

**“I’VE GOT MY MIND MADE UP”: HOW  
JUDICIAL TELEOLOGY IN CASES INVOLVING  
BIOLOGICALLY BASED EVIDENCE VIOLATES  
THERAPEUTIC JURISPRUDENCE**

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Table of Contents

INTRODUCTION .....	81
I. ON TELEOLOGY .....	84
II. ON BIOLOGICALLY-BASED EVIDENCE .....	90
III. THERAPEUTIC JURISPRUDENCE.....	93
CONCLUSION.....	103

INTRODUCTION

Courts are, and have always been, teleological in cases involving litigants with mental disabilities. By “teleological,” I refer to outcome-determinative reasoning; social science that enables judges to satisfy predetermined positions is privileged, while data that would require judges to question such ends are rejected.<sup>1</sup> Courts do this in cases

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<sup>1</sup> Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 NYU REV. L. & SOC’L CHANGE 517, 539 (1993-94); *see also*, David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 549 (1991) (“Some commentators suggest that the Court’s use of science is disingenuous; these critics believe that the Court cites empirical research when it fits the Court’s particular needs, but eschews it when it does not”).

involving, inter alia, the death penalty,<sup>2</sup> the insanity defense,<sup>3</sup> civil competency,<sup>4</sup> incompetency to stand trial,<sup>5</sup> questions related to malingering,<sup>6</sup> juvenile criminal procedure,<sup>7</sup> and criminal sentencing.<sup>8</sup> And I am not the only one to have pointed this out.<sup>9</sup>

Courts are also teleological on the question of admission of evidence in accordance with the rulings in cases such as *Daubert* and *Frye*.<sup>10</sup> There is no reason to doubt Professor Susan Rozelle's glum conclusion that "the game of scientific evidence looks fixed."<sup>11</sup> If scientific knowledge is, as Professors David Faigman, John Monahan and Christopher Slobogin have stated, "a product of research that applies generally to all similarly situated cases,"<sup>12</sup> then judicial teleology flies directly in the face of that knowledge.<sup>13</sup>

<sup>2</sup> See e.g., Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence*, 8 NOTRE DAME J. L., ETHICS & PUB. POL. 239 (1994).

<sup>3</sup> See e.g., Michael L. Perlin, *Back to the Past: Why Mental Disability Law Reforms Don't Reform*, 4 CRIM. L. FORUM 403 (1993) (reviewing JOHN Q LA FOND & MARY DURHAM, *BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES* (1992)).

<sup>4</sup> Perlin, *supra* note 1.

<sup>5</sup> Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993).

<sup>6</sup> 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 (1997).

<sup>7</sup> Daniel A. Ross, *Rethinking the Road to Gault: Limiting Social Control in the Juvenile Court, 1957-72*, 98 VA. L. REV. 425, 475 (2012).

<sup>8</sup> See e.g., Michael L. Perlin, "I Expected It to Happen/I Knew He'd Lost Control": *The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5*, UTAH L. REV. 881 (2015).

<sup>9</sup> See e.g., Susan Stefan, *Silencing the Different Voice: Feminist Theory and Competence*, 47 U. MIAMI L. REV. 763, 774 (1993) (courts determine competence "quite blatantly in terms of the desirability of the outcome"); LA FOND & DURHAM, *supra* note 3, at 156 ("Judges' refusals to consider the meaning and realities of mental illness cause them to act in what appears, at first blush, to be contradictory and inconsistent ways, and teleologically, to privilege (where that privileging serves what they perceive as a socially-beneficial value) and subordinate (where that subordination serves what they perceive as a similar value) evidence of mental illness").

<sup>10</sup> *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 586-591 (1993) (crafting a five-factor test for admissibility of evidence in federal trials); see also *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (designating general acceptance by the scientific community as the standard for the admissibility of expert testimony).

<sup>11</sup> Susan Rozelle, *Daubert, Schaubert: Criminal Defendants and the Short End of the Science Stick*, 43 TULSA L. REV. 597, 598 (2007); see also D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 105-08 (2000). In sixty-seven cases of challenged government expertise, the prosecution prevailed in sixty-one of these. *Id.* at 105. Out of fifty-four complaints by criminal defendants that their expertise was improperly excluded, the defendant lost in forty-four of these. *Id.* at 106. Contrarily, in civil cases, ninety percent of *Daubert* appeals were by the defendants, who prevailed two-thirds of the time. *Id.* at 108.

<sup>12</sup> David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 424 (2014)

<sup>13</sup> There is significant literature available on these issues, but it does not appear as if it has had any real impact on the judicial process, see e.g., Sally McSwiggan, Bernice Elger & Paul S.

In a recent article, my colleague Alison Lynch and I discussed how judges treat biologically-based evidence in criminal cases involving questions of mental disability law (via privileging and subordination) so as to conform to the judges’ pre-existing positions, specifically looking at judicial interpretations of neuroimaging evidence.<sup>14</sup> We noted that neuroscience, like other types of scientific evidence, is subject “to the same sort of cognitive dynamics as other types of scientific evidence.” Neuroscience is seen as persuasive when it is in line with an individual’s prior beliefs, but is perceived negatively when it conflicts with those beliefs.<sup>15</sup>

In this paper, I will consider what the implications of this behavior are for criminal procedure developments, and will show how this behavior violates the basic precepts of therapeutic jurisprudence. First, I will consider a range of teleological judicial behaviors. Then, I will consider how biologically-based evidence is especially susceptible to these sorts of misjudgments, and specifically focus on how these misjudgments damage the application of constitutional criminal procedure doctrines. Finally, I will consider how this behavior flies in the face of the basic tenets of therapeutic jurisprudence.

My title comes from a truly obscure song, *Got My Mind Made Up*, that Bob Dylan co-wrote with Tom Petty (and was released on the rightfully-obscure album, *Knocked Out Loaded*). It is the final line of each chorus that needs to be considered in the context of the opening verse:

Don’t ever try to change me,

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Appelbaum, *The Forensic Use of Behavioral Genetics in Criminal Proceedings: Case of the MAOA-L Genotype*, 50 INT’L J. L. & PSYCHIATRY 17 (2017) (exploring the forensic uses of behavioral genetic science); Paul Appelbaum & Nicholas Scurich, *Impact of Behavioral Genetic Evidence on the Adjudication of Criminal Behavior*, 42 J. AM. ACAD. PSYCHIATRY & L. 91 (2014) (not yet cited in any reported case)..

<sup>14</sup> See Michael L. Perlin & Alison J. Lynch, “*In the Wasteland of Your Mind*”: *Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304 (2016) (Perlin & Lynch, *Wasteland*). See also on neuroscience evidence, Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885 (2009) (Perlin, *With Great Skill*); Michael L. Perlin, “*And I See Through Your Brain*”: *Access To Experts, Competency To Consent, And The Impact Of Antipsychotic Medications In Neuroimaging Cases In The Criminal Trial Process*, STANFORD TECHNOL. L. J. 1 (2009) (Perlin, *See Through Your Brain*); Michael L. Perlin & Alison J. Lynch, “*My Brain Is So Wired*”: *Neuroimaging’s Role in Competency Cases Involving Persons with Mental Disabilities*, 27 BOSTON U. PUB. INT. L. J. 73 (2018) (Perlin & Lynch, *Brain Is So Wired*).

On the specific question of the relationship between *Daubert* and how courts treat expert testimony as to capacity in guardianship cases and contested-will hearings, see Lawrence A. Frolik, *Science, Common Sense, and the Determination of Mental Capacity*, 5 PSYCHOL. PUB. POL’Y & L. 41 (1999).

<sup>15</sup> Perlin & Lynch, *supra* note 14, at 343-44 (discussing the research reported in Nicholas Scurich & Adam Shniderman, *The Selective Allure of Neuroscientific Explanations*, 9 PLOS ONE (Sept. 10, 2014), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0107529>).

I been in this thing too long.  
 There's nothin' you can say or do  
 To make me think I'm wrong.<sup>16</sup>

As I will discuss subsequently, judges deciding the sorts of cases that are the subject of this paper are – like Dylan's narrator – equally impervious to the arguments of others that might suggest that their conclusions are incorrect, and they show no sign of being receptive to change. This obduracy – whether in the context of a failed love affair (as in the song in question)<sup>17</sup> – or in the context of criminal law and procedure decisions involving testimony related to such topics as mental disability, future dangerousness or the potential impact of neuroscience evidence leads to dysfunction and dissonance. By writing this paper, I hope to raise awareness of this dilemma.

### I. ON TELEOLOGY

Succinctly, teleology places the highest emphasis on ends, not means.<sup>18</sup> Teleology emphasizes Aristotle's tendency to explain things primarily with respect to a *telos* or final end.<sup>19</sup> For over 25 years, I have criticized how courts teleologically weigh social science evidence.<sup>20</sup> In an early piece, I argued that judges are “suspicious of the psychological sciences,” are “hostile to the use of social science in the legal process,” and, that their track record in this area has, generally, been “dreadful.”<sup>21</sup>

Perhaps courts see social science as a “threat.” Perhaps it is feared that social science's “complexities . . . shake the judge's confidence in imposed solution, and, perhaps, judges' lack of clarity about the underlying issues” permits [social science data] to be used as a kind of *deus ex machina*, whose sudden appearance produces the desired

<sup>16</sup> Bob Dylan & Tom Petty, *Got My Mind Made Up*, <http://bobdylan.com/songs/got-my-mind-made/>.

<sup>17</sup> *Id.* at verses 3 and 4.

<sup>18</sup> Tom Lininger, *Reconceptualizing Confrontation after Davis*, 85 TEX. L. REV. 271, 295 (2006), relying on Robert G. Olson, *Teleological Ethics*, in 8 THE ENCYCLOPEDIA OF PHILOSOPHY 88, 88 (Paul Edwards ed., 1967).

<sup>19</sup> Mark C. Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. & HUMAN. 249, 253 (2000).

<sup>20</sup> Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of “Ordinary Common Sense,” Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 136-37 (1991). According to Prof. Paul Appelbaum, I actually first made these arguments as to teleology prior to this, in Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or Doctrinal Abyss?* 29 ARIZ. L. REV. 1, 71 (1987); see Paul Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 AM. J. L. & MED. 335, 341 (1987) (referring to the cited article as putting forth the view that “judicial argumentation is entirely teleologic”).

<sup>21</sup> Perlin, *supra* note 5, at 667 n. 210.

result.<sup>22</sup> Nothing that has transpired in the past quarter-century has changed my mind.

In this same article, I pointed out that other scholars have suggested that justices of the U.S. Supreme Court employ an outcome-determinative approach, “uncritically” accepting social science data bolstering opinions when they are in the majority, but “debunk [ing]” it when they are in the minority.<sup>23</sup> Elsewhere, I have noted that the legal system selectively—teleologically— either accepts or rejects social science data depending on whether or not the use of that data meets the a priori needs of the legal system.<sup>24</sup> This teleological turn masks the true political and ideological bases of judicial decisions.<sup>25</sup>

In the context of mental disability law, courts are, as I have already noted, teleological in their decisions in cases involving the insanity defense, the death penalty, and criminal and civil incompetency.<sup>26</sup> But courts are also teleological in cases involving, inter alia, all aspects of the civil commitment process<sup>27</sup> and the right to refuse

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<sup>22</sup> Perlin, *supra* note 20, at 136. For a pointed example of how judges may be threatened by the use of social science evidence, see e.g., *Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., *concurring*) (challenging the “wisdom-as well as the necessity-of Justice Blackmun’s heavy reliance on numerology derived from statistical studies” in a jury size case).

<sup>23</sup> Perlin, *supra* note 20, at 137 (quoting Norbert L. Kerr: *Social Science and the U.S. Supreme Court*, in *THE IMPACT OF SOCIAL PSYCHOLOGY ON PROCEDURAL JUSTICE* 56, 71 (Martin F. Kaplan, ed., 1986)); Cf. Appelbaum, *supra* note 20, at 341 (“one would like to believe that the Court’s teleology is at least tempered by the evidence before it”). Attorneys representing individuals with serious mental illness report little, if any, change in the 30 years since Professor Kerr wrote this book chapter.

Consider here Justice Alito’s dissent in *Hall v. Florida*, 134 S. Ct. 1986 (2014). In *Hall*, the Court made it clear that made it clear that inquiries into a defendant’s intellectual disability (for purposes of determining whether he is potentially subject to the death penalty) cannot be limited to a bare numerical “reading” of an IQ score), noting that Florida’s rule was “contrary to all professional judgment;” see MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL*, § 17-4.2.3, at 17-106 (3d ed. 2017). Alito asserted that the positions of professional associations did not reflect the position of the American people but, “at best, represent the views of a *small professional elite*,” *Hall*, 134 S. Ct. at 1986 (emphasis added), ignoring the fact that *not a single professional association* disagreed with the majority’s position.

<sup>24</sup> Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 *BEHAV. SCI. & L.* 47, 49 (1993). See also Perlin, *supra* note 6, at 1419: “In cases where fact-finders are hostile to social science teachings, such data often meets with tremendous judicial resistance, evidenced by the courts’ expression of their skepticism about, suspicions of, and hostilities toward such evidence.”

For a thoughtful article by a trial judge as to how juvenile courts can better take into account the science of child development, see Cindy Lederman, *From Lab Bench to Court Bench: Using Science to Inform Decisions in Juvenile Court*, *CEREBRUM*, Sept. 2011, available at <http://dana.org/Cerebrum/Default.aspx?id=39466>, discussed in this context in Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan New Knowledge from Neuroscience*, 53 *JUDGES’ J.* 32, 36 n. 28 (Summer 2014).

<sup>25</sup> J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 *INDIANA L. J.* 137, 151 (1990).

<sup>26</sup> See *supra* sources cited notes 2-7.

<sup>27</sup> For a classically teleological decision in the area of civil commitment, see the dissenting

medication.<sup>28</sup> Consider here the Supreme Court's decision in *Washington v. Harper*,<sup>29</sup> providing correctional inmates with a limited remedy in cases where they have sought to enjoin being involuntarily medicated: "In providing defendant with a limited remedy, the majority in *Harper* selectively chose to privilege those aspects of the data available on the effects of antipsychotic drugs that discussed the benefits of such medication, while at the same time acknowledging but discounting the potential harmful and debilitating effects of these drugs."<sup>30</sup> Interestingly, the Court subsequently did take seriously the potential harm of these drugs in other cases dealing with other forensic populations (those who had not been convicted of crimes).<sup>31</sup>

This teleology is most pointed in cases involving issues related to mental disability law that reflect judges' overwhelming ambivalence about all aspects of expert testimony.<sup>32</sup> On one hand, judges frantically desire experts to testify as to future dangerousness (notwithstanding the experts' plea that they frequently do not have that expertise)<sup>33</sup> and to "take the weight" on difficult release-or-commit decisions.<sup>34</sup> On the

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option in *In re Melton*, 565 A.2d 635, 649 (D.C. 1989) (Schwalb, J., dissenting), *superseded on rehearing*, 597 A.2d 788 (D.C. 1991) (likening an oncologist's ability to predict the future prognosis of a cancer patient to a psychiatrist's ability to predict future dangerousness, as discussed in Perlin & Dorfman, *supra* note 24, at 55).

<sup>28</sup> *Id.* at 54-58.

<sup>29</sup> *Zinermon v. Burch*, 494 U.S. 113 (1990).

<sup>30</sup> Perlin & Dorfman, *supra* note 24, at 57.

<sup>31</sup> See *Riggins v. Nevada*, 504 U.S. 127, 137 (1992) (competent insanity pleader); see also *Sell v. United States*, 539 U.S. 166, 185 (2003) (incompetent defendant awaiting trial). In comparing *Harper* and *Riggins*, I focused on the subordination/privilege issue:

Coming so soon after the decision in *Harper*, *Riggins* was somewhat surprising. It differs importantly from *Harper* in that the Court treated *Harper* as a prison security case while it read *Riggins* as a fair trial case; yet, this difference in the litigants' legal status self-evidently has no effect on the physiological or neurological potential impact of the drugs in question. Nevertheless, the side-effects language in *Harper* (subordinated there because of security reasons) is privileged in *Riggins* (where such issues are absent) by nature of the Court's consideration of the question in the context of a fair trial issue.

PERLIN & CUCOLO, *supra* note 23, § 8-7.2, at 8-162.

<sup>32</sup> See e.g., C. Robert Showalter, *Distinguishing Science from Pseudo-Science in Psychiatry: Expert Testimony in the Post-Daubert Era*, 2 VA. J. SOC. POL'Y & L. 211, 228 (1995).

<sup>33</sup> See e.g., Eugenia T. La Fontaine, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional*, 44 B.C. L. REV. 207, 231 (2002) ("Most psychiatrists do not believe that they are capable of making long-term predictions of future dangerousness").

<sup>34</sup> See e.g., JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* (1981) (psychiatrists may overpredict dangerousness because of their fear of being perceived as responsible for the erroneous release of a violent individual). On a question rarely discussed in the legal process, the likelihood that a person with mental illness may be violently victimized by another; see John Monahan et al., *Violence to Others, Violent Self-Victimization, and Violent Victimization by Others Among Persons with a Mental Illness*, PSYCHIATRIC SERVICES IN ADVANCE (doi: 10.1176/appi.ps.201600135) (Feb. 1, 2017). Professor Monahan has more recently questioned whether biological risk factors for violence would be admissible in court

other, they characterize psychiatry as “the ultimate wizardry” and refer to psychiatrists as “medicine m[e]n” or “shamanistic wizards.”<sup>35</sup> Of course, the judicial fear of voter retaliation in the case of a “false negative” decision<sup>36</sup> is well known;<sup>37</sup> “the literature is replete with studies of political campaigns—many of which were successful—that turned on this precise issue.”<sup>38</sup>

This behavior reflects the heuristic of the “confirmation bias,” through which we focus on information that confirms our preconceptions.<sup>39</sup> If judges are inclined – for a variety of reasons having nothing to do with the prevailing law or the substantial valid and reliable research – to “feel” a position because it “seems right” or is, to them, “common sense,” then, they fit – perhaps consciously, perhaps unconsciously – the evidence before them, into their pre-existing

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(concluding that it would depend on whether the “rational basis” or “strict scrutiny” test was employed, but cautioning that such factors cannot be used as a surrogate for race); see John Monahan, *The Inclusion of Biological Risk Factors in Violence Risk Assessments*, in BIOPREDICTION, BIOMARKERS, AND BAD BEHAVIOR: SCIENTIFIC, LEGAL AND ETHICAL IMPLICATIONS 57,71 (Ilna Singh, Walter P. Sinnott-Armstrong, & Julian Savulescu eds. 2014).

On how unconscious bias leads clinicians to overpredict future dangerousness in cases involving African-American individuals subject to involuntary civil commitment, see 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 & JUSTICE 431, 438 n. 49 (2017), citing Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW. & HUMAN BEHAVIOR 483, 499–501 (2004); James Hicks, *Ethnicity, Race, and Forensic Psychiatry: Are We Color-Blind?* 32 J. AM. ACAD. PSYCHIATRY LAW 21, 23 (2004).

<sup>35</sup> Perlin, *supra* note 20, at 137.

<sup>36</sup> “False negatives” refer to persons falsely predicted to be not dangerous. See, e.g., David L. Faigman, *Judges as “Amateur Scientists,”* 86 B.U.L. REV. 1207, 1212-14 (2006).

<sup>37</sup> See e.g., Samuel Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 464 (2016); LA FOND & DURHAM, *supra* note 3, at 156 (discussing how judges privilege expert testimony that supports their pre-existing positions while subordinating such testimony that rebuts it). On how judges, in adjudicating sex offender cases, are “as susceptible to heuristics as are all other citizens,” see 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, 215 (2013). On heuristics, see generally *infra* notes 38 and 53.

<sup>38</sup> MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION 165 (2017), citing, *inter alia*, Paul Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1989–90 (2011) (discussing the California Supreme Court election of 1986 that led to the defeat of Chief Justice Rose Bird and two other associate justices perceived in this way).

<sup>39</sup> See generally 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 PSYCHOL. PUB. POL’Y & L. 54, 58 (2011)). Through this heuristic, people tend to favor “information that confirms their theory over disconfirming information.” Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006). The essential work on heuristics is JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

schemas of the case in question.<sup>40</sup> When the valid research is dissonant with their “ordinary common sense” on these positions, then that “ordinary common sense” prevails – an “ordinary common sense” that is often wrong<sup>41</sup>—and the research is ignored.<sup>42</sup> As Professors Bruce Green and Ellen Yaroshefsky have noted, these cognitive biases account for what is popularly known as “‘tunnel vision,’ the human tendency to evaluate evidence through the lens of one’s preexisting expectations and conclusions.”<sup>43</sup>

This may also explain a phenomenon I have recently written about but which appears rarely elsewhere in the literature: How judges regularly curtail defense lawyers seeking to *voir dire* proposed expert witnesses who would be testifying for the state, and similarly curtail cross-examination of state experts in the case in main.<sup>44</sup> An attorney

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<sup>40</sup> The classic article on the heuristic roots of our systemic misperception of risk is Paul Slovic, *Perception of Risk*, 236 *SCI.* 280 (1987).

<sup>41</sup> See e.g., Robert A. Beatty & Mark Fondacaro, *The Misjudgment of Criminal Responsibility*,—*BEHAV. SCI. & L.* – (2017) (forthcoming), manuscript at 13, accessible at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2919855](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2919855) (“a folk psychology [referring to “ordinary common sense”] approach to something like *mens rea* is guaranteed to be wrong some of the time and costly much of the time”).

<sup>42</sup> Related to the impact of the confirmation bias in this context is the impact of the *hindsight* bias – how we exaggerate how easily we could have predicted an event beforehand. See e.g., Neal V. Dawson et al., *Hindsight Bias: An Impediment to Accurate Probability Estimation in Clinicopathologic Conferences*, 8 *MED. DECISION MAKING* 259 (1988); Baruch Fischhoff, *Hindsight Foresight: The Effect of Outcome Knowledge on Judgment under Uncertainty*, 1 *J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE* 288 (1975); Chris William Sanchirico, *Finding Error*, 2003 *MICH. ST. L. REV.* 1189. Judges are no better than lay persons in avoiding the deleterious impact of hindsight bias. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777, 826-27 (2001). The pernicious impact of these biases extends far beyond the areas of law discussed in this paper. See e.g., Liz McKenzie, *Drawing Lines: Addressing Cognitive Bias in Art Appropriation Cases*, 20 *UCLA ENT. L. REV.* 83, 85 (2013) (discussing how fact finders can be improperly influenced by known cognitive biases such as anchoring, hindsight, and confirmation bias “as well as their own value judgments” in the area of art misappropriation). See also, Byron Holz, *Chaos Worth Having: Irreducible Complexity and Pragmatic Jurisprudence*, 8 *MINN. J.L. SCI. & TECH.* 303, 336 (2007) (discussing how using heuristics to resolve intractable problems “pushes the decision maker towards value judgments”). On how heuristics lead us to resist changes in our thinking, see ROBERT A. FORDE, *BAD PSYCHOLOGY: HOW FORENSIC PSYCHOLOGY LEFT SCIENCE BEHIND* 203 (2018).

<sup>43</sup> Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 *OHIO ST. J. CRIM. L.* 467, 488 (2009).

<sup>44</sup> 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.* – (2018) (forthcoming) manuscript at 11-12, accessible at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2860052](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860052).

This, of course, is independent from the widely-accepted rule of practice that trial judges retain wide latitude to impose reasonable limits on cross-examination when there is a concern about harassment, prejudice, confusion of the issues, the witness’s safety, or interrogation that is repetitive or only marginally relevant. See e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). On issues related to the topics under discussion in this article, see *United States v. Giorgi*, 840 F.2d 1022, 1038 (1st Cir. 1988) (no abuse of discretion in limiting cross-examination about alleged mental impairment of witness when witness declared competent to stand trial in prior



whom I know well who regularly represents persons facing involuntary civil commitment, and who has requested anonymity, now reports: “[There are] judges who would give more time to petitioner’s side and less time to us (to the point where I would start timing how long petitioner’s attorney got to ask questions so that I could say my cross should be allowed to be at least that long).”<sup>45</sup>

This is especially troubling in subject matter areas in which it is reasonable to assume that the judges have little pre-existing independent expertise. By example, judges who, like the rest of us, are subject to an incessant media barrage of media hysteria on questions of whether sex offenders are likely to recidivate<sup>46</sup> are going to be less inclined to soberly assess statistical evidence that rejects this assumption.<sup>47</sup> Thus, in sexual predator cases, forensic psychologists have demonstrated—beyond doubt—that the actuarial instruments regularly used to determine who is such a “predator” are fatally flawed.<sup>48</sup> Yet, courts continue to adhere to the principle of “actuarial superiority.”<sup>49</sup>

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court-ordered examination).

<sup>45</sup> Personal communication to author, October 23, 2016.

<sup>46</sup> See generally, Cucolo & Perlin, *supra* note 37 (discussing this phenomenon).

The US Supreme Court has “bought in” to this myth. See *McKune v. Lile*, 536 U.S. 24, 33 (2002) (quoting the U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner’s Guide to Treating the Incarcerated Male Sex Offender xiii (1988) (“[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%,” whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%.”). This 80% figure, however, is found only once in the literature, in an article written over 30 years ago for a popular psychology magazine (Robert Freeman-Longo, *Changing a Lifetime of Sexual Crime*. PSYCHOLOGY TODAY 58. (1986)), and it referred to *one* counseling program run by the study’s author. See Adam Liptak, *Dubious Data Belies Supreme Court’s Stance on Repeat Sex Offenders* N.Y. TIMES, March 6, 2017. The Court’s critical errors in mindlessly accepting this figure (for which no evidence was offered) has not gone without notice. See e.g., Ira Mark Ellman & Tara Ellman, “Frightening and High”: *The Supreme Court’s Crucial Mistake about Sex Crime Statistics*, 30 CONST. COMMENT. 495, 508 (2015): “[The Supreme Court’s] endorsement [of these unsubstantiated statistics] has transformed random opinions by self-interested nonexperts into definitive studies offered to justify law and policy, while real studies by real scientists go unnoticed”).

<sup>47</sup> See e.g., PERLIN & CUCOLO, *supra* note 38, at 73 (“The media-driven panic over sexual offenders has directly influenced judicial decisions, at both the trial and appellate levels, in this area of the law, especially in jurisdictions with elected judges”).

<sup>48</sup> See e.g., John Matthew Fabian, *The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators*, 32 WM. MITCHELL L. REV. 81, 85–87 (2005). The difficulty of calculating actual risk using actuarial instruments is compounded by a host of factors: underreported offenses, amount of time the offenders studied have resided in the community, and the vast differences in types/attractions/specifics of offending characteristics. PERLIN & CUCOLO *supra* note 38, at 97.

<sup>49</sup> Eric Janus & Robert Prentky, *Sexual Predator Laws: A Two-Decade Retrospective*, 21 FED. SENT’G REP. 90, 92 (2008).

For a rare example of a sexual offender case that does *not* fall into this category, see *Does #1–5 v. Snyder*, 834 F.3d 696, 705–06 (6th Cir. 2016) (Michigan’s sex offender registry and residency restriction law constituted an ex post facto punishment in violation of the constitution), discussed carefully in Melissa Hamilton, *Constitutional Law and the Role Of Scientific Evidence: The Transformative Potential of Doe v. Snyder*, 68 B.C. L. REV. 34 (2017).

If judges are similarly barraged by anecdotal stories that “deinstitutionalization is the cause of the criminalization of persons with mental illness,”<sup>50</sup> they will be less likely to seriously weight the impressive accumulation of scientific evidence that rejects this proposition.<sup>51</sup> In such cases, judges – exhibiting such confirmation bias – are teleological.<sup>52</sup> Just as “the hindsight bias . . . causes people to hold decisionmakers legally liable for outcomes that they could not have predicted,”<sup>53</sup> so does the fear of being judged retrospectively to have been in error – of being second-guessed—abet the confirmation bias.

## II. ON BIOLOGICALLY-BASED EVIDENCE

Let us look more carefully now at the way that judicial teleology corrupts decision-making in cases involving biologically-based evidence (such as the *Harper* case previously discussed). Of course, in virtually all such cases there will be expert testimony presented to the fact-finder. Theoretically, the task for the expert witness in such cases “is to communicate . . . scientific knowledge of biologically based factors to the jury—to use the courtroom as a classroom and to encourage verdicts based on informed understanding of the facts.”<sup>54</sup>

One of the problems that must be faced is that fact-finders often reject such evidence because it does not match up with their own

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<sup>50</sup> See e.g., Michael L. Perlin, “*Wisdom Is Thrown into Jail*”: *Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, 17 MICH. ST. U. J.L. & MED. 343 (2013) (discussing this myth).

<sup>51</sup> See *id.* at 350-53, citing, *inter alia*, Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 L. & HUM. BEHAV. 110, 116 (2011), and John Junginger et al., *Effects of Serious Mental Illness and Substance Abuse on Criminal Offenses*, 57 PSYCHIATRIC SERVS. 879, 879 (2006).

<sup>52</sup> On how confirmation and hindsight bias infect judicial decision-making in the area of Fourth Amendment law, see Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 NOTRE DAME L. REV. 1085, 1119-1120 (2007) (defining these two biases, as “cognitive effects that conspire . . . to select the facts that ratify the officer’s decision, even if those facts probably would not, and should not, have governed his decision without the court’s aid”).

In assessing placement decisions in special education law, courts have recognized the peril of hindsight bias. See *Susan N. v. Wilson School District*, 70 F.3d 751, 762 (3d Cir. 1995) (“Courts must be vigilant to heed Judge Garth’s warning that “[n]either the statute nor reason countenance “Monday Morning Quarterbacking” in evaluating the appropriateness of a child’s placement,”” quoting, in part, *Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993)), as discussed in Dennis Fan, *No Idea What the Future Holds: The Retrospective Evidence Dilemma*, 114 COLUM. L. REV. 1503, 1535 n. 186 (2014).

<sup>53</sup> Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 588 (1998).

<sup>54</sup> Margaret G. Spinelli, *Maternal Infanticide Associated with Mental Illness: Prevention and the Promise of Saved Lives*, 161 AM. J. PSYCHIATRY 1548, 1552 (2004).

Judges may be especially threatened by social science when it is presented to a jury, as such presentation may appear to undermine “judicial control” of trial proceedings. Perlin, *supra* note 2, at 262.

heuristic thinking in certain controversial subject matter areas.<sup>55</sup> Thus, in another controversial area of law and society (beyond the scope of this paper), it is widely believed—despite significant evidence to the contrary—that race is biologically-based.<sup>56</sup>

Judicial decisions in this area of the law reflect judges’ pre-existing biases. There is certainly some valid and reliable evidence that neurobiological evidence has improved the criminal justice system through better competency determinations and reconsiderations about the role of punishment in society.<sup>57</sup> But then consider how courts regularly ignore the reality that there is scientific evidence that instrumental violence may stem from uncontrolled, biologically based psychopathology (amygdala dysfunction) and/or controlled decision making that is based on anticipated environmental consequences (observational and enactive learning of external reinforcers),<sup>58</sup> evidence that is ignored in large part because it appears to conflict with the primacy of “free will,” which is a major underpinning of the entire criminal justice system.<sup>59</sup> Consider further how neuroscience might be

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<sup>55</sup> “Heuristics” is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks, the use of which frequently leads to distorted and systematically erroneous decisions, and causes decision-makers to “ignore or misuse items of rationally useful information.” See e.g., Michael L. Perlin, *Are Courts Competent to Decide Competency Questions? Stripping the Facade from United States v. Charters*, 38 U. KAN. L. REV. 957, 966 n.46 (1990), discussing John S. Carroll & John W. Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology*, in COGNITION AND SOCIAL BEHAVIOR 13, 21 (John S. Carroll & John W. Payne eds. 1976), and Michael L. Perlin & Naomi 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 PUBLIC L., POL’Y & ETHICS J. 73 (2016-2017).

One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made. Perlin, *supra* note 6, at 1417. Empirical studies reveal jurors’ susceptibility to the use of these devices. Jonathan Koehler & Daniel Shavero, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 264–65 (1990). Similarly, legal scholars are notoriously slow to understand the way that the use of these devices affects the way individuals think. Thomas Tomlinson, *Pattern-Based Memory and the Writing Used to Refresh*, 73 TEX. L. REV. 1461, 1461–62 (1995). The use of heuristics “allows us to willfully blind ourselves to the ‘gray areas’ of human behavior,” 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, 27 (2003), and predisposes “people to beliefs that accord with, or are heavily influenced by, their prior experiences.” Cucolo & Perlin, *supra* note 37, at 213, quoting Russell Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1381 (2009).

<sup>56</sup> Edward Stein, *Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 619-20 (2014).

<sup>57</sup> See Nita A. Farahany, *Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis*, 2 J. L. & BIOSCI. 485, 508 (2016).

<sup>58</sup> Reid Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 PSYCHOL. PUB. POL’Y & L. 143, 156 (2007).

<sup>59</sup> See generally, Emad H. Atiq, *How Folk Beliefs about Free Will Influence Sentencing: A New Target for the Neuro-Determinist Critics of Criminal Law*, 16 NEW CRIM. L. REV. 449 (2013).

relevant in general if its findings demonstrate that the current criteria for criminal responsibility are unjust because they do not comport with our biologically-based understanding of behavior.<sup>60</sup>

There is a double-edged sword aspect to all of this as well. As John Puyn has perceptively pointed out:

Neurogenetic evidence risks framing mental illness through a narrow explanatory model—one relying solely on biological causes. Such evidence elicits both stigma-reducing and stigma-enhancing implicit biases against mental illness, which can manifest themselves in beliefs that a person with mental illness is less blameworthy for his condition, but also more dangerous and less receptive to treatment.<sup>61</sup>

But this also “plays into” the pre-existing teleology of judges. An important example is the fact that, in a vast majority of cases, requests for funding for neuroimaging test sought by defendants are rejected.<sup>62</sup> On the other hand, when the subset of cases involving “shaken baby syndrome”<sup>63</sup> is examined in this context, there is profound prosecutorial misuse of such testimony, and courts are willing to accept scientifically questionable testimony offered by the state.<sup>64</sup>

Recently, with my colleague, Alison J. Lynch, I made this suggestion in an article about scientific discoveries and the role of

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<sup>60</sup> Stephen Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 401 (2006); see also Perlin, *With Great Skill*, *supra* note 14, at 912; Perlin & Lynch, *My Brain Is So Wired*, *supra* note 14. See , Stephen Morse, *Neuroscience Evidence in Forensic Contexts: Ethical Concerns*, in ETHICS DILEMMAS IN FORENSIC PSYCHIATRY AND PSYCHOLOGY PRACTICE, CHAPTER 9 (Ezra E. H. Griffith ed. 2017) (forthcoming), accessible at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2923354](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2923354) (prescribing modesty and caution before employing neuroscience as the basis for expert reports and testimony in criminal and civil law cases). For a “sober appreciation of [the] limitations and risks” of neuroimaging, see Russell Poldrack, *The Risks of Reading the Brain*, 541 NATURE 156 (Jan. 2017), reviewing Barbara J. SHAKIAN & JULIA GOTTWALD, *SEX, LIES, AND BRAIN SCANS: HOW FMRI REVEALS WHAT REALLY GOES ON IN OUR MINDS* (2017).

<sup>61</sup> John Puyn, *When Neurogenetics Hurts: Examining the Use of Neuroscience and Genetic Evidence in Sentencing Decisions Through Implicit Bias*, 103 CAL. L. REV. 1019, 1019 (2015).

<sup>62</sup> See e.g., Lyn M. Gaudet & Gary E. Marchant, *Under the Radar: Neuroimaging Evidence in the Criminal Courtroom*, 64 DRAKE L. REV. 577 (2016), Appendix C, available at <https://drakelawreview.org/vol-64-no-3-2016/>.

<sup>63</sup> See e.g., Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 1 (2009) (“a medical diagnosis of murder, one based solely on the presence of a diagnostic triad: retinal bleeding, bleeding in the protective layer of the brain, and brain swelling”).

<sup>64</sup> Deborah W. Denno, *Concocting Criminal Intent*, 105 GEO. L.J. 323, 378 (2017) (“Although the criminal law needs neuroscience to help elucidate and refine outmoded conceptions of mental state, such innovations can come with the baggage of misuse”); See generally, Deborah W. Denno, *How Prosecutors and Defense Attorneys Differ in Their Use of Neuroscience Evidence*, 85 FORDHAM L. REV. 453 (2016); Cf. Research in Brief, *Shaken Baby Syndrome and Abusive Head Trauma Accepted as Valid Diagnoses by Most Physicians*, 35 CHILD L. PRAC. 123, 123 (Aug. 2016) (“Recent media reports and judicial decisions have called into question the general acceptance among physicians of shaken baby syndrome and abusive head trauma”).

2017]

“I’VE GOT MY MIND MADE UP”

93

criminology in the court process to which I previously referred:

Given the current research available, it is clear that fMRIs, PET scans, and SPECT scans still have a limited place in our criminal justice system. However, the law must anticipate and acclimate to the very real possibility that these technologies will continue to improve at a rapid rate. This will require a proactive effort on the part of judges and attorneys to become educated, and to apply *Daubert* and *Frye* tests appropriately—and not teleologically—each time a new trend in neuroscience emerges. In this way, the legal profession can also ensure that individuals who already face extreme bias—those with mental illness—have the chance to present valid and reliable scientific evidence that may help to mitigate harsh criminal sentences.<sup>65</sup>

It is essential that lawyers and judges think more seriously about these issues in the context of the decision-making outlined in this paper.

### III. THERAPEUTIC JURISPRUDENCE<sup>66</sup>

One of the most important legal theoretical developments of the past three decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).<sup>67</sup> Therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.<sup>68</sup>

Therapeutic jurisprudence asks whether legal rules, procedures,

<sup>65</sup> Perlin & Lynch, *Wasteland*, *supra* note 14, at 359.

<sup>66</sup> Text *infra* accompanying notes 67-75 is generally adapted from 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 (2014), Perlin & Lynch, *Wasteland*, *supra* note 14, and Perlin & Weinstein, *supra* note 55. Further, it distills the work of the author’s over the past 25 years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993). See generally, Michael L. Perlin, “Have You Seen Dignity?”: *The Story of the Development of Therapeutic Jurisprudence*, 27 U.N.Z. LAW REV. 1135 (2017).

<sup>67</sup> See e.g., David B. Wexler, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); David B. Wexler & Bruce J. Winick, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); Bruce J. Winick, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005). Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 27, 32-33 (1992); David B. Wexler, *Therapeutic Jurisprudence Forum: The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691, 693-94 (1999). See generally, David B. Wexler, *Mental Health Law and the Seeds of Therapeutic Jurisprudence*, in THE ROOTS OF MODERN PSYCHOLOGY AND LAW: A NARRATIVE HISTORY 78 (Thomas Grisso & Stanley Brodsky eds., 2018).

<sup>68</sup> See Perlin, *With Great Skill*, *supra* note 14, at 912; see also Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, DISP. & DILEMMAS IN HEALTH L. 91 (2006) (for a transnational perspective).

and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.<sup>69</sup> Professor David Wexler clearly identifies how the inherent tension inherent in this inquiry must be resolved: “the law’s use of “mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.”<sup>70</sup> As I have written elsewhere, “An inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”<sup>71</sup>

Using TJ, we “look at law as it actually impacts people’s lives”<sup>72</sup> and assess its influence on emotional life and psychological well-being.<sup>73</sup> One governing TJ principle is that the “law should value psychological health, strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by the law, TJ should attempt to bring about healing and wellness.”<sup>74</sup> TJ supports an ethic of care.<sup>75</sup>

The question to be posed here is whether in the instances in which criminal trial judges consider biologically-based evidence in cases that involve questions of mental disability law (or choose to not consider it), to what extent does that decision-making comport with TJ principles?<sup>76</sup> Remarkably, there has been almost no scholarship on this specific issue.

Professor Amy Ronner has persuasively argued that one of the essential values of therapeutic jurisprudence is adherence to what she

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<sup>69</sup> Michael L. Perlin, “*Everybody Is Making Love/Or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481 (2008); 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). See also, Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585-86 (2008).

<sup>70</sup> David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993). See also, e.g., David Wexler, *Applying the Law Therapeutically*, 5 APPL. & PREVENT. PSYCHOL. 179 (1996).

<sup>71</sup> Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, “*Where the Winds Hit Heavy on the Borderline*”: *Mental Disability Law, Theory and Practice, Us and Them*, 31 LOYOLA L.A. L. REV. 775, 782 (1998).

<sup>72</sup> Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

<sup>73</sup> David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, PRACTICING THERAPEUTIC JURIS.: L. AS A HELPING PROF. 45 (2006).

<sup>74</sup> Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

<sup>75</sup> See e.g., 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).

<sup>76</sup> On the extent to which criminal sentencing decision-making considers neuroscientific tests and evidence in the context of TJ, see Perlin & Lynch, *Wasteland*, *supra* note 14, at 351-55; Perlin & Lynch, *Brain Is So Wired*, *supra* note 14.

characterizes as the “three Vs” – voice, validation and voluntariness,<sup>77</sup> If judges decide cases teleologically, then, even if litigants feel they have a voice in a validated proceeding, it may be a cruel hoax. Litigants “prosper when they feel that they are making, or at least participating in, their own decisions,”<sup>78</sup> but, if judges ignore valid and reliable evidence, then this validation may be nothing but an illusion.<sup>79</sup>

This issue – the accuracy of perceptions of fairness of court procedures and interpersonal treatment – is rarely discussed, but it extraordinarily crucial to the subject at hand.<sup>80</sup> We know that “people who feel the legal system, and their own treatment within it, to be fair will internalize the values of the system, show greater compliance with court orders, and be less likely to re-offend.”<sup>81</sup> But, what if that perception of fairness is an illusion? In an article about the relationship between law and politics, Professor Charles Geyh has noted, “If, for example, a judge presents himself as neutral and fair, but is thought to be under the thumb of an energized legislature or interest group, the adverse impact on the judge’s perceived fairness, honesty, ethics, and bias seems plain.”<sup>82</sup> I do not believe that any judicial proceeding can be “fair” if the judge decides cases in the teleological manner I have discussed above – even (or perhaps, especially) one being conducted under the guise of procedural justice and therapeutic jurisprudence values.<sup>83</sup>

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<sup>77</sup> 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). See also *id.*:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome.

<sup>78</sup> *Id.*

<sup>79</sup> See e.g., Michael L. Perlin, “*They’re an Illusion to Me Now*”: *Forensic Ethics, Sanism and Pretextuality*, *PSYCHOL., CRIME & L.: BRIDGING THE GAP* 239 (2008).

<sup>80</sup> See e.g., Tom R. Tyler, Jonathan D. Casper & Bonnie Fisher, *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedure*, 33 *AM. J. POL. SCI.* 629, 640-41 (1989) (reporting data from interviews with criminal defendants and concluding that perceptions of procedural fairness affected attitudes towards judicial authority and government more so than did outcomes and favorable sentences).

<sup>81</sup> Carol Fidler, *When Research Challenges Policy and Practice: Toward a New Understanding of Mental Health Courts*, 54 *JUDGES’ J.* 8, 12 (2015), citing Tom R. Tyler, *Procedural Justice and the Courts*, 44 *COURT REV.* 26 (2007).

<sup>82</sup> Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?* 97 *CORNELL L. REV.* 191, 241, 277 (2012).

<sup>83</sup> See e.g., David B. Wexler, *Guiding Court Conversation along Pathways Conductive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence*, 1 *INT’L J. THER. JURIS.* 367, 372 (2016):

While [procedural justice] is of great importance, there are *other* practices and techniques—captured by TJ—that are crucially important for judges to employ, and thus TJ should surely be integrated in court proceedings (specialized or otherwise). This is a dynamic area and requires ongoing attention to developments in psychology, criminology, and social work

Many years ago, David Wexler suggested that “sentencing guidelines and practices . . . be examined from a therapeutic jurisprudence perspective to shed light on whether they promote or impede rehabilitation.”<sup>84</sup> Subsequently, Georgia Zara has thoughtfully and carefully considered how biologically based criminological research can be integrated into a therapeutic jurisprudence perspective regarding the study of the behavior of offenders.<sup>85</sup> However, there has been virtually no follow-up scholarship at all on either of these important insights.<sup>86</sup>

Biologically-based evidence is relevant to so much of criminal law, and virtually all of mental disability law. In trial and pre-trial questions of competency to stand trial,<sup>87</sup> criminal responsibility,<sup>88</sup> competency to plead guilty,<sup>89</sup> and competency to proceed *pro se*,<sup>90</sup> in post-trial questions of sentencing<sup>91</sup> (including mitigation)<sup>92</sup> and competency to be executed,<sup>93</sup> and in other mental disability law areas such as whether a patient meets criteria for commitment,<sup>94</sup> the right of patients to sexual autonomy,<sup>95</sup> the right to refuse treatment,<sup>96</sup> and institutional release,<sup>97</sup> questions related to brain-biology emerge regularly.<sup>98</sup> Therapeutic

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and to their integration into the legal system.

<sup>84</sup> David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 768 n.35 (1993).

<sup>85</sup> Georgia Zara, *Therapeutic Jurisprudence as an Integrative Approach to Understanding the Socio-Psychological Reality of Young Offenders*, 71 U. CIN. L. REV. 127, 128 (2002).

<sup>86</sup> See Perlin & Lynch, *Wasteland*, *supra* note 14, at 351-53 (noting this paucity of scholarship).

<sup>87</sup> See, e.g., Perlin & Lynch, *Brain Is So Wired*, *supra* note 14.

<sup>88</sup> See e.g., Perlin, *With Great Skill*, *supra* note 14

<sup>89</sup> See e.g., *Allen v. Mullin*, 368 F. 3d 1220 (10<sup>th</sup> Cir. 2004).

<sup>90</sup> See e.g., *State v. McCall*, 163 P.3d 378 (Kan. Ct. App. 2007).

<sup>91</sup> See e.g., Deborah W. Denno, *What Real-World Criminal Cases Tell Us about Genetics Evidence*, 64 HASTINGS L.J. 1591 (2013).

<sup>92</sup> See e.g., Brent Garland & Mark S. Frankel, *Considering Convergence: A Policy Dialogue about Behavioral Genetics, Neuroscience, and Law*, 69 LAW & CONTEMP. PROBS. 101 (Spring 2006).

<sup>93</sup> See e.g., Michael L. Perlin, “*Good and Bad, I Defined These Terms, Quite Clear No Doubt Somehow*”: *Neuroimaging and Competency to be Executed after Panetti*, 28 BEHAV. SCI. & L. 621 (2010).

<sup>94</sup> See e.g., Nori Wieder, *Sealing the Record: An Analysis of Jurisdictional Variations of Juvenile Sex Offender Record Sealing Laws*, 24 HEALTH MATRIX 377 (2014).

<sup>95</sup> See e.g., Perlin & Lynch, *supra* note 65, MICHAEL L. PERLIN & ALISON J. LYNCH, *SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER?* (2016).

<sup>96</sup> See e.g., Douglass Mossman, *Unbuckling the “Chemical Straitjacket”*: *The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033 (2002).

<sup>97</sup> See e.g., Megan S. Wright & Joseph J. Fins, *Rehabilitation, Education, and the Integration of Individuals with Severe Brain Injury into Civil Society: Towards an Expanded Rights Agenda in Response to New Insights from Translational Neuroethics and Neuroscience*, 16 YALE J. HEALTH POL’Y, L. & ETHICS 233 (2016).

<sup>98</sup> There is significant support for the position that “the evidence that many mental illnesses are biologically based and treatable is stronger today than it ever has been.” Sara Nadim, *The*



jurisprudence scholars have examined each of these questions substantively, but have, again, focused virtually no attention on the topic I am addressing in this paper: the impact of courts’ teleological interpretation of biologically-based evidence.<sup>99</sup>

Self-evidently, this should be important for multiple reasons. As I noted previously, there has been virtually no scholarship about the therapeutic jurisprudence implications of sentencing decision-making.<sup>100</sup> In a recent discussion of this issue – in the context of defendants with traumatic brain injury (TBI) – Lynch and I underscored that this was especially distressing for cases involving this population, “since the recognition of a physical component of their disability could help to comport with therapeutic jurisprudence principles of dignity, voice and validation.”<sup>101</sup> It should be a “given” that the opportunity for individuals with mental illness and brain injury, “who are already facing additional discrimination and bias” should have “another avenue through which to present legitimate evidence.”<sup>102</sup> If courts reject valid and reliable evidence – because, for example, the defendant does not “look” brain-damaged – then the proceedings are robbed of any TJ value.

An instructive parallel can be made here to the way judges privilege visual cues and clues in insanity defense cases. If a defendant

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2008 *Mental Health Parity and Addiction Equity Act: An Overview of the New Legislation and Why an Amendment Should Be Passed to Specifically Define Mental Illness and Substance Use Disorders*, 16 CONN. INS. L.J. 297, 318-19 (2009); see also, Christopher John Churchill, *The Parity Cure: Solving Unequal Treatment of Mental Illness Health Insurance through Federal Legislation*, 44 GA. L. REV. 511, 528 n. 126 (2010) (discussing “evidence that mental illnesses are real, biologically based diseases”).

<sup>99</sup> On how mental health reform legislation that does not meet the paternalistic needs of mental health professionals, the statutes are often subverted by expert testimony (and how judges are complicit in that subversion), see R. Michael Bagby & Leslie Atkinson, *The Effects of Legislative Reform on Civil Commitment Admission Rates: A Critical Analysis*, 6 BEHAV. SCI. & L. 45, 59 (1988). On how TJ can redeem a heuristics-driven jurisprudence, see 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, 876 (2010).

<sup>100</sup> See Perlin, *supra* note 8.

<sup>101</sup> Perlin & Lynch, *Wasteland*, *supra* note 14, at 354. For the only legal scholarship about the relationship between therapeutic jurisprudence and traumatic brain injury, see Evan R. Seamone, *Dismantling America’s Largest Sleeper Cell: The Imperative to Treat, Rather Than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 479 (2013). I am currently working with Lynch on a paper exploring this precise question. See Alison J. Lynch & Michael L. Perlin, *A Therapeutic Jurisprudence Model of Representing Criminal Defendants with Traumatic Brain Injury* (work in progress; originally presented to the American Society of Criminology, November 2016, New Orleans, LA). On the determination of PTSD and neuroscientific research, see Mark B. Hammer, *The Role of PTSD in Adjudicating Violent Crimes*, 42 J. L. MED. & ETHICS 155 (2014). On how patients with TBI are often treated inappropriately in state facilities, see *Williams v. Wasserman*, 164 F. Supp. 2d 591, 618 (D. Md. 2001) (“Dr. Culotta testified that the chaotic environments in the state hospitals subjected the plaintiffs to an unacceptable risk of harm because they were inappropriately managed for TBI patients”).

<sup>102</sup> Perlin & Lynch, *Wasteland*, *supra* note 14, at 354-55.

does not “look crazy,”<sup>103</sup> then the legitimacy of an insanity defense is rejected.<sup>104</sup> The fact that most persons with severe mental illness do not comport with popular culture’s depictions of “crazy people”<sup>105</sup> increases the likelihood of teleological decision-making and diminishes the likelihood of TJ-based decision-making.<sup>106</sup>

If judges continue to teleologically privilege certain evidence and subordinate other evidence<sup>107</sup> – and this is the heart of the problem – then the accuracy of Professor Susan Rozelle’s pessimistic observation that “the game of scientific evidence looks fixed”<sup>108</sup> is inevitable. And such a “fixed” game flies, again, in the face of the basic principles of therapeutic jurisprudence. If courts discount biologically-based evidence because such evidence does not coincide with the judges’ pre-existing positions, then the core TJ principle of “validation” is absent. This “fixed” game also robs persons before the court of their “voice,” and it mocks the notion that it is “voluntary,” that, per Ronner, the “litigant experiences the proceeding as less coercive.”<sup>109</sup>

The relationship between the hindsight bias and therapeutic jurisprudence was first tackled nearly thirty years ago in a therapeutic jurisprudence “forerunner” article by Wexler and Professor Robert Schopp,<sup>110</sup> in which they suggested trial bifurcation as a potential way

<sup>103</sup> See e.g., Perlin, *supra* note 2, at 265-66 (“the lay public cannot, by using its intuitive ‘common sense’ effectively determine who is or is not criminally responsible by whether or not the individual ‘looks crazy’”).

<sup>104</sup> See Michael L. Perlin, “Merchants and Thieves, Hungry for Power”: *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1532 n. 132 (2016):

Whether or not a defendant “drools” has acquired totemic significance in these sorts of cases. In the trial of Andrew Goldstein for the murder of Kendra Webdale (after whom New York’s outpatient commitment statute, “Kendra’s Law,” was named), jurors, who initially rejected Goldstein’s insanity defense, “reported crediting testimony that Goldstein did not froth at the mouth or drool, and considered his lack of drooling significant to their responsibility determination.” See Amanda Pustilnik, *Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, 96 J. CRIM. L. & CRIMINOLOGY 217, 248 (2005).

<sup>105</sup> See e.g., Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 724 (1989-90): “To the lay person (the juror or the judge), the temporarily delirious patient ‘leaping over chairs and taking the broomstick to hallucinatory monsters’ [still] looks more genuinely psychotic than a deeply disordered but calm and brittle-worded schizophrenic,” citing Walter Bromberg & Harvey Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM.L. & CRIMINOLOGY 729, 738 (1952).

<sup>106</sup> On juror response to evidence of physical brain “abnormalities” in insanity cases, see Richard Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51 (2006).

<sup>107</sup> See LA FOND & DURHAM, *supra* note 3, at 156.

<sup>108</sup> Rozelle, *supra* note 11, at 598.

<sup>109</sup> Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002).

<sup>110</sup> See David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations*, 7 BEHAV. SCI. &

of alleviating the harm that this bias could cause in some malpractice litigation,<sup>111</sup> and suggested the adoption of a “hindsight bias quotient” to be employed in jury selection in such cases.<sup>112</sup> Importantly, in this work, the authors take note of the possible detrimental effect that jurors’ verdicts based on infallible hindsight can have on physicians’ treatment decisions made without the benefit of hindsight.<sup>113</sup>

The parallels to judicial decision-making in the cases I have been discussing are striking. Professor Nigel Stobbs has argued that the teleological world view can be used as a “backboard against which to highlight the emotive views of the more trenchant critics of therapeutic jurisprudence,”<sup>114</sup> and I think Professor Stobbs has it exactly right. I have written in the past that “we need to take what we learn from therapeutic jurisprudence to strip away sanist behavior, pretextual reasoning and teleological decision making from the insanity defense process.”<sup>115</sup> I have written *this* article in an effort to re-focus on therapeutic jurisprudence as a means of combatting teleology in the law.

What can be done? First, judges must “own up” to what they do.<sup>116</sup> There are no new revelations here. I first wrote about this in 1991;<sup>117</sup> La Fond and Durham’s book was published in 1993;<sup>118</sup> Rozelle’s article was published in 2007. The response from the judiciary has been, to a great extent, deafeningly silent.<sup>119</sup> I have written often about the

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L 485 (1989), reprinted in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 135 (David B. Wexler & Bruce J. Winick eds. 1991).

<sup>111</sup> *Id.* at 147. See also Edward A. Dauer, *A Therapeutic Jurisprudence Perspective on Legal Responses to Medical Error*, 24 *J. LEGAL MED.* 37, 39 (2003) (“[I]n a very patent way, the tort system is ineradicably infected with ‘hindsight bias’”).

<sup>112</sup> Wexler & Schopp, *supra* note 109, at 155.

<sup>113</sup> *Id.* at 151-52.

<sup>114</sup> Nigel Stobbs, *In Defence of Therapeutic Jurisprudence: Threat, Promise and Worldview*, 8 *ARIZ. SUMMIT L. REV.* 325, 349 (2015).

<sup>115</sup> Perlin, *With Great Skill*, *supra* note 14, at 913; see also, Perlin, *supra* note 6, at 1425-26. Sanism is an irrational prejudice based predominantly upon stereotype, myth, superstition and deindividualization, see e.g., Michael L. Perlin, *On “Sanism,”* 46 *SMU L. REV.* 373 (1992). [P]retentiousness refers to the ways that courts often accept testimonial dishonesty and engage in dishonest decisionmaking, see, e.g., Perlin, *supra* note 5. On how Therapeutic jurisprudence “might be a redemptive tool in efforts to combat sanism, as a means of ‘strip[ping] bare the law’s sanist façade,” see Michael L. Perlin, “*Yonder Stands Your Orphan with His Gun*”: *The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 *TEXAS TECH L. REV.* 301, 331 n. 185 (2013).

<sup>116</sup> Although there is a robust literature (much of it written by judges) on how judges can employ therapeutic jurisprudence principles in their work, see e.g., Michael King, *A Judicial Officer Assists Offenders to Set Rehabilitation Goals & Strategies*, in *THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM* (blog), accessible at <https://mainstreamtj.wordpress.com/2017/02/28/a-judicial-officer-assists-offenders-to-set-rehabilitation-goals-strategies-tj-court-craft-series-8/> (Feb. 28. 2017) (King was formerly a judge in Australia), this does not seem to have had a significant impact on the judiciary as a whole.

<sup>117</sup> See Perlin, *supra* note 20.

<sup>118</sup> See LA FOND & DURHAM, *supra* note 3.

<sup>119</sup> But see Michael S. King, *Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush*, 26 *CRIM. L.J.* 260 (2002).

pernicious impact of false, self-referential “ordinary common sense” in judicial decision-making;<sup>120</sup> nowhere is it more toxic than here. Next, lawyers must be vigilant about seeking their own independent expert testimony in cases involving biological evidence. In *Ake v. Oklahoma*,<sup>121</sup> the Supreme Court found a constitutional right to an independent expert in cases where defendant makes a showing that his or her sanity at the time of the crime is going to be a significant issue at the trial. Courts have been reluctant to expand the scope of *Ake* significantly in subsequent years in such areas as neuroimaging tests<sup>122</sup> or assessment of intellectual disability in death penalty cases.<sup>123</sup> Especially given the “fixed-ness” of the “game,” it is essential that defense lawyers seek a vigorous expansion of this doctrine.<sup>124</sup>

In such cases, there may be need for two experts: one to evaluate the litigant and offer a clinical assessment, and one to explain to the fact-finders why they must step outside of the “comfort zone” of their “ordinary common sense,” and reject the ease of heuristic thinking, so as to judge a case accurately, especially in cases involving the sort of biologically-based evidence that is so susceptible to teleological thinking. There is certainly precedent that urges the admission of what Professor John Monahan and his colleagues have referred to as “social frameworks testimony” so as to allow for “the introduction of general social science research to frame or provide context for the determination of specific factual issues in litigation,” a gambit that has met with “widespread agreement.”<sup>125</sup> But, to my knowledge, there is no evidence

<sup>120</sup> “[O]rdinary common sense” is a “‘prereflective attitude’ exemplified by the attitude of ‘What I know is “self-evident”; it is “what everybody knows.”” Keri K. Gould & Michael L. Perlin, “*Johnny’s in the Basement/Mixing Up His Medicine*”: *Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE U. L. REV. 339, 357 (2000) (citing Richard K. Sherwin, *Dialectics and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737 (1988)). See generally, Perlin & Cucolo, *supra* note 39; Michael L. Perlin, *Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990), reprinted in LAW AND PSYCHOLOGY: THE BROADENING OF THE DISCIPLINE 109 (James Ogloff ed. 1992).

<sup>121</sup> 470 U.S. 68, 83-84 (1985).

<sup>122</sup> See e.g., Perlin, *See Through Your Brain*, *supra* note 14, at 22.

<sup>123</sup> See e.g., Michael L. Perlin, “*Life Is in Mirrors, Death Disappears*”: *Giving Life to Atkins*, 33 N. MEX. L. REV. 315, 332 (2003).

<sup>124</sup> In *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), the Supreme Court elaborated upon the *Ake* standard, finding that the expert witness must “help . . . the defense evaluate the [assigned doctor’s] report [and defendant’s] medical records and translate these data into a legal strategy,” *id.* at 1800. See generally, PERLIN & CUCOLO, *supra* note 23, § 15-4.4, at 15-72 to 15-76, discussing *McWilliams*.

<sup>125</sup> John Monahan; Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks”*, 94 VA. L. REV. 1715, 1727 (2008). See also *Id.* at 1742 (footnotes omitted):

[W]e believe it appropriate for a judge to exercise her power to comment on evidence to suggest how social framework evidence may apply to the case at hand, and for appellate courts to then review this commentary to set limits on the proper uses of framework evidence and to ensure uniformity of use across cases. In this way, a common law of social frameworks may develop

2017]

“I’VE GOT MY MIND MADE UP”

101

that this sort of testimony has been proffered in cases such as the ones to which I refer here.

This issue raises other TJ-related issues for the defense appellate lawyer. In a slightly different context, David Wexler has looked at the dilemma she faces in many cases:

The appellate lawyer’s task is a highly sensitive one. On the one hand, it is important for counsel to convey the message of voice and validation. On the other hand, it is crucial that counsel not simply serve as an apologist for an appellate affirmance; that appellant know that counsel is truly on the appellant’s side, giving the case the best possible shot.<sup>126</sup>

This important insight of Wexler’s needs to be considered in the context of what I have raised in this paper. If the fact-finder employs this sort of teleology to make baseless findings, because, based on heuristic reasoning, those findings are consonant with his “ordinary common sense, then what is the obligation of the defense lawyer in explaining why and how a decision was made for baseless reasons? I have written elsewhere about the role of the defense counsel when faced with prosecutorial misconduct in death penalty cases involving defendants with serious mental and/or intellectual disabilities,<sup>127</sup> but these issues require a different sort of approach on counsel’s part. Certainly, the refusal to allow an expert witness to testify as to the bases of judicial teleology can be raised as grounds for appeal. Though it is not likely that these grounds will be speedily granted,<sup>128</sup> nonetheless, I think counsel must begin to take this issue seriously.

In a series of earlier articles, I have suggested dialogues that a TJ practitioner might have with her client in cases involving the incompetency status and the insanity defense, sex offender law, and criminal sentencing.<sup>129</sup> Writing about relapse prevention planning,

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analogous to the common set of judicial instructions on social frameworks that we envisioned in our original proposal.

<sup>126</sup> David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, in REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 20, 39 (David B. Wexler ed. 2008).

<sup>127</sup> See Perlin, *supra* note 103; Michael L. Perlin, “*Your Corrupt Ways Had Finally Made You Blind*”: Prosecutorial Misconduct and the Use of “Ethnic Adjustments” in Death Penalty Cases of Defendants with Intellectual Disabilities, 65 AM. U. L. REV. 1437 (2016); Michael L. Perlin, “*Power and Greed and the Corruptible Seed*”: Mental Disability, Prosecutorial Misconduct, and the Death Penalty, 43 J. AM. ACAD. PSYCHIATRY & L. 266 (2015).

<sup>128</sup> Given the penury of courts in granting applications to extend *Ake* to other areas of substantive biological evidence, see Perlin, *See Through Your Brain*, *supra* note 14, at 21 (“The courts have generally read *Ake* narrowly, and have refused to require appointment of an expert unless it is ‘absolutely essential to the defense,’” citing STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 802 (6th ed. 2000) , I am not optimistic that this will be an easy job for defense counsel).

<sup>129</sup> For examples of conversations for clients raising the insanity defense or the incompetency to stand trial status, see Michael L. Perlin, “*Too Stubborn to Ever Be Governed by Enforced*

Wexler has suggested additional TJ-compliant questions that an attorney might ask.<sup>130</sup> A thorny question to be asked here is whether, in a conversation of this sort, should counsel share with her client the fact that the judge's decision may not be based on a fair assessment of the facts and law, but on the judge's pre-existing teleological "reading" of the matter in question – that the apparent fairness is, in fact, an illusion?<sup>131</sup> To return to Bob Dylan again, think of the sardonic lyric in *The Lonesome Death of Hattie Carroll*:<sup>132</sup> "In the courtroom of honor, the judge pounded his gavel/To show that all's equal and that the courts are on the level."<sup>133</sup>

We know that some judges have suppressed evidence in negligence cases that would have, if admitted, exacerbated the impact of the hindsight bias on a jury's judgment.<sup>134</sup> That reality tells us that, in one related area, courts have grasped the potential negative impact of heuristic thinking on judicial decision-making, at least when it comes to potential juror bias.<sup>135</sup> But this still does not go to the question of bias on the part of judges.

Recall that therapeutic jurisprudence is designed to let us "look at law as it actually impacts people's lives"<sup>136</sup> and to bring focus on the law's influence on emotional life and psychological well-being.<sup>137</sup> The teleology of the judicial process in this context makes it impossible for these aims to be met. It is time for this to change. Articulating the existence of this teleology and amassing legal and other policy-based

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*Insanity*": *Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases*, 33 INT'L J. L. & PSYCHIATRY 475, 480-81 (2010). For criminal defendants prior to sentencing, see Perlin, *supra* note 7, at 924-25. For individuals facing sexually violent predator commitments, see 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 (2017).

<sup>130</sup> Wexler, *supra* note 83, at 370-71.

<sup>131</sup> See 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. 43, 51 (2016): "Although there has been substantial theoretical discussion regarding the role of legitimacy and compliance with the law, there has been a relative lack of empirical research testing this relationship."

<sup>132</sup> Carroll, an African-American hotel worker, was killed by William Zantzinger, a wealthy tobacco farmer who received a six-month sentence after the initial charge of murder was reduced to manslaughter. See Michael L. Perlin, *Tangled Up in Law: The Jurisprudence of Bob Dylan*, 38 FORD. URB. L.J. 1395, 1404-05 (2011).

<sup>133</sup> <http://bobdylan.com/songs/lonesome-death-hattie-carroll/>. See CHRISTOPHER RICKS, DYLAN'S VISIONS OF SIN 221 (2003), concluding that *Hattie Carroll* "brings home the falsity of the boast . . . that 'the courts are on the level.'"

<sup>134</sup> See Rachlinski, *supra* note 53, at 617.

<sup>135</sup> On the heuristic roots of juror bias in general, see John E. Montgomery, *Cognitive Biases and Heuristics in Tort Litigation: A Proposal to Limit Their Effects without Changing the World*, 85 NEB. L. REV. 15 (2006).

<sup>136</sup> Winick, *supra* note 72, at 535.

<sup>137</sup> Wexler, *supra* note 73, at 55.

2017]

“I’VE GOT MY MIND MADE UP”

103

arguments against its perpetuation will go a long way towards fulfilling therapeutic jurisprudence mandates.

#### CONCLUSION

Judges decide cases teleologically, taking refuge – perhaps unconsciously – in time-worn heuristics that appeal to their own distorted “ordinary common sense.”<sup>138</sup> This is especially problematical in cases involving biologically-based evidence since so much of this evidence is out of the ken of lay persons.<sup>139</sup> Such cases demand “a proactive effort on the part of judges and attorneys to become educated,”<sup>140</sup> an effort that it does not appear to me is being made.<sup>141</sup> I believe that a turn to therapeutic jurisprudence in this context<sup>142</sup> would best remediate this state of affairs. TJ demands an “ethic of care”;<sup>143</sup> even if judges profess to be deciding cases in line with procedural justice values, if they fall prey to teleological thinking, that “ethic of care” cannot be present.

The narrator of Bob Dylan’s song that gave this article the first part of its title had “his mind made up.” That might or might not have had an influence on the ultimate resolution of the love affair that is the subject of that song. But when judges approach cases with their “mind[s] made up,” this certainly does influence the resolution on the cases before them, often leading to a decision that cannot be supported by the facts or the valid and reliable research evidence. It is time that we begin to take this state of affairs far more seriously than we ever have.

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<sup>138</sup> See generally, Perlin, *supra* note 20. On how teleology is “inspired” by alleged common sense, see Bert van Roermund, *The Embryo and its Rights: Technology and Teleology*, 14 GERMAN L.J. 1939, 1947 (2013). See also Perlin, *supra* note 6, at 1425-26 (“we accept an insanity defense system that is sanist, pretextual and teleological, a system that rests on the shaky underpinnings of heuristic reasoning and a false OCS (ordinary common sense”).

<sup>139</sup> See generally, Richard S. Schmechel et al, *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177 (2006).

<sup>140</sup> Perlin & Lynch, *Wasteland*, *supra* note 14, at 359.

<sup>141</sup> See generally, cases discussed in sources cited *supra* notes 53-64.

<sup>142</sup> A turn suggested by Wexler and Schopp nearly 30 years ago. See Wexler & Schopp, *supra* note 110.

<sup>143</sup> Winick & Wexler, *supra* note 75, at 605-07.