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David B. Wexler
University of Arizona

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JUSTICE, MENTAL HEALTH, AND THERAPEUTIC JURISPRUDENCE

DAVID B. WEXLER¹

Mental health law advocates and even scholars have typically been hostile toward, afraid of, or at best indifferent to, the mental health disciplines (mainly psychiatry and psychology) and their practitioners. The reason for this is that modern mental health law, as part of the civil liberties revolution, was conceived to correct the abusive exercise of state psychiatric power.² As such, it took its place as part of the anti-psychiatry movement.

Learning to be skeptical of supposed scientific expertise is an important lesson, and the law should never simply defer to psychiatry and the related disciplines.³ But to the extent that the legal system (and even legal academics) now *ignore* developments in the mental health disciplines, the lesson of healthy skepticism has been overlearned. It is my thesis, then, that those of us interested in "justice" in mental health law ought not to adopt the shortsighted and anti-intellectual stance of ignoring or shunning the mental health disciplines. Indeed, as I hope to show in this essay, an appreciation of the mental health disciplines can in many instances help to create a more just legal system and should surely contribute meaningfully and refreshingly to the dialogue on rights and justice.

The vehicle for bringing mental health insights into the study of law is therapeutic jurisprudence—the study of the role of the law as a therapeutic

¹J.D., 1964, New York University. John D. Lyons Professor of Law and Professor of Psychology, University of Arizona. The author, a former student of Robert McKay, served, together with Dean Steven R. Smith, as a co-leader of a Conference Workshop dealing with justice issues in law and mental health.

²See BRUCE J. ENNIS, *PRISONERS OF PSYCHIATRY* (1972). Often, however, the judiciary encouraged the exercise—and misuse—of psychiatric power, sometimes through discouraging effective advocacy by attorneys. Norman G. Poythress Jr., *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope with Expert Testimony*, 2 *LAW & HUM. BEHAV.* 1, 16 (1978); Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 *LAW & HUM. BEHAV.* 39, 44-45 n.33 (1992) [hereinafter *Fatal Assumption*] (referring to personal advocacy experience and the advocacy experience of colleague, Professor Keri Gould).

³For current examples of inappropriate deference—even abdication—by the appellate judiciary, see Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 *YALE L.J.* 639 (1992).

agent.⁴ Therapeutic jurisprudence is a truly interdisciplinary enterprise that proposes that we explore ways in which, consistent with principles of justice, the knowledge, theories, and insights of the mental health and related disciplines can help *shape* the development of the law.

Therapeutic jurisprudence suggests that the law itself can be seen to function as a kind of therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, like it or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence proposes that we be sensitive to those consequences, rather than ignore them, and that we ask the question whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and justice values.⁵ Therapeutic jurisprudence in no way suggests that therapeutic considerations should trump other considerations. Therapeutic considerations are but one category of important considerations, as are autonomy, integrity of the fact-finding process, community safety, and many more. Therapeutic jurisprudence does not itself purport to resolve the value questions; instead, it sets the stage for their sharp articulation.⁶

Often, legal arrangements or legal doctrines can be established that promote therapeutic outcomes while, at the same time, advancing (or leaving unaffected) liberty or justice interests. As Professor Schopp has noted, "early work in the agenda of therapeutic jurisprudence has tended to seek this convergence. . . ."⁷

Some of my own writings seem illustrative of the desire to seek convergence between therapeutic and justice interests. One piece, for example, shows how psychological principles for increasing patient compliance with medical advice can be imported into the legal system and used by judges to increase an insanity

⁴ See generally DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991) [hereinafter *ESSAYS*]; DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990) [hereinafter *THERAPEUTIC JURISPRUDENCE*]; David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 *BEH. SCI. & L.* 17 (1993) (discussing recent therapeutic jurisprudence scholarship).

⁵ MICHAEL L. PERLIN, 1 *MENTAL DISABILITY LAW: CIVIL & CRIMINAL* § 1.05a (Supp. 1992).

⁶ Therapeutic jurisprudence will also often force the mental health disciplines to demonstrate the efficacy of their procedures. John W. Parry, *Psychiatric Treatment and Justice at Odds*, 15 *MENT. & PHYS. DISAB. L. REP.* 119, 120 (1991) (book reviews).

⁷ Robert F. Schopp, *Therapeutic Jurisprudence and Conflicts Among Values in Mental Health Law*, 11 *BEH. SCI. & L.* 31 (1993).

acquittee's (or a probationer's) compliance with conditions of release (e.g., taking medication, keeping appointments, etc.).⁸

The psychological principles suggest that when one signs a behavioral contract, one is more likely to comply than if one does not embody the agreement in a behavioral contract. Also, one who makes a "public" commitment to comply—a commitment to persons above and beyond the medical provider—is more likely to comply than is one who makes no such public commitment. Relatedly, if family members are involved and aware of a patient's agreement, the patient is more likely to comply with the conditions than if family members are uninvolved in the process.

Therapeutic jurisprudence would suggest that trial judges shaping conditional release orders might increase compliance with such orders if a patient/defendant were asked to embody the conditional release plan in a behavioral contract, and if the hearing were used as a forum for the patient/defendant to make a "public" commitment to comply—a commitment made in the presence of the judge and agreed-upon family members. Such a procedure would tap therapeutic potential without offending our notions of justice.

Another "convergence" piece draws on the clinical insight that offenders—and particularly sex offenders—harbor "cognitive distortions" about their offending behavior and therefore tend to deny or minimize their involvement in criminal activity.⁹ As a first step in therapy, mental health practitioners seek to perform a task of "cognitive restructuring"—an attempt to break through offender denial by having the offender admit to the underlying conduct and its details.

Therapeutic jurisprudence might ask whether the law operates antitherapeutically, by promoting cognitive distortion, or whether it operates therapeutically, by setting the stage for cognitive restructuring. Since most offenders plead guilty, the plea process might be a profitable stage to examine for therapeutic jurisprudence implications. For example, when a trial judge accepts a guilty plea and goes through the process of establishing a factual basis for that plea, the behavior of the judge may be looked at in therapeutic jurisprudence terms. If the judge involves the defendant only minimally, and looks to the record and to statements by the prosecutor and defense counsel to establish the factual basis of the plea, a defendant harboring cognitive distortions might not have those distortions confronted head-on by the plea process and the colloquy with the judge. On the other hand, if the judge

⁸ David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, in *ESSAYS*, *supra* note 4, at 199.

⁹ David B. Wexler and Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 *Mental & Phys. Disab. L. Rep.* 225, 229-30 (1992). See also Jeffrey A. Klotz et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process*, 15 *U. PUGET SOUND L. REV.* 579, 581-82 (1992).

conducts a change of plea hearing so as to involve the defendant personally and heavily in the process of ascertaining a factual basis for the plea, the court may actually be performing a therapeutically valuable cognitive restructuring function.

In terms of our search for convergence of therapeutic and justice goals, it is interesting to note the research of legal anthropologist Susan Philips, who observed and analyzed a number of plea hearings.¹⁰ Philips concluded that civil libertarian judges were "procedure oriented" and involved the defendant heavily in the process of establishing a factual basis for the plea. It was the politically conservative judges who were "record oriented" and who tended to establish the factual basis with minimal involvement of the defendant. Those judges regarded the defendant as someone who might mess up and muddy an otherwise clean change of plea record, perhaps rendering the plea more vulnerable to collateral or appellate attack.

Although the early work in therapeutic jurisprudence has indeed tended to seek out areas where there is a convergence between therapeutic and justice interests, such convergence is by no means inevitable. When there is a potential conflict, therapeutic jurisprudence does not itself attempt to resolve the debate. Therapeutic jurisprudence performs a service, however, by bringing the debate to the fore.

Professor Schopp, for example, has advanced the discussion of rights and justice by noting that a conflict between therapeutic interests and individual liberty might be resolved through a "constraint" approach or through a "balancing" approach:

When therapeutic interests conflict with individual liberty, one can advocate either of two plausible relationships between the competing values. First, one can grant a priority to one value over the other such that the first serves as a constraint on the second. According to this approach, for example, liberty might constrain therapeutic efforts such that any therapeutic program must give way when it conflicts with protective liberty, regardless of the magnitude of the potential gains or losses to each value. Alternately, one can balance the two competing values, selecting a rule or deciding a case by weighing the relative gains and losses to each value in the circumstances.¹¹

Apart from the "constraint" and "balancing" inquiry, any potential conflict is likely to require us to think more clearly than we currently do about exactly what we mean by particular rights. A potential conflict will force us to focus on what the right entails, what its purpose is, and how it is likely to work in the real world.

¹⁰Susan U. Philips, *Ideological Diversity in Courtroom Discourse: Due Process Judicial Discretion and the Guilty Plea* (tentative title of book manuscript in preparation)(on file with author).

¹¹Schopp, *supra* note 7, at 32.

Let me provide a concrete example that arose in my teaching. In my Therapeutic Jurisprudence Seminar, students are required to submit a short (e.g., 2-3 page) weekly reaction paper on the assigned readings. The reaction papers typically form the basis of classroom discussion.¹² One week, the topic for discussion was the therapeutic or antitherapeutic aspects of the legal process, with particular attention paid to the civil commitment hearing. The reading assignment included four chapters from one of the assigned texts,¹³ as well as a recent law review article.¹⁴ Some of the pieces emphasize the potential harm that could occur by having an emotionally troubled person (particularly an adolescent) listen to adverse testimony at a civil commitment hearing. Other readings addressed the importance of such hearings for communicating to the person exactly what it is about his or her behavior that society finds troubling and unacceptable. An assigned article by Tom Tyler suggested that according a patient respect and giving him or her "voice" in the proceeding would likely lead to greater acceptability of even an adverse judgment and would lead to greater therapeutic efficacy.¹⁵

Against the background of those readings, Marc Natelsky, one of the seminar students, proposed a "model" that he thought would increase the factual integrity of the process, clarify the roles of the participants, give the respondent "voice", and, at the same time, operate without some of the antitherapeutic aspects of the hearing that are worrisome to some commentators. Here is a somewhat abbreviated version of his reaction paper, which seems to propose a model that bears some similarity to the Continental system of criminal adjudication:

This week's assignments in TJ discuss at length the possible therapeutic benefits that may be realized through a retooling of the civil commitment hearing. The greatest difficulty . . . appears to be that of assigning proper . . . roles for the judge and attorneys.

¹²For more on the teaching of therapeutic jurisprudence, see ESSAYS, *supra* note 4, 292-301.

¹³The assignment included one case, *Parham v. J.R.*, 442 U.S. 584 (1979), as well as John J. Ensminger & Thomas D. Liguori, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, in THERAPEUTIC JURISPRUDENCE, *supra* note 4, at 245; Marc Amaya & W.V. Burlingame, *Judicial Review of Psychiatric Admissions: The Clinical Impact on Child and Adolescent Inpatients*, in THERAPEUTIC JURISPRUDENCE, *supra* note 4, at 281; Michael L. Perlin, *An Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger's "Time-Consuming Procedural Minuets" Theory in Parham v. J.R.*, in THERAPEUTIC JURISPRUDENCE, *supra* note 4, at 293.

¹⁴Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992).

¹⁵*Id.* at 439-40.

The traditional respective roles of judge as impartial arbiter and of defense attorney as dogged advocate are problematic, because both roles must be essentially compromised in order for the patient to secure the care he may need. The judge must interact closely with professionals, to whom he often defers . . . due to a lack of knowledge of the field. The defense attorney is often placed in the uncomfortable position of denying hospitalization to someone who truly needs inpatient care, and might harm self or others if released, due to the attorney's efforts The defense attorney might be violating the duty of loyalty in a majority of cases, as he is no longer playing the traditional role of ardent defender.

Because the role of judge and defense counsel have become so compromised in civil commitment hearings, I propose an alternative that might replace both traditional roles, while still meeting constitutional due process mandates. Because the judge and defense attorney are no longer, respectively, impartial and zealous, I believe that the roles of judge and defense attorney can be combined into a fact-finder . . . role; . . . the fact-finder represents the interests of no party, responsible only for deciding whether a given hospitalization is necessary based on open testimony and records. The fact-finder must hear all witnesses, gather all pertinent evidence, and interview the family, if necessary. The patient . . . must be given a forum to present his views . . . This [procedure] would be available to minors and adults.

Precisely because due process is so vital, I believe that this type of [procedure] is necessary. Under the current system, prosecutors are often ignorant of the nature of their cases until the morning of the trial. Judges are easily swayed by professionals, and patients are rarely given a forum. Defense attorneys are necessarily compromised by the gravity of the situation, and the incongruity of a "vigorous defense" when release may, in a given case, be the very worst thing for the patient. Under a fact-finder system, the judge would assume a role . . . responsible for gathering the facts of the case. The "civil commitment arbitrator" would be much more effective than players in the current system, in that he would be held to a high standard of having extensive knowledge in the field . . . and would be responsible for maintaining a reasonable knowledge of mental health law and issues. This knowledge is sorely lacking presently, with neither judge, defender, nor prosecutor possessing enough knowledge to really be effective

Natelsky's "model"—which should obviously be regarded as food for thought rather than as a fully developed proposal—raises some very interesting questions, as indeed it did in the seminar session in which it was discussed. First of all, the proposed procedure is recommended both for the commitment of minors and for the commitment of adults. In the context of minors, if the procedure is invoked in situations where the parents are seeking commitment and where the hospital is willing to accept the juvenile, the proposal seems plainly constitutional. After all, in that setting, the suggested

safeguards far exceed the minimal due process protections accorded juveniles by the Supreme Court decision in *Parham v. J.R.*¹⁶

Indeed, since the proposal clearly exceeds constitutional requirements, a state would be free to institute these procedures, and researchers and policymakers might then be able to assess the relative therapeutic and other merits of the proposal in comparison with the "ordinary" *Parham* protections generally in operation. For example, will juveniles given "voice" under the proposal more readily accept an order of commitment, cooperate more fully with treatment teams, and have a more favorable therapeutic outcome than those accorded the barebones *Parham* protections?

In the adult commitment context, the proposal clearly conflicts with our traditional notions of the right to an adversary hearing and the right to counsel. But the proposal forces us to think through the ways in which the proposal differs from our traditional rights and what it is about those rights that we hold dear.

Under Natelsky's scheme, some important fact-gathering by the investigative/judicial official will apparently take place outside the presence of respondent. Such a proposal therefore raises questions about a cluster of rights,¹⁷ including the right, in theory and practice, to face-to-face confrontation.

Does or should the right to face-to-face confrontation apply to a civil commitment hearing as well as to a criminal hearing? How important is face-to-face confrontation in a jurisdiction where respondent's presence at the hearing can be waived "by such person or by adversary counsel acting in her behalf and for good cause shown?"¹⁸ How important is the right in jurisdictions where counsel routinely waives respondent's presence or where patients overwhelmingly choose not to attend?¹⁹ How important is the right in jurisdictions where the respondent is required to appear at the hearing but where live medical testimony will not be offered unless the respondent, before the hearing, notifies the court that he or she wishes to cross-examine the

¹⁶ 442 U.S. 584 (1979).

¹⁷ If civil commitment is analogized to a criminal proceeding, these rights would include the right to notice, to a public trial, to the presence of respondent, to cross-examination and the exclusion of hearsay, to compulsory process, and to effective counsel. RALPH REISNER & CHRISTOPHER SLOBOGIN, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 716-23 (2d ed. 1990).

¹⁸ *Greene v. State*, 537 S.W.2d 100, 102 (Tex. Ct. App. 1976).

¹⁹ See Fred Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 428-29 (1966). The author visited the Austin State Hospital, Austin, Texas, to observe commitment hearings. Of forty hearings observed in one day, only 2 were attended by the patient/respondent.

examining physician?²⁰ Is the purpose of face-to-face confrontation tied exclusively to promoting the integrity of the fact-finding process? If so, is the Natelsky proposal likely to yield at least as accurate a factual picture as would a traditional civil commitment hearing? Are there some other values protected by face-to-face confrontation? Are there ways of modifying the proposal to accommodate those values?

How should procedural law reform proposals be constitutionally assessed, given the massive difference between the theory and reality of adversary commitment hearings? Those familiar with hearings²¹ know that the Supreme Court unfortunately understated the situation when it noted that "the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real."²² When traditional "adversary" hearings typically take only a matter of minutes,²³ can we really say the traditional due process right is meaningful? Which proceeding would the typical respondent find fairer? A currently conducted hearing or the procedure proposed by Natelsky? Putting aside for the moment the question of counsel, if a state were genuinely interested in implementing the Natelsky adjudicative model, should we mechanically condemn the procedure as unconstitutional and insist upon continuing the sham that may well now exist in that state?

And with respect to counsel, is the absence of counsel really worse than counsel who performs in a wholly perfunctory—or even compromised—fashion?²⁴ Again, which system would a respondent find fairer? If some sort of ally/mouthpiece is necessary, must it take the form of counsel? Why not a lay advocate from a Protection and Advocacy agency? Which of the two (agency lay advocate or appointed attorney) would likely

²⁰ See David B. Wexler, *The Waivability of Recommitment Hearings*, 20 ARIZ. L. REV. 175, 181 n.31 (1978) (citing CONN. GEN. STAT. ANN. § 17-178(c) (West Supp. 1978)).

²¹ See, e.g., *Fatal Assumption*, *supra* note 2; David B. Wexler & Stanley E. Scoville, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1 (1971); Cohen, *supra* note 19.

²² *Parham v. J.R.*, 442 U.S. 584, 609 (1979). For a recent study indicating that the supposed protections for an adversary proceeding remain more illusory than real, see Jane Hudson, *Progress Made in Representation in Civil Commitment Hearings*, 19 *Centerline* 2 (Winter 1993) (reporting on a recent study by the Arizona Center for Law in the Public Interest that focuses on representation in Maricopa County, Arizona).

²³ *Parham*, 442 U.S. at 609 n.17.

²⁴ See generally *Fatal Assumption*, *supra* note 2. See also Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. (forthcoming 1993) (antitherapeutic aspects flowing from the pretext of a system claiming to provide vigorous counsel).

know more? Be better motivated to help the client? Be more willing to act as a true advocate? Perform better?

My overall point, then, is that by attending carefully to the therapeutic or antitherapeutic implications that often inescapably flow from various rules of law, legal procedures, and the roles of legal actors, we will in no way deserve justice. Instead, we may find creative ways of crafting legal arrangements whereby we can preserve justice and increase therapeutic benefit. In cases where convergence is not possible, therapeutic jurisprudence does not call for elevating therapeutic values. Sometimes, other values will surely prevail even if the results are antitherapeutic. The constitutional rule prohibiting the execution of the mentally incompetent is a clear example.²⁵ In many instances, we may conclude that therapeutic concerns should be operative only within certain limits which are themselves fixed by concepts of justice. A criminal law analogy would be sentencing schemes that allow sentencing for utilitarian purposes, but only within a time frame fixed by notions of just deserts.²⁶ In still other cases of potential conflict, we will need to precisely define the conflict, and that ought to shed new light on the rights and justice concerns at issue.

In terms of rethinking the purpose and application of constitutional rights, Professor Slobogin's recent exercise of casting aside the shackles of caselaw and probing more deeply the fundamental values served by the Fourth Amendment²⁷ can serve as a model for more meaningful justice discussions in the law and mental health field. Instead of being prompted to think about rights because of the influence of another discipline (e.g., psychology or psychiatry), Slobogin's contribution was apparently aided by a comparative law perspective (faculty workshops on search and seizure that Slobogin conducted in Australia). Here is how Slobogin viewed his task:

How would we regulate searches and seizures if the Fourth Amendment did not exist? . . . Starting on a blank slate, as it were, should free us from current preconceptions about the law of search and seizure, ingrained after years of analyzing current dogma. Viewed from this fresh perspective we might gain a better understanding of the values at stake when the state seeks to obtain evidence or detain suspects. This new understanding in turn should invigorate criticism

²⁵ *Ford v. Wainwright*, 477 U.S. 399 (1986).

A normative principle—the notion that it does not comport with human dignity to execute a defendant who is so mentally ill that he is unable to understand and appreciate why he is being put to death—drives the *Ford* analysis, and in our view this normative principle justifies the Court's decision in *Ford* even if it is shown to be antitherapeutic in effect [by encouraging and rewarding incompetence].

ESSAYS, *supra* note 4, at 313 n.23.

²⁶ NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

²⁷ Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991).

of current law, and might even lead to fundamental reinterpretations of the Fourth Amendment's language.²⁸

Slobogin's refreshing approach is reminiscent of the Warren Court's invitation, apparently never accepted by policymakers or scholars, to think through the true bases of *Miranda*²⁹ and the line-up cases.³⁰ Recall that the *Miranda* Court required specific warnings and waivers, including advice regarding appointed counsel during interrogation, "unless other fully effective means are devised to inform accused persons to their right of silence and to assure a continuous opportunity to exercise it. . . ."³¹ With lineups, the Court's right to counsel was not intended as a "constitutional straightjacket":³² "Legislative or other regulations . . . which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may . . . remove the basis for regarding the stage as 'critical'".³³

In my experience, this sort of analysis in the mental health law context is often sparked by attempts, such as the above-noted seminar paper, seeking simultaneously to explore justice and therapeutic concerns. In many contexts, surely including traditional mental health law, "rights" talk has become stale.³⁴ Just as a comparative law perspective may rejuvenate the study of rights in constitutional criminal procedure, perhaps the therapeutic jurisprudence perspective will revivify rights talk in mental health law—and in our teaching and scholarship.

²⁸ *Id.* at 3-4.

²⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

³⁰ *See, e.g., United States v. Wade*, 388 U.S. 218 (1967).

³¹ 384 U.S. at 444. *See also id.* at 467.

³² 388 U.S. at 239.

³³ *Id.*

³⁴ Ingo Keilitz, *Justice and Mental Health Systems Interactions*, 16 LAW & HUM. BEHAV. 1, 2 (1992); Daniel W. Shuman, *Overview*, 46 SMU L. REV. 323, 324 (1992) (introduction to mental disability law symposium).