NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 10
Issue 3 *THERAPEUTIC JURISPRUDENCE: RESTRUCTURING MENTAL DISABILITY LAW*

Article 12

1993

PATIENTS, PROFESSIONALS, AND THE PATH OF THERAPEUTIC JURISPRUDENCE: A RESPONSE TO PETRILA

David B. Wexler

Bruce J. Winnick

PATIENTS, PROFESSIONALS, AND THE PATH OF THERAPEUTIC JURISPRUDENCE: A RESPONSE TO PETRILA

David B. Wexler*
Bruce J. Winick**

In his book review *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*,[1] Professor John Petrila indicts our compilation, *Essays in Therapeutic Jurisprudence*,[2] and therapeutic jurisprudence generally, for subordinating patient/consumer interests and endorsing professional dominance. The indictment lacks probable cause. It evidences a lack of familiarity with (or a disregard of) much of the therapeutic jurisprudence literature[3]—including the contributions to this Symposium—and seriously misreads *Essays*. Indeed, Petrila puts words in our mouths and then critiques us for writing a book we did not (and would not) write.[4]

---

* John D. Lyons Professor of Law and Professor of Psychology, University of Arizona.

** Professor of Law, University of Miami

[1] 10 N.Y.L. SCH. J. HUM. RTS. 877 (1993) (this issue).

[2] ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1993).

[3] *See generally Bibliography of Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 915 (1993).

[4] Petrila challenges our notion that we *should* be concerned with the therapeutic implications of the law. The therapeutic jurisprudence approach, however, sheds light on the fact that the law (rules, procedures, and legal rules) often produces therapeutic or antitherapeutic consequences, and it does so whether we want it to or not. Would Petrila really have us *ignore* these matters, rather than study them and grapple with them in an effort to improve the situation? Would ignoring these consequences be in the interests of patients and consumers? Would he be unconcerned that the current criminal justice system might itself traumatize sexual battery victims or child victim/witnesses? Would he suggest a judge imposing probation conditions not be concerned with the type of judicial behaviors (e.g., speaking clearly and simply, asking defendant to express his or her understanding) that might lead a defendant to follow—rather than to

Despite an introduction to *Essays* that carefully highlights the importance of values such as autonomy and the integrity of the fact-finding process, and that repeatedly warns that we are *not* suggesting that therapeutic interests "trump" other values, Petrila says we are saying otherwise. And as to *who* decides what is therapeutic (or, presumably,[5] *when* therapeutic interests should trump other interests), Petrila says:

> *Essays* fails to answer the more important question of *who decides* what constitutes a therapeutic outcome. While Wexler and Winick do not address this point directly, they suggest at least implicitly that research scientists and lawyers sensitive to research data will make such decisions. In concluding Part I, which establishes the rationale for pursuing a therapeutic jurisprudence agenda, Wexler writes: "[in] the aftermath of [therapeutic jurisprudence] research and thinking, the accumulated body of knowledge may be useful to practicing legal and mental health professionals. Indeed, with such knowledge, the professionals might strive together to reform the law and the legal system to help counteract mental illness and to help promote mental health."[6]

Absolutely nothing in the above quotation suggests that lawyers, researchers, or mental health professionals should formulate law reform proposals without regard to the patient/ consumer perspective. Further, there is an obvious and crucial difference between "striving" to change the law and having the actual power to change it. Ultimately, it is lawmakers, not researchers, who must be convinced of the merits of a proposal. In fact, in a recent piece by Wexler, cited by Petrila in his review, Wexler notes the importance of therapeutic jurisprudence scholars addressing their policy

---

[5] *See* David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517, 518.

[6] Petrila, *supra* note 1, at 891-92 (quoting David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, *in* ESSAYS, *supra* note 2 at 38).

recommendations in a convincing manner to legislators, trial and appellate judges administrators, and other *true* decisionmakers.[7]

We have repeatedly emphasized the fact that therapeutic jurisprudence is merely a "lens" designed to shed light on interesting and important empirical and normative issues relating to the therapeutic impact of the law. The therapeutic jurisprudence perspective sets the stage for the articulation and debate of those questions,[8] and hence has the potential of reinvigorating the field,[9] but it does not itself provide any of the answers. As noted in the introduction, "[t]herapeutic jurisprudence, although it seeks to illuminate the therapeutic implications of legal practices, does not resolve *this* dispute, which requires analysis of the impact of alternative practices on other relevant values."[10] Petrila faults us at once for *not* providing

---

[7] David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAVIORAL SCI. & L. 17 (1993). *See also* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2196, n.20 (1993), where Judge Edwards, speaking of "practical interdisciplinary scholarship," notes that "Professor Wexler analyzes a number of articles—directed to judges, legislators, and other public decisionmakers—that address concrete problems in mental health law."

[8] David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517 (1992); Robert F. Schopp, *Therapeutic Jurisprudence and Conflicts Among Values in Mental Health Law*, 11 BEHAVIORAL SCI. & L. 31 (1993) (stressing importance of autonomy values).

[9] Petrila questions the "newness" of therapeutic jurisprudence. So do we. Therapeutic jurisprudence is merely a sharper conceptualization of and focus on work that a number of us—including many Symposium participants—had been engaging in earlier. In fact, David B. Wexler's first book, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990) [hereinafter LAW AS AGENT], was composed of an introductory chapter explaining therapeutic jurisprudence, followed by selections from pre-existing works by a number of writers that fell "implicitly" in the therapeutic jurisprudence framework. *Essays*, in contrast, consists of articles written explicitly from a therapeutic jurisprudence perspective. This sharpened focus has, we believe, helped generate much scholarship that otherwise likely would have gone unwritten, and, as 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, 765 (1993) (this issue) [hereinafter *New Directions*] and *Bibliography*, *supra* note 3, indicate, has created a community of therapeutic jurisprudence scholars interested in law/mental health issues in *many* fields of law, not simply in conventional mental health law. In that sense, we hope therapeutic jurisprudence has helped reinvigorate and restructure the law/mental health field.

[10] David B. Wexler & Bruce J. Winick, *Introduction* to ESSAYS, *supra* note 2, at xii.

the answers and (incorrectly) for *providing* the answer that professionals decide what is meant by therapeutic and when therapeutic interests should prevail.

As Wexler points out, therapeutic jurisprudence, as a mere lens for better seeing the (legal) world, does not (and ought not) provide a tight definition of "therapeutic."[11] This flexibility has left scholars free to examine the issue in a number of important and interesting contexts. Significantly, the patient/consumer perspective has weighed heavily in those efforts.

For example, Tom Tyler has indicated how the importance of giving patient/respondents "voice" in commitment proceedings is of likely therapeutic significance.[12] In a recent piece looking at alternative commitment hearing structures, Wexler asks which procedure *respondents* would find fairer.[13] In *Law as Agent*, Wexler addressed right-to-refuse treatment questions by including an essay by psychiatric researchers who approached the matter by interviewing about-to-be released patients.[14] And psychologist Julie Zito and associates, in a recent therapeutic jurisprudence right-to-refuse inquiry, interviewed patients as well as doctors.[15]

In addition, as therapeutic jurisprudence takes us beyond the subject matter of traditional mental health law, commentators and investigators are asking how the law impacts therapeutically or antitherapeutically on persons other than traditional patients. For example, Gould proposes research to ascertain whether criminal defendants will find the U.S. Sentencing Guidelines fair—and, if not, how that will impact on their respect for the law, institutional

---

[11] Wexler, *New Directions*, *supra* note 9.

[12] Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992).

[13] Wexler, *supra* note 8, at 524 ("[W]hich proceeding would the typical respondent find fairer?").

[14] Harold I. Schwartz et al., *Autonomy and the Right to Refuse Treatment: Patients' Attitudes After Involuntary Medication*, *in* LAW AS AGENT, *supra* note 9, at 189. *See also* Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, *in* LAW AS AGENT, *supra* note 9, at 75 (discussing "privilege study" by authors conducted through questionnaires to patients as will therapists).

[15] Julie Magno Zito et al., *Toward a Therapeutic Jurisprudence Analysis of Medication Refusal in the Court Review Model*, 11 BEHAVIORAL SCI. & L. 151 (1993)

behavior, and recidivism.[16] Feldthusen examines how sexual battery victims are treated in the criminal justice system and listens to what those victims have to say in analyzing whether there is therapeutic value in bringing tort actions against perpetrators.[17] Shuman begins the inquiry into whether accident victims will respond better to a fault-based, as opposed to a no-fault, compensation scheme.[18] And, as noted in Wexler's *New Directions* article, Shuman and associates have taken the trouble to ask persons who have served as jurors in traumatic criminal cases how that experience has affected them emotionally.[19] All of these inquiries, and more, have been made in the name of therapeutic jurisprudence research.

Thus, Petrila's claim that *Essays* takes us down the wrong path seems incorrect. Properly understood, therapeutic jurisprudence simply is a path to greater enlightenment about the law. Petrila also misinterprets incomplete, shortsighted, and even misleading in his examination of some of the specific chapters in *Essays*. Let us look at some of those examinations.

Petrila discusses Wexler's essay regarding possible reckless endangerment prosecutions against persons who are dangerous without medication and who culpably fail to take the medication.[20] Petrila says Wexler's "focus" is on persons with schizophrenia, and chastises Wexler because (a) most persons with schizophrenia are not dangerous, and (b) persons with schizophrenia stop taking medication for a number of understandable reasons.[21] It is surprising that Petrila does not mention serotonin-deficient persons, for the springboard and the clear focus of Wexler's essay was not persons with schizophrenia, but violent offenders with a low serotonin function. When schizophrenia was mentioned, it was mentioned only (a) in the

---

[16] Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 870 (1993) (this issue).

[17] Bruce Feldthusen, *The Civil Action for Sexual Battery: Therapeutic Jurisprudence?*, 25 OTTAWA L. REV. (forthcoming 1994).

[18] Daniel W. Shuman, *Making the World a Better Place Through Tort Law: Through the Therapeutic Looking Glass*, 10 N.Y.L. SCH. J. HUM. RTS. 739 (1993) (this issue).

[19] Wexler, *New Directions*, *supra* note 9, at 769-70 (Para. beginning "While Feldthusen. . .").

[20] Petrila, *supra* note 1, at 886-87.

[21] *Id.*

context of that subset of patients "who have a history of violent behavior when they fail to take antipsychotic medication,"[22] and (b) with the recognition of the complication, not as likely to be present in the serotonin example, that the failure to take antipsychotic medicine "may not be *culpable* with regard to the treatment refusal."[23]

Petrila particularly misconstrues Winick's chapters regarding patient "assent" to hospitalization and treatment.[24] Winick analyzes the difficult area of competence to consent to hospitalization and treatment, and concludes that, in part to maximize and to capitalize therapeutically on the patient's choice, the law ought to be fairly flexible in finding a patient competent when the patient and doctor agree, though not in situations where the patient's objection to recommended treatment is sought to be overridden on the ground that the patient is incompetent.[25]

By minimizing Winick's discussion of the legal treatment of patient/physician disagreement, Petrila makes it appear that Winick argues for an expansive view of patient competence in order to further the interests of the *doctor*.[26] In fact, under Winick's proposal, flexibility in finding competence follows entirely from the *patient's* expressed interest.

Petrila accuses Winick of having an "idealized" view of doctor/patient relations, and of downplaying the reality of hospital life and its coercive pressures.[27] But Winick expressly *acknowledges* that in "some (perhaps many) understaffed civil mental hospitals . . . practices have sadly evidenced a conflict of interest on the part of staff physicians . . ." that should render inapplicable the

---

[22] David B. Wexler, *Inducing Therapeutic Compliance Through the Criminal Law*, *in* ESSAYS, *supra* note 2, at 193.

[23] *Id.* at 195 (emphasis in original).

[24] Petrila, *supra* note 1, at 893-99.

[25] *See* Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, *in* ESSAYS, *supra* note 2, at 41 [hereinafter Winick, *Competency to Consent to Treatment*]; Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of* Zinermon v. Burch, *in* ESSAYS, *supra* note 2, at 83 [hereinafter *Competency to Consent to Hospitalization*].

[26] Petrila, *supra* note 1, at 890-91.

[27] Petrila, *supra* note 1, at 897.

presumption of competency that he argues is otherwise appropriate in the patient assent context.[28]

Ironically, it is Petrila's artificial and idealized view of the *legal* system that makes *his* supposed "real world" analysis falter: Petrila critiques Winick's supposed naivete, but does not consider the real world likely implications of *rejecting* Winick's view. If one rejects Winick's view of respecting the treatment assent of a patient of somewhat questionable competency, then a competency inquiry will be triggered. That inquiry, according to the non-idealized and non-artificial view confirmed by empirical studies that Winick cites,[29] will almost invariably lead to a decision to *treat* the patient according to the plan proposed by the *doctor*. And the patient will probably be given the message that, because of seeming mental incompetence, his or her input or "voice" is of no great concern to the decisionmakers.

However a reader or policymaker may ultimately come out with regard to the difficult question of patient "assent," it is clear that Winick's proposal attempts to give meaning to a *patient's* expressed desire and is emphatically *not* designed further to empower physicians. Winick's recent law review article on autonomy, and his defense in this Symposium of a broadened right to refuse treatment, underscore the importance he gives to patient decisionmaking and choice.[30]

For Petrila to derive from Winick's analysis of the difficult problem of patient assent, or from a reading of *Essays* generally, a view of therapeutic jurisprudence as uninterested in a patient/consumer perspective is a serious flaw and a total misunderstanding of our intentions and aspirations. On the other hand, that a person of Petrila's knowledge, intellect, and accomplishment should so badly misread us will surely lead us, and undoubtedly others working in therapeutic jurisprudence, to be constantly vigilant in seeking out a

---

[28] Winick, *Competency to Consent to Treatment*, *supra* note 25, at 66 n.93

[29] *Id.* at 79 nn.148-49; Winick, *Competency to Consent to Voluntary Hospitalization*, *supra* note 25, at 120 nn.165-66.

[30] Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992); Bruce J. Winick, *Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of* Riggins v. Nevada, 10 N.Y.L. SCH. J. HUM. RTS. 637 (1993) (this issue).

patient/consumer perspective,[31] as Perlin emphasizes in his introduction to this symposium,[32] and in using empirical work very carefully (another critique offered by Petrila)[33]—themes that ran through the papers, audience discussion, and "corridor talk" at the New York Law School Symposium on Therapeutic Jurisprudence.

Rather than being unduly deferential to professional discretion, as Petrila suggests, therapeutic jurisprudence calls for a "healthy skepticism toward claims of clinical expertise."[34] Rather than ignoring the patient/consumer perspective, therapeutic jurisprudence seeks to focus attention on the extent to which legal practices have actually served their therapeutic interests (and on the extent to which they may unintentionally yield antitherapeutic results). By asking hard questions about the impact of law on the people it is designed to affect, therapeutic jurisprudence seeks to bring about a restructuring of mental health law more responsive to the interests, and desires, of its consumers.

---

[31] Sometimes, studies of that perspective may yield results that differ from the experiences of those ex-patients who regard themselves as victims or survivors. For instance, a recent analysis of transcripts of interviews with recently admitted patients revealed that:

> When the admission process violates [relevant] moral norms—when the patient is excluded from participation in the decision about whether he or she should be hospitalized, when the actions of others appear to be selfishly motivated, or when others lack the personal or professional qualifications to intervene, or lie to or disrespect the patient—coercion may be more likely to be perceived, and resented. *When these moral norms are adhered to, many apparently coercive acts seem to be accepted by the patient as morally legitimate.*

Nancy S. Bennett et al., *Inclusion, Motivation, and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAVIORAL SCI. & L. 295, 305 (1993) (emphasis added).

[32] Michael J. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993) (this issue).

[33] It is puzzling, however, that Petrila criticizes Winick's discussion of deferred gratification (and its absence) for failure to cite authority, when Winick *cites* some authority and specifically calls for additional empirical work to examine the assumption made. Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, *in* ESSAYS, *supra* note 2, at 237 nn.68 & 69.

[34] Wexler & Winick, *supra* note 10, at xi.