THERAPEUTIC JURISPRUDENCE AND DISABILITY RIGHTS: A CASE STUDY ON THE TRIAL OF ANNA STUBBLEFIELD

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Therapeutic Jurisprudence studies the manner in which law may be used as a tool for healing. By integrating law and psychological health, this field of legal scholarship seeks to evaluate the ameliorative effect of the legal process on the well-being of the participants. The object of its study is to determine how legal rules and procedures can and ought to be re-shaped to enhance their therapeutic potential, without having to compromise the due process of law. In the aforementioned context, this paper examines how the core principles underlying therapeutic jurisprudence were ignored by the District Court of New Jersey while dealing with the high-profile case of Anna Stubblefield, who was charged with criminal sexual assault for having an allegedly non-consensual sexual relationship with a man who had cerebral palsy. The paper will analysethe instances in the trial where his alleged 'lack of intelligence' was tried to be established at the cost of dehumanising the victim. Continuing in the same vein, this paper also attempts to look at how language used in our day-to-day lives is inherently loaded with ableist and sanist assumptions so as to maintain power structures – a hierarchy designed specifically to subject certain bodies reflective of any differentness to be considered undesirable, and tries to develop an interdisciplinary understanding to address the issue. We further suggestadopting a 'situational approach' in such cases to ensure that the intellectually disabled participants are treated with dignity. Further, the paper argues that the victim's sexual autonomy was not considered in the wake of his disability, and considers the manner in which the ableist and patronising approach adopted by such policies disregards the agency of differently abled individuals.

I. INTRODUCTION

This paper is inspired by a trial that took place in the United States District Court of New Jersey, concerning a professor charged with the sexual assault of a mentally disabled man.[1] While the case itself could be said to have dealt with numerous issues ranging from consent to agency, all of which have been widely discussed upon in different intellectual circles, the theoretical

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[1] Roe v. Rutgers, The State University of New Jersey, 2013 SDW, Civil Action No. 13-1762; *See also* Jeff McMahan & Peter Singer, *Who is the Victim in the Anna Stubblefield Case*, The New York Times, April 3, 2017, available at https://www.nytimes.com/2017/04/03/opinion/who-is-the-victim-in-the-anna-stubblefield-case.html (Last visited on December 20, 2017).

underpinnings of this trial on disability rights still remain to be discussed. This paper focuses on the societal perception of differently abled individuals and the manner in which this was perpetuated in the present case by the District Court of New Jersey – treating the victim as a 'freak' by the very same legal institution that was called upon to protect his interests. We argue that this warrants a shift in our understanding of law – law must be seen as a therapeutic device where it is not only concerned with adversarial triumphalism but is also considered with its influence on emotional life and psychological well-being of the participants. This branch of law, known as 'Therapeutic Jurisprudence', examines the influence of law and the legal procedure on the lives of the individuals involved,[2] and in doing so, explores how adherence to its principles can maximise a disabled person's chances of being treated with dignity.[3]Judges, lawyers, and judicial officials have been aware of the practice of considering the interests of such individuals since a long time.[4] This is reflected, for example, when a brief adjournment period is allowed by the judge when a witness experiences a particularly trying time while testifying in the witness box. However, any progress made in this regard has been intermittent, and until recently, no general theory has been developed analysing the manner in which law affects the well-being of the participants in conjunction with its primary objective of ensuring justice. It is believed that therapeutic jurisprudence fills this gap.[5]

Before going into its jurisprudential aspects, it is imperative to shed some light on the facts of this case, which are discussed in detail in Part II of the paper. In Part III of the paper, we see therapeutic jurisprudence as an obligation that ensures the dignity of the participants. This concept is first explored through Professor Ronner's theory which is a commitment to the three 'V's (namely, 'voice', 'validation' and 'voluntariness') central to the concept of therapeutic jurisprudence.[6] The second subsection focuses on the Anna Stubblefield case, and suggests practices that should have been incorporated in the decision-making process to ensure that the objectives of therapeutic jurisprudence were met. Moreover, additional legal reforms are also suggested in this regard. In Part IV, the present paper, apart from describing how the trial in the Stubblefield case failed by therapeutic jurisprudential standards, will touch upon the issue of people with mental disabilities not being given autonomy in their sexual decision making, and will try to frame these issues by considering them in the context of therapeutic jurisprudence. Through this section, the paper will also discuss the ways in which both

[2] Michael Perlin, *Sexuality, Shame, Disability and Therapeutic Jurisprudence*, December 4-5, 2014, available at http://www.humiliationstudies.org/documents/PerlinNY14meetingSexualityShameDisabilityandTherapeuticJurisprudence.pdf (Last visited on January 16, 2018).

[3] Michael Perlin & Meaghan Gallahager, *Why a Disability Rights Tribunal Must Be Premised on Therapeutic Jurisprudence Principles*, 10 Psychological Injury and Law 3 (2016).

[4] The Australasian Institute of Judicial Administration, *The Concept of Therapeutic Jurisprudence*, available at https://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse/the-concept-of -therapeutic-jurisprudence (Last visited on January 16, 2018).

[5] *Id*.

[6] Ronner,*infra* note 37.

lawyers and judges discount and trivialise the experiences of people with mental illnesses. Lastly, Part V concludes by analysing the manner in which this process is embedded in our everyday spoken language. This idea is explored in the context of '*enfreakment of language*', a term that incorporates both the manner in which 'enfreakment' is imposed upon individuals as well as the heuristic that allows us to observe this practice.[7]

II. THE STRANGE CASE OF ANNA STUBBLEFIELD

The case of Anna Stubblefield unfolds much like a tragic opera. On October 2, 2015, Anna Stubblefield, an Associate Professor of Philosophy at Rutgers-Newark, and disability studies scholar, was charged with criminal sexual assault for having an allegedly non-consensual sexual relationship with a man that the newspapers later referred to as "D.J.".[8] The jury believed that D.J., whom Stubblefield claimed to be in love with, was unable to consent to sex.[9] This was because D.J. at the time of the incident was a thirty-four year old man who had cerebral palsy and could not speak.[10] However, the accused in this case claimed before the court that there was mutual consent for the sexual relations that took place.[11] In D.J.'s instance, consent had been given through a communication software using a technique called Facilitated Communication ('FC').[12] The case thus hinged on whether the victim could communicate using this method where a helper sets up a device and provides support to a subject, while they make gestures towards certain letters or pictures. However, the Court ultimately refused to consider the legitimacy of FC and sentenced Stubblefield to twelve years.[13]

Shortly after her conviction, numerous accounts were written of the events leading up to Anna's trial, most of which mentioned the 'debunked pseudoscience' of FC.[14] There were other articles that also casted some aspersions – *Was D.J. actually incapable of giving consent? Did Anna fall for D.J. or for some dissociated aspect of herself?*[15] Questions such as these posed by popular media outlets completely overshadowed the scope of disability rights in this particular case,

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7 Wheeler,*infra* note 115.

8 Roe v. Rutgers, The State University of New Jersey, 2013SDW, Civil Action No. 13-1762.

9 Wichert, *infra* note 44.

10 *Id*.

11 State of New Jersey v. Marjorie Anna Stubblefield, 2017 Superior Court of New Jersey, Appellate Division, Docket No. A-02112-15T1, ¶6.

12 *Id*.,¶5.

13 *Id*.

14 Mark Sherry, *Facilitated Communication, Anna Stubblefield and Disability Studies*, 31 Journal of Disability and Society 7 (2016).

15 Daniel Engber, *The Strange Case of Anna Stubblefield*, The New York Times Magazine, October 20, 2015, available at https://mobile.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna stubblefield.html?referer=http://www.google.co.in/ (Last visited on January 15, 2018);*See also*McMahan & Singer, *supra* note 1.

which brings us now to a completely different narrative, one which considers that there was actually no fair trial in the present case.

On reading one of the written accounts of a differently abled individual attending the opening day testimony of these proceedings, one finds that there were many ableist assumptions on display at the hearings.[16] Throughout the course of the trial, there were numerous instances where D.J. was treated as a 'freak' by the prosecution to establish the fact that there could have been no valid, consensual sexual activity between the victim and the defendant owing to the former's 'lack of intelligence'.[17] Disability studies scholars discussing upon the issue have suggested that the victim did not testify in the case, and argue that without his testimony,there is no case against Stubblefield as it would be impossible to know whether D.J. had consented or not.[18] One of the written accounts of the trial does mention that the legal guardians of the victim indeed brought him to court one day where he was presented as a non-verbal 'demonstrative exhibit'.[19] It is this element of the proceedings that has been widely critiqued by disability studies scholars, and one which we are particularly interested in, which was "*to parade a disabled person as an exhibit which was eerily reminiscent of the 'freak shows' of yesteryear.*"[20]

From the above statement, it is evident that D.J. was 'exhibited' in the legal proceedings as someone who was not fully human. This is reflective of our societal attitudes, where the policies made in pursuance thereof demean, shame and humiliate persons with disabilities on an ongoing basis. Legal institutions focus on how such individuals are different from the rest of society, thereby denying them the basic standards of humanity, and suppressing any recognition of their shared physical, emotional and spiritual needs.[21] This is where the application of therapeutic jurisprudence principles is required. We need to consider every individual as having an intrinsic worth, and mandate that the state should not treat individuals in a manner that is inconsistent with this worth.[22] The legal process in accordance with such principles would meet the basic tenet of ensuring the dignity of every individual participating in the legal process, especially differently abled individuals.

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16 Taylor,*infra* note 75.

17 State of New Jersey v. Marjorie Anna Stubblefield, 2017 Superior Court of New Jersey, Appellate Division, Docket No. A-02112-15T1, ¶29.

18 Mintz, *infra* note59; McMahan & Singer, *supra* note 1.

19 Engber, *supra* note 15.

20 Kathryn Hampshire, *Freak Shows and Human Zoos*, 3 Digital Literature Review (2016), available at http://bsuenglish.com/dlrOLD/past/dlr_issue3.pdf (Last visited on May 31, 2018); Jasmine E. Harris, *The Role of Support in Sexual Decision-Making for People with Intellectual and Developmental Disabilities,* 77 Ohio State L.J. Furthermore (2016).

21 Perlin, *supra* note 2.

22 Carol Sanger, *DecisionalDignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 Colum. J. Gender & L.2 (2008).

III. THERAPEUTIC JURISPRUDENCE: ETHICS OF CARE

Therapeutic jurisprudence emphasises on law's influence on the emotions as well as the mental well-being of the individuals that it affects.[23] Legal processes and outcomes either impedes, improves or neutralises their effects on the psychological health of a person, and according to this branch of jurisprudence, value should be given to those procedures that give priority to the welfare of the individual.[24] In other words, it states that law is a social force and one that must strive to be a therapeutic consequence. With respect to the court process, therapeutic jurisprudence studies the curative part that a court may play in the psychological health of the litigants.[25] Therapeutic jurisprudence seeks to ascertain whether legal rules, procedures, and lawyers' roles can or should be adapted, to optimise their therapeutic potential, while not subverting the principles of due process.[26] In its essence, the legal process as well as its outcome is considered in terms of how they impact the whole person.

However, there is some inherent tension in this kind of enquiry, which is raised by the question of whether the law's functioning as a therapeutic agent supersedes law's another significant function of serving justice. David Wexler identifies a solution for resolving this issue, stating that the concern for the mental well-being of participants cannot impinge upon the apprehensions of justice being done.[27] In other words, a balanced approach needs to be considered where the law serves an ameliorative purpose while retaining the legitimacy of the legal process. For instance, while looking into the situational context of what inspired an offence, it is agreed that one must emphatically engage with all the dimensions of the victim of an alleged offence and their resultant suffering. However, at the same time, there must equally be a place for a critique to ensure that all reasonable doubts available to the accused have been explored. Thus, an investigation into the possible therapeutic outcomes of the legal process would not mean that therapeutic concerns would supersede civil rights and civil liberties.[28] This is further discussed in Part B of this section with regard to the Anna Stubblefield case – allowing D.J. to testify in the proceedings would have fulfilled both the objectives of justice and dignity. While it would have given a balanced view of the case and

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[23] David Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part*, 37 Monash University Law Review 1 (2011).

[24] Kate Diesfeld& Ian Freckelton,Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment 23, 26(1st ed., 2003).

[25] Bruce J. Winick & David B. Wexler, Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts 7, 13 (2003).

[26] Michael L. Perlin, *You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching*, 9 Clinical L. Rev.683 (2003).

[27] David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*,11 Behav. Sci. & L. 17 (1993).

[28] Michael L. Perlin, *A Law of Healing,* 68U. Cin. L. Rev. 2(2000).

made for a fair verdict, allowing D.J. to voluntarily participate in the proceedings would be recognition of his agency in the proceedings.

A relatively new concept, therapeutic jurisprudence has thus been described as bringing a "sea change in the ethical thinking about the role of the law"[29] in its pursuit to use the law to expand the scope of individual rights for psychological betterment. It signifies a shift towards a practice of law that distinctly considers the relation between the legal process and the individual, one which emphasises "psychological wellness over adversarial triumphalism."[30] As has already been established, therapeutic jurisprudence mandates that individual dignity is ensured, and this would require cases to be seen on a situational basis.[31] The particular circumstances of a case should be seen, and this precludes any uniform rule that may be applied. Additionally, the notion of individual dignity that was embodied in the concepts of self-worth, empowerment and self-determination,was the crux of a jurisprudential and moral outlook that brought about reforms in criminal justice institutions.[32] In a similar manner, there are certain principles central to the concept of therapeutic jurisprudence that must be followed by the courts, as we shall discuss in the subsequent part. Further, since people with disability are considered to be experts in their own experiences, law and the legal procedure should include the participation of people with intellectual disability in cases pertaining to their lives, bearing in mind such principles. In light of this, we have divided the section into two subsections – while Part A elaborates on the three 'V's, i.e., the three central tenets of therapeutic jurisprudence, Part B gives certain suggestions by which the legal process in the Anna Stubblefield case could have been made therapeutic.

A. THE THREE 'V'S CENTRAL TO THERAPEUTIC JURISPRUDENCE

Litigants must be given an opportunity to convey their side of the story, i.e., they must be given a sense of participation in the legal proceedings. In order to influence a decision, Professor Amy Ronner states that it is necessary that the "three 'V's" central to therapeutic jurisprudence, i.e., 'voice', 'validation', and 'voluntariness', be provided to them.[33] She stresses the importance of the "three 'V's" while making the argument that these are the basic concepts: the first, i.e.,

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[29] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework,* 8 J. L. & Med.3 (2001).

[30] Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, The Effective Assistance ofCounsel: Practicing Law as a Healing Profession 341- 363 (Marjorie A. Silver, 2007).

[31] Janine Benedet& Isabel Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief*, 52 McGill L.J. 2 (2007).

[32] Daniel Rothbart, Systemic Humiliation in America: Finding Dignity within Systems of Degradation 186 (2018).

[33] Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to BartlebySyndrome*, 24 Touro L. Rev. 4 (2008).

'voice', implies that litigants must have the right and ability to make themselves heard and to make their experiences and perspectives available to the decision maker.[34] They must have a sense of voice to participate in their construction of self and to decide how to represent the self to others. This is linked to the second concept of validation, when the litigant feels that their version of the event has been genuinely taken into account by the tribunal – in short, recognition fosters a sense of validation.[35] Ronner writes that the two together allows the individual to feel that his legal participation is that of his own free will rather than the legal proceedings forcibly compelling him to do so.[36] When the legal proceedings allow the participants to have a sense of voice and validation, they are relatively satisfied with the outcome. When the litigants feel that they have voluntarily participated in bringing about the end result, or a judicial pronouncement that has a direct effect on their lives, it creates a sense of control and initiates healing. In short, she writes that human beings thrive when they believe that their decisions are attributable to their own choices.[37] This is a legal process that gives litigants a chance to be a part of the proceedings, warrants their faith, and considers their individual autonomy.[38]

The judge presiding over the Stubblefield proceedings refused to consider the validity of FC as a legitimate mode of communication while deciding the matter, thus excluding all FC related evidence. Moreover, no text from D.J.'s keyboard was allowed to be introduced, as ruled by Judge Teare at the onset of the trial itself.[39] We note that this in itself should be considered as a setback to the first tenet of the concept of therapeutic jurisprudence, where the first 'V', i.e., Voice – was taken away from the victim by the legal process. It is to be discerned that FC was the only mode through which D.J. could communicate and make his wishes known (according to Stubblefield and her lawyers) here, notwithstanding the fact that FC had been debunked as a pseudo-science. When the court made such communications via FC inadmissible in a case like this,[40] it denied D.J. a voice in the trials. Instead, it should have made all possible attempts to make an effort to grant him some form of agency which was required in order for him to testify.[41]

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34 *Id*.

35 *Id*., 601.

36 *Id*.

37 Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles,* 71 U. Cin. L. Rev. 89 (2002).

38 David B. Wexler, Michael L. Perlin, Michel Vols, Pauline Spencer&Nigel Stobbs, *Current Issues in Therapeutic Jurisprudence*, 16 QUT L. Rev. 3 (2016).

39 Daniel Engber, *Talking Without Talking*, Slate Magazine, April 11, 2017, available at http:// www.slate.com/articles/health_and_science/science/2017/04/will_anna_stubblefield_get_a_new_trial_in_her_facilitated_communication.html (Last visited on January 16, 2018).

40 State of New Jersey v. Marjorie Anna Stubblefield, 2017 Superior Court of New Jersey, Appellate Division, Docket No. A-02112-15T1, ¶40.

41 David M. Perry, *Sexual Ableism*, Los Angles Review of Books, February, 25, 2016, available at https://lareviewofbooks.org/article/sexual-ableism/ (Last visited on January 16, 2018).

Further, with respectto the second 'V', i.e., validation, as per Ronner's theory,[42] it is argued that the victim in the present case did not receive any sense of validation even after undergoing the cumbersome legal process. During the entire course of the trial, the prosecution painted a picture of D.J. as someone who by reason of his mental disability could not have been possibly considered sexually desirable by anyone. This reflects a common global experience of people with disabilities, where society fails to view them as sexual beings.[43] The interview-given by one of the jurors perfectly signifies this underlying ableist assumption at display during the course of the said trial. He was found on record stating that, "*I couldn't understand why she did it when I did see him…I was like, you're going to leave your husband and your kids for someone like this?*"[44] The individuality of D.J. as a human being was disregarded, as was his ability to feel and communicate sexual desire, if any, felt by him. This ultimately resulted in giving way to the assumption of 'undesirability of disability'. Michael Gillcallsthis form of prevalent sexual ableism and undesirability of disability and disabled bodies as a contradiction of sexual capability where individuals with intellectual disabilities are desexualised.[45] In other words, people with intellectual disabilities are perceived as unable to participate in voluntary social interaction as per him; a common view that disabled people's sexuality is intrinsically tied to their disability implying that anything sexual, that is not a direct result of their disability, is disregarded. This remains true whether it be the prejudice and discrimination faced by them or the effect of the incomplete, disadvantaged body.[46] Moreover, Gill in his book warns the readers about the danger of a single story, arguing that reducing people to only a sum of their disability while ignoring the other aspects of their personhood makes it harder for us to recognise their equal humanity.[47] Discussing the interplay of sex and intellectual disability, Gill states that people generally only consider what seems them to be the most 'likely' singular story of victimhood. They do not consider any other narrative. In such a case, we bring our own idea of what that story must be to the facts, modifying them to fit our predetermined biases. When discussing issues of sexual and reproductive rights in conjunction with differently abled individuals, Gill writes that the most common response he encounters to such discussions is that which imagines the most 'severe' case. He propounds that by attempting to state that individuals with 'severe' mental disabilities are not worthy of being given sexual and reproductive rights, such responses seek to discredit

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42 Ronner, *supra* note 33.

43 Jane Maxwell, Julia Watts Belser& Darlena David, A Health Handbook for Women with Disabilities (1sted., 2008).

44 Bill Wichert, *Juror explains why professor was convicted of sexually assaulting disabled man*, New Jersey Advance Media News, October 3, 2015, available at http://www.nj.com/essex/index.ssf/2015/10/why_was_professor_convicted_of_sexual_assaulting_d.html (Last visited on January 16, 2018).

45 Michael Gill, AlreadyDoing It: Intellectual Disability and Sexual Agency 106 (2015).

46 RenuAddalakha, Janet Price & Shirin Heidari, *Disability and Sexuality: Claiming Sexual and Reproductive Rights*, 25 Reproductive Health Matters50 (2017).

47 TED Talks, *Chimamanda Ngozi Adichie*: *The Danger of a Single Story*,October 7, 2009, available at https://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story/up-next (Last visited on December 15, 2017).

any efforts towards securing such rights.[48] According to him, these responses only consider a single narrative, without taking individual cases into account.[49]

It is to be noted here that taking a look at the Stubblefield case, one can easily discern that the judge presiding over the case as well as the jury buys into only one of the possible narratives. In their opinion, the sexual relationship between a highly renowned professor and her patient who was a disabled man, could not have possibly been a consensual one and could only be termed rape. This is evidence of the ableist fetishism of disability,[50] which mocks the person with disability in sexual relationships,[51] and glorifies or vilifies their non-disabled partners,[52] due to the attribution of no agency on part of the former. In such a situation, we argue that it would have been impossible that the victim would attain any sense of validation by participating in the legal process which only pitied him owing to his disability rather than trying to make an actual attempt to give him an agency to testify and make his voice heard before the courts. Thus, in our opinion, the legal institutions at work in the Stubblefield case failed to give D.J. any sense of validation, resulting in an impediment to Ronner's second central tenet of the principles of therapeutic jurisprudence.

Coming to Amy Ronner's third and last tenet of the principle of therapeutic jurisprudence, i.e., voluntariness, it is pointed out that it is only when the two aforementioned principles of voice and validation are accorded to them that the litigants emerge from the legal outcome with an active sense of participation; one which makes their experience of the proceedings less coercive.[53] Following this thread, we argue that in the present case, D.J. had no feeling of control over the decisions that were made for him by the judge and the jury, as these were made without taking into consideration his voice or giving him any sense of validation (as described in the paragraphs above). The process did not even attempt to make him an effective participant in the course of the said trial,which if done otherwise, could have resulted in the healing of the victim. In such a scenario where D.J. was reduced to a mere unconscious object, the entire motive of the legal process, to bring justice to the victim, failed.

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48 Gill,*supra* note 45,72.

49 *Id*.

50 Privacy R. Adams, *Dependency, Discegenation: Toward a Sexual Culture for People with Intellectual Disabilities,* 35 Disability Studies Quarterly 1 (2015).

51 Campbell F. Kumari, *Refusing Able(ness): A Preliminary Conversation About Ableism*, 11 M/C/ Journal 3 (2008).

52 Kim Sauder, *'Why are you Complaining? Some People Actually Feel that Way: A Critique of 'Me Before You'*, The Huffington Post, May 23, 2016, available at https://www.huffingtonpost.com/kim-sauder/why-excitement-me-before-you-is-deeply-troubling_b_10108260.html (Last visited on January 24, 2018).

53 Ronner, *supra* note 33, 94-95.

B. SUGGESTIONS FOR INCORPORATION OF PRINCIPLES OF THERAPEUTIC JURISPRUDENCE

In this context, it needs to be stated that 'effective participation' entails that the participant, be it a victim or an accused, comprehends the character of the trial process and the implications of the possible outcomes, including any penal ramifications.[54] This also means that an interpreter, a lawyer, a social worker or a friend may be called to assist him, in order for him to understand the general thrust of what is being said in the court.[55] The application of therapeutic jurisprudence principles is an ongoing process. In the present case, this would entail D.J.'s involvement at all stages of the legal proceedings, in terms of both, giving his testimony as well as understanding what was being said. Thus, instead of bringing about a reform in the legislature, it is a method of reforming the practice of law itself – analysing how law may be applied in order to bring about therapeutic consequences. In the present case, this would imply following inclusive legal methods that would not have reduced D.J. to a non-speaking exhibit. The application of therapeutic jurisprudence principles by the courts, and the extent to which they are applied, can be viewed on a continuum.[56] In Anna Stubblefield's case, at one end of this continuum, therapeutic jurisprudence principles could have been practiced by the judge in the courtroom by allowing alternative means of communication for D.J., through a concept known as communication accessibility.[57] At the other end of the continuum, the entire trial could have integrated therapeutic jurisprudence principles within the legal procedure as well as the decision-making process, either by use of non-ableist language or through a liberal admission of evidence.

Therapeutic jurisprudence mandates that judges be aware that they function as therapeutic agents and employ an ethic of care.[58] Access to an appropriate augmentative communication system for D.J., which would allow him to express himself, would fulfil this particular requirement.[59] A much more substantial way of interacting with D.J. could have been incorporated by way of communication accessibility, by taking material or discursive actions to include alternative

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[54] SC v. United Kingdom, 2004 ECHR, 40 EHRR 121, ¶29 (stating the ruling by the European Court of Human Rights that the applicant's right to a fair trial had been breached because he had not had 'effective participation' in the trial).

[55] Polly McConnell & Jenny Talbot, *Mental Health and Learning Disabilities in the Criminal Courts: Information for Magistrates, District Judges and Court Staff*, The Prison Reform Trust & Rethink Mental Illness (2013), available at http://www.mhldcc.org.uk/media/493/rmi_prt_mhldcc_sept2013.pdf (Last visited on March 30, 2018).

[56] David Rottman& Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, 240Nat'l Inst. Just. J. 12-19 (1999).

[57] Zach Richter, *Some Notes on Communication Accessibility: A Term Just Now Finding Life*, December 1, 2015, available at https://www.didistutter.org/blog/-some-notes-on-communication-accessibility-a-term-just-now-finding-life (Last visited on February 28, 2018).

[58] Winick & Wexler,*supra* note 25.

[59] Kevin Mintz, *Ableism, Ambiguity, and the Anna Stubblefield Case*, 32 Disability and Society 10 (2017).

ways of communicating.[60] This would include admitting testimonies obtained through FC, as discounting these would make it difficult to determine whether justice was being done. In such a situation, consent or its lack thereof, became a detail shrouded in ambiguity. Enabling D.J. to find his 'voice' in the legal proceedings, whether through FC or through witness testimonies, would have made him an active agent in the decision-making process. To uphold this tenet of therapeutic jurisprudence, Winnick and Wexler propose that judges who might be interested in learning more about therapeutic jurisprudence could get training by courts and academic experts.[61] Further, keeping abreast of social science principles that could have been applied in the present case could also have helped in the overall decision-making process.[62]

On a more systematic and operational level, the court system could have offered expertise or provided resources,[63] in the form of a prosecutor who had basic knowledge of D.J.'s disability, so that he could ensure that D.J. was represented with respect and dignity instead of portraying him as a freak. The prosecution highlighted the fact that D.J. wore diapers, to depict him as a child who would be unable to give sexual consent.[64] While this was not in any way indicative of D.J.'s intellectual capacity, the purpose that was sought to be achieved through this statement was the portrayal of D.J. as an infant. In light of how briefly he was paraded before the jury, therapeutic jurisprudence principles suggest that he should not have been infantilised. Incapacity to give consent should not have been seen in the wake of how D.J.'s behaviour differed from that of 'normal' people. On the contrary, his activities and expression should have been seen from a different perspective, and his agency should have been taken into account. In addition to D.J.'s treatment as an exhibit, disability studies scholars have also critiqued the language used in the case.[65] In court documents, D.J. was described as suffering from cerebral palsy and mental retardation, with 'the mental capacity of a toddler'.[66] Unfortunately, the language of the court system, as evinced in this case, is often disablist. Given that the courts need to use the specific language of the criminal code in their verdicts,[67] alternative language to the term 'mental retardation' was not possible in this case. Nevertheless, it would have been possible to use an alternative word other than 'suffering' to describe the experience of having cerebral palsy. For instance, a simple description of D.J. as an individual with cerebral palsy would have sufficed for the purpose of identification.

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60 Richter, *supra* note 57.

61 Winick & Wexler,*supra* note 25.

62 *See also* Amy Rublin, *The Role of Social Science in Judicial Decision Making*, 19 Duke Journal of Gender Law and Policy 1 (2011) (discussing that the social context in which the law is applied is not static and evolves over time, it is therefore imperative to examine the interplay of social science and law).

63 *Id*.

64 Roe v. Rutgers, The State University of New Jersey, 2013SDW, Civil Action No. 13-1762.

65 Mintz, *supra* note 59; Sherry, *supra* note 14.

66 Engber, *supra* note 15.

67 Sherry, *supra* note 14.

Therapeutic jurisprudence also requires that courts tailor their approach while dealing with the particular aspects of a case.[68] In this case, this would include admitting evidence from sources that provided a holistic view of D.J.'s intellectual capacity. During the course of the trial, a witness(an assistant) who had met with D.J. as a college student was forbidden from testifying and telling the jury of her interactions with him.[69] This amounted to the repression of what could have been invaluable information as to D.J.'s psyche, since allowing her to talk about her experience with D.J. would have allowed her a chance to convince the jury of her reasons for her anomalous perception of D.J.'s capabilities. In the present case, the facts of the case were highly unusual, and in order to decide on a fair judgement, it was necessary to render a complete account of the events. Hence, a liberal admission of evidence supporting the defendant's defence, if allowed, would have better served the purpose of therapeutic jurisprudence. In the same vein, therapeutic outcomes in consonance with legal values could be discussed in the admission of evidence in courts by convening discussion groups with scholars and practitioners to consider the issues of paramount concern to the courts in their jurisdiction and the ways in which therapeutic jurisprudence might address those issues.[70] In Anna Stubblefield's case, incorporation of therapeutic jurisprudence principles in the above manner would have improved the court's performance by providing jury members with information about D.J.'s capacity to consent, and hence, giving a balanced view of the case. Efforts to understand the matter should have been guided by the understanding of his sexuality by people who were themselves differently abled. This understanding should have been recognised by developing context-specific strategies to facilitate the same.

Thus, we can see that the trial in the Stubblefield case ultimately resulted in making the entire experience of the proceedings coercive for D.J. rather than inviting his voluntary participation in the same, frustrating the concept of therapeutic jurisprudence as a consequence. The legal institutions in this case failed in every aspect when they were approached to provide D.J., the three 'V's ('voice', 'validation' and 'voluntariness'). Further, if the judges in the case would have been versed with the aforementioned concept, measures could have been adopted and help could have been provided for D.J. that would have ensured his participation in the proceedings with dignity, instead of being 'exhibited' and treated as an object. As evidenced in the Stubblefield case, not all individuals of different disabilities have been conceived as persons and rights holders. This highlights the need for amplifying the possibilities of terms under which "humanness"

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[68] For instance, judges and other legal actors while dealing with juvenile drug addicts understand that, adolescents often respond differently from adults, as they are more inclined to risk-taking behaviour. As a result, common techniques used for adult drug addicts might be totally ineffective or have anti-therapeutic consequences for juvenile offenders. *See* Monica K. Miller & Brian H. Bornstein, Stress, Trauma, and Wellbeing in the Legal System (2013).

[69] Colleen Flaherty*, Second Chance for Fallen Philosopher,* June 12, 2017, available at https://www.insidehighered.com/news/2017/06/12/professor-accused-raping-disabled-man-sees-her-convictions-overturned (Last visited on February 28, 2018).

[70] Winick & Wexler,*supra* note 25.

is conferred.[71]Hence, it is to be noted that there are many critical issues at play in this matter which remain unresolved because our society still seems uneasy and uncomfortable while talking about sexual agency of mentally disabled people.

IV. HIDDEN PREJUDICES AGAINST THE MENTALLY DISABLED: UNDERSTANDING SANISM AND PRETEXTUALITY

Michael L. Perlin in his book '*The Hidden Prejudice: Mental Disability on Trial*' discusses the ways in which both lawyers and judges discount and trivialise the experiences of people with mental illnesses.[72] The author discusses how 'sanism' is a concept akin to that of 'racism' – a prejudgement against a minority community.[73] Subsequently, he discusses the manner in which differently abled individuals are denied equal treatment under the law owing to an identifiable pattern of prejudices against them.[74] This is evident in the case at hand when we go through a written account of the Stubblefield trial from the perspective of some differently abled people who were witnessing the opening day testimony in this trial.[75] We get to see an altogether different narrative, one which is neither popular nor gets noticed by people who are not disabled. On reading the said accounts, we find that there were many ableist assumptions on displayat these hearings. These written accounts claim that apart from the fact that the trial was unresponsive to D.J.'s needs, discriminatory attitudes about disabled people in general, and about D.J. in particular, could be clearly noted in every instance of the legal proceedings. This included the assumption that one could gauge D.J.'s mental capabilities simply by looking at him.The interview given by the juror, wondering aloud how Anna could have left her husband and kids for "someone like D.J.",[76] displayed the anxiety, vulnerability and fear often felt by non-disabled people in response to disability.[77] Further, statements such as these make one realise that there was an underlying assumption about D.J., one that was deeply rooted in prejudice, where D.J. was seen neither as someone who could be considered a human being with ambitions and passions of his own, nor as someone who might be seen as attractive to another.

Judges, lawyers, or fact finders deliberately turn a blind eye to the rendering of faulty evidence, and rationalise their decision based on such disregard

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71 Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 Canadian Journal of Law and Jurisprudence 2 (2002).

72 Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial 26, 27 (2000).

73 *Id*., 14, 16.

74 *Id*.

75 Astra Taylor, *Anna Stubblefield was convicted of raping her disabled student. But was the Trial Fair?*, Splinter News, November 12, 2015, available at http://splinternews.com/anna-stubblefield-was-convicted-of-raping-her-disabled-1793852818 (Last visited on January 16, 2018).

76 Wichert, *supra* note 44.

77 Addalakha, Price &Hiedari, *supra* note 46, 4-5.

as being one that is given on the pretext of improving the society. Such decisions are rooted in sanism.[78] Perlin states that the basis of this testimonial dishonesty is that the final outcome would excuse any such wrongs.[79] In cases involving the mentally disabled, these end results are found on the prejudicial belief that such individuals, being less intelligent less responsible than non-disabled individuals, deserve a smaller quantum of citizenship rights as well.[80] A possible reason for this could be that the disability industry actively disenfranchises people with disability in many ways, placing the physiological needs of a person (breathing, food, water, shelter, clothing, sleep) ahead of other needs such as love and sexual pleasure.[81] The natural exploration of sexuality and sexual expression, to which people without disability are accustomed, essentially meets the other needs of social security and belonging, as well as that of affection and self-esteem, among others.[82] However, this is not the natural assumption for people with disability. People with intellectual disability, in particular, are not often given support to understand their sexual rights.[83] Something to take particular note of at this juncture is the fact that this form of discrimination against mentally ill people, historically common in various cultures, and whose effects can still be observed on our legal system, remains to be hidden for some reason. Looking back at the two different accounts of the case at hand mentioned in the earlier paragraph, it is important to note that the ableist assumptions made by the District Court in the proceedings would not ordinarily be noticed by non-disabled individuals.[84]

Perlin argues that 'sanism' stays hidden because the most liberal group of individuals among lawyers, judges, psychologists, and psychiatrists, while eliminating the other '-isms' perpetuate sanism.[85] It is imperative to note that Perlin, in anarticle later, defined 'sanism' as "*an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.*"[86] Numerous instances provided throughout the course of the trial high-

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78 Perlin, *supra* note 72, 16.

79 *Id*., 24-25.

80 Felipe Jaramillo Ruiz, *The Committee on the Rights of Persons with Disabilities and its Take on Sexuality*, 25 Reproductive Health Matters 50 (2017).

81 Rebecca Meaney-Tavares & Susana Gavidia-Payne, *Staff Characteristics and Attitudes towards the Sexuality of People with Intellectual Disability*, 37 J Intellect. Dev. Disabil. 3 (2012).

82 As described by Maslow in his Hierarchy of Needs, where humans have certain physiological needs, seen in a 'pyramid form' in a hierarchy of importance; *See* A. H. Maslow, *A Theory of Human Motivation*, 50 Psy. Rev. 4 (1943).

83 C.E. Brolan, et al., *Health Advocacy:A Vital Step in Attaining Human Rights for Adults with Intellectual Disability*, 56 J. Intell. Disabil. Res. 11 (2012).

84 Taylor, *supra* note 75.

85 Perlin, *supra* note 26, 27& 72.

86 Michael L. Perlin, *Things Have Changed: Looking at Non-Institutional Mental Disability Law Through the Sanism Filter,* 46 N.Y.L. Sch. L. Rev. 3-4 (2003); *See also* Michael L. Perlin, *On "Sanism"*, 46 SMU L. Rev. 2 (1992) (identifying prejudice toward the mentally ill among "well-meaning citizens" as the same "quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry," which in turn is reflected in our legal system); *See*

lighted the *enfreakment*,or the 'otherness' of D.J.[87] From the fact that D.J. was not given a seat in the courtroom, as is the norm for a witness, one can deduce that he was not considered a conscious person at all, being presented only as an exhibit for demonstration.[88] Added to this, the fact that during the course of the trial, it was stated quite a few times that "*...he scoots on his butt on the floor to move around.*"and that "*...sometimes he might grab a banana and eat it with the peel still on*" while referring to his disability and his inability to perform basic motor functions, showcases the multiple incidents served to reinforce this 'freak' status.[89] The prosecution, by doing this, tried to paint a picture of D.J. as an 'unaware animal' – when instead, these actions could also be conversely interpreted as acclimatisation: it could have been the case that scooting on the floor to move about and eating a banana, as described, meant that D.J. had found a unique way to adapt to his disability. There have been research studies to this effect which demonstrate that people with congenital disability are better adapted than those with acquired disability, and that their actions should not be viewed through the lens of 'normalcy'.[90] An attempt at normalisation translates into the disability industry ensuring that such people are "behaving appropriately", both in their own homes and in the public, and this amounts to social restraint.[91] Expressions of pleasure by people who are pre-verbal or non-verbal, for example, by making noises, may be discouraged and repressed by their caretakers, to ensure that they fit within social norms.[92] Natural expressions of joy, pleasure, grief, pain and so on, are limited to what is determined as socially appropriate, and thus, people with intellectual disability are forced to fit their expressions to what is externally determined.[93]

Although the credit for coining the term 'sanism' goes to Dr. Morton Birnbaum,[94] who has been credited with developing the concept of the 'right to treatment'– which then became a constitutional basis for the just and humane treatment of psychiatric patients, Perlin's definition of the term 'sanism' reflects the current scenario which influences our jurisprudence and our legal practices.[95] Perlin argues that 'sanism' usually goes unnoticed, and due to its reliance upon

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*generally*Gordon Allport, The Nature of Prejudice (1979) (elaborating upon a landmark study on the roots and nature of prejudice).

87 Taylor, *supra* note 75.

88 Engber, *supra* note 15.

89 *Id*.

90 Kathleen R. Bogart, *The Role of Disability Self-Concept in Adaptation to Congenital or Acquired Disability*, 59Rehabilitation Psychology 1 (2014).

91 Miriam Taylor Gomez & Fran Vicary, *Disability Empires: Some Observations*, Lifestyle in Supported Accommodation Inc, 2012, available at http://www.lisainc.com.au/disability__empires__believe_they_are_doing_society_a_favour (Last visited on January 24, 2018).

92 Natasha Alexander & Miriam Taylor Gomez, *Pleasure, Sex, Prohibition, Intellectual Disability, and Dangerous Ideas*, 25 Reproductive Health Matters 50 (2017).

93 Sheridan Forster, *Stop Asking, Hands Down, Swoosh: Social restraint in the Name of Appropriateness?*, available at https://www.asid.asn.au/files/691_36_forster_social_restraint.pdf (Last visited on January 24, 2018).

94 Morton Birnbaum, *The Right to Treatment,* 46 A.B.A J. 5 (1960).

95 Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*,28 Hous. L. Rev. 1 (1991).

false beliefs, stereotypes and de-individualisation, it is mostly allowed in society. It is maintained and bolstered by our use of alleged "ordinary common sense" ('OCS')[96] and heuristic[97], reasoning in an unconscious response to events both in everyday life and the legal process.[98]

In the light of these arguments, it is evident that our sanism and hidden prejudices are reflected when we, as a society, patronise the sexual needs and desires of the mentally disabled, refusing to consider them as autonomous individuals. During the United States presidential campaign in 2017, an advertisement called 'Grace' was released.[99] While at first glance, it seemed to be advocating for the rights of disabled people, it ultimately played into the stereotype of regarding persons with disabilities as innocent and vulnerable,[100] stripping them of agency and treating them as children instead. Alternatively, it is assumed that people with mental disabilities possess an animalistic hyper sexuality which must be contained to restrict them from acting on these basic urges.[101] This justifies the imposition of restrictions on their sexual behaviour. This is evidenced by a 2012 incident in West Bengal, where a mentally challenged woman was sexually assaulted in the government mental hospital.[102] When contacted by women activists, the hospital superintendent refused to entertain the matter, stating that it was the woman's fault as "mentally ill women usually cannot control their sexual urges".[103] In this context, where the sexuality of differently-abled individuals is construed as being on either one of the extreme ends of the spectrum, i.e., as being either hypersexual or non-sexual, one needs to examine how such individuals have their own sexual subjectivity.[104] Perlin notes that instead of their integration into the 'normal' society as people who share common physical, emotional and spiritual needs, the focus is on the ways in which people with disabilities are allegedly different. This serves as a ground for depriving them of the basic standard of humanity.[105] Their

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96 'Ordinary Common Sense' is a 'pre-reflective attitude' exemplified by the attitude of 'What I know is "self-evident"; it is "what everybody knows"'.*See* Keri K. Gould & Michael L. Perlin, *"Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudenceand Clinical Teaching*,24 Seattle U. L. Rev. 339, 357 (2000).

97 'Heuristics' is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information processing tasks; *See* 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'y 239, 254 (1994).

98 Michael L. Perlin, *Psychodynamics and the Insanity Defence: "Ordinary Common Sense" and Heuristic Reasoning,*69 Neb. L. Rev. 3 (1990).

99 Priorities USA, *Grace*, June 6, 2016, available at https://www.youtube.com/watch?v=9QUYQUd0Qh8 (Last visited on April 13, 2018).

100 David M. Perry, *AClinton Ad Full of Disability Stereotypes*, The Atlantic, June 12, 2016, available at https://www.theatlantic.com/politics/archive/2016/06/grace-clinton-ad-disability-stereotypes/486710/ (Last visited on April 13, 2018).

101 Perlin, *supra* note 2.

102 AshwaqMasoodi, *Sexual Rights of Disabled Women*,December 3, 2014, available at https://www.livemint.com/Politics/FDPpol4lJ0pX037spUU1kL/Sexual-rights-of-disabled-women.html (Last visited on April 13, 2018).

103 *Id*.

104 Addalakha, Price &Hiedari, *supra* note 46, 5.

105 Perlin, *supra* note 2.

autonomy to show love and affection is denied, and their actions and feelings are censored on the assumption that theirs is a primitive morality.[106] This disparate treatment extends to the denial of any professed expression of sexuality. Sexuality and sexual expression are inherently connected to the humanness of the individual, and the present status quo at best ignores sexuality as an integral part of a person's life and, at worst, prohibits sexual expression for people with intellectual disability.[107] A case study that interviewed teenagers with disabilities showed that despite having sexual desires, they had been told by society that sex for them was a taboo subject. Their responses ranged from "my disability does not allow me to have a boyfriend" to "they [society] judge us by our disabilities and ignore our feelings and desires".[108] In another such situation, an open letter to the director of a critically acclaimed movie (that touched upon the issue of sexual expression by individuals with cerebral palsy) written by a non-disabled actress declared that, "for a disabled person, sex was the last thing on their mind as there were so many different things to worry about."[109]

It is to be noted that this might be the very reason why so many of us (including the above mentioned juror in the Stubblefield trial) have so much difficulty in dealing with the issue of sexual autonomy when it comes to disabled people. In this context, analysing the manner in which persons with disabilities are denied any sexual expression by society, it seems unlikely that the three tenets of Professor Ronner's vision would be attained. In an analysis of these underlying issues, Benedet and Grant have dealt with the issue of capacity to consent by viewing it through a therapeutic jurisprudential filter.[110] The definitions of the "capacity to consent" and "engage in sexual activities" have been dealt with by the authors in their paper, and they have considered the issue of ensuring that such definitions remain person-centred and allow for a "situational approach" to each case.[111] They write that a person's sexual autonomy must be considered, and their agency maximised, rather than considering the ability to consent as an all-or-nothing measure. Incapacity should be defined situationally in a functional manner. Considering that consent is given in a particular instance to a particular person, incapacity should also be assessed with reference to the particular context of a case or situation.[112] However, it is imperative to note that Benedet and Grant's consideration of the individual autonomy and sexual agency or self-determination, which are both

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[106] *Id*.

[107] Alexander & Gomez, *supra* note 92, 114.

[108] AkshayPrathisthan (NGO) & Children and Youth Studies, *The voices unheard – Exploring how young people with disabilities view and experience their growing up as sexual beings*,International Institute of Social Studies(2012), available at http://hdl.handle. net/2105/13286 (Last visited on April 13, 2018).

[109] India Today, *TV actor SonalVengurlekar writes an open letter to Margarita With A Straw's director Shonali Bose,* April 24, 2015, available at https://www.indiatoday.in/television/top-stories/story/tv-actor-sonal-vengurlekar-writes-an-open-letter-to-margarita-with-a-straws-director-shonali-bose-250088-2015-04-24 (Last visited on April 13, 2018).

[110] Benedet& Grant, *supra* note 31.

[111] *Id*., 245.

[112] *Id*., 245-247.

principles inherent in the concept of the dignity of an individual, have not yet been elucidated upon, either in case law or legislation. This implies that the concept of therapeutic jurisprudence – where the legal process may take into consideration a person's overall well-being, has mostly not been given effect to.[113] While looking at the proceedings of the Stubblefield case, it cannot be said that this 'situational approach' was even considered once before determining the question of D.J.'s capacity to consent. The factors that were considered only served to emphasise his 'abnormality'. The fact that he could not communicate or perform basic motor functions like a normal person designated him a status equivalent to that of an unaware infant. Thus, the trial fails yet again by therapeutic jurisprudential standards and cannot be considered a fair trial for this reason.

V. ENFREAKMENT OF LANGUAGE: DISABILITY AND UNDESIRABLE BODIES

The discussed issues of sanism, hidden prejudices against people with mental disability and undesirability of their bodies is deeply embedded in the language that we use in our day to day lives. For example, a disabled student in an interview described being approached by a mother who, referring to the student's dwarfism, said, "My son is married to someone like you."[114] This encapsulates the process employed by us to impose an identity of 'other' on the differently abled individual. In an analysis of such language, reliance is placed upon Stephanie Wheeler's work where she discusses how the manner in which we perceive and give meaning to things is largely shaped by a eugenic approach.[115] In the course of such discussion, she uses two concepts: *'enfreakment'*,where the elements that are considered worthy or desirable are singled out or identified (alternatively, this would also entail the recognition of elements that are abhorred) and *'eugenicist logics'*, which encapsulates the removal of such unwanted elements, or alternatively, the replication of elements considered 'useful'.[116] Upon this, she then notes the interplay of eugenicist logic and enfreakment within ableist systems, and evolves the concept of '*the enfreakment of language'*, a term that incorporates both the manner in which 'enfreakment' is imposed upon individuals as well as the heuristic that allows us to observe this practice. This was evidenced by the ableist expressions of grief that followed the death of disabled genius Stephen Hawking.[117]People spoke of Hawking being eventually free of his constrictions,

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[113] Perlin, *supra* note 2.

[114] Nicola Martin, *Brief Relections on Disability Theory, Language, Identity, Equality and Inclusion*, LSE Blog, May 13, 2011, available at http://blogs.lse.ac.uk/equityDiversityInclusion/2011/05/brief-reflections-on-disability-theory-language-identity-equality-and-inclusion/ (Last visited on April 13, 2018).

[115] Stephanie K. Wheeler, *The Enfreakment of Language: Disability, Eugenics, and Rhetoric*, available at http: //hdl .handle .net /1969 .1 /152544 (Last visited on January 22, 2018).

[116] *Id*.

[117] Philly, *To Able-Bodied People Mourning the Passing of Stephen Hawking*, The Mighty, March 16, 2018, available at https://themighty.com/2018/03/responding-to-ableist-tributes-to-stephen-hawking/ (Last visited on June 8, 2018) (The article mentions tweets where mourners referred

and how his "suffering had finally ended"[118]– unwittingly misconstruing disability as a disease that one needed to be free from, to be happy, and in Hawking's case, stating that freedom from his disability took the form of death. Thus, according to Wheeler, the concept of *'enfreakment of language*' reveals the manner in which our meaning-making is dependent on the logic of eugenics. This is a dependency which is perpetuated by ableist discourses in an effort to maintain power which is detrimental to the bodies which become subjected to the power gained through this logic.[119] The presentation of D.J. as a non-verbal 'demonstrative exhibit' in the court proceedings seeks to emphasise on this perspective of enfreakment, whereby denial of his ability to give testimony was a denial of his inherent humanness, and showcased the ableist assumption made by the legal institution that he was different, and somehow 'less' than the non-disabled people called upon to give their account.

In the paper, Wheeler goes on to argue that the language that we use in our day-to-day lives is inherently ableist because it functions primarily through eugenicist and ableist logic.[120] She makes this claim based on the fact that because of the relationship to eugenicist logics, any representation of disability is always in the process of 'enfreakment', and this produces a unique illusion of 'accomplishment' that ableist systems can achieve by means of discouraging the reproduction of undesirable qualities or traits.[121] Perhaps the most famous characterisation of this attitude is embodied in the statement of United States Supreme Court judge, Justice Oliver Wendell Holmes, who in *Buck* v. *Bell*,[122]a case that raised the issue of whether an allegedly intellectually disabled woman should be sterilised, said, "Three generations of imbeciles are enough."[123] It is to be noted that 'ableism' here is used to refer to the power structure designed to construct 'ability' and 'normalcy' through the manipulation and removal of what deviates from models of 'normalcy'. In the present case, the juror expressed his disdain for D.J. by wondering why an able-bodied Anna Stubblefield would disrupt her life for *'someone like [D.J.]'*,[124] showcasing his prejudice in the form of incredulousness that D.J. could be sexually desirable by anyone, especially an able-bodied person. The prosecution in this case did everything to make sure that the presiding judge and the jury did not, even for a moment, consider D.J. as a being capable of having agency or desires and aspirations of his own, even when arguing in his favour. Further, the

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to Hawking as being 'limited' to a wheelchair, and those that state that he accomplished much, 'despite suffering from a debilitating disease')

118 Amba Salelkar, *Celebrating Stephen Hawking and also Celebrating Disability*, The Wire, March 16, 2018, available at https://thewire.in/society/celebrating-stephen-hawking-and-celebrating-disability (Last visited on April 13, 2018).

119 Anna Kerchy, Exploring the Cultural History of Continental European Freak Shows and 'Enfreakment' 2, 3 (2013).

120 Wheeler, *supra* note 115.

121 *Id*.,7.

122 Buck v. Bell, 1927 USSC, 274 U.S. 200.

123 *Id*., 207; *See also*PaulA. Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell (2009)(It discusses the theoretical underpinnings of Holmes' statement).

124 Wichert, *supra* note 44.

prosecution's account of D.J.'s activities – that he "*scoot[ed] on his butt to move around*", and that he "*[ate] a banana with the peel still on*"portrayed D.J. as an unconscious animal, someone who couldn't even perform basic motor functions like moving or eating on his own, let alone give consent to any kind of pleasurable sexual activity. D.J.'s deviation from the accepted norms of behaviour was taken as evidence of him being 'inferior' to those who were non-disabled.

Contextualising disability, we will now proceed to interrogate and confront the ways in which ableism and eugenics are implicated in cultural, linguistic, and discursive practices. This understanding will open up new ways of recognising what is assumed to be the 'able' body and privileged logics in rhetorical theories, practices, and models of meaning-making. For doing this, we will make use of Rakesh Roshan's 2003 Bollywood movie '*Koi Mil Gaya*',[125] which tells the story of a cognitively mentally impaired individual, 'Rohit'. The protagonist of this story (Rohit), owing to his cognitive impairments, is still in middle-school even after being aged enough to have ordinarily graduated high-school/college. Owing to this, he often becomes the butt of peoples' jokes. However, when he accidentally encounters and befriends an Extra Terrestrial ('E.T.') creature, Rohit starts discovering that the E.T. is somehow responsible for enhancing Rohit's physical and mental attributes using some form of alien super power. This results not only in Rohit being accepted by his teachers and peers in school and in society but also finds him his love interest who until this point of time only saw Rohit as a friend and pitied him for being 'abnormal'.

It is to be noted that the E.T. is also responsible for enhancing Rohit's weak body to maximum human potential, making him hyper-masculine and attractive enough to the girl he desires. Rohit's story of initially being a cognitively impaired individual with learning difficulties to a super-intelligent and hyper-masculine man gives us an idea of the very specific narrative about our society's relationship to eugenics, enfreakment and disability, and how these concepts inform our understandings of 'normalcy' and 'superiority', as well as the various ways in which we make meaning. Rohit's story relies upon the idea of superiority in both body and mind as the path to success, wherein disability is seen as an element which hinders that success. These understandings of cultural rhetorical practices and acts of meaning-making rely on conceptualisations of disability as hindrances to 'successful' deployments of making meaning. For example, participants in an interview who were asked questions regarding their disability and its societal perception stated that they were often treated as 'damaged goods'.[126] Moreover, it is argued that these conceptualisations of disability are largely formed by ableism, sanism and the prejudice against people with disabilities, wherein the ableist system functions in an effort to maintain its power over disabled bodies.

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[125] Koi Mil Gaya (Filmkraft Productions Pvt. Ltd., 2003).

[126] Tarshi, *Sexuality and Disability in the Indian Context*,115-117, available at http://www.tarshi.net/downloads/Sexuality_and_Disability_in_the_Indian_Context.pdf (Last visited on April 13, 2018).

In this context, it is asserted here that owing to such cultural projections, the disabled viewer is positioned to see his body as something that is undesirable, unwanted or flawed and at the same time, lacking in many ways. Wheeler, in her paper, also makes an argument that at the centre of an ableist system is the non-disabled body from which all understandings about bodies emanate.[127] A cultural example of this argument is seen in the Oscar nominated Hollywood movie '*The Shape of Water*',[128] where a hearing impaired woman, Elisa, falls in love with a water monster, thus enforcing the idea that a disabled person cannot be loved or understood by her own kind, but only by a monster. Elisa, who needs FC to interact with those who cannot speak her form of language, is treated as an 'outsider' in society, seen as sexually desirable not by her own kind, but by a monster, emphasising her status as a freak. The end of the movie sees Elisa dying, ultimately to be resurrected under the water and away from humans to join the only creature that has desired her, subconsciously sending the message that she deserves a freak like her, and not a human like her.[129] Thus, to be non-disabled in an ableist system is to be the 'right kind' of human. This is a distinction that ableism relies on while dehumanising those bodies which do not conform to what is normal. For instance, a woman with dwarfism recalled that while delivering her child via the caesarean section, the anaesthesiologist assigned to her suggested to her husband that she needs to be sterilised since he was "already down there", without the woman having said anything earlier to indicate that this was what she wanted. She later stated that this was not the first time anyone had treated her as 'less than fully human'.[130] Even the language employed in relation to people with disability, especially mental disability, is different – it becomes its own self-serving jargon. For example, one would notice everyday activities described in formal terms – instead of saying "going out", people with intellectual disability are referred to as having "community access" or "social interaction". The spirit of 'normalisation' has been thwarted by the industrialisation of people with intellectual disability, wherein they become the object of care, and lose their parallel humanity in the process.[131] It is pointed out that knowingly or unknowingly, even our legal institutions commit this dehumanisation of disabled bodies, albeit in the name of paternalism or protectiveness,[132] it is omnipresent in decisions which are made ostensibly on behalf of persons with mental illness.[133] In the Stubblefield case, the judge's decision to disallow FC from D.J.'s keyboard and the subsequent denial of his agency, allowing his participation

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127 *Id*.

128 The film was directed by Guillermo del Toro and produced by Guillermo del Toro & J. Miles Dale in 2017.

129 Elsa Sjunneson-Henry, *I Belong Where the People Are: Disability and the Shape of Water*, January 16, 2018, available at https://www.tor.com/2018/01/16/i-belong-where-the-people-are-disability-and-the-shape-of-water/ (Last visited on February 11, 2018).

130 Rebecca Cokely, *TogetherWe Make a Family,* CNN Opinion Series: What It's Like to Be Me, December 20, 2017, available at https://edition.cnn.com/2017/12/20/opinions/what-its-like-to-be-me-disability-rebecca-cokley-opinion/index.html (Last visited April 13, 2018).

131 Gomez &Vicary, *supra* note 91.

132 Ruiz,*supra* note 80, 92-93.

133 Linda Steele & Leanne Dowse, *Gender, Disability Rights and Violence Against Medical Bodies*, 31Australian Feminist Studies 88 (2016).

only as an 'exhibit', is an instance of such dehumanisation. Thus, it can be undoubtedly said that eugenics and ableist attitudes are so deeply imbedded in our language, the ways in which we communicate and make meanings of things, that it has largely become unrecognisable. Therefore, it certainly becomes a challenge to recognise and understand the presence of eugenics in our everyday lives.

VI. CONCLUSION

The medium of language that we use to communicate with each other is deeply imbedded with sanist and ableist assumptions, which does not view people, who are differently abled, at par with themselves. Thus, there is always an 'us' versus 'them' attitude present while dealing with differently abled people, especially mentally disabled ones, even when the arguments are being made in their favour for their benefit. The same was observed in the mute participation of D.J. as an exhibit, as well as during the arguments of the prosecution in the Stubblefield proceedings. The common perception of disabled people is that they have no sensual or sexual desires, and thus, they are seldom asked to express such wants. As claimed by Wheeler, such prejudices and ableist assumptions are ingrained in us, couched in the fine details of the language that we use.[134] It then becomes imperative for us to make our legal processes more therapeutic so as to ensure psychological as well as emotional well-being of the participants.

D.J. was not afforded any of the three central tenets of therapeutic jurisprudence. He had neither voice, nor validation, and due to the absence of the two, he could not have said to have voluntarily participated in the proceedings. Taken in this context, we see that the reason most people with mental disability find themselves at the periphery of the judicial discourse is when it comes to legally asserting their rights, be it against involuntary commitment or for claiming their sexual autonomy.[135] The term 'sex' is subjective, and this issue in the context of people with disabilities must be seen as a multi-textured one. It remains a taboo subject in society, with people unwilling to discuss the sexual autonomy of differently abled individuals. Sexuality is one of the basic needs of an individual, and societal concerns and realisations of the issue are steeped in sociological as well as religious beliefs and observations. We suggest that when dealing with the issue of consent with regard to people with mental disability, recourse to the 'situational approach' as mentioned by Bendet and Grant should be taken.[136] This approach would ensure that in cases of alleged sexual violation against people with mental disabilities, they are not perpetually considered victims. Further, due regard needs to be given insuch situations to assess whether there is consensual sexual activity or not.

[134] Wheeler, *supra* note 115.
[135] Benedet& Grant, *supra* note 31.
[136] *Id*.

As increasing agency and control is being gained by people with disability in various other sectors of their lives such as education and employment, it is imperative to comprehend and translate their needs into practice to enable them in expressing their sexuality and in their relationships. The application of principles of therapeutic jurisprudence to these questions forces us to confront and rectify our social attitudes and responses towards people with mental disabilities to provide actual access to legal institutions, where such individuals can make their voices heard.