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But I Ain't a Judge: The Therapeutic Jurisprudence Implications of the Use of Nonjudicial Officers in Criminal Justice Cases

Michael L. Perlin

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"But I Ain't a Judge"

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Introduction

A core axiom of American political theory is the importance of the separation of powers between executive, legislative, and judicial as a foundational constitutional principle.[1] The constitution's framers regarded this separation as essential to limiting the overall power possessed by the national government and essential to the ability of the people to hold the government politically accountable for its decisions and actions.[2]

But what may be news is the reality that in some very important areas of criminal law, decisions are made by those who are not judges (or nonjudicial officers, as they are known). These decisions can lead to criminal con-

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1. For early scholarship on this question, *see* Warren H. Pillsbury, *Administrative Tribunals*, 36 HARV. L. REV. 405 (1923).

2. JAMES MADISON, THE FEDERALIST No. 51 (Jacob E. Cooke ed., 1961).

victions, to enhanced time in correctional facilities, and to stigmatizing labels. And this is truly under the radar for most.

I consider here two disparate statutory grants of authority in two dissimilar states—New York and South Dakota—in which nonjudges are statutorily vested with the jurisdiction to decide certain pretrial motions (motions that may eventually be dispositive of the outcome of the case)[3] and to accept certain guilty pleas, and with determining whether certain criminal defendants have violated their terms of probation and should thus be incarcerated or forced to participate in sex offender treatment[4] (a power markedly different from the traditional role of probation officers who typically present their findings to judges, who make this determination).[5]

These statutes are problematic for multiple reasons. First, they are an impermissible delegation of power in some of the most important matters that courts decide—whether individuals do or do not lose their freedom.[6] Second, with specific reference to pretrial suppression of evidence hearings, the task of weighing and appraising testimony—an especially significant aspect of such hearings[7]—is transferred to those who were never selected to be judges (in New York's case, by the voters).[8] Third, they violate basic tenets of therapeutic jurisprudence that teaches us that "legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles."[9]

3. *See* NY Crim. Pro. L.§ 255.20(4), discussed *infra* text accompanying notes 14–28.

4. *See* SD Consol. L § 23A-27-12.1, discussed *infra* text accompanying notes 39–42.

5. In multiple other areas of the law, nonjudges are given like power, and courts have split in deciding cases challenging this statutory power. Compare, e.g., General Motors, Corp. v. Carter-Wallace, Inc. 553 N.Y.S.2d 983 (Civil Ct. 1990) (judicial hearing officer did not have authority to sign order to show cause in landlord's holdover proceeding), and Seinfeld v. Robinson, 755 N.Y.S.2d 69 (App. Div. 2002) (affidavits should not have been received by Judicial Hearing Officer from witnesses who were not available for cross-examination in court in shareholder derivative action), to Stewart v. Moseley, 958 N.Y.S.2d 598 (App. Div. 2013) (custody determination by judicial hearing officer appropriate).

6. *See* People v. Scalza, 562 N.Y.S.2d 14, 18 (1990) (Titone, J., dissenting). *See also id.* at 19: ("The impairment can hardly be characterized as de minimis, since the vast majority of suppression determinations involve, as the primary fact-finding task, an assessment of the conflicting witnesses' truthfulness").

7. *See infra* notes 16–26.

8. Along with the American Bar Association, I prefer a system of state-level appointed judges (rather than elected ones, the law in about three-quarters of all states), but I recognize at this point in time that this is a losing argument. *See, e.g.*, Heather Ellis Cucolo and Michael L. Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy* 3 U. Denv. Crim. L. Rev. 185, 218 (2013). ("Elections have a 'chilling effect' on judicial independence, and even, in the cases of appellate judges, on the issuance of dissents from majority opinions"); *see, e.g.*, Gregory Huber and Sanford Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?* 48 Am. J. Poli. Sci. 247 (2004).

The title of this article comes in part from a relatively obscure Bob Dylan song, "She's Your Lover Now."[10] Notwithstanding its obscurity—it was originally supposed to be on Dylan's *Blonde on Blonde* album—the critic Tony Attwood has noted that most reviewers view it "as an absolute masterpiece, perhaps the greatest Dylan song never to be formally released."[11] The line follows these two: "I already assumed / That we're in the felony room / But I ain't a judge, you don't have to be nice to me."

It may be, as the critic Evan Schlansky has surmised, that in these lyrics, "Dylan spills his vitriol not only over the woman who's done him wrong, but also for the Mr. Jones–type character she's been shacking up since their love affair has ended."[12] Or perhaps, per Paul Williams, a reflection of the "anguish and fury" that underlies the narrator's "pain underneath."[13] But either way, Dylan's metaphor—of being judged for a serious offense (in "the felony room") by one who is not a judge—works equally well for this topic.

Judicial Hearing Officers in New York

New York's Criminal Procedure Law sets out the role of these officers:

> Any pre-trial motion . . . may be referred by the court to a judicial hearing officer [JHO] who shall entertain it in the same manner as a court. In the discharge of this responsibility, the [JHO] shall have the same powers as a judge of the court making the assignment, except that the [JHO] shall not determine the motion but shall file a report with the court setting forth findings of fact and conclusions of law. The rules of evidence shall be applicable. . . . A transcript of any testimony taken, together with the exhibits or copies thereof, shall be filed. . . . The court shall determine the motion on the motion papers, affidavits and other documents submitted by the parties

9. *See* Michael L. Perlin and Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process*, 4 Va. J. Crim. L. 304, 348 (2016).

10. *See* Bob Dylan, "She's Your Lover Now," https://www.bobdylan.com/songs/shes-your-lover-now/.

11. Tony Attwood, *Untold Dylan* (Feb. 15, 2016), accessible at https://bob-dylan.org.uk/archives/2042.

12. Evan Schlansky, *The 30 Greatest Bob Dylan Songs: #26 "She's Your Lover Now"* (April 6, 2009), accessible at https://americansongwriter.com/2009/04/the-30-greatest-bob-dylan-songs-26-shes-your-lover-now/.

13. Paul Williams, Bob Dylan, Performing Artist: 1960–1973, The Early Years 181 (1994 ed).

> thereto, the record of the hearing before the [JHO], and the [JHO's] report.[14]

Although the final decision here remains vested with a "real judge," that individual only sees the report filed by the JHO (along with exhibits) and thus has no opportunity to weigh the credibility or the motivations of the testifying witnesses. This is of great importance in all criminal pretrial motion practice,[15] but nowhere is it greater than in matters involving Fourth Amendment challenges to searches and seizures, where the evidence of police fabrication—and the frequency of so-called "dropsy cases"[16]—is overwhelming, and where "the determination of the motion to suppress often determines the ultimate question of guilt."[17]

Use of the word "overwhelming" is not an exaggeration. Studying "dropsy" cases in Chicago, Myron Orfield reported that 86 percent of judges, public defenders, and prosecutors questioned (including 77 percent of judges) believed that police officers fabricate evidence in case reports at least "some

14. NY Criminal Procedure Law § 255.20(4). In *Scalza*, *supra*, the State Court of Appeals (New York's highest court) held that this statute was facially constitutional but was undecided on the issue of whether a defendant can challenge the constitutionality of the statute as applied to his or her particular case. 562 N.Y.S.2d at 17.

15. Note also that JHOs have the statutory authority to accept guilty pleas in certain misdemeanor cases. NY Criminal Procedure Law [CPL] § 350.20 permits class B and unclassified misdemeanors to be tried and determined by a Judicial Hearing Officer [JHO] "upon agreement of the parties." In such capacity, JHOs act as a court (*see* CPL § 350.20[l]–[3]), and are empowered to "(a) determine all questions of law; (b) act as the exclusive trier of all issues of fact; and (c) render a verdict" (*see* CPL § 350.20[1][a]-[c]).

This procedure was approved of in People v. Abdrabelnaby, 66 N.Y.S. 3d 567 (App. Div. 2017), but was sharply criticized in Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611, 611 (2014):

> *Misdemeanor justice in New York City has largely abandoned what I call the adjudicative model of criminal law administration—concerned with adjudicating specific cases—and instead operates under what I call the managerial model—concerned with managing people through engagement with the criminal justice system over time.*

16. *See* Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. Miami L. Rev. 625, 626 (1993), discussing "unimpeachable" lies often told in warrantless search and seizure cases. A "dropsy case" is one in which a police officer falsely testifies that the defendant dropped the narcotics in plain view (as opposed to the officer's discovering the narcotics in an illegal search). Gabriel J. Chin and Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 248–49 (1998).

17. *Scalza*, 562 N.Y.S. 2d at 20. Judicial hearing officers are also vested with determining the admissibility of confessions. *See* People v. Dunbar, 23 N.E.3d 946 (N.Y. 2014), discussed in this specific context in Amanda Miller, Miranda *Or Its Equivalent: The Two "W's" of Reasonable Conveyance Court of Appeals of New York*, 32 Touro L. Rev. 877 (2016).

of the time," and that a staggering 92 percent (including 91 percent of judges) believe that police officers lie in court to avoid suppression of evidence at least "some of the time."[18] A subsequent *New York Times* article called attention to another phenomenon: how police regularly testify that they smelled the odor of marijuana in nearly every traffic stop in the Bronx,[19] a practice decried by a judge who called on other judges across the state "to stop letting police officers get away with lying about it."[20] This has been called "testilying" by leading scholars;[21] it can only be remediated through vigorous cross-examination—before a "real" judge.

The court determines the credibility of witnesses in such cases;[22] the trial judge is expected to be the fact-finder.[23] One of the leading articles thus begins,

> Because law enforcement officers must justify searches and seizures in response to motions to suppress evidence, judges ruling upon these motions often must evaluate the credibility of the officers' testimony.[24]

Yet under New York practice, credibility determinations are passed on to nonjudges, leaving the judges who enter the final order in the case in a kind of legal fantasyland: they must determine whether the search and/or seizure satisfies constitutional standards[25] without ever having seen either the police witness or the defendant subject to cross-examination. The dissenting

18. Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. Contemp. Leg. Iss. 3, 6–7 (1999), quoting, in part, Myron W. Orfield Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75, 100–107, nn.113, 146 (1992).

19. Joseph Goldstein, *Officers Said They Smelled Pot. The Judge Called Them Liars*, N.Y. Times (Sept. 12, 2019), accessible at https://www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html.

20. *Id.*

21. *See* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. Colo. L. Rev. 1037 (1996).

22. *See, e.g.*, United States v. Young, 105 F.3d 1, 5 (1st Cir. 1997) (recognizing importance of district court's unique opportunity to observe witness demeanor and determine witness credibility); *see also* United States v. Arvizu, 534 U.S. 266, 276 (2002) (observing importance of district court's access to evidence).

23. John Wesley Hall, Search and Seizure § 46.5, at 837 (3d ed. 2000).

24. Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. Cal. L. Rev. 1341, 1341 (1996). *See generally* Slobogin, *supra* note 21.

25. On "the important function of spelling out police authority under the Fourth Amendment," *see* Wayne R. LaFave et al., 2 Crim. Proc. § 3.1(c), at 46 (4th ed. Nov. 2018 update).

opinion of Judge Titone in *People v. Scalza* makes the point: this is an "impermissible delegation of the elected County Court Judges' authority."[26]

Some New York authority supports my position. In *People v. Ahmed*, the Court of Appeals reversed a conviction where the trial judge was absent from the courtroom for portion of jury's deliberations and allowed his law secretary to respond to juror questioning, concluding that this deprived defendant of his right to trial by jury.[27] There, the court cited a late nineteenth-century Supreme Court case for the proposition that "The presence and active supervision of a judge constitute an integral component of the... right [to trial by jury]."[28] But at this time, the judicial hearing officers still retain the power to hear pretrial motions and accept guilty pleas.

Court Services Officers in South Dakota

Courts and commentators have long pondered the question of the exact meaning of "core judicial function." In *United States v. York*,[29] the court concluded that the definition encompassed a "significant penological decision," such as deciding whether a probationer must undergo specific types of treatment.[30] Elsewhere, in *United States v. Pruden*,[31] the Third Circuit concluded that a decision as to "nature or extent of the punishment imposed" was nondelegable[32] and thus a core function.[33]

26. *Scalza*, 562 N.Y.S. 2d at 18. On how Judge Titone's views are "thoughtfully expressed" in this dissent, *see* Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review, 1990*, 12 Pace L. Rev. 1, 24 (1992).

27. 496 N.Y.S. 2d 984, 985–86 (1985)

28. *Id.* at 986, quoting Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

29. 357 F.3d 14 (1st Cir. 2004).

30. *Id.* at 21.

31. 398 F.3d 241 (3d Cir. 2005).

32. *Id.* at 250.

33. Core judicial functions also include the "'authority to hear and determine justiciable controversies . . . the authority to enforce any valid judgment, decree, or order . . . (and all powers) necessary to protect the fundamental integrity of the judicial branch.'" Salt Lake City v. Ohms, 881 P.2d 844, 849 (Utah 1994). *Also see id.* (law statutorily empowering nonjudicial officers (commissioners) to enter final orders in criminal cases violated state constitution). *See generally* Heather Brann, *Utah's Medical Malpractice Prelitigation Panel: Exploring State Constitutional Arguments Against a Nonbinding Inadmissible Procedure*, 2000 Utah L. Rev. 359, 405.

See also Mark Thomson, *Who Are They to Judge? The Constitutionality of Delegations by Courts to Probation Officers*, 96 Minn. L. Rev. 306, 313–14 (2011). Another commentator has suggested that a "core judicial function" is the "defining [of] constitutional rights." Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work*, 31 Loy. U. Chi. L.J. 153, 157.

Consider the extensive caselaw and scholarly commentary on the constitutionality of certain sex offender treatment programs. For instance, in *McKune v. Lile*,[34] the Supreme Court ruled that consequences for refusal to participate in a prison sex offender treatment programs did not violate the Fifth Amendment privilege against self-incrimination.[35] Other courts have found, variously, that participation in mandated treatment does not violate free speech,[36] but that a statute prohibiting most registered sex offenders from using social networking websites, instant messaging services, and chat programs was not narrowly tailored to serve a significant governmental interest in shielding children from improper sexual communication, thus violating the First Amendment.[37] A state court found that a defendant's Fifth Amendment rights were not violated by a sexual history therapeutic polygraph examination as part of sex offender treatment, a condition of probation.[38] How do these cases relate to the question at hand?

Under South Dakota law:

> Upon receipt of an order that a defendant has been placed on probation to the court service department, the chief court services officer shall immediately assign the defendant to a court services officer for probation supervision.

34. 536 U.S. 24 (2002).

35. *See generally* Michael L. Perlin and Heather Ellis Cucolo, Mental Disability Law: Civil and Criminal (3d ed. 2016; spring 2021 update), § 5-4.10.1.1. On how *McKune* was based on an "unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons," *see* Heather Ellis Cucolo and Michael L. Perlin, *"The Strings in the Books Ain't Pulled and Persuaded": How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases*, 69 Case W. Res. L. Rev. 637, 651–52 (2019), quoting Ira Mark Ellman and Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment. 495, 499 (2015).

36. Newman v. Beard, 617 F.3d 775 (3d Cir. 2010), *cert. denied sub. nom.* Newman v. Wetzel, 563 U.S. 950 (2011).

37. Doe v. Prosecutor, Marion County, Indiana, 705 F.3d 694 (7th Cir. 2013). *See also* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (statute banning sex offender registrants from accessing commercial websites that would also allow minors to register and communicate violated First Amendment). On the relationship between sex offender laws and freedom of religion, *see* Christopher Lund, *Sex Offenders and the Free Exercise of Religion*, 96 Notre Dame L. Rev. 1025 (2021).

38. Com. v. Knoble, 42 A.3d 976 (Pa. 2012). But compare United States v. Von Behren, 2016 WL 2641270 (10th Cir. 2016) (government's threat to seek revocation of defendant's supervised release if he failed to complete sex offender treatment program, which required him to answer incriminating questions, constituted unconstitutional compulsion under the Fifth Amendment).

> All such probationers shall cooperate fully with the court services officer and comply with all directives thereby issued in their regard.[39]

It has generally been held that authority to fashion conditions of probation is strictly judicial and may not be delegated,[40] and it must be approved by the court before becoming effective.[41] But only a handful of cases has ever considered this rule of law seriously, and fewer have vacated such conditions.[42] In the most significant of these, *State v. Blakney*,[43] a trial court's sentencing order mandated that the defendant participate in "any" evaluation, counseling, or treatment necessary for him to be successful on probation.[44] This led to a South Dakota "court services officer"[45] ordering that defendant undergo and successfully complete sex offender treatment program in order to be eligible to participate in a Family Violence Program.[46] Although the court noted the constitution is not infringed when courts delegate to nonjudicial officers details with respect to the selection and schedule of a probationary program,[47] this impermissibly delegated a "core judicial function"[48] to a court services officer to make all decisions concerning defendant's probation's conditions and thus not an enforceable condition of probation.[49]

In short, the line between what a nonjudicial court officer may do and what one may not do is a fine one, but it is also one that has not been the topic

39. S.D. CONSOL. L. § 23A-27-12.1.

40. Commonwealth v. MacDonald, 757 N.E. 2d 725 (Mass. 2001) (probation officer's inserting name in preprinted form of person with whom probationer could have "no contact," was not a binding condition because it was not specifically ordered by the court). *See also* State v. Vondal, 585 N.W.2d 129 (N.D. 1998) ("Conditions of probation must be announced by the court and not delegated to other agencies or people.") and United States v. Barany, 884 F.2d 1255 (9th Cir. 1989) (unlawful to delegate to probation officer determination of restitution amount as discussed in ARTHUR W. CAMPBELL, LAW OF SENTENCING § 5:3 [Sept. 2018 update]).

41. *See, e.g.*, United States v. Bowman, 175 Fed. Appx. 834, 838 (9th Cir.2006).

42. *See also* State v. Putnam, 130 A.3d 836, 858–60 (Vt. 2015) (condition requiring defendant to attend "any counseling or training program" designated by probation officer and to "participate to [probation officer's] satisfaction" unlawful delegation of authority).

43. 851 N.W. 2d 195 (S.D. 2014).

44. *Id.* at 197.

45. *See* SDCL § 23A-27-12.1.

46. *Blakney*, 851 N.W. 2d at 197.

47. *Id.* at 199. *See also* Cohen, *supra* note 38.

48. *Blakney*, 851 N.W. 2d at 200.

49. *Id.* at 199–200. *See also* Jackson v. State, 959 So. 2d 1282 (Fla. Dist. Ct. App. 2007) (only court can impose probation conditions).

of great scholarly (or judicial) attention. It is clear, though, that much authority that should have remained with judges has been offloaded to nonjudges.[50]

A Therapeutic Jurisprudence Analysis[51]

As noted in the introductory chapter in this volume,[52] therapeutic jurisprudence recognizes that as a therapeutic agent, the law can have therapeutic or antitherapeutic consequences,[53] asking whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[54]

There is robust literature on the relationship between therapeutic jurisprudence and nonjudges in the context of administrative agencies and other nonjudicial interactions.[55] Some deal with workers' compensation,[56] some

50. Omitted because of space constraints is a discussion of the scandal on Florida in which—until stopped by Judge Ginger Lerner-Wren's intervention—county sheriff's officers unilaterally changed terms of probation that were statutorily mandated to be in the discretion of the trial judge. *See* Michael L. Perlin, *"But, I Ain't a Judge": The Therapeutic Jurisprudence Implications of the Use of Non-Judicial Officers in Criminal Justice Cases*, 64 AM. BEHAV. SCI. 1686, 1692–93 (2020).

51. This section is largely adapted from Michael L. Perlin, *"I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARD. J. EQUAL RTS. & SOC'L JUST. 81, 93–95 (2018) (Perlin, *Mind Made Up*), and Perlin and Lynch, *supra* note 9, at 357.

52. *See* Michael L. Perlin and Kelly Frailing, *Introduction to Justice Outsourced* (this volume).

53. Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?* 42 AKRON L. REV. 885, 912 (2009).

54. Michael L. Perlin, *"And My Best Friend, My Doctor, Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005)

55. *See, e.g.*, Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L.J. 189, 197 (2002):

> *The administrative lawyer or specialist in some area of regulatory law therefore also needs to understand the therapeutic jurisprudence/preventive law model and apply it in client counseling. Many disputes with administrative agencies that are waiting to happen can be avoided or the level and risk of disputatiousness lessened through preventive law.*

56. *See, e.g.*, William E. Wilkinson, *Therapeutic Jurisprudence and Workers' Compensation*, 30 ARIZ. ATTORNEY 28 (Apr. 1994); Donald L. Ghareeb, *Life in the Fast Lane of Administrative Law: Workers' Compensation Practice in Arizona*, 30 ARIZ. ATTORNEY 10 (Apr. 1994); Katherine Lippel, *Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation*, 22 INT'L J.L. & PSYCHIATRY 521 (1999).

with labor arbitration,[57] some with negotiation theory,[58] some with mediation and alternative dispute resolution,[59] and some with administrative tribunals vested with compensating sexual violence victims.[60] However, with the important exception of the work done by Professor Lorana Bartels, writing about the HOPE probation program in Hawaii,[61] there is virtually none on the sort of interstitial,[62] quasijudicial roles I discuss here.[63]

How does this relate to the current questions? Per Professor Michal Albertstein:

> The essential task of therapeutic jurisprudence is to sensitize judges to the fact that they are therapeutic agents in the way they play their judicial roles and to develop some general principles that might improve judicial structure, function, and behavior, in a manner that allows judges to be more effective therapeutic agents.[64]

Certainly, the roles of judges and attorneys in litigation conducted according to principles of therapeutic jurisprudence are "greatly expanded

57. *See, e.g.*, Roger I. Abrams, Frances E. Abrams, and Dennis R. Nolan, *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994).

58. *See* Carol L. Zeiner, *Getting Deals Done: Enhancing Negotiation Theory and Practice Through a Therapeutic Jurisprudence/Comprehensive Law Mindset*, 21 HARV. NEGOT. L. REV. 279 (2016).

59. *See, e.g.*, David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 265 (1999); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guided Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999).

60. *See, e.g.*, Nathalie Des Rosiers, Bruce Feldthusen, and Oleana A. R. Hankivsky, *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433 (1998); Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, *Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse—An Empirical Study*, 12 CAN. J. WOMEN & L. 66 (2000) (discussing the Ontario Criminal Injuries Compensation Board).

61. *See e.g.*, Lorana Bartels, Looking at Hawaii's Opportunity with Probation Enforcement (HOPE) Program Through a Therapeutic Jurisprudence Lens, 16 QUT L. REV. 30 (206); Lorana Bartels, *HOPE-Ful Bottles: Examining the Potential for Hawaii's Opportunity Probation with Enforcement (HOPE) to Help Mainstream Therapeutic Jurisprudence*, 63 INT'L J.L. & PSYCHIATRY 26 (2019).

62. *See e.g.*, David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part*, 37 MONASH U.L. REV. 33, 38 (2011) (role of judge in such cases is "interstitial," quoting former Presiding Justice Kevin Bellon).

63. *Also see*, Kelly Frailing, Brandi Alfonso & Rae Taylor. *Therapeutic Jurisprudence in Swift and Certain Probation* (this volume).

64. Michal Alberstein, *Therapeutic Keys of Law: Reflections on Paradigmatic Shifts and the Limits and Potential of Reform Movements*, 39 ISR. L. REV. 140, 148 (2006).

from their traditional models,"[65] as therapeutic jurisprudence seeks to "augment current rigid legal processes by taking into account the intangible, emotional states of the parties to the litigation."[66] But there has been absolutely no consideration of the extent to which this expansion has had any impact at all on the topics of this chapter: the use of nonjudges to hear criminal trial motions that are often dispositive of the underlying case, and the authority of the probation department to significantly change the court's orders of probation.

Interestingly and importantly, Professor David Wexler—one of the founders of the school of therapeutic jurisprudence—has underscored that "the sanction of probation, *when legally available for a given offense*, is chock-full of Therapeutic Jurisprudence considerations."[67] The point here is that the South Dakota case of *State v. Blakney*[68] makes clear that some of the probationary sanctions imposed by court services officers were blatantly illegal.

Professor Albertstein's aspirations cannot be fulfilled in cases of nonjudicial officers who decide cases that potentially have such impact on the lives of litigants. Again, such nonjudges (1) make dispositive decisions in cases that turn on search and seizure motions (and other critical pretrial motions as well) and are tasked with accepting pleas in what a scholar has called an "embarrass[ing]" experiment,[69] and (2) are free to *sua sponte* impose potentially onerous conditions of probation on defendants in complex areas of the law in which the Supreme Court continually tinkers and modifies the scope of defendants' rights.[70] There are no checks and no balances.[71]

65. Patricia H. Murrell and Philip D. Gould, *Educating for Therapeutic Judging: Strategies, Concepts, and Outcomes*, 78 REV. JUR. U.P.R. 129, 133 (2009).

66. Philip D. Gould and Patricia H. Murrell, *Therapeutic Jurisprudence and Cognitive Complexity: An Overview*, 29 FORDHAM URB. L.J. 2117, 2120 (2002).

67. David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 756–57 (2005) (emphasis added). *See also* David B. Wexler, *Therapeutic Jurisprudence and Its Application to Criminal Justice Research and Development*, 7 IRISH PROBATION J. 94 (2010); Faye S. Taxman and Meredith H. Thanner, *Probation from a Therapeutic Perspective: Results from the Field*, 7 CONTEMP. ISSUES IN L. 39 (2004).

68. 851 N.W. 2d 195 (S.D. 2014). *See supra* text accompanying notes 43–48.

69. Kohler-Hausmann, *supra* note 15, at 611.

70. *See* generally PERLIN AND CUCOLO, *supra* note 35, Chapter 5; MICHAEL L. PERLIN AND HEATHER ELLIS CUCOLO, SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION (2017).

71. *See, e.g.*, Martin Edwards, *Who's Exercising What Power: Toward a Judicially-Manageable Nondelegation Doctrine*, 68 ADMIN. L. REV. 61, 65 (2016) ("The very concept of separation of powers is involved intimately with 'checks and balances,' the notion that dividing powers limits the aggregate power of government over the governed").

One of the *sine qua nons* of therapeutic jurisprudence is its refusal to subordinate due process principles.[72] When non-judges make what should be judicial decisions—with perilously little oversight—that may be life-and-death, it is fatuous to even assess whether therapeutic jurisprudence principles are honored. They simply cannot be.

Conclusion

Much of this is truly under the radar for most scholars and most practitioners, and it has also basically escaped the notice of most who write about and care about therapeutic jurisprudence. An article in a bar journal has argued that "the organized bar has a special responsibility to defend the judiciary's proper role as a co-equal branch of government."[73] The Massachusetts constitution sets the issue out clearly and forthrightly: "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."[74] Perhaps it was fine for the narrator of the Bob Dylan song that partially gave this chapter its title to not be a "judge," but it is not fine for states to allow nonjudges to make the sorts of what should be judicial decisions. It violates the law, common sense, and the principles of therapeutic jurisprudence.

72. *See* Perlin and Lynch, *supra* note 9, at 348.

73. Donald R. Frederico, *Justice Under Fire*, 55 B.B.J.5, 5 (Spring 2011).

74. MASS. CONST. art. 29, *Declaration of Rights. See generally* Francis J. Larkin, *The Variousness, Virulence, and Variety of Threats to Judicial Independence*, 36 JUDGES' J. 4 (Winter 1997).