Therapeutic Jurisprudence: An Overview

David Wexler
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THE FOLLOWING IS SLIGHTLY REVISED VERSION OF A PUBLIC LECTURE GIVEN ON OCTOBER 29, 1999 AT THE THOMAS COOLEY LAW REVIEW DISABILITIES LAW SYMPOSIUM.

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Therapeutic jurisprudence is the "study of the role of the law as a therapeutic agent."[2] It focuses on the law's impact on emotional life and on psychological well-being.[3] These are areas that have not received very much attention in the law until now. Therapeutic jurisprudence focuses our attention on this previously underappreciated aspect, humanizing the law and concerning itself with the human, emotional, psychological side of law and the legal process.

Basically, therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviors and consequences.[4] Sometimes these consequences fall within the realm of what we call therapeutic; other times antitherapeutic consequences are produced.[5] Therapeutic jurisprudence wants us to be aware of this and wants us to see whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected.[6]

It is important to recognize that therapeutic jurisprudence does not itself suggest that therapeutic goals should trump other ones.[7] It does not support paternalism, coercion, and so on.[8] It is simply a way of looking at the law in a richer way, and then bringing to the table some of these areas and issues that previously have gone unnoticed.[9] Therapeutic jurisprudence simply suggests that we think about these issues and see if they can be factored into our law-making, lawyerly, or judging.[10]

Therefore, therapeutic jurisprudence is the study of therapeutic and antitherapeutic consequences of the law.[11] When we say the law, we mean the law in action, not simply the law on the books. The law can be divided into the following categories: (1) legal rules, such as "Don't Ask, Don't Tell"[12] or the Americans with Disabilities;[13] (2) legal procedures, such as hearings and trials;[14] and (3) the roles of legal actors and the behavior of judges, lawyers, and of therapists acting in a legal context.[15] Much of what legal actors do has an impact on the psychological well-being or emotional life of persons affected by the law.[16] I refer here, for example, to matters such as the dialogue that judges have with defendants or that lawyers have with clients.[17]

An example of a legal rule that could be examined from a therapeutic jurisprudence perspective is the "Don't Ask, Don't Tell" provision that bars military service for one who acknowledges being gay or bisexual.[18] The government is not permitted to ask about it, and so long as a recruit does not talk about it, there is supposedly no problem.[19]

One of the things that therapeutic jurisprudence does, however, is to tease out some of the more subtle, more unintended consequences of legal rules that may be antitherapeutic.[20] An interesting study of the "Don't Ask, Don't Tell" rule suggested that if someone is gay in the military and cannot talk about it, then that person may also be afraid to talk about many other things as well because those other things are likely to raise the question of the legally prohibited topic.[21] So where you went on vacation and with whom may be things you're not comfortable talking about because this
topic could raise the question of whether you're gay, and that is the prohibited conversational topic. (22)

Therefore, the author of the "Don't Ask, Don't Tell" article, Kay Kavanagh, suggested that the law, in practice, may cause great isolation, marginality, and superficiality in social relations for a gay person in the military, perhaps above and beyond what was anticipated when this provision was drafted. (23) Perhaps it was drafted with the thought that one's sexual life is personal, and that it makes sense, therefore, for us not to ask about it and for people not to talk about it. (24) It was perhaps based on the assumption that one's sexual life was a very isolated topic that doesn't spill over into other aspects of social life. (25) Kay Kavanagh's piece suggests, and I think with very good reason, that it does spill over into other areas; therefore, this is a richer look at that law and its implications. (26)

Therapeutic jurisprudence is a framework for asking questions and for raising certain questions that might otherwise go unaddressed. The answers to those questions are often empirical. Is Kay Kavanaugh right in suggesting that the rule has this chilling effect on other conversational topics?

Secondly, even if true empirically, there remains the normative question: what, if anything, should we do about that rule? Therapeutic jurisprudence sharpens the debate, focuses the debate; it does not really provide answers here, but it does bring these questions out into the open.

"Don't Ask, Don't Tell" is an example then of a legal rule and how it might be looked at from a therapeutic jurisprudence perspective. (27) Next, let's look at a legal procedure. (28)

An example of a legal procedure looked at through the lens of therapeutic jurisprudence is an article by Professor Janet Weinstein regarding child custody disputes. (29) Weinstein wrote about how the adversary process in a child custody context can be both traumatic for the child and damaging to the relationship of the parents who may, despite their divorce, need to have some kind of relationship in the future merely for the sake of the child. (30)

Weinstein's analysis is very interesting because it exposes how the adversary process encourages us to find the worst thing about the other party, to bring it out, and to talk about just how terrible that other parent is. (31) This is traumatic to children and, of course, damaging to the relationship of the parents. (32) Can there be other, less damaging ways of resolving these issues, such as through mediation or new mechanisms sucha as collaborative divorce. Therapeutic jurisprudence focuses on these creative explorations. (33)

Finally, an example of the third category is legal roles. This category examines the behavior of lawyers, judges, and other actors in the legal system. (34) For instance, the way the judge behaves at a sentencing hearing can actually, in and of itself, affect how someone who has been given probation complies with the conditions of that probation. (35)

In the simplest example, if a judge is not entirely clear in formulating a condition of probation, someone may not comply with the probationary terms because he or she never quite understood what it is that he or she was told to do or not to do. (36) How a judge behaves at a hearing can affect whether someone complies. (37) Later, I will come back to that issue and put it in a more complex context.

Therapeutic jurisprudence grew out of mental health law, the area that has been the main subject of the Thomas M. Cooley Law Review's Disabilities Law Symposium, from which these remarks are drawn. (38) Therapeutic jurisprudence cut its teeth on civil commitment, the insanity defense, and
incompetency to stand trial. It looked at the way in which a system that is designed to help people recover or achieve mental health often backfires and causes just the opposite. Therefore, a perspective developed recognizing that the law itself, know it or not, like it or not, sometimes functions as a therapeutic or an antitherapeutic agent. This is, of course, highly relevant to mental health law. The therapeutic jurisprudence perspective, however, now applies to other legal areas, probably all legal areas. For example, the perspective applies to mental health law, criminal law, juvenile law, family law, and other areas. Personal injury law has also received attention. We think of compensation in personal injury law as a way of trying with money to make someone whole; to put injured persons in a position that they would have been in if they hadn't been subjected to this accident. It is clumsy, but it is designed to try to make them whole.

What therapeutic jurisprudence adds to this mix is that compensation may itself affect the course of recovery. Sometimes, time simply does not heal. Sometimes we see that people do not recover until a case is settled, for example, and sometimes they consciously or unconsciously exaggerate or accentuate the injury. Thus, compensation can independently affect a person's healing process, above and beyond its theoretical purpose. Therapeutic jurisprudence encourages people to think about that and study it to see if there are certain ways that we can lessen that impact. In summary, then, therapeutic jurisprudence started as a new twist on mental health law and has now become a mental health twist on law in general, and in all legal areas.

One of the things therapeutic jurisprudence tries to do is to look carefully at promising literature from psychology, psychiatry, clinical behavioral sciences, criminology and social work to see whether those insights can be incorporated or brought into the legal system. In this respect therapeutic jurisprudence is very different from the early days of mental health law, where the effort was really just to see what was wrong with this sort of literature or testimony. Again, there were good reasons for that early emphasis; however, an exclusive focus on what is wrong, rather than also looking at what might be right and how we might use some of this material, is seriously shortsighted.

Current therapeutic jurisprudence thinking encourages us to look very hard for promising developments, even if the behavioral science literature itself has nothing to do with the law. It also encourages people to think creatively about how these promising developments might be brought into the legal system. An example links back to the earlier discussion of the judge's role in setting probation conditions or conditions on someone being conditionally released from a mental hospital after a judgment of not guilty by reason of insanity.

Facilitating Treatment Adherence is a book written by psychologists on psychological principles that could help doctors and other health care providers have their patients adhere better to medical advice. It is not specifically about psychiatry, although it could include that medical specialty, and it had nothing at all to do with law. But the words "facilitating treatment adherence," approached from a therapeutic jurisprudence angle, were exciting to me. I wondered whether the law could use any of this to facilitate a probationer's compliance with conditions of probation, and to facilitate an insanity acquittee's compliance with conditions of release from an institution.

Those principles dealt first with some very common sense things, such as speaking in simple terms. Patients sometimes may not comply with medical advice because they just never really quite got the message. They were not told in simple terms what the doctor was suggesting they do, or they were not asked before they left, "Now, let's make sure you've got this straight. Tell me what you intend to do, how often you're going to take these pills? Do you take them with meals or without meals? How often do you take them?" Thus, noncompliance sometimes results from insufficient
Another principle that Meichenbaum and Turk dealt with was signing a behavioral contract. When people sign behavioral contracts, they are more likely to comply with medical advice than if they do not. Also, if they made a public commitment to comply, to persons above and beyond the health care provider, they were more likely to comply. Relatedly, if family members were informed of what patients were to do, those patients were more likely to comply.

It is interesting to think about how these principles might operate in a legal setting. For example, if a judge is looking at a proposal for an acquitted insanity patient to be conditionally released from a hospital or when a judge is deciding whether to grant probation in a sentencing hearing, the court could conceptualize the conditional release as a type of behavioral contract: I will agree to give you probation if you will agree to abide by these conditions.

One can also envision a hearing as a forum in which an insanity acquittee or criminal defendant makes a public commitment to comply. You might also see whether agreed-upon family members might be present at that hearing.

These are ways of trying to bring these psychological health care compliance principles into a legal setting. Now, will they work the same way in that setting? That is the kind of empirical question that therapeutic jurisprudence suggests or raises but does not answer.

Should we do it? Is it going to be too time consuming? Do judges have the time to do this? That's the normative question that gets raised by all of this. But I suggest that we're now asking questions that otherwise we might not be asking at all.

Another way in which therapeutic jurisprudence has tried to use information from behavioral science relates to cognitive distortions of offenders, especially sex offenders. Many therapists suggest that in order to take a first step in the treatment of offenders, one needs to tackle offender denial or minimization. The offenders also need to take responsibility and to be accountable. They need to overcome the cognitive distortions of denial and minimization, such as "I didn't do it," or "I did it but it wasn't my idea," and "I did it and it was my idea but it wasn't for sexual gratification."

A question therapeutic jurisprudence would ask is whether the law in practice operates to foster cognitive restructuring or whether it actually perpetuates cognitive distortions. One area we might examine is the plea process. When judges take guilty pleas, and most people do plead guilty, there is a requirement that the court find that the plea is voluntary and that there is a factual basis for the plea. There are different ways that judges behave in accepting pleas from offenders, and some legal anthropologists who have actually gone into the courtrooms have categorized and classified these judicial behaviors.

Some judges are very "record oriented." They try to avoid dealing with the defendant because he could "muck up" the record. Instead, they look to statements of the prosecutor, the defense counsel, or something in the file that will establish the factual basis for the plea. Those courts involve the defendants minimally.

Other judges have an open colloquy with the defendant, such as: "Okay, you realize this is the offense that you're pleading to. Please tell me in your own words what happened, when, and so on." The second type of judicial behavior might be a bit better than the first because it takes that
first step of confronting denial, minimization, and encouraging an offender to take responsibility. (81)

The next example concerns rights and responsibilities and their relationship to rehabilitation. (82) I have been interested in some recent literature that relates to relapse prevention planning principles and how they may be brought into the law.

For years there was a real pessimism in rehabilitation and rehabilitative efforts. (83) Starting in the 1970s, when Martinson suggested that nothing really worked, there was a long period of time when people were giving up on rehabilitation. (84)

More recently, it looks like there are certain kinds of rehabilitative programs and packages, particularly the cognitive/behavioral variety, that look rather promising. (85) One type of these cognitive behavioral treatments encourages offenders to think through the chain of events that lead to criminality and then tries to get the offenders to stop and think in advance. (86) This will enable an offender to figure out two things: (1) what are the high risk situations, in my case, for criminality or juvenile delinquency; and (2) how can the high risk situations be avoided, or how can the situations be coped with if they arise? (87)

These situations may be things such as realizing you are very much at risk on Friday nights after having partied with such and such person. The offender may decide that he or she shouldn't go out Friday nights. This determination is a way of avoiding high risk behaviors. (88) Instead of going out on Friday night with Joe and getting into trouble, the offender may choose to stay home. But what happens the next night when Joe calls or what happens when Joe knocks on the offender's door?

Therapists have developed approaches of working with these issues, and of having offenders prepare relapse prevention plans. (89) There are also certain programs, like "reasoning and rehabilitation" type programs, that teach offenders cognitive self change, to stop and think and figure out consequences, to anticipate high risk situations, and to learn to avoid and cope with them. (90)

These programs seem to be reasonably successful. (91) One of the issues that I am interested in now, from a therapeutic jurisprudence standpoint, is how this might be brought into the law. In one obvious sense, these problem-solving, reasoning and rehabilitation type of programs can be made widely available in correctional and community settings. (92) A way of linking them even more to the law, of course, would be to say that as a condition of probation or parole, one might have to attend or complete one of these courses. (93)

A more subtle way of thinking about this in therapeutic jurisprudence terms, however, is to ask how reasoning and rehabilitation can be made part of the legal process itself. (94) The suggestion here is that if a judge or parole board becomes familiar with these techniques and is about to consider someone for probation, the judge might say, "I'm going to consider you but I want you to come up with a type of preliminary plan that we will use as a basis of discussion. I want you to figure out why I should grant you probation and why I should be comfortable that you're going to succeed. In order for me to feel comfortable, I need to know what you regard to be high risk situations and how you're going to avoid them or cope with them." (95)

If that approach is followed, courts will be promoting cognitive self-charge as part and parcel of the sentencing process itself. (96) The process may operate this way: "I realize I mess up on Friday nights; therefore, I propose that I will stay home Friday nights." Suddenly, it is not a judge imposing something on you. It's something you are coming up with so you should think it is fair. You have a voice in it, and presumably your compliance with this condition will also be better. (97)
I hope I have given you an idea of what therapeutic jurisprudence is through these examples, and how it tries to achieve therapeutic goals through the very operation of the legal system itself. The remainder of this volume will further introduce principles of Therapeutic Jurisprudence and will suggest how Therapeutic Jurisprudence may reform criminal law practice.

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3. See id.

4. See id.

5. See id.

6. See id.

7. See id.

8. See id.

9. See id.

10. See id.

11. See id.

12. Kay Kavanagh, Don't Ask, Don't Tell: Deception Required Disclosure Denied, in Key, supra note 2, at 343.


15. See generally David B. Wexler, Therapeutic Jurisprudence and the Criminal Courts, in Key, supra note 2 (discussing therapeutic jurisprudence in a criminal court setting).


17. See id.

18. See Kavanagh, supra note 12, at 343.

19. See id. at 346.
20. See id. at 344-45.

21. See id.

22. See id.

23. See id. at 344.

24. See id. at 353-54.

25. See id.

26. See id. at 353-64.

27. See id. at 343-63.

28. See Weinstein, supra note 14.

29. See id.

30. See id. at 123-24.

31. See id. at 86-88.

32. See id.


34. See Wexler, supra note 15, at 167-68.

35. See id. at 168.

36. See id. at 167-68.


40. See id. at 9. An early example that started me thinking along lines that culminated in the development of the therapeutic jurisprudence perspective was coming across a situation involving an Arizona statute that paid the transportation costs to the state hospital only for court-committed patients, not for voluntary ones, thus legislatively creating an incentive for involuntary hospitalization. See David B. Wexler, Stanley E. Scoville, et al, The Administration of Psychiatric Justice: Theory and Practice in Arizona, 13 Ariz. L. Rev. 1, 58 n.186 (1971).

41. See Wexler & Winick, supra note 2, at xvii. I wrote the first paper on therapeutic jurisprudence, explicating and naming the perspective, for a 1987 National Institute of Mental Health law-mental health workshop. I was asked to write within the general area of law and therapy, and decided to
sharpen my focus by concentrating not on law and therapy but rather on law as therapy, as therapy through law, thereby offering a conceptual framework for therapeutic jurisprudence as a discrete filed of inquiry. For an historical account, see generally David B. Wexler, The Development of Therapeutic Jurisprudence:From Theory to Practice, 68 Revista Juridica Universidad de Puerto Rico 691(1999).

42. See Daniel W. Shuman, The Psychology of Compensation in Tort Law, in Key, supra note 2, at 438.

43. See id.

44. See id. at 441.

45. See id. at 433.

46. See id.

47. See id.

48. See id.

49. See id. at 443-44; see also Katherine Lippel, Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation, 22 Int'l J. L. & Psychiatry 521 (1999).

50. See Wexler, supra note 2, at xvii.

51. See Wexler, supra note 15, at 167-77.

52. See id. at 167.

53. See Meichenbaum & Turk, supra note 37, at 159-60.

54. See Meichenbaum & Turk, supra note 37.

55. See id.

56. See id.

57. See Wexler, supra note 15, at 165.

58. See Meichenbaum & Turk, supra note 37, at 81, 116.

59. See id. at 76.

60. See id. at 122.

61. See id. at 113.

62. See id. at 164-73.

63. See id. at 164.

64. See id. at 124-25.
65. *See id.*

66. *See id.* at 164.


68. *See id.* at 168.

69. *See id.* at 159.

70. *See id.*

71. *See id.* at 159, 161-62.

72. *See id.* at 159.

73. *See id.*

74. *See id.* at 159-60.

75. *See id.* at 159-64.

76. *See id.* at 163.

77. *See id.*

78. *See id.* at 162-63.

79. *See id.* at 163.

80. *See id.* at 161-62.


84. *See id.*


87. *See id.*

88. *See id.*

90. See Knott, *supra* note 89.

91. See id.

92. See id.

93. See id.


95. See id. at 367-68.

96. See Knott, *supra* note 85, at 117.

97. See id.

[1] This is a slightly revised version of a public lecture given on October 29, 1999 at the Thomas M. Cooley Law Review Disabilities Law Symposium.