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WHAT IS THERAPEUTIC JURISPRUDENCE?

Michael L. Perlin

I. Introduction

The most important and exciting new jurisprudential insights into mental disability law of the last two decades have come from the development—primarily by two of the contributors to this Symposium, David Wexler and Bruce Winick—of the construct of "therapeutic jurisprudence." Therapeutic jurisprudence presents a new model by which we can assess the ultimate impact of case law and legislation that affects mentally disabled individuals.

It studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures, and lawyers' roles may have either therapeutic or antitherapeutic consequences, and questioning whether such rules, procedures, and roles can or
should be reshaped so as to enhance their therapeutic potential while not subordinating due process principles.¹

Therapeutic jurisprudence stems from a variety of sources. First, recent changes in the judicial temperament have made it appear that the seemingly endless expansion of civil rights decisions in cases involving the constitutional and civil rights of mentally disabled persons has come to a stuttering halt,² and that federal courts could no longer be looked to as the last bastion of patients’ rights.³ Second, changes in the political and social climate (the residue of the Reagan years) eliminated any sort of political consensus that might have once supported the proposition that amelioration of the lives of mentally disabled individuals was a positive social goal.⁴


Next, the development of more sophisticated behavioral and empirical research began to shed some important light on the roots of mental disability and the reasons for some previously-not-understood behavior of mentally disabled persons. Finally, the development of other sophisticated schools of jurisprudence (e.g., law and economics; feminist jurisprudence; critical legal studies; critical race studies) has begun to examine the entire legal system through a series of new and critical lenses and filters.

Therapeutic jurisprudence, then, looks at a variety of mental disability law issues in an effort to both shed new light on past developments and to offer new insights for future developments. Recent articles and essays have thus considered such matters as the insanity acquittee conditional release hearing, juror decisionmaking in malpractice and negligent release litigation, competency to consent to treatment, competency to seek voluntary treatment, standards of psychotherapeutic tort liability, the effect of guilty pleas in sex offender cases, the impact of scientific discovery on substantive criminal law doctrine, and the competency to be executed.

In three recent essays, by way of example, I have tried to apply this construct to Tarasoff issues, to the development of right to refuse antipsychotic drug treatment litigation, and in a piece co-

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6 See, e.g., Michael L. Perlin & Deborah A. Dorfman, The Invisible Renaissance of Mental Disability Law Scholarship: A Case Study in Subordination (unpublished manuscript, on file with the authors).

7 See, e.g., 1 Perlin, supra note 1, § 1.05A, nn.156.6-156.24A (Supp. 1993).


9 See, e.g., Michael L. Perlin, Reading the Supreme Court's Tea Leaves: Predicting Judicial Behavior in Civil and Criminal Right to Refuse Treatment Cases, 12 AM. J. FORENSIC PSYCHIATRY 37 (1991) (reviewing the development of the right to refuse medication); Michael L. Perlin, Decoding Right to Refuse Treatment Law, 16 INT'L J. L. & PSYCHIATRY 151, 177 (1993) (tracing the development of case law with respect to the right to refuse antipsychotic medication in various litigation settings) [hereinafter Perlin, Decoding].
authored with Deborah Dorfman, another contributor to this symposium, to two recent United States Supreme Court cases involving mentally disabled criminal defendants: *Foucha v. Louisiana* and *Riggins v. Nevada.* In a book that has just been published, I apply these constructs to both substantive and procedural aspects of the insanity defense.

This list should suggest the broad scope of substantive and procedural mental disability law topics to which therapeutic jurisprudence can be applied, but should also trigger thoughts about other areas of potential scholarly study as well. While these are fresh, stimulating and provocative ideas, at least two caveats need to be added to any therapeutic jurisprudence analysis.

First, and most importantly, it is clear that an inquiry into therapeutic outcomes does not mean that therapeutic concerns "trump" civil rights and civil liberties. David Wexler underscores this in a recent article: the law’s use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns." Therapeutic jurisprudence does not, cannot and must not mean, in Nicholas Kittrie’s famous phrase, "a return to the

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13 See Perlin, *JURISPRUDENCE OF INSANITY*, supra note 5, at ch. 9.

therapeutic state." Consideration of therapeutic jurisprudence issues cannot be used as an excuse to return to the days of the 1950's when courts were comfortable simply with a "hands off" policy toward institutionalized persons. Also, familiarity with therapeutic jurisprudence cannot be limited to the worlds of the small circle of law professors and academic psychologists writing in this area. If therapeutic jurisprudence is to be meaningful, there must be a concentrated outreach to members of the practicing bar, to frequent forensic witnesses, and to clinicians. Most importantly, therapeutic jurisprudence must consider the perspective of clients and consumers of mental health services. In this way, those who are involved in

15 See generally Nicholas Kittrie: The Right to Be Different: Deviance and Enforced Therapy (1971) (criticizing "therapeutic state").

16 See generally 1 Perlin, supra note 1, § 1.03 (discussing the federal courts' abandonment of the "hands off" doctrine and the resulting consequences for the rights of the mentally disabled); Perlin, supra note 2, at 1249-50 (discussing the gradual abandonment of the "hands off" doctrine). For standard articulations of the doctrine, see Banning v. Looney, 213 F.2d 771, 771 (10th Cir. 1954) ("Courts are without power to supervise prison administration or interfere with ordinary prison rules or regulations."). cert. denied., 348 U.S. 854 (1954); Siegel v. Ragan, 180 F.2d 785, 788 (7th Cir. 1950) ("The Government of the United States is not concerned with, nor has it the power to control or regulate the internal discipline of the penal institutions of its constituent states."). See Helling v. McKinney, 113 S. Ct. 2475 (1993) (Thomas, J., dissenting) (questioning the constitutional underpinnings of the right of incarcerated prisoners to medical care articulated in Estelle v. Gamble, 429 U.S. 97 (1976), and wistfully longing for a return to a pre-Estelle approach).


or are the subjects of litigation dealing with mentally disabled individuals can share their insights into how the therapeutic, anti-therapeutic or atherapeutic aspects of the justice system actually play out. Those of us who write in this field can and must learn from them.

One example should do. Fourteen years ago, John Ensminger and Thomas Liguori, then colleagues in the New Jersey Division of Mental Health Advocacy, wrote a piece on the therapeutic aspects of the civil commitment process, an essay reprinted in Professor Wexler's first collection of therapeutic jurisprudence essays. No other piece written in the intervening fifteen years has significantly built on their insights about how the commitment process actually works, what effect it has on the individuals subject to commitment, and how state hospital employees respond to the litigation process. Additional involvement of both legal and mental health practitioners

therapeutic jurisprudence to patients' perspectives on commitment and medication refusal decisionmaking).


20 Indeed, there is a wide array of other perspectives that therapeutic jurisprudence has already begun to take account. See 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 (this issue) (criminal defendants); Daniel W. Shuman et al., "The Health Effects of Jury Service" (unpublished manuscript; on file with the author); Bruce Feldthusen, Discriminatory Damage Quantification in Civil Actions for Sexual Battery, 44 U. TORONTO L.J. (forthcoming 1994) (civil tort victims); Poythress & Brodsky, supra note 17 (mental health professionals at state psychiatric institutions). These and similar investigations must continue in the future.


22 For two other important perspectives on the question, compare Paul Appelbaum, Civil Commitment From a Systems Perspective, 16 LAW & HUM. BEHAV. 61 (1992) (suggesting a new functionally independent system to assume all civil commitment responsibilities now shared by mental health and judicial systems) with Joel Haycock et al., Mediating the Gap: Thinking About Alternatives to the Current Practice of Civil Commitment, 20 NEW ENG. J. CIV. & CRIM. CONFINEMENT (forthcoming 1993) (suggesting the use of mediation as an alternative means of resolving involuntary civil commitment cases).
in the therapeutic jurisprudence enterprise would help insure that there are meaningful "real world" results from any academic efforts in this field.

Again, it is essential that therapeutic jurisprudence incorporate the viewpoints and perspectives of the eventual consumers of mental health services—those who involuntarily and voluntarily enter the mental health system. There is now a vibrant and growing body of literature by former recipients of mental health services.24 For years, the mental health system and the judiciary have ignored this perspective,25 a willful blindness that is even more perplexing in light of Professor Tom Tyler's findings that perceptions of systemic fairness are driven, in large part, by "the degree to which people

23 See, e.g., Zinermon v. Burch, 494 U.S. 113 (1990) (voluntary patient could proceed with 42 U.S.C. § 1983 damages action against state hospital officials for allowing him to sign voluntary admissions forms at a time when they should have known he was incompetent to do so).

24 See 1 PERLIN, supra note 1, § 1.03 at 8 n.34 & Supp. 1994 at 1-2; Symposium, Challenging the Therapeutic State: Critical Perspectives of Psychiatry and the Mental Health System, 11 J. MIND & BEHAV. 1 (1990).

judge that they are treated with dignity and respect.26 The next generation of therapeutic jurisprudence scholarship must incorporate these perspectives.27

I need also emphasize that I do not believe that consideration of therapeutic jurisprudential values should end new inquiries into the behavior of the mental disability law system. While the therapeutic jurisprudence construct is an enormously useful one and an excellent organizing tool, it does not answer all the questions before us. In order to understand the motivations behind the responses of judges, lawyers and litigators to the mental disability law system, it is also necessary to examine the influence of what I call "sanism" and "pretextuality."

"Sanism" refers to the irrational prejudices that cause (and are reflected in) the prevailing social attitudes toward mentally disabled persons and those so perceived.28 It infects our jurisprudence, our lawyering practices, and our forensic practices. It is largely invisible and largely socially acceptable. It is based upon stereotype, myth, superstition and deindividualization, and is sustained and perpetuated by our false use of ordinary common sense (OCS) and heuristic reasoning in our unconscious responses to events in everyday life and the legal process.29 Its effects are especially pernicious in the ways that social science is accepted or rejected in the formulation of a mental disability law jurisprudence.30

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26 Tom R. Tyler, The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings, 46 SMU L. REV. 433, 442 (1992). See id. at 444 (noting that these findings "have especially important implications for the study of commitment hearings").

27 See Petrila, supra note 19, at 905 ("Until these issues are confronted directly . . . in therapeutic jurisprudence . . . the promise that the theory of therapeutic jurisprudence has for reinvigorating mental disability law will go unrealized."); Joel Haycock, Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law, 20 NEW ENG. J. CIV. & CRIM. CONFINEMENT (forthcoming 1993) ("If the success of therapeutic jurisprudence will depend in part on the degree to which it empowers the objects of therapeutic and judicial attention.").

28 Perlin, Sanism, supra note 25, at 374.


30 See generally Perlin & Dorfman, supra note 10 (examining Supreme Court cases in order to determine the extent of domination of sanist behavior in cases concerning civil commitment, the right to refuse medication, and criminal prosecutions).
"Pretextuality" refers to courts' acceptance, either implicitly or explicitly, of testimonial dishonesty and their decisions to engage in dishonest and even sometimes meretricious decisionmaking in mental disability law cases. This pretextuality infects all participants in the system, breeds cynicism and disrespect for the law, demeans participants and reinforces shoddy lawyering, blase judging and, at times, perjurious testimony.\footnote{*}{See generally Perlin, Pretexts, supra note 25, at 628-39 (explaining "pretextuality"); Michael L. Perlin, Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131 (1991) (discussing the gulf between legal and mental health professionals and the resulting consequences on mental health law which is created when the perspectives of the two different disciplines collide).}

These constructs need to be considered in the context of any therapeutic jurisprudence inquiry, since, unless we determine why the law has developed as it has, it will make little difference if we determine whether it is developing in a "therapeutically correct" way. In short, even if the legal system were to come to grips with all therapeutic jurisprudence issues in all aspects of mental disability law, these additional inquiries will still be required. While I am thus convinced that "therapeutic jurisprudence" is an absolutely essential tool to be used in the reconstruction of mental disability law, we must not fail to place it within the social/political context of why and how mental disability law has developed, and what conscious and unconscious motivations have contributed to the law's development in order for it to truly illuminate the underlying system.

II. This Symposium Issue

The papers in this Symposium reflect the growth of therapeutic jurisprudence as a maturing academic discipline. They employ therapeutic jurisprudence as a means of illuminating, variously, individual cases involving mentally disabled litigants\footnote{See 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).} by analyzing the systemic way in which such individuals are dealt with by the judiciary in two important inquiries (commitment status and...
the refusal of antipsychotic medication). They use therapeutic jurisprudence as a means of exploring how administrative agencies (jails and prisons) treat mentally disabled persons, and how legal rules affect the practice of therapy. They examine other areas of the law beyond mental disability questions, including the tort compensation system and the federal sentencing guidelines, using tools of analysis shaped and formed by therapeutic jurisprudence. Moreover, these papers suggest how therapeutic jurisprudence can and does affect all forensic mental health practice, and how it can be employed to illuminate aspects of the entire legal system. When taken together, they provide the reader with a level of insight into therapeutic jurisprudence in a way that has never before been presented in one discrete law journal Symposium issue.

The range of these papers is important for several reasons. First, it demonstrates that therapeutic jurisprudence is not and cannot be simply an elaborate academic justification for a return to the "therapeutic state." Therapeutic jurisprudence has not developed as a means by which mental health professionals can avoid legal accountability or by which civil libertarian principles can be subverted. As Dorfman's paper underscores, a therapeutic


40 See supra note 15 and accompanying text.
jurisprudence inquiry will force us to "step[ ] back from our treatment choices and assess[ ] why we are making them." in an effort to determine if society is really being driven by purported therapeutic outcomes rather than the need to "relieve the anxieties the mentally ill provoke in us." In the same vein, Winick's article demonstrates how decisions such as Riggins v. Nevada, which effectively expand the right to refuse treatment by implicitly focusing on the nature of choice in the construction of a treatment calculus, will set up "expectancies of positive outcomes that predictably will increase patient motivation and treatment compliance, which in turn enhances the chances that treatment will be successful."

Second, it shows how therapeutic jurisprudence can be employed as a servant of law reform, by illuminating the therapeutic and anti-therapeutic affects of rules that drive behavior in other institutional and litigational systems. Cohen and Dvoskin's paper demonstrates how careful consideration of the empirical data that has developed about jail suicides could lead judicial decisionmakers to reconsider the appropriate liability standards in subsequent tort cases. Looking at a very different system, Shuman concludes that there is a common agenda shared by tort law and therapeutic jurisprudence, and raises provocative questions that tort scholars need to consider in the continued development of tort/compensation jurisprudence. In and of itself, the consistent showing of an association of a reduction of post-accident pathology with "a shorter time between accident and settlement, a longer time after the settlement of the lawsuit, and having less severe symptomatology after [the] accident" suggests the importance of therapeutic jurisprudence to the tort law.

Third, it demonstrates how therapeutic jurisprudence can be a powerful interpretive tool to make vivid the stories of individuals

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41 Dorfman, supra note 33, at 824.
43 Winick, supra note 32, at 704.
44 Cohen & Dvoskin, supra note 34, part IV.
45 Shuman, supra note 36, at 758.
46 Id. at 741-42, 755-56.
in other areas of the law. Gould's examination of the aspect of the federal sentencing guidelines that permits departure from presumptive sentencing terms when the defendant "turns rat" by becoming an informant takes therapeutic jurisprudence into new and totally unchartered waters. The questions that she asks provide an important research agenda for sophisticated criminal law scholars and empiricists. Similarly, Levine's empirical analysis of the impact of mandatory child abuse reporting by therapists demonstrates the complexity and ambiguity of the underlying issues, and shows how a law written with an ostensibly therapeutic purpose can cause feelings of anger and betrayal on the part of therapists and subsequently result in significantly anti-therapeutic outcomes.

Finally, the papers contextualize these developments in two very different but complimentary ways: within the world of forensic mental health law practice, and within the larger legal process. Wexler provides another enticing menu of alternative legal and behavioral areas which cry out for therapeutic jurisprudence analysis. Here, he explicitly calls for "expanding the reach of therapeutic jurisprudence beyond the conventional contours of mental disability law" so as to serve as an eventual "instrument of law reform." Sadoff considers the entire school of therapeutic jurisprudence from the important perspective of practicing forensic psychiatrists (although his insights are equally applicable to the other mental health professions as well) and demonstrates how therapeutic jurisprudence inquiries must extend far beyond the mental disability law borders.

This perspective forces us to consider a reality that is too often

49 See Gould, supra note 37, at 841-42.
50 See, e.g., N.Y. soc. serv. law §§ 413.1 (McKinney 1993) (imposing duty on health professionals to report suspected child abuse and instances of maltreatment). See generally Margaret Meriwether, Child Abuse Reporting Laws: Time for a Change, 20 Fam. L.Q. 141 (1986) (inaccurate reports of child abuse can violate privacy of family, disrupt family relations, stigmatize child care providers and expose children to unnecessary court appearances and physical and psychological examinations).
51 Levine, supra note 35, part VI.
52 Wexler, New Directions, supra note 14, at 775.
53 Sadoff, supra note 38.
glossed over in all legal scholarship: that therapeutic jurisprudence will also restructure the contours of forensic testimony as well as the contours of the relationship between fact-finders and expert witnesses, a relationship which is already shaped to a large extent by constitutional dictates, statutory limitations, and self-imposed professional restrictions on expertise.  

**III. Conclusion**

At the conference at which these papers were presented, a member of the audience said, "I wish you guys (sic) had a different name for this." He explained later that what he meant was this: That therapeutic jurisprudence sounded too "therapeutic" and not sufficiently "jurisprudential." I demurred to his comment at that time, but have given it much thought over the intervening four months. I understand his concern and agree wholeheartedly with his basic position—that therapeutic must not be used as a rationale to support a return to the days of the "hands off" policy in which courts unthinkingly and inevitably deferred to the expertise of institutional keepers and in which treatment questions were seen as nonjusticiable. Perhaps not coincidentally, this is the position that Justice Thomas, the member of the court with the fewest insights into therapeutic issues and mental health concepts, seems ominously the most comfortable with. On the other hand, if therapeutic jurisprudence is used in the ways that it is employed in the papers in

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55 See supra note 16 and accompanying text.

56 Compare O'Connor v. Donaldson, 422 U.S. 563, 574 n.10 (1975) ("Where 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present.") (emphasis added).

57 See, e.g., Perlin & Dorfman, supra note 10, at 58-61; Perlin, *Decoding*, supra note 9, at 174 (discussing the sanist and pretextual nature of Justice Thomas' dissents in *Riggins* and *Foucha*); 1 PERLIN, supra note 1, § 14.20A (Supp. 1993) (discussing Justice Thomas' majority opinion in *Godinez* v. Moran, 113 S. Ct. 2680 (1993)).
this symposium—as a tool for exposing pretextuality,\textsuperscript{58} as a means of integrating concepts born in mental disability law into other areas of jurisprudence,\textsuperscript{59} as a means of revealing the unexpected "litigational side-effects"\textsuperscript{60} of a seemingly-benign anti-child abuse law,\textsuperscript{61} as a means of insuring that therapeutic jurisprudence inquiries retain their constitutional moorings,\textsuperscript{62} and as a means of attacking and uprooting "the we/they distinction that has traditionally plagued and stigmatized the mentally disabled"\textsuperscript{63}—then that result \textit{will be} therapeutic for the legal system, for the development of mental disability law jurisprudence, and ultimately, for all of us.

\textsuperscript{58} See Dorfman, \textit{supra} note 33.

\textsuperscript{59} See Gould, \textit{supra} note 37; Shuman, \textit{supra} note 36.

\textsuperscript{60} See Perlin, \textit{Decoding}, \textit{supra} note 9, at 166 (discussing this concept in the context of Riggins).

\textsuperscript{61} See Levine, \textit{supra} note 35.

\textsuperscript{62} See Winick, \textit{supra} note 32.

\textsuperscript{63} See Wexler, \textit{New Directions}, \textit{supra} note 776.