MENTAL HEALTH LAW AND THE SEEDS OF THERAPEUTIC JURISPRUDENCE

David Wexler
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I am the only author in this project who is not a psychologist. Yes, my name sounds like that of a psychologist (David Wechsler of intelligence test fame). And, if you look up even my properly spelled name in Amazon.com, you’ll find a California psychologist named David B. Wexler who is more prolific than I! We are often confused by others and regularly receive invitations to speak and write intended for the other. A university press that had asked me to do an essay on Therapeutic Jurisprudence for an encyclopedia even published it under the “other” David B. Wexler, thanks to an over-eager editorial assistant doing a last-minute Google check of credentials who identified me as a psychologist from San Diego, California.

As much as I love psychology, and though many of my best friends are psychologists, I lack even a single unit of psychology in my training. I attended a college where Intro to Psych was an 8 unit “rat lab” course, and I was accordingly denied permission, not having taken that prerequisite, to enroll in Abnormal Psychology or Social Psychology. I did manage to major in Sociology, and it served me well as a background for law school, as an attorney in the Criminal Division of the U.S. Department of Justice, and as a legal academic.

My passion and life’s work—apart from fully enjoying my domestic/family life, as well as my professorial, social, and cultural life in San Juan, Puerto Rico and in travels beyond—is in Therapeutic Jurisprudence. As I will explain below, TJ’s official “birth” can be traced to a presentation given in October, 1987 in an NIMH workshop on Law and Mental Health coordinated by Saleem Shah and Bruce Sales. But the purpose of this book is to look especially at the 1970s when AP-LS was getting started, and at that time I was creating some of the field’s early works on mental health law. This retrospective assignment has given me an opportunity to
consider, more closely than I have before, how the seeds of Therapeutic Jurisprudence were evident in my earliest mental health law projects.

My objective, then, is to fine tune the early history of Therapeutic Jurisprudence (TJ) to show where it came from. Some of that history is provided in an essay presented long ago at the University of Virginia (Wexler, 1999) at a conference organized by John Monahan as a 25 year retrospective on mental health law. But before going back to the seventies, let me provide a brief “pod” of TJ into which I will, in the next section, place the TJ seeds.

TJ is an approach that regards the law itself as a potential therapeutic (or anti-therapeutic) agent. It looks at the law in action, not simply at the law in books, and it views “the law” as consisting of rules of law, legal procedures, and the roles of legal actors (judges, lawyers, mental health and other professionals working in a legal context). TJ is interested in examining the therapeutic and anti-therapeutic consequences of the law, and in proposing ways that the law may be made or administered in a more therapeutic (or less anti-therapeutic) way, but without privileging therapeutic results over due process or other constitutional and related values.

The Seventies: Mental Health Law

I left my position as an attorney at the Criminal Division of the US Department of Justice in 1967 to begin teaching at the University of Arizona College of Law. Given my interest and experience, my courses were Criminal Law and Criminal Procedure. I was not the only mental health law scholar to make my way into academia in those early years. Two others who made extraordinary contributions to our field across the following decades were Bruce Winick and Michael Perlin. Bruce, about whom I will say much more later, had been a lawyer for the New

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1 See also a recent academic biographical essay written about me and TJ by the distinguished legal scholar and legal historian University of Ottawa Professor Constance Backhouse (Backhouse, 2016). I would also like to take this opportunity to thank my research assistant, Rocío Alonso, for her diligent aid in the preparation of this chapter.

When I began teaching in the late 1960s, the “criminal procedure revolution” was in full swing, with cases like *Miranda* taking center stage. My earliest publications had to do with witness immunity, criminal discovery, and prisoners’ rights. But the criminal procedure revolution was spilling over into other, related areas: Juveniles are also being deprived of freedom, the argument went, and even though those proceedings are technically “civil”, that label is merely a technicality, and many of the criminal safeguards, such as the right to a hearing and assigned counsel, should apply to them as well (*In re Gault*, 1967).

And then, what about mental patients, often confined against their will for extended periods, again without a hearing and counsel. Shouldn’t something like the criminal-type rights apply to them as well?

So, a few years into my teaching career—in the 1970-71 academic year—Dean Charles Ares, who has just now celebrated his 90th birthday, invited me to teach a seminar in Law and Psychiatry, an offer I jumped at. Note that the course was law and *psychiatry*, not law and *psychology*, which I don’t think existed in law schools in those days. Nor was the course then called Mental Health Law, which similarly didn’t then exist. There was no published casebook,
only a large mimeographed volume (officially published several years later) by Rutgers Professor Alexander Brooks, called *Law, Psychiatry, and the Mental Health System*. Interestingly, ten years later, when I published my first book—volume 4 in Bruce Sales’ *Perspectives in Law and Psychology*—the book was entitled *Mental Health Law: Major Issues* (Wexler, 1981). Apparently, by then, the term Mental Health Law had taken root. The book consists of revised essays all originally published between 1971 and 1979—the exact period of interest to the present project. Of the eleven chapters, four have been of enduring interest to me. Not surprisingly, those four are the ones that contain the seeds of Therapeutic Jurisprudence, and it is thus to those four that I will now turn.

**The Administration of Psychiatric Justice (Wexler & Scoville, 1971)**

This law review article was a major book-length (269 pages) project that I undertook in connection with my Law and Psychiatry seminar and a group of law review students. Among those students was Dan Shuman, who later became a leading contributor to Mental Health Law. The project was unique in law school education in terms of its group project method. Moreover, it was unique in engaging not only in careful doctrinal analysis but also in bringing the area to life through extensive field work: observing many commitment hearings, examining court files, visiting the Arizona State Hospital and various county hospitals, and conducting interviews with physicians, lawyers, and judges in every Arizona county. Substantively, the study covered material now regarded as standard in Mental Health Law courses—the civil commitment process, criminal commitment of those found incompetent or acquitted by reason of insanity, the role of counsel in all such proceedings, and the rights of patients, including the right to treatment.

The project enabled us to learn a tremendous amount about the law and its application (and misapplication) in the course of a year-long study. And we were gratified that it led to
widespread legislative reform and was awarded the very first Manfred Guttmacher Award of the American Psychiatric Association.

Lessons for the eventual development of TJ? This project was a seed for the later development of TJ. The project used a “standard” approach except for its important field work component. But the field work made an important impression regarding the need for understanding the law in action, an approach that has become crucial to TJ and to what we now call Therapeutic Application of the Law (TAL), as discussed later in this chapter.

More to the point of the TJ framework of “the law as a therapeutic agent,” we encountered an important example of an anti-therapeutic rule of law, something that especially stood out in an area of the law explicitly designed to help persons with mental disability. A young man willing to go to the hospital as a voluntary patient had no means of transportation, leading the court to issue an involuntary commitment order, thereby requiring the sheriff’s department to provide the transport. This measure, of course, added to the stigma of the hospitalization and likely to the enhanced security measures that follow involuntary commitment, such as the inability freely to exercise “ground privileges.” In any case, this example of a statute that provided publicly-funded transportation only for involuntary patients—thus discouraging voluntary admission in certain cases—is an anti-therapeutic rule of law, and a TJ seed of the study that has remained vivid to me from the moment I encountered it, as have a number of others.²

² In another example, a patient found incompetent to stand trial, and therefore confined as a “criminal” commitment to the maximum security ward, was later reclassified as a mere “civilly” committed patient, and thus moved to a less secure ward. The reclassification, however, was not done for clinical concerns. Instead, it somehow came at the request of the county Board of Supervisors, as “criminal” commitments were a charge to the county, but the “civilly” committed were a charge to the state. Other anti-therapeutic laws and policies discovered during the field work of the project relate to prison-to-hospital transfers, but, since they were also discussed as part of another publication, they will be mentioned below in the section on Criminal Commitment Contingency Structures.
**Token and Taboo (Wexler, 1973)**

This California Law Review article—on law, behavior modification, and token economies operative in mental hospitals—is the best-known of my works, at least among behavioral psychologists of that time. Mostly, it was a straight-forward legal/constitutional analysis of the challenges posed by token economies, where important items—food, beds, privacy—were, under the token system, only available contingent on appropriate patient behavior. Yet, at the same time, cases like Wyatt v. Stickney (1969) were mandating minimum constitutional standards for hospital life, and those constitutional rights meant that the items should be given as a matter of right, not merely as reinforcers for good conduct.

What was unique about the piece was the extensive use of the literature of behavioral psychology and the description of the actual operation of token systems in the hospitals. An interdisciplinary approach became a later staple of much TJ writing, as did the notion that therapeutic goals should not take precedence over basic rights, but must try to accommodate those rights. Finally, an approach was suggested to capture the positive value of reinforcers without violating the basic constitutional rights of the patients. If reinforcers could be found by observing patient preferences (the Premack Principle: Premack, 1959), or even by the less “pure” method of merely asking patients for their preferences, individual idiosyncratic reinforcers could be established. And given that they were in fact idiosyncratic, they would by definition not threaten the basic, general rights of the hospitalized population. Thus, the piece involved a thorough examination and use of the pertinent psychological literature, and it paved the way for the TJ approach in seeking both to affirm patient rights and, at the same time, to navigate creatively in order to use behavioral psychological principles to achieve therapeutic results.
Criminal Commitment Contingency Structures (Wexler, 1976, 1990)

In 1974 or 1975, Saleem Shah invited me to prepare a monograph for NIMH entitled Criminal Commitments and Dangerous Mental Patients (Wexler, 1976). The monograph’s approximate 100 pages contained much “standard” doctrinal mental health law analysis. But certain parts captured my attention more than others. These parts were accordingly plucked out and put together under the name Criminal Commitment Contingency Structures, an essay presented in the mid-1970s at a University of Nebraska conference (sponsored by Bruce Sales), then printed in volume 1 of Bruce Sales’ Perspectives in Law and Psychology: The Criminal Justice System (1977), and again in two of my books—Mental Health Law: Major Issues (1981), and Therapeutic Jurisprudence: The Law as a Therapeutic Agent (Wexler, 1990).

From the title of that article, the reader can see we are getting closer to what might now be considered an almost full-blown TJ analysis. It is surely an “implicit” TJ paper. Its focus was basically the incentive structures in various rules and procedures, and how those incentives could help or hinder therapeutic gains. In this paper, four incentive structures were examined:

- **Indeterminate confinement**—where it is proposed that release is best gained by meeting objective conditions (e.g., obtaining a high school equivalency diploma) rather than by subjective criteria (e.g., demonstrating socially constructive attitudes) or, even worse, by practices where the confined population is never informed of the release criteria.

- **Defendants found Incompetent to Stand Trial (IST)**—although developments increasingly allow for outpatient treatment of ISTs, some expressed a concern that such an incentive structure could encourage unwanted behavior: “by remaining clinically IST while at large in the community, a patient may indefinitely postpone ‘pending’ criminal proceedings without sacrificing liberty.” (Wexler, 1981, p 122).
• *Prison-to-Hospital Transferees*—here, the piece concentrated on disincentives for a prisoner with mental health issues to seek transfer—even voluntary transfer—to a mental hospital. These include a transferred prisoner possibly losing good time credits while in a mental hospital, parole board policies disfavoring conditional release of prisoner-patients, and policies in some jurisdictions requiring maximum security confinement of all transferred prisoners—including those who in prison were able to serve as outside trustees.

• *Defendants found Not Guilty by Reason of Insanity (NGRI)*—To me, the most interesting of these incentive contingencies relates to the NGRI release structure. When a patient is merely *civilly* committed to an institution, release usually lies *unilaterally* in the hospital’s hands. Nothing more is required. But for the NGRI population, there is often an extra protective layer required for release: court approval of the hospital’s release recommendation.

At first glance, this release procedure may seem to disadvantage the NGRI population, and some courts and legislatures have moved to equalize the release procedures for the two patient groups. But interviews of hospital officials and an examination of the “diffusion of responsibility” literature led me to pose the question (obviously ultimately an empirical one) whether the extra requirement of court approval might, in the aggregate, inure to the benefit of NGRI release at a time the hospital believes release is clinically warranted. Hospital officials are fearful of releasing NGRI patients completely on their own. The officials are fearful that the releasee might commit a violent act on release, and the hospital would then be the target of litigation or legislative budget cuts, or at least of seriously adverse publicity. The patients may thus be held longer than the hospital actual believes necessary. On the other hand, if the hospital
recommend recommends release to the *court*, the court is likely, in most cases, to approve the hospital recommendation:

The sharing of responsibility may thus lessen improper inhibitions. The hospital knows the court will scrutinize the hospital recommendation; and the court will know the hospital’s decision is based on an evaluative judgment of professionals who have had a considerable amount of time to observe the patients proposed for release. It seems a win-win situation. Thus, the shared release procedure may lead to the timely release of those clinically regarded as ready for release—something that ironically might *not* occur if the professionals alone were in charge.

In the language of TJ seeds, we see in these examples, and dramatically in the example of the NGRI release structure, the therapeutic design of a *procedure*, and also how necessary it is to examine not only the *written law* but also the law’s likely impact in practice. Interestingly, especially in retrospect, I closed the chapter by noting, “it seems that lawyers, behavioral psychologists, and others have reached the stage where they may begin cooperating to formulate a ‘behavioral jurisprudence.’” (Wexler, 1981, p 130). Perhaps. But such a jurisprudence would seemingly be restricted to the therapeutic *design* of the law—to proposing and evaluating rules and procedures for their incentive structure. In fact, though, we were well on our way to completing the ingredients of the broader and more robust *TJ framework*. What we are missing, at this stage, is the crucial component of “roles” or behaviors of legal actors (judges, lawyers, mental health professionals and others working in a legal context). The component of “roles”—practices and techniques—is essential to a full picture of TJ. The next section will provide that component.

**The Tarasoff Case and its Victimological Virtues (Wexler, 1979)**

In 1979, just under the wire to be included in work published during the seventies, I wrote a paper giving a different twist to the important and controversial *Tarasoff* case (1976), a
California case that held that a therapist owes a duty of reasonable care to third parties who may be endangered by the therapist’s patient. The case was widely attacked by mental health professionals who were worried that the trusted therapist-patient relationship might be impaired by this additional obligation to non-patient third parties.

I, too, was initially wary of Tarasoff and its potential impact on effective therapy. But then I received a telephone call from a worried therapist whose patient believed his wife was having affairs and told the therapist there would be “big trouble unless she cuts it out.” The therapist did not know if this was a case of true infidelity or, instead, of “morbid jealousy”, but was worried about liability if he failed to warn the wife. Tarasoff wasn’t binding in our jurisdiction, but, needless to say, he did not want to be the defendant in a future Arizona case that might accept the Tarasoff rule. Nor of course did he want—ethically or legally—to violate his patient’s confidence. I asked him how he thought his patient would react if he were told, “Mr. P, if you’re so agitated about this, what would you think of my calling your wife, telling her of your agitation, and finding out what she has to say for herself?” He thought the patient would consent—and I thought such a strategy would finesse the legal dilemma: neither the patient nor the spouse would then have a claim against the therapist.

Then, when I reviewed the victimological literature and the literature on marital jealousy, I realized that the involvement of the spouse seemed not only legally advisable but also therapeutically warranted—we needed more of an interpersonal rather than an intrapsychic approach. Yet, without the pressure generated by Tarasoff, such spousal involvement would likely not occur. My pro-Tarasoff thesis then began to take shape.

But Tarasoff would be of potential therapeutic benefit only if mental health professionals skillfully discharged the Tarasoff duty in an appropriate manner. It would not be therapeutic, for
example, if the therapist simply called the police and mentioned the patient’s statement. Nor would it be therapeutic if the therapist merely took the unilateral step of calling the spouse. Tarasoff, in other words, is not self-executing. If it is to work out, it calls for a proper and sensitive therapeutic application of the law (TAL). The Tarasoff article provides a suggested step-by-step sensitive way in which a therapist can navigate to achieve a therapeutic application of the rule. (Today this component is essential and is evident especially in the recommended roles for judges and their court conversations (Wexler, 2016)).

So there we have it. The seventies coming to a close with all the pieces of the TJ jigsaw puzzle, some “implicit” articles, most clearly Criminal Commitment Contingency Structures and the just-mentioned article on the Tarasoff case. The pieces were there, albeit mixed with other mental health law pieces, published in Mental Health Law: Major Issues (1981); but the jigsaw still was not assembled to form a perspective of “the law as a therapeutic agent.” For some reason, there would be a delay. Let’s try to figure out why.

**TJ’s Long Gestation Period**

I’ve looked back at my list of publications following the 1979 Tarasoff article and am surprised to see a developmental delay. True, there is one paper immediately following the Tarasoff article—a 1980 piece which, by its title, is clearly an “implicit” TJ work—a Yale Law Journal review essay entitled Doctor-Patient Dialogue: A Second Opinion on Talk Therapy through Law (Wexler, 1980). “Talk therapy through law” sounds soooo TJ. In 1980, its birth seemed imminent.

But, curiously, my subsequent publications are instead general mental health law topics: civil commitment, seclusion and restraint, and a sprinkling relating to insanity defense issues. Insanity defense issues? Hmm. Aha! In retrospect, I remember that the surprising 1982 Hinckley
NGRI verdict caused shock waves through the mental health law community and, for many, including myself, interrupted the pre-existing trajectory of scholarship.

Finally, then, more than a few years later—in 1986-- I again wrote an implicit TJ piece that struck me at the time as being remarkably similar, at least in approach, to my 1979 _Tarasoff_ article: This article was called _Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian Commitment Codes_ (Wexler, 1986). The thesis and particulars are not important for our purposes. Instead, what seems relevant is that I was again in a “TJ kind of mood”.

About then I received an invitation to participate in the October 1987 NIMH law/mental health workshop, and since I had done quite a bit of writing in the general area of law and therapeutic practice—_Tarasoff_, token economies, an analysis of the _Kaimowitz_ psychosurgery case (Wexler 1981)—I was asked by the workshop organizers to focus on the area of “law and therapy”.

It was then, preparing my written work during the summer of 1987, that it struck me that my enduring interest was not in law _and_ therapy in general, but rather in law _as_ therapy, and that was the TJ lightbulb—therapy _through_ law, just as “talk therapy through law” was the title of the review essay I had written in 1980 right before the Hinckley “disruption”.

The TJ puzzle pieces then came clearly and quickly together in a paper first named “Juridical Psychotherapy,” a title which didn’t survive the feedback at the October meeting (feedback which included Bruce Sales’ persistent difficulty pronouncing “juridical”). The title was accordingly promptly changed to the first-runner up of Therapeutic Jurisprudence—a term that has always had its own set of problems but which, helped by its nickname “TJ,” has now firmly taken hold.
Because of publishing delays and other snafus, the paper was actually not officially published for several years, when it appeared as the first chapter in my edited book, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Wexler, 1990). That book contained my essay explaining and naming TJ, followed by chapters (by myself and others) that were “implicitly” TJ (such as the Tarasoff piece and, once again, *Criminal Commitment Contingency Structures*).

Actually, for newcomers to TJ, I think the best introductory route at the present time would be later-written essays that were revisions of talks, such as *Therapeutic Jurisprudence: An Overview* (Wexler, 2000; see also Wexler, 2010).

Curiously, therefore, because of the substantial publishing delay, the first articles to use the TJ name were in 1989—two pieces coauthored by me and Robert Schopp, now a longtime member of the University of Nebraska law faculty (and involved in Nebraska’s law and psychology program) (Wexler & Schopp, 1989a; Wexler & Schopp, 1989b). Schopp came to the University of Arizona law school after a 10 year career as a PhD clinical psychologist. At Arizona, he entered a law/philosophy JD/PhD concurrent degree program. He served as an off-the-charts brilliant research assistant, and then launched a remarkable academic career combining his many interests, which include TJ and much more.

**Bruce Winick**

Because of the structure and requirements of this chapter, I have not yet mentioned the enormous contribution to TJ of my late friend, colleague, and collaborator, Bruce Winick. In the most wonderful of coincidences, Bruce and I first met in 1975, when I was on a semester sabbatical at the University of Miami and was given an office adjoining a brand new law professor named Bruce Winick. As noted earlier, Bruce had been a lawyer for the New York City Department of Mental Health and, believe it or not, was assigned to teach mental health
law! We became fast friends and mental health law colleagues who were able to finish each other’s sentences. We were constant stimulants for each other’s work. We did not write together until 1991, but from then until Bruce’s untimely death several years ago, we were the principal co-developers of TJ, known as “the Ws.” We wrote *Essays in Therapeutic Jurisprudence* (Wexler and Winick, 1991)—the first book to deal completely and explicitly with TJ, all chapters by me (including a reprint of my 1990 essay conceptualizing TJ), by him, by me and Schopp, and a conclusion by me and Bruce. In 1996, we attracted a number of other writers and edited a mammoth (1000 page) book, *Law in a Therapeutic Key* (Wexler and Winick, 1996): the main contribution of that work was converting TJ from a new approach to mental health law to a mental health/wellbeing approach to law in general. In 2000, together with Dennis Stolle as first editor, we produced *Practicing Therapeutic Jurisprudence* (Stolle, Wexler & Winick, 2000), extending TJ to an office counseling approach that drew also on insights from preventive law; and in 2003, Bruce and I followed with *Judging in a Therapeutic Key* (Winick & Wexler, 2003), my personal favorite.

We each of course continued to write (books and articles) separately as well, and Bruce’s body of work in TJ is enormous and inspirational. His work remains incredibly influential, constantly cited in today’s scholarship.

**Today and Tomorrow**

Today, TJ is a flourishing international and interdisciplinary movement. The *International Journal of Therapeutic Jurisprudence* has been launched, a product of the Arizona Summit Law School in Phoenix, and a non-profit *International Society of Therapeutic Jurisprudence* is, at this writing, soon to be launched. TJ work has been published in 14 languages, and there is an Iberoamerican TJ Association active in Spain, Portugal, and Latin
America. There is a *TJ in the Mainstream Blog* edited by Victoria, Australia Magistrate Pauline Spencer working with an International Advisory Group from 18 countries. The Blog is an easy-to-join and user-friendly resource, available at [www.mainstreamtj.wordpress.com](http://www.mainstreamtj.wordpress.com).

The Mainstreaming project—which seeks to use TJ even *beyond* the familiar problem-solving court (e.g., drug treatment court) area where it is best known—has been facilitated by a methodology that looks at the legal structure (rules and procedures) as “bottles” and the legal roles (practices and techniques of lawyers, judges, mental health and correctional professionals, etc) as “liquid” or “wine” (Wexler, 2014). Conceptually, TJ remains true to its original conceptualization, but now emphasizes the important *interrelationship* of the components: it is now clear that for true, meaningful, and sustainable law reform to take place, we need to concentrate on the therapeutic application of the law (TAL) (the liquid or wine) as well as the therapeutic design of the law (TDL) (the bottles) (Wexler, 2015). We urge a seamless process entailing both dimensions. The wine and the bottles should be examined and thought of *together*.

The “mainstreaming” effort began principally in the criminal law domain (Wexler, 2014) but the methodology has already expanded, internationally, to juvenile law, child protection law, and public housing law. And a current international mainstreaming proposal urges the use of the TJ perspective to add an explicit “wellbeing” component to the achievement of “court excellence”, employing as an important tool the *International Framework for Court Excellence* (see Richardson, Spencer, & Wexler, 2016). It is an exciting time for TJ.
References


In Re Gault (1967) 387 U.S. 1


Tarasoff v. Regents of University of California (1976), 17 Cal. 3d 425


