL HEALTH COURT 2 (2011), https://www.courts.ca.gov/documents/Improving_Outcomes_NCYL_Pub.pdf [<https://perma.cc/5SAV-VBSK>] [hereinafter IMPROVING OUTCOMES]; *see also* Marit Haugen, *The Last One Standing: How the United States’ Decision Not to Ratify The Convention on the Rights of a Child Impacted Its Juvenile Mental Health Courts in Comparison to Canada*, 39 ARIZ. J. INT’L & COMP. L. 201, 211 (2022).

¹²⁸ Geary, *supra* note 11, at 679; *see also* Brian Jay Nicholls, *Justice in the Darkness: Mental Health and the Juvenile Justice System*, 11 J.L. & FAM. STUD. 555, 558 (2009) (“The desire to implement these juvenile mental health courts comes from a recognition that mental disabilities often cause, or contribute to, delinquent behavior.”).

¹²⁹ Geary, *supra* note 11, at 679. *See generally* Joel Frost-Tift, *Juveniles in Jeopardy: Reclaiming the Justice System’s Rehabilitative Ideals*, 23 S. CAL. REV. L. & SOC. JUST. 457, 466–67 (2014).

¹³⁰ Haugen, *supra* note 127, at 211 (citing *Juvenile Mental Health Treatment Locator*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/juveniles?field_gains_mhc_state_value=IA [<https://perma.cc/5LKV-MC27>] (last visited Jan. 15, 2024)).

who become involved in the justice system.”¹³¹ There is great variance as to how these courts operate,¹³² although most courts take a similar “case management” approach to adjudication.¹³³ And the empirical research tells us that “Juvenile Mental Health Courts save money and reduce crime by treating children with mental health eligibility.”¹³⁴ One study, by way of example, has found that post-release recidivism rates of youth in the court were significantly lower than those for a sample of other youth in the juvenile justice system diagnosed with mental disorders.¹³⁵

To be effective, juvenile mental health courts must be grounded in and incorporate principles of therapeutic jurisprudence.¹³⁶ For example, it is more likely that defendants in a juvenile mental health court will be consulted about decisions being made about them.¹³⁷ And the evidence tells us that when such courts “buy into” the precepts of therapeutic jurisprudence, “their likelihood of success is enhanced.”¹³⁸

B. *The Need for Specialized Mental Health Courts*

1. Courts for Juveniles with ASD

In 2018, after noticing a growing number of young people with symptoms of ASD in the criminal justice system, Clark County (Nevada) Juvenile Court Hearing Master Soonhee “Sunny” Bailey and Family Court Judge William Voy launched a specialized court geared toward helping juvenile defendants with ASD.¹³⁹ The Detention Alternatives

¹³¹ Haugen, *supra* note 127, at 211–12 (citing *Juvenile*, ALAMEDA CNTY. PUB. DEF., <https://permits.acgov.org/defender/services/juvenile.htm> [<https://perma.cc/A695-XERE>] (last visited Jan. 23, 2024)).

¹³² *See id.* at 212–15.

¹³³ Sean C. MacGarvey, *Juvenile Justice and Mental Health: Innovation in the Laboratory of Human Behavior*, 53 JURIMETRICS J. 97, 116 (2012); *see* Patrick Gardner, *An Overview of Juvenile Mental Health Courts*, ABA CHILD L. PRAC., September 2011, at 101.

¹³⁴ Carmen Cusack, *Kent Make-Up Their Minds: Juveniles, Mental Illness, and the Need for Continued Implementation of Therapeutic Justice Within the Juvenile Justice and Criminal Justice Systems*, 22 AM. U. J. GENDER SOC. POL’Y & L. 149, 161–62 (2013) (citing JOSEPH J. COCOZZA & JENNIE L. SHUFELT, *JUVENILE MENTAL HEALTH COURTS: AN EMERGING STRATEGY* (2006), <https://search.issueab.org/resource/juvenile-mental-health-courts-an-emerging-strategy.html> [<https://perma.cc/2F66-HBKN>]).

¹³⁵ Heretick & Russell, *supra* note 12. *See generally* Voula Marinos & Devon Gregory, *The Tale of a Youth Guilty Plea Court & a Youth Mental Health Court in Ontario: How Different Are They in Practice?*, 2 INT’L J. THERAPEUTIC JURIS. 25 (2016).

¹³⁶ *See, e.g.*, Kimberly A. Kaiser & Kristy Holtfreter, *An Integrated Theory of Specialized Court Programs: Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation*, 43 CRIM. JUST. & BEHAV. 45, 58 (2016); Morgan Molinoff, *supra* note 8, at 321.

¹³⁷ Michael L. Perlin, Alison J. Lynch, Kelly Frailing, & Ashley Juneau, “*The Distant Ships of Liberty*”: *Why Criminology Needs to Take Seriously International Human Rights Laws that Apply to Persons with Disabilities*, 31 S. CAL. REV. L. & SOC. JUST. 374, 399–400 (2022); *see also* Voula Marinos, *Methodologies for the Study of TJ Processes or Procedural Justice Within the Operation of TJ-Related Courts: A Conversation* (Oct. 14, 2016) (unpublished manuscript) (materials on file with authors).

¹³⁸ Naomi M. Weinstein & Michael L. Perlin, “*Who’s Pretending to Care for Him?*” *How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives Persons with Mental Disabilities the Right to Continuity of Care*, 8 WAKE FOREST J.L. & POL’Y 455, 490 (2018).

¹³⁹ *Specialized Court in Las Vegas Helps Autistic Youth*, ELIZABETH KELLEY, <https://myemail.constantcontact.com/Specialized-Court-in-Las-Vegas-Helps-Autistic-Youth.html?soid=1130747716366&aid=CCe7kFaiLRc> [<https://perma.cc/BD8D-64NX>] (last visited Mar. 13, 2024).

for Autistic Youth Court (DAAY Court) is the first court of its kind in the nation.¹⁴⁰ The judges who spearheaded the program recognized that many of the youth exhibited signs of undiagnosed ASD, and were not receiving the treatment they required.¹⁴¹ As noted by Judge Sunny Bailey, one of the presiding judges, the “DAAY court is a lot of coordination and moving pieces. The program has graduated sixty-five kids with only five to come back.”¹⁴² Judge Bailey also noted “that you have to start young. Early intervention can help youth to adapt to the mainstream for better outcomes by the time they get to middle school. Consistency and a behavioral plan are important; and reinforcement should be instantaneous.”¹⁴³

Other courts throughout the nation are slowly beginning to recognize the prevalence of ASD in the juvenile delinquency population, and the need to bolster resources and training within the court system. Pennsylvania has recently made efforts to address the challenges that arise when juveniles with ASD enter the criminal justice system. The Justice Training Project of Pennsylvania's Autism Services, Education, Resources and Training Collaborative, together with the Autism Society of Pittsburgh, secured a grant from the Pennsylvania Department of Human Services and the Bureau of Autism Services to develop an education program for criminal justice professionals.¹⁴⁴ The focus in Pennsylvania is providing intensive training and education to the people involved in the adjudication and rehabilitation of the ASD population, including probation officers, public defenders, magistrates and judges.¹⁴⁵ “Through the program, which is supported by a grant from the Pennsylvania Department of Human Services and the Bureau of Autism Services, 1,000 Pennsylvania magistrates are now learning to recognize ASD indicators in juveniles.”¹⁴⁶ With nearly one in fifty-nine children diagnosed with an ASD, it is inevitable that judges in criminal, juvenile, orphan, and family courts will hear cases that involve individuals living with ASD.¹⁴⁷

2. Courts for Juveniles with FASD

Seven years ago, a student note carefully and thoughtfully argued for problem-solving courts to be created specifically to deal with cases of juveniles with FASD.¹⁴⁸ According to the author:

State legislatures should create courts modeled after drug courts because an FASD court would appropriately punish offenders for their crimes, give

¹⁴⁰ *Las Vegas Autism Court Brings Effective Methods and Resources for Youth and Charts a Course for Others to Follow*, EIGHTH JUD. DIST. CT., CLARK CNTY. NEV. (May 2, 2023), <http://www.clarkcountycourts.us/las-vegas-autism-court-brings-effective-methods-and-resources-for-youth-and-charts-a-course-for-others-to-follow/> [<https://perma.cc/PD2M-E3UQ>].

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Leslie A. Gordon, *Autism Awareness Project Trains Pennsylvania's Juvenile Judges*, ABA J. (Sept. 1, 2016, 3:50 AM), https://www.abajournal.com/magazine/article/autism_awareness_pennsylvania_juvenile_courts [<https://perma.cc/U4LV-QXK7>].

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Stacey Witalec, *Pennsylvania Supreme Court, Department of Human Services Hold Statewide Discussions About Autism in the Courts*, LAWYERS J., Dec. 4, 2020, at 8.

¹⁴⁸ Herrmann, *supra* note 9, at 243.

offenders with FASD the treatment they need to become productive members of society, and stop the “revolving door” of FASD offenders in the criminal justice system.¹⁴⁹

The implementation of FASD courts “would remedy many of the issues facing offenders with FASD.”¹⁵⁰ By way of example, judges in FASD courts would be able to “incorporate FASD cutting-edge research and resources into their decisions, recommendations, and sentences.”¹⁵¹

Notwithstanding these recommendations, and notwithstanding the empirical data—that tells us that this individuals with FASD have been identified as a “potentially vulnerable group of offenders in the context of a criminal prosecution owing to substantial cognitive, behavioral, and social challenges commonly seen in those with the diagnosis”¹⁵²—there are, as of today, no FASD problem-solving courts, either for juveniles or for adults. We hope this Article is the first step toward a change in this non-policy.

IV. SOME JURISPRUDENTIAL FILTERS

It is impossible to contextualize any data or analysis that deals with any aspect of mental disability law—civil or criminal—without an understanding of the basic jurisprudential filters that have gone to corrode this entire area of the law.¹⁵³ Here, we briefly discuss these: sanism, pretextuality, heuristics, and false “ordinary common sense.”¹⁵⁴

A. Sanism

Sanism is an irrational prejudice towards mentally ill persons, which is of the same quality and character as other irrational prejudices—often reflected in prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.¹⁵⁵ “Decision-making in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist,

¹⁴⁹ *Id.* at 244 (drawing on the language in ABA, RESOLUTION 112B, at 11 (2012), <https://www.americanbar.org/groups/diversity/disabilityrights/resources/resolutions/> [<https://perma.cc/6BH4-KTAH>]).

¹⁵⁰ *Id.* at 243–44.

¹⁵¹ Perlin & Cucolo, *Fetal Alcohol Syndrome*, *supra* note 4, at 612.

¹⁵² McLachlan, *supra* note 58, at 10.

¹⁵³ *See, e.g.*, Michael L. Perlin & Heather Ellis Cucolo, “*See this Empty Cage Now Corrode*”: *The International Human Rights and Comparative Law Implications of Sexually Violent Predator Laws*, 23 NEW CRIM. L. REV. 388, 427–32 (2020) [hereinafter Perlin & Cucolo, *Sexually Violent Predator Laws*].

¹⁵⁴ *See generally, e.g.*, Michael L. Perlin, Talia Roitberg Harmon, & Sarah Chatt, “*A World of Steel-Eyed Death*”: *An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J.L. REFORM 261, 278–81 (2020). These are factors that we have discussed many times in the past. *See supra* text accompanying notes 148–154; *infra* text accompanying notes 156–66.

¹⁵⁵ *See, e.g.*, Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 374 (1993); Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 4–5 (1999).

homophobic, and religiously and ethnically bigoted decision-making.”¹⁵⁶ Its “corrosive effects have warped all aspects of the criminal process.”¹⁵⁷

B. *Pretextuality*

Pretextuality defines the ways in which courts “accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends.”¹⁵⁸ It contaminates all mental disability law.¹⁵⁹

C. *Heuristics*

Heuristics refers to a cognitive psychology construct that describes the implicit thinking devices that individuals use to simplify complex, information-processing tasks.¹⁶⁰ Their use often leads to distorted and systematically erroneous decisions, and it leads decision-makers to ignore or misuse items of rationally useful information.¹⁶¹ Judges consistently focus on information that confirms their preconceptions (confirmation bias)¹⁶², to recall vivid and emotionally charged aspects of cases (the availability heuristic),¹⁶³ and to interpret information that reinforces the status quo as legitimate (system justification biases).¹⁶⁴

¹⁵⁶ Michael L. Perlin & Naomi M. Weinstein, “Said I, ‘But You Have No Choice’”: *Why a Lawyer Must Ethically Honor a Client’s Decision about Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, 15 CARDOZO PUB. L., POL’Y & ETHICS J. 73, 82 (2016).

¹⁵⁷ Michael L. Perlin & Meredith R. Schriver, “You Might Have Drugs at Your Command”: *Reconsidering the Forced Drugging of Incompetent Pre-Trial Detainees from the Perspectives of International Human Rights and Income Inequality*, 8 ALBANY GOV’T L. REV. 381, 394 (2015).

¹⁵⁸ Michael L. Perlin & Deborah A. Dorfman, “Is It More Than Dodging Lions and Wastin’ Time?” *Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCH., PUB. POL’Y & L. 114, 117 (1996).

¹⁵⁹ Michael L. Perlin, “Your Old Road Is/ Rapidly Agin’”: *International Human Rights Standards and Their Impact on Forensic Psychologists, the Practice of Forensic Psychology, and the Conditions of Institutionalization of Persons with Mental Disabilities*, 17 WASH. U. GLOB. STUD. L. REV. 79, 90–110 (2018).

¹⁶⁰ Michael L. Perlin, “I’ve Got My Mind Made Up”: *How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 91 n.55 (2017) [hereinafter Perlin, *Biologically Based Evidence*].

¹⁶¹ Perlin, Harmon, & Chatt, *supra* note 154, at 280 (citing Heather Ellis Cucolo & Michael L. Perlin, “They’re Planting Stories in the Press”: *The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185, 212 (2013)).

¹⁶² See, e.g., Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 38–39 (2012) (quoting Eden B. King, *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCH. PUB. POL’Y & L. 54, 58 (2011)).

¹⁶³ See, e.g., Michael L. Perlin, “The Borderline Which Separated You from Me”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1417 n.278 (1997) [hereinafter Perlin, *The Insanity Defense*] (citing Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 L. & SOC’Y REV. 123, 137 (1980)).

¹⁶⁴ See, e.g., Julie Goldenson, Stanley Brodsky, & Michael L. Perlin, *Trauma-Informed Forensic Mental Health Assessment: Practical, Legal, Ethical and Alignment with Therapeutic Jurisprudence Perspectives*, 28 PSYCH., PUB. POL’Y & L. 226, 233 n.4 (2022).

What is most pernicious is the “vividness” heuristic, through which “one single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.”¹⁶⁵ As co-author Perlin has previously written, “[t]he use of these heuristics blinds us “to the ‘gray areas’ of human behavior.”¹⁶⁶

D. (False) Ordinary Common Sense (OCS)

A false “ordinary common sense” (OCS) is a “powerful unconscious animator of legal decision making”¹⁶⁷ and has long pervaded the jurisprudence of disability law.¹⁶⁸ False OCS is a “self-referential and non-reflective” way of constructing the world.¹⁶⁹ Essentially, the OCS refers to the assumption that if “I see something a certain way, I assume everyone see it that way; if I see something a certain way, that’s the way it is.”¹⁷⁰ OCS is further supported by our reliance on a series of heuristics—cognitive-simplifying devices that distort our abilities to rationally consider information.¹⁷¹

OCS presupposes two “self-evident” truths: “First, everyone knows how to assess an individual’s behavior. Second, everyone knows when to blame someone for doing wrong.”¹⁷²

As we will demonstrate in this Article, so much of the law that has developed in criminal cases involving juveniles with ASD and juveniles with FASD is premised on these failed rationales. As we discuss below, we believe that TJ is the best “tool” in our toolkit to “combat sanism and pretextuality in the law, to minimize heuristic decision-making, and to shine a light on decisions that flow from faulty ‘ordinary common sense.’”¹⁷³

¹⁶⁵ Perlin, *The Insanity Defense*, *supra* note 163, at 1417.

¹⁶⁶ Michael L. Perlin, “*She Breaks Just Like a Little Girl*”: *Neonaticide, the Insanity Defense, and the Irrelevance of Ordinary Common Sense*, 10 WM. & MARY J. WOMEN & L. 1, 25, 27 (2003).

¹⁶⁷ Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3, 22–23, 29 (1990). *See generally* Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737–38 (1988).

¹⁶⁸ Michael L. Perlin & Heather Ellis Cucolo, “*Tolling for the Aching Ones Whose Wounds Cannot Be Nursed*”: *The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER, RACE & JUST. 431, 453 (2017) [hereinafter Perlin & Cucolo, *Marginalization of Racial Minorities*].

¹⁶⁹ Lynch, Perlin, & Cucolo, *supra* note 16, at 254 n.252.

¹⁷⁰ *E.g.*, Cucolo & Perlin, *supra* note 162, at 38.

¹⁷¹ Perlin & Cucolo, *Marginalization of Racial Minorities*, *supra* note 168, at 453.

¹⁷² Perlin, Harmon, & Chatt, *supra* note 154, at 281 (citing Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5, 17 (1996)).

¹⁷³ Perlin, *Therapeutic Jurisprudence*, *supra* note 98, at 267.

V. THERAPEUTIC JURISPRUDENCE

A. *In General*¹⁷⁴

Therapeutic jurisprudence (TJ) is an emerging school of thought that recognizes that the law has therapeutic or anti-therapeutic consequences. TJ requires looking at the “real world” implications of the way the legal system regulates behavior and, most importantly, the way it regulates the lives and behavior of marginalized individuals.¹⁷⁵ It seeks to “ferret out biases, and to deal with the vulnerabilities of so much of [this marginalized] population[, and TJ] is a means of potentially avoiding the polarization that is often the hallmark of traditional litigation.”¹⁷⁶

TJ aims to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential *while not subordinating due process principles*.¹⁷⁷ Though there is an inherent tension in this inquiry, David Wexler has identified how it can be resolved: the law’s use of “mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.”¹⁷⁸ To be clear, “an inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”¹⁷⁹

TJ uses the law to “empower individuals, enhance rights, and promote well-being.”¹⁸⁰ Further, it is “a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism.”¹⁸¹ TJ is inherently

¹⁷⁴ This Part is largely adapted from Perlin, *Alternative Jurisprudences*, *supra* note 100, at 183–206. Further, it distills the work that Perlin has done on this topic for the past three decades, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623, 623–35 (1993). For fuller explanations, see Perlin, *Biologically Based Evidence*, *supra* note 160; 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, 357 (2016).

¹⁷⁵ For a comparative consideration of the TJ implications of implications of the real-world consequences of the “failure of criminology to confront international human rights as it applies to persons institutionalized because of mental disability,” see Perlin, Lynch, Frailing, & Juneau, *supra* note 137, at 394.

¹⁷⁶ Goldenson, Brodsky, & Perlin, *supra* note 164, at 227.

¹⁷⁷ See, e.g., 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); David Wexler, *Therapeutic Jurisprudence: Restructuring Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 759 (1993).

¹⁷⁸ David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

¹⁷⁹ Perlin, Dorfman, & Weinstein, *supra* note 77, at 103–04.

¹⁸⁰ Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients*”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 278 (2014).

¹⁸¹ Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001).

“collaborative and interdisciplinary”¹⁸² and supports an ethic of care.¹⁸³ Its structural linchpins are commitments to dignity and to compassion.¹⁸⁴

The use of therapeutic jurisprudence would make it more likely that defendants are satisfied with the outcome of court proceedings. In cases involving therapeutic intervention, this outcome satisfaction could lead to greater compliance and “success.”¹⁸⁵ For one example, TJ would give richer textures to sentencing and disposition procedures as well as likely bring about the sort of reconciliation that can only be positive for mental health purposes.¹⁸⁶ In short, the “perception of receiving a fair hearing is therapeutic because it contributes to the individual’s sense of dignity and conveys that he or she is being taken seriously.”¹⁸⁷

David Wexler, one of the co-creators of TJ, has underscored:

Developments in areas of psychology—such as the elements of procedural justice, such as the reinforcement of desistance from crime, such as the techniques of relapse prevention planning, such as the principles of health psychology used to promote compliance with medical (or judicial) orders—can be brought into the legal realm and used as the new wine of TJ.¹⁸⁸

It is also critical to consider two of TJ’s central principles: compassion and dignity.¹⁸⁹ Professors Jonathan Simon and Stephen Rosenbaum¹⁹⁰ embrace TJ as a modality of analysis in their work on dignity in the context of civil commitment.¹⁹¹ As dignity is at the “core” of TJ,¹⁹² this means that people “possess an intrinsic worth that should be

¹⁸² Nigel Stobbs, Lorana Bartels, & Michel Vols, *Therapeutic Jurisprudence—A Strong Community and Maturing Discipline*, in *THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE* 15, 18 (Nigel Stobbs, Lorana Bartels, & Michel Vols eds., 2019) [*hereinafter* METHODOLOGY AND PRACTICE]. See generally Perlin, *Therapeutic Jurisprudence*, *supra* note 98.

¹⁸³ Perlin, *Biologically Based Evidence*, *supra* note 160, at 94 (citing 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)).

¹⁸⁴ See Perlin, *Therapeutic Jurisprudence*, *supra* note 98, at 226–30.

¹⁸⁵ See, e.g., Bernard P. Perlmutter, *George’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 (2005).

¹⁸⁶ See generally Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 *CRIM. L. BULL.* 483 (2004).

¹⁸⁷ Michael L. Perlin, Keri K. Gould, & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 *PSYCH., PUB. POL’Y & L.* 80, 114 (1995).

¹⁸⁸ David B. Wexler, *Guiding Court Conversation Along Pathways Conductive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence*, 1 *INT’L J. THERAPEUTIC JURIS.* 367, 369 (2016).

¹⁸⁹ See generally Perlin, *Therapeutic Jurisprudence*, *supra* note 98, at 226–30.

¹⁹⁰ Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 *U. MIAMI L. REV.* 1, 51 (2015). See generally Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 *DENV. U. L. REV.* 1145 (1997).

¹⁹¹ On TJ and the civil commitment process in general, see PERLIN & CUCOLO, *supra* note 2, §2–6.

¹⁹² Perlin, *Have You Seen Dignity*, *supra* note 123, at 1137.

recognized and respected, and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth.”¹⁹³

Further, justice with compassion is one of the central premises of TJ.¹⁹⁴ A judge who demonstrates compassion best “represent[s] the goals of therapeutic jurisprudence.”¹⁹⁵ Professors Anthony Hopkins and Lorana Bartels make this explicit:

The argument we make here is that TJ is founded upon the psychology of compassion, understood as a sensitivity to and concern for the suffering of others and a commitment to alleviating and preventing it.¹⁹⁶ The “other” in the context of TJ is any person upon whom the law acts or any actor within the legal process.¹⁹⁷

It is also critical to contextualize the right to—and need for—adequate counsel within the scope of TJ, especially in the context of a juvenile population.¹⁹⁸ “The right to counsel is . . . the core of therapeutic jurisprudence,”¹⁹⁹ and is “an integral component of TJ-supported lawyering.”²⁰⁰ Further, “[t]he failure to assign adequate counsel bespeaks . . . a failure to consider the implications of therapeutic jurisprudence.”²⁰¹

Finally, TJ also is the best “tool” for dealing with the vulnerability of the population in question here. Using Professor Lois Weithorn’s definition—“susceptibility to physical or emotional harm and susceptibility to coercion or other external sources of

¹⁹³ Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009); see also Perlin & Cucolo, *Jurors (Mis)Construe Autism*, *supra* note 3, at 617–18.

¹⁹⁴ Lorie Gerkey, *Legal Beagles, a Silent Minority: Therapeutic Effects of Facility Dogs in the Courtroom*, 1 INT’L J. THERAPEUTIC JURIS. 405, 415 (2016).

¹⁹⁵ LeRoy Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 287–88 (2001).

¹⁹⁶ See generally Perlin, *Therapeutic Jurisprudence*, *supra* note 98.

¹⁹⁷ Anthony Hopkins & Lorana Bartels, *Paying Attention to the Person: Compassion, Equality and Therapeutic Jurisprudence*, in *METHODOLOGY AND PRACTICE*, *supra* note 182, at 107. In the context of TJ:

Compassion is a virtue, value or disposition to act which can be held by individuals or groups . . . Compassion is generally defined as having two elements. First is empathy—the capacity to sense that another is suffering, and to know what it might feel like to be subjected to that kind of suffering . . . The second element of compassion is a felt need to try and alleviate that sensed suffering of others.

Nigel Stobbs, *Compassion, the Vulnerable and COVID-19*, 45 ALT. L.J. 81, 81 (2020).

¹⁹⁸ See, e.g., THOMAS GRISSO, *DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDER* 32 (2004) (“If there is a single most important obligation of the system for protecting the legal interests of youths with mental disorders, it is the obligation to provide them with competent defense attorneys . . .”).

¹⁹⁹ Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 119 (2004).

²⁰⁰ Perlin & Cucolo, *Fetal Alcohol Syndrome*, *supra* note 4, at 604; see also Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel? A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115 (2002).

²⁰¹ Michael L. Perlin, “Yonder Stands Your Orphan with His Gun”: *The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH L. REV. 301, 337 (2013). For a stark example of a case where TJ was *not* employed, see *Trevino v. Davis*, 861 F.3d 545, 557 (5th Cir. 2017), discussed in Erin M. Morrissey, *Too Much of A Not-So-Good Thing: Trevino v. Davis and the Overly Deferential Strickland Standard*, 92 TUL. L. REV. 943 (2018). See also Perlin, Harmon, & Chatt, *supra* note 154, at 291–92.

influence”²⁰²—the cohorts of juveniles that are the subject of this Article fit perfectly with the universe of other vulnerable cohorts for whom the use of TJ in the court system is the only meaningful judicial remedy.²⁰³

B. *Why Is TJ a Prerequisite to a Properly Functioning Problem-Solving Court?*

The purpose of problem-solving courts is to address the problems that led to the prosecution of an individual through alternative means to punishment, such as treatment, restorative justice, and other similar measures.²⁰⁴ But a laudable purpose alone does not ensure that a problem-solving court will be effective. There are many ways in which a problem-solving court, if not properly implemented, can undermine its purpose and not serve the interests of the people it should be assisting. First, just because a court is a problem-solving court, does not guarantee the absence of sanism, pretextuality, and the overall pervasive bias against individuals with disabilities.²⁰⁵ Relatedly, even in problem-solving courts, judges do not always have the training or the interpersonal skills necessary to effectively understand how individuals with mental health problems or developmental disabilities communicate, the scope of their abilities, and the barriers to services and supports those individuals with mental health problems or developmental disabilities face.²⁰⁶

To proactively address these potential problems and ensure their effectiveness, problem-solving courts must be grounded in the principles of therapeutic jurisprudence.²⁰⁷ By doing so, these courts will be better equipped to fulfill their very purposes. As co-author Perlin has previously written:

The promotion and creation of [mental health] courts are consistent with TJ’s aims and aspirations, especially where litigants are given the “voice” that TJ demands. The courts are grounded and rooted in TJ; they reflect TJ

²⁰² Lois A. Weithorn, *A Constitutional Jurisprudence of Children’s Vulnerability*, 69 HASTINGS L.J. 179, 190 (2017), discussed in Perlin, *Therapeutic Jurisprudence*, *supra* note 98, at 239.

²⁰³ See Perlin, *Therapeutic Jurisprudence*, *supra* note 98, at 240 (discussing how TJ can help “heal vulnerable cohorts” such as “abused children, inmates with serious mental disabilities, psychiatric patients who seek to enforce their constitutional right to refuse medication, juveniles subject to police interrogations or incarceration, individuals with mental illness subject to involuntary hospitalization, victims or alleged perpetrators of sexual abuse, ex-felons, and juvenile witnesses of domestic abuse”). We must emphasize that we can never assume that counsel will be competent in cases such as these, a reality that we have known for decades. See Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 *passim* (1992); see also Michael L. Perlin & Meghan Gallagher, “*Temptation’s Page Flies out the Door*”: Navigating Complex Systems of Disability and the Law from a Therapeutic Jurisprudence Perspective, 25 BUFFALO HUM. RTS. L. REV. 1, 3 (2018) (“[M]any of the lawyers who represent these individuals do an obscenely inadequate job.”).

²⁰⁴ Winick, *supra* note 2, at 1064 (problem solving courts involve the “integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and governmental organizations”).

²⁰⁵ See *supra* Part IV.

²⁰⁶ Winick, *supra* note 2, at 1069–71; cf. Perlin, *Profound Differences*, *supra* note 12.

²⁰⁷ Note the effectiveness of TJ as a tool for rooting out biases such as sanism. See Perlin, *Therapeutic Jurisprudence*, *supra* note 98, at 230–39 (discussing both group biases and cognitive biases).

“theory in practice;” and they acknowledge that a defendant’s appearance in such a court comes at a “painful and crucial point in life.”²⁰⁸

VI. WHY PROBLEM-SOLVING COURTS FOR THESE POPULATIONS ARE ESPECIALLY IMPORTANT.

There are at least three key reasons why problem-solving courts that are implemented consistently with TJ principals are particularly important for children with ASD and FASD who are in the juvenile justice system. First, problem-solving court judges, attorneys, and other court participants, such as social workers, psychologists, and other clinicians, are more likely to have the needed training and skills to help guard against sanist decision-making.²⁰⁹ Second, if TJ tenets are applied and court personnel are properly trained (including training in interpersonal skills), it is more likely that such personnel will be better able to communicate with those before the courts. This will also allow for meaningful participation in court proceedings as required by Title II of the Americans with Disabilities Act (Title II).²¹⁰ Finally, an ASD/FASD problem-solving court that applies TJ will better ensure that the appropriate, medically necessary neurodevelopmental and other home-based services and support are available to children with ASD and FASD in a timely manner.

A. *With the Application of TJ Principles, Problem-Solving Courts Are More Likely to Avoid Sanist Decision-Making when Adjudicating Youth with ASD and FASD.*

As noted earlier, there are pervasive stereotypes that people with ASD and FASD are delinquent, should be blamed for their behaviors, are unable to control themselves, and require the imposition of restrictive interventions to stop or prevent future dangerousness.²¹¹ These

²⁰⁸ Perlin, *Profound Differences*, *supra* note 12, at 959.

²⁰⁹ *Cf.* Winick, *supra* note 52, at 1069–70 (discussing the ways that problem-solving judges can, with training, be empathetic and “avoid tainting their interactions with offenders with these prior negative feelings and relational images that these former unsuccessful lectures might have produced”); *see* Laurie A. Drapela, *Incorporating Neurodiversity into Therapeutic Jurisprudence: Exploring the Policy Diffusion Potential of Pennsylvania’s Autism Training Law for Juvenile Court Judges*, 19 JUST. POL’Y J. 1, 3 (2022).

²¹⁰ Title II of the ADA and its implementing regulations require that public entities make their programs, services, and activities accessible to qualified individuals with disabilities. *See* 42 U.S.C. § 12132; 28 C.F.R. §§ 35.130, 35.160. Such public entities include state and local courts. *Tennessee v. Lane*, 541 U.S. 509, 517 (2004). In *Lane*, the Supreme Court held that because access to the courts was a constitutional right, the failure of a court to make its programs, services, and activities to qualified individuals with disabilities was unenforceable under Title II. *Id.* In doing so, the Court held:

The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem.... Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this “difficult and intractable problem” warranted [the enactment of Title II] . . . Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. . . . [A]s it applies to the class of cases implicating the fundamental right of access to the courts, [Title II] constitutes a valid exercise of Congress’ . . . authority to enforce the guarantees of the Fourteenth Amendment.

Id. at 531, 534.

²¹¹ *See* Bell, Andrew, Di Pietro, Chudley, Reynolds, & Racine, *supra* note 43, at 69–71.

negative biases exist despite the fact that the professional literature shows that youth with ASD and FASD do not commit crimes at a higher rate than other juveniles.²¹²

Misconceptions about youth with ASD and FASD are further exacerbated by the lack of understanding about the manner in which individuals with ASD and FASD communicate. For example, many people with ASD present with certain characteristics that can appear to be a lack of emotion, a lack of empathy, impaired speech, or what may seem to be inappropriate responses to their social circumstances (e.g. smirking, unusual facial expressions, and grunting).²¹³ This behavior and seeming lack of emotion can be misunderstood as lack of remorse or unwillingness to take responsibility for one's actions.²¹⁴ This can lead to negative outcomes, including institutionalization at facilities or in programs that are ill-equipped to provide the neurodevelopmental and habilitative therapies and treatment that these individuals need.²¹⁵

Consequently, misconceptions about individuals with ASD or FASD can lead to judges, attorneys, and others in the juvenile justice system to make sanist decisions. For example, sanism can lead judges to assume that children with ASD or FASD, particularly adolescent boys, are or will become violent; thus, judges may decide that these children should be subjected to harmful restrictive behavioral interventions, including seclusion, restraint (both physical and chemical), or subjection to unnecessary institutionalization and segregation.²¹⁶

With proper training and development of the necessary interpersonal skills, however, judges, attorneys, and other court participants (providers and social workers) who participate in an ASD and FASD problem-solving court will understand the characteristics and effects of ASD and FASD on the behavior and communication of children with these conditions.²¹⁷ Therefore, these courts will (1) overcome misconceptions about the dangerousness of individuals with ASD and FASD; (2) improve those individuals' overall court experience; and (3) ensure more just outcomes for these children by providing opportunities for integration, preserving the children's agency and dignity, and preventing them from being subjected to harmful restrictive behavioral interventions.²¹⁸

²¹² See *id.*

²¹³ See Perlin & Cucolo, *Jurors (Mis)Construe Autism*, *supra* note 63, at 601.

²¹⁴ Carolina R. Caliman & Colleen M. Berryessa, *Legal Decision-Makers in Cases Involving Defendants with Autism Spectrum Disorder: A Review of Research and Call to Action*, 7 *ADVANCES PSYCH. & L.* (forthcoming 2023) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4212622 [<https://perma.cc/5AJZ-LZRK>].

²¹⁵ See *supra* note 55.

²¹⁶ Lynne S. Webber, Keith R. McVilley, & Jeffery Chan, *Restrictive Interventions for People with a Disability Exhibiting Challenging Behaviours: Analysis of a Population Database*, 24 *J. APPLIED RES. INTELL. DISABILITIES* 495, 506 (2011) (finding that young males with autism were particularly at risk of being subjected to seclusion, and physical and chemical restraints); see *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995) (citing S. REP. NO. 116 (1989) & H.R. REP. NO. 485, pt. 2 (1990)). Forms of discrimination that concerned Congress included segregation of people with disabilities and their concomitant exclusion from the community and society at large. S. REP. NO. 116, at 5–6 (“One of the most debilitating forms of discrimination is segregation imposed by others.”); H.R. REP. NO. 485, pt. 2, at 29 (“Discrimination against people with disabilities includes segregation [and] exclusion . . .”).

²¹⁷ Cf. Perlin, *Profound Differences*, *supra* note 12, at 948 (discussing the importance of problem-solving court judges developing “enhanced interpersonal skills” to enable them to be better equipped to work with defendants with mental health and other disabilities).

²¹⁸ See Perlin & Cucolo, *Jurors (Mis)Construe Autism*, *supra* note 3; Perlin & Cucolo, *Fetal Alcohol Syndrome*, *supra* note 4.

B. ASD and FASD Courts Can Best Provide Effective Communications and Other Reasonable Modifications in the Court Process

Problem-solving courts for youth with ASD and FASD that apply TJ principles will be better positioned as well as more likely to take affirmative steps to ensure that they both effectively communicate with litigants and provide the reasonable modifications for youth with ASD and FASD that best allow them to meaningfully and actively participate in the court proceedings in which they are involved.²¹⁹ Effective communication and other reasonable modifications to the court process are essential to ensure that the individual is afforded true substantive and procedural due process protections.²²⁰ Effective communication is particularly important for people who have disabilities that affect their ability to communicate and be understood by others, like individuals with ASD and FASD.²²¹

Title II of the Americans with Disabilities Act and its implementing regulations require that state courts make reasonable modifications to litigants and defendants so that they can participate and have meaningful access to the courts, including the measures to ensure effective communication.²²² Specifically, public entities, including state, county, and municipal courts,

must ensure that [their] communications with individuals with disabilities are as effective as communications with others. This obligation, however, does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of its services, programs, or activities, or in undue financial and administrative burdens. In order to provide equal access, a public accommodation is required to make

²¹⁹ Because many people with cognitive disabilities such as ASD and FASD often do not realize that they can ask for reasonable accommodations or what to request, it is important that courts take affirmative steps to identify and provide the appropriate reasonable accommodations. *See, e.g.*, JUST. WITHOUT BARRIERS COMM., WASH. STATE ACCESS TO JUST. BD., ENSURING EQUAL ACCESS FOR PEOPLE WITH DISABILITIES: A GUIDE TO WASHINGTON'S ADMINISTRATIVE PROCEEDINGS (2011) [hereinafter ENSURING EQUAL ACCESS], https://www.wsba.org/docs/default-source/legal-community/sections/adm/resources/adm_resources_access_guide_for_wa_administrative_proceedings_2011.pdf [<https://perma.cc/Q7XJ-9APW>].

²²⁰ *See Tennessee v. Lane*, 541 U.S. 509, 532–34 (2004); *see also* ENSURING EQUAL ACCESS, *supra* note 219. *See generally* Perlin & Cucolo, *supra* note 2, § 11-3.4.

²²¹ *See* Robyn White, Juan Bornman, Ensa Johnson, & Dianah Msipa, *Court Accommodations for Persons with Severe Communication Disabilities: A Legal Scoping Review*, 27 PSYCH., PUB. POL'Y, & L. 399, 400 (2021).

²²² *See* 42 U.S.C. § 12131 *et seq.* In *Tennessee v. Lane*, the Court held that Congress validly abrogated states' sovereign immunity when enacting Title II of the ADA with respect to the right of litigants with disabilities to have meaningful access to the Courts. 541 U.S. 509, 533–34 (2004). Specifically, the court held that Title II of the ADA requires state and municipal courts to provide reasonable modifications to litigants with disabilities so that they may have equal access to a state and local judicial system. *Id.* at 532; *see also* ADA Requirements: Effective Communications, ADA (Feb. 28, 2020) [hereinafter ADA Communication Requirements], <https://www.ada.gov/resources/effective-communication/> [<https://perma.cc/P8BX-KSWV>].

available appropriate auxiliary aids and services where necessary to ensure effective communication.²²³

The determination of what constitutes a reasonable modification, including effective communications, must be determined on an individualized basis.²²⁴

Examples of possible effective communications for individuals with ASD and FASD include (1) using an intermediary to interpret what is being said to the individual and what the individual was saying to the court,²²⁵ (2) the use of jargon-free, simple and direct language, (3) making statements in a neutral manner,²²⁶ (4) being respectful and conscious of the language being used in court, and (5) speaking slowly during the court proceedings, among similar other reasonable accommodations.²²⁷

Not only are effective communication and other reasonable modifications required by Title II in the court process, they are also consistent with the principles of TJ. For example, effectively communicating with and providing other reasonable accommodations for children with ASD and FASD aligns with the therapeutic jurisprudence principle that a person should have a “voice” and feel “validation” in the court process.²²⁸ As noted above, when people feel that they have been meaningfully heard by the court and been shown respect, even without the desired outcome, the professional research shows that there is a therapeutic value to the individual.²²⁹

Relatedly, providing reasonable modifications to the court process can enable a person to actively and meaningfully participate in the court process, which aligns with the principles of therapeutic jurisprudence because it provides individuals with dignity.²³⁰ Children in general must be provided with a meaningful opportunity to be included in the court process, but it is especially necessary to include children with ASD, FASD, and other

²²³ U.S. DEP’T JUST., *The Americans with Disabilities Act, Title II Technical Assistance Manual, Covering State and Local, ADA*, <https://archive.ada.gov/taman2.htm> [<https://perma.cc/9R6Z-5VNX>] (last visited Jan. 16, 2024) (Section II-7.1000, “Equally Effective Communication”).

²²⁴ See, e.g., *Mary Jo C. v. N.Y. State & Loc. Ret. Sys.*, 707 F.3d 144, 153 (2d Cir. 2013) (quoting *Staron v. McDonald’s Corp.*, 51 F.3d 353, 356 (2d Cir. 1995)) (“[T]he determination of whether a particular modification is ‘reasonable’ involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.”).

²²⁵ ADA Communication Requirements, *supra* note 222.

²²⁶ ENSURING EQUAL ACCESS, *supra* note 219, at 16.

²²⁷ *Id.*

²²⁸ Perlin & Cuculo, *Fetal Alcohol Syndrome*, *supra* note 4, at 602 n.216 (discussing Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 *TOURO L. REV.* 601, 627 (2008)).

²²⁹ See *supra* text accompanying notes 184–185; see also Winick, *supra* note 78, at 1077–78 (“People resent others treating them as incompetent subjects of paternalism, and suffer a diminished sense of self-esteem and self-efficacy when not permitted to make decisions for themselves. To the extent that the individual experiences her decision to participate in a problem-solving court treatment or rehabilitative program as voluntary, it can have significant positive effects on treatment outcome.”). See generally John J. Ensminger & Thomas D. Liguori, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, 6 *J. PSYCHIATRY & L.* 5 (1978), reprinted in *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* 245 (David B. Wexler ed., 1990).

²³⁰ Perlin & Cuculo, *supra* note 3, at 617–18.

disabilities.²³¹ Yet, as discussed in Part IV, long held biases, misconceptions, and sanist beliefs about children with ASD and FASD often lead to those children being punished, segregated, restricted, and denied the ability to make their own decisions.²³²

Incorporating TJ principles in a stand-alone problem-solving court for people with ASD and FASD will improve the chances that effective communication is provided. As such, these children will have meaningful access to the courts, improved due process protections, an overall improved and therapeutic experience that preserves their dignity and agency, and better outcomes.

C. Access to Services for Juveniles with ASD and/or FASD

Finally, an ASD and FASD court based upon TJ principles will optimally ensure that children with ASD and FASD have timely access to the treatment and services they need. As noted above, a key component of problem-solving courts is that they have broader discretion to determine if treatment is necessary and can serve as an alternative to traditional punishment. Therefore, an ASD and FASD problem-solving court will provide an opportunity for children to get the services they need. Without a court order, these children might not otherwise receive necessary services. A lack of providers; extensive delays in screening; trouble assessing and providing necessary therapies and home-based services; and other barriers make accessing services increasingly difficult for these children.²³³

There is a chronic lack of necessary therapies, home-based treatments, and other services for children with ASD.²³⁴ Due to the persistent and nationwide lack of providers with a capacity to serve children with ASD and FASD, children and their families wait for months—sometimes even years—to obtain screenings, assessments, and medically-necessary neurodevelopmental therapies.²³⁵ Delays in services are compounded by issues of race and class. Medicaid-eligible children living in poverty are disproportionately adversely affected by provider shortages, due to the low rates that are paid to Medicaid

²³¹ Mary Elizabeth Wood, Katherine M. Lawson, Jaime L. Anderson, Dominique I. Kinney, Stephen Nitch, & David M. Glassmire, *Reasonable Accommodations for Meeting the Unique Needs of Defendants with Intellectual Disabilities*, 47 J. AM. ACAD. PSYCH. & L. 310, 314 (2019).

²³² See, e.g., Anita Gibbs, *Best Practices for Justice: Practitioner Views on Understanding and Helping Youth Living with Fetal Alcohol Spectrum Disorder (FASD)*, 34 AOTEAROA N.Z. SOC. WORK 6, 9 (2022) (misconceptions about people with FASD).

²³³ “Home-based services” includes other “wraparound” services including behavior support, case management, peer support, in-home mobile crisis services, among others, provided in the child’s home to avoid institutionalization and removal of the child from his/her/their family and community. See Ctr. for Pub. Rep., *What are Home-Based Services*, ROSIE D. (2008), <https://rosied.wildapricot.org/page-73410> [<https://perma.cc/YBE8-WJLS>].

²³⁴ Jonathan Cantor, Ryan K. McBain, Aaron Kofner, Bradley D. Stein, & Hao Yu, *Less Than Half of U.S. Mental Health Treatment Facilities Provide Services for Children with Autism Spectrum Disorder*, 39 HEALTH AFF (MILLWOOD) 968, 968 (2020). There are also long delays for children, particularly children of color, to obtain the needed assessments to determine their service needs. Brandon S. Aylward, Diana E. Gal-Szabo, & Sharief Taraman, *Race, Ethnic, and Sociodemographic Disparities in Diagnosis of Children with Autism Spectrum Disorder*, 42 J. DEVELOPMENTAL BEHAV. PEDIATRICS 682, 683–84 (2021).

²³⁵ Ryan K. McBain, Vishnupriya Kareddy, Johnathan H. Cantor, Bradley D. Stein, & Hao Yu, *Systematic Review: United States Workforce for Autism-Related Child Healthcare Services RH = US Health Workforce for Autism Care: A Review*, 59 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 113, 114 (2020) (nationwide lack of providers serves a barrier to children with ASD to obtain timely assessments and services).

providers.²³⁶ Similarly, children living in rural areas, particularly impoverished ones, wait particularly long for screening, assessments, and services.²³⁷

In addition to the lack of available services, legal restrictions on service eligibility create barriers to access. In some states, this cohort of children neither qualify for services from the state agencies responsible for serving people with intellectual disabilities nor qualify for mental health services. As such, children with ASD and FASD in those states are only eligible to receive limited services through their school districts and local educational agencies (also referred to as “LEAs”) through special education. For example, in Connecticut, children with ASD who do not have intellectual disabilities do not qualify for services from the state—except for a small group of people with ASD who are eligible for a Connecticut Medicaid Autism Waiver.²³⁸ Children with ASD also do not qualify for mental health services from Connecticut’s mental health services agency, unless they have a qualifying mental health diagnosis. Consequently, many children “fall through the cracks” and are unable to receive any services.²³⁹

As with children with ASD, it is important that children with FASD are diagnosed at an early age and provided with early intervention services.²⁴⁰ Yet, like children with ASD, children with FASD must wait long periods of time for screening, assessments, and treatment due to the frequency with which a child with FASD is not diagnosed or is

²³⁶ Although children who are Medicaid-eligible are legally entitled to receive all medically necessary services, including neurodevelopmental and other medically necessary services under the Medicaid Act (42 U.S.C. §§ 1396a(a)(10), 1396a(a)(43), 1396d(a)(4)(B), 1396d(r)(5)), many with ASD do not timely receive these services because of the dearth of qualified providers to conduct screening, assessments, and provision of services. Aylward, Gal-Szabo, & Taraman, *supra* note 234, at 683.

²³⁷ See generally Ligia Antazana, Angela Scarpa, Andrew Valdespino, Jordan Albright, & John A. Richey, *Rural Trends in Diagnosis and Services for Autism Spectrum Disorder*, 8 FRONT. PSYCH., April 2017, <https://www.frontiersin.org/articles/10.3389/fpsyg.2017.00590/full> [<https://perma.cc/34N6-DGKB>] (discussing the extensive delays and barriers to assessments and services for children with ASD in rural areas).

²³⁸ CONN. GEN. STAT. § 1-1(g) (West 2021); Conn. Dep’t of Developmental Servs., *Eligibility Fact Sheet*, STATE OF CONN., <https://portal.ct.gov/-/media/DDS/FactSheets/Autismfactsheet.pdf> [<https://perma.cc/89Y5-VUAD>] (last visited Mar. 6, 2024); Conn. Dep’t of Developmental Servs., *Autism Spectrum Disorder*, STATE OF CONN., <https://portal.ct.gov/DSS/Health-And-Home-Care/Autism-Spectrum-Disorder---ASD/Autism-Spectrum-Disorder---ASD> [<https://perma.cc/7MUB-NLN4>] (last visited Mar. 2, 2024).

²³⁹ See generally, e.g., AUTISM FEASIBILITY STUDY WORKGROUP, *AUTISM SERVICES IN CONNECTICUT: A REPORT FROM THE AUTISM FEASIBILITY STUDY WORKGROUP, RECOMMENDATIONS TO ENHANCE AND IMPROVE THE SERVICE SYSTEM TO SUPPORT INDIVIDUALS WITH AUTISM AND THEIR FAMILIES* (2013), <https://www.ctbhp.com/wp-content/uploads/sites/53/Appendix-B-Autism-Services-in-Connecticut.pdf> [<https://perma.cc/YR9Q-V6H4>] (discussing the dearth of services for individuals with ASD in Connecticut); see also Ginny Monk, *Advocates: Medicaid Rates Leave CT Kids Without Autism Services*, CONN. MIRROR (Feb. 20, 2023), <https://ctmirror.org/2023/02/20/ct-husky-medicaid-autism-services-children/> [<https://perma.cc/285Q-BSRJ>] (reporting on the lack of services for children with Autism in Connecticut, and the long waits for services due inadequate Medicaid provide rates and insufficient numbers of providers).

²⁴⁰ Svetlana Popova, Danijela Dozet, & Larry Burd, *Fetal Alcohol Spectrum Disorder: Can We Change the Future?*, 44 ALCOHOLISM CLINICAL & EXPERIMENTAL RSCH. 815, 817 (2020) (“Early diagnosis is crucial in providing timely interventions and support services to people with FASD and their families.”).

misdiagnosed.²⁴¹ Children with FASD also face barriers due to their lack of eligibility for public health services and an overall dearth of services available.²⁴²

In typical juvenile courts, children and their parents are often ordered to obtain and comply with treatment requirements, but there is no guarantee that the treatment ordered will be available.²⁴³ Moreover, many parents and guardians are unable to obtain the necessary services due to a lack of transportation, the parents' work schedule, and the high cost of treatments.²⁴⁴ A problem-solving court that applies TJ principles could order and monitor treatment without imposing an insurmountable burden on the parent. Therefore, children would not face the ramifications that stem from noncompliance with a traditional court order. Instead, the child would be more likely to remain in their homes, with their families, in their schools, and in their community as well as avoid the imposition of unnecessary segregation or harmful behavioral interventions.²⁴⁵

However, we emphasize that caution must be taken to avoid the unintended consequence of creating a court that becomes a conduit to involuntary treatment. There is a real risk that providers, parents, teachers, and others may view an ASD and FASD problem-solving court as a portal to services they otherwise cannot access and, thereby, overly (and inappropriately) rely on the juvenile justice system to access those services.²⁴⁶ Because of the many barriers that children with ASD and FASD face when trying to obtain necessary assessments, treatments, and other services—including the long delays—providers, teachers, and parents may find themselves desperate to obtain services. If the only realistic way to obtain assessments, services, and treatment for a child is through the court system, there is a risk that when even the smallest behavioral problem arises, the response will be to have the child arrested and placed in the juvenile justice system in the hopes that the court will order that the child receive treatment. Were this to happen, the result would be significant, and it would unnecessarily increase the number of children with ASD and FASD in the juvenile justice system. Additionally, it could lead lawmakers and policymakers to incorrectly believe there is no need for proactive systemic changes to

²⁴¹ Christie L.M. Petrenko, Naira Tahir, Erin C. Mahoney, & Nancy P. Chin, *Prevention of Secondary Conditions in Fetal Alcohol Spectrum Disorders: Identification of Systems-Level Barriers*, 18 *MATERNAL & CHILD HEALTH J.* 1496, 1498 (2014), <https://pubmed.ncbi.nlm.nih.gov/24178158/> [<https://perma.cc/7XGG-SASS>] (detailing the systemic barriers to treatment and services that child with FASD, including FAS, experience); *see also supra* Part I.B.

²⁴² *Id.*

²⁴³ *See, e.g., Juvenile Delinquency*, N.C. JUD. BRANCH, <https://www.nccourts.gov/help-topics/family-and-children/juvenile-delinquency> [<https://perma.cc/4UYC-8Y26>] (last visited July 14, 2023) (“The court may order a parent or guardian to provide transportation to meetings, take parental responsibility classes, pay for treatment or services for the juvenile, and pay the attorney’s fees for the juvenile. . . .”).

²⁴⁴ Petrenko, Tahir, Mahoney, & Chin, *supra* note 241; *see also* Aubyn C. Stahmer, Sarah Vejnaska, Suzannah Iadarola, Diodra Staiton, Francisco Rienosa Segovia, Paul Luelmo, Elizabeth H. Morgan, Hyon Soo Lee, Asim Javed, Briana Bronstein, Samantha Hochheimer, EunMi Cho, Aritz Aranbarri, David Mandell, Elizabeth McGhee Hassrick, Tristram Smith, & Connie Kasari, *Caregiver Voices: Cross-Cultural Input on Improving Access to Autism Services*, 6 *J. RACIAL & ETHNIC HEALTH DISPARITIES* 752 (2019) (discussing the burdens on parents, including having to give up their jobs, to care for children with ASD due to lack of services).

²⁴⁵ *See, e.g.,* Anu Helkkula, Alexander John Buoye, Hyeyoon Choi, Min Kyung Lee, Stephanie Q. Liu, & Timothy Lee Keiningham, *Parents’ Burdens of Service for Children with ASD—Implications for Service Providers*, 31 *J. SERV. MGMT.* 1015 (2020) (discussing the need for timely assessments and services for children with ASD without burdening parents to ensure positive outcomes).

²⁴⁶ *See, e.g.,* NAT’L COUNCIL OF JUV. & FAM. CT. JJ., *FETAL ALCOHOL SPECTRUM DISORDERS: IMPLICATIONS FOR JUVENILE AND FAMILY COURTS* 23 (2015).

ensure children with ASD and FASD have better access to the services and support that they need.²⁴⁷

The adoption of a stand-alone problem-solving court for children with ASD and FASD, with careful planning and fidelity to the principles of therapeutic jurisprudence, would significantly alter the manner in which these children’s cases are adjudicated, and, more importantly, improve their lives.

CONCLUSION

As co-author Perlin has previously written:

The promotion and creation of [mental health] courts [is] consistent with TJ’s aims and aspirations, especially where litigants are given the “voice” that TJ demands. The courts are grounded and rooted in TJ; they reflect TJ “theory in practice;” and they acknowledge that a defendant’s appearance in such a court comes at a “painful and crucial point in life.”²⁴⁸

We believe that this is especially applicable in cases involving juveniles with ASD and FASD. Juveniles with ASD and FASD currently suffer, needlessly and disproportionately, in the criminal justice system. The jurisprudential factors that we discuss above—sanism, pretextuality, heuristic biases, and false “ordinary common sense”—have an especially negative impact on cases involving this population.²⁴⁹ This will continue, unless the legal system takes bold new steps to minimize their suffering; treat them with dignity and compassion; ensure adequate counsel; ensure the availability of support services to the population in question; and provide a way for them to meaningfully communicate with court actors.²⁵⁰

Further, as we noted above, “[p]roblem-solving courts . . . play an important role in protecting the rights of persons with trauma-related mental disabilities,”²⁵¹ a cohort that includes many with ASD and FASD. Engaging in trauma-informed practice “fits squarely within existing scholarship about client-centered lawyering, cross-cultural lawyering, and therapeutic jurisprudence.”²⁵²

In a recent article, Perlin and his co-authors considered the five principles that would lead to trauma-informed service delivery: (1) facilitating a sufficient sense of safety (both

²⁴⁷ The litigation experience of one of the co-authors, Dorfman, raises a cautionary warning here. In litigation in Washington, one of the states in which she has represented plaintiffs with disabilities, providers inappropriately used state hospital programs for persons with intellectual disabilities (IDD) as part of a settlement agreement when they could not get them in the community. In another state, some individuals with IDD were inappropriately admitted nursing facilities in order to more readily be eligible for community services.

²⁴⁸ Perlin, *Profound Differences*, *supra* note 12, at 959.

²⁴⁹ For an especially troubling example, see *Trevino v. Davis*, 861 F.3d 545, 552 (5th Cir. 2017) (Dennis, J., dissenting) (noting that Trevino had suffered prejudice as a result of trial counsel’s failure to conduct a reasonably thorough mitigation investigation, to discover evidence that Trevino suffered from FASD, and to present this mitigating evidence to the jury). On *Trevino* in this context, see Perlin & Cucolo, *Fetal Alcohol Syndrome*, *supra* note 4, at 592.

²⁵⁰ See generally, Perlin, *Therapeutic Jurisprudence*, *supra* note 98.

²⁵¹ Gallagher & Perlin, *supra* note 67, at 278.

²⁵² Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLINICAL L. REV. 201, 206 (2018).

physical and emotional); (2) being sufficiently trustworthy; (3) working collaboratively; (4) providing choice to individuals, to the degree possible; and (5) empowering individuals.²⁵³ Mental health courts specifically designed to serve children with ASD and FASD using TJ principles are more likely to adhere to these principles. Also, the creation of such courts would inevitably lead to a reduction of the stigma that often accompanies such trauma.²⁵⁴

Again, our proposal for an ASD and FASD problem-solving court will *only* be effective if such courts are based on therapeutic jurisprudence. Adherence to TJ principles will most effectively minimize the stigma that often accompanies court proceedings involving children with ASD and FASD and make the healing of this vulnerable population more likely.²⁵⁵ Just as "therapeutic jurisprudence encourages mental health lawyers to engage in appropriate civil rights lawyering,"²⁵⁶ so too does it encourage lawyers to adequately and fully represent clients with ASD and FASD.

To return to the title of the article, Harvard Professor Richard Thomas has characterized *Hard Rain*—the song from which this Article title is drawn—as “a song of indignation but also of resolve.”²⁵⁷ We think that is absolutely right. We are indignant about the way that juveniles with ASD and FASD are treated in the criminal justice system, but we hope that the path that we have proposed will help resolve this problem.

²⁵³ Goldenson, Brodsky, & Perlin, *supra* note 164, at 227 (citing MAXINE HARRIS & ROGER D. FALLOT, USING TRAUMA THEORY TO DESIGN SERVICE SYSTEMS (2001)).

²⁵⁴ *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 287 (1993) (Kennedy, J., dissenting). This case is discussed in this context in Brian P. Barrow, Buckley v. Fitzsimmons: *Tradition Pays a Price for the Reduction of Prosecutorial Misconduct*, 16 WHITTIER L. REV. 201, 322 (1995).

²⁵⁵ On vulnerability, see *supra* notes 202–203 and accompanying text.

²⁵⁶ Perlin, Gould, & Dorfman, *supra* note 187, at 85.

²⁵⁷ RICHARD F. THOMAS, WHY BOB DYLAN MATTERS 301 (2017).