An Orientation to Therapeutic Jurisprudence

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The purpose of this Article is to introduce the reader to therapeutic jurisprudence, provide some concrete examples, and discuss some developments that have occurred in the area since Bruce Winick and I published Essays in Therapeutic Jurisprudence (Essays). An additional function is to provide the interested reader with up-to-date references to the growing therapeutic jurisprudence literature.

Therapeutic jurisprudence—the study of the role of the law as a therapeutic agent—is a vehicle for bringing mental health insights into the development of the law. Therapeutic jurisprudence is a truly interdisciplinary enterprise. It 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.

The therapeutic jurisprudence heuristic 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, and that we ask whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and justice values.

Therapeutic jurisprudence does not suggest that therapeutic considerations should trump other considerations. Therapeutic

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considerations are but one category of important considerations, as are autonomy, integrity of the factfinding process, and community safety. Therapeutic jurisprudence does not itself purport to resolve the value questions; instead, it sets the stage for their sharp articulation.\(^2\) In addition, the therapeutic jurisprudence lens generates empirical questions: one may speculate on the therapeutic consequences of various legal arrangements or law reform proposals, but empirical research is often necessary to determine with confidence whether the law actually operates in accordance with the speculative assumption.

Let us turn to some concrete exercises in therapeutic jurisprudence, using some of my own writings as illustrations. One chapter in *Essays* demonstrates how psychological principles for increasing patient compliance with medical advice can be imported into the legal system and used by judges to presumably increase an insanity acquittee’s (or a probationer’s) compliance with conditions of release (e.g., taking medication, keeping appointments, etc.).\(^3\)

The psychological principles suggest that when one signs a behavioral contract, one is more likely to comply than if one does not make such an agreement. 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 one who does not make such public commitment. Further, 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. If it works in the manner in which I have speculated, such a procedure would tap therapeutic potential without offending our notions of justice.

Another therapeutic jurisprudence piece, published after *Essays*,

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draws on the clinical insight that offenders, particularly sex offenders, harbor "cognitive distortions" about their offending behavior and, therefore, tend to deny or minimalize their involvement in criminal activity. As a first step in therapy, mental health practitioners typically seek to perform a task of "cognitive restructuring," which is 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 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 accepting 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 the 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 conducts a change of plea hearing so as to involve the defendant personally and integrally in the process of ascertaining a factual basis for the plea, the court may be performing a therapeutically valuable cognitive restructuring function.

The therapeutic jurisprudence perspective originated in the context of mental health law scholarship, and, not surprisingly, most of its applications to date have involved mental health law. The topics in


this symposium, covering law and mental health issues in the civil,\(^6\) criminal,\(^7\) and juvenile,\(^8\) contexts is representative. Elsewhere, writers have put a therapeutic jurisprudence "spin" on criminal mental health topics such as competency to be executed,\(^9\) the insanity defense,\(^10\) the law of suicide prevention in jail,\(^11\) and a criminal defense attorney's decision to request a competency evaluation.\(^12\) From the civil and mental health perspective, writers have recently looked through a therapeutic lens at matters such as the right to refuse treatment,\(^13\) a psychotherapist's duty to protect potential victims of patient violence,\(^14\) and the related matter of negligent release suits.\(^15\)

consisting of six law and mental health articles using a therapeutic jurisprudence perspective).


15. Norman G. Poythress, Jr. & Stanley L. Brodsky, *In the Wake of a Negligent Release
Some therapeutic jurisprudence tort law work has ventured beyond the traditional bounds of mental health law. Daniel Shuman, for example, has suggested that tort law standard of care rules might be reformulated to encourage emotionally-stressed (and consequently accident-prone) persons to seek mental health treatment. Bruce Feldthusen has speculated on the possible therapeutic benefits of tort claims filed by sexual battery victims against their assailants, and on the extent to which the treatment of the victim in the criminal process may generate the civil litigation.

As evident by the tort law scholarship just noted, therapeutic jurisprudence scholarship is beginning to transcend the borders of mental health law. A spillover into criminal law and procedure is another natural direction for therapeutic jurisprudence. For example, the material presented earlier regarding guilty pleas and the acceptance of responsibility will presumably be relevant to criminal cases generally, not simply to sex offense cases. Further, the material presented above regarding compliance with conditions of release should be relevant to probationers in the criminal process, not simply to conditionally released insanity acquittees. Indeed, all of this material also seems pertinent to the family law area relating to rehabilitation plans formulated in termination of parental rights cases based on parental misconduct.


20. Id.

This is a thumbnail sketch of recent developments in therapeutic jurisprudence. The Massachusetts Therapeutic Jurisprudence Conference, which spawned the articles in this special section, was of course itself a major recent development. Until now, most of the therapeutic jurisprudence writing has been produced by full-time academics, most of them law professors. For a field so concerned with ascertaining and affecting the actual therapeutic and antitherapeutic consequences of legal rules, legal procedures, and the roles of legal actors, it is essential that the literature attend to the law's impact on consumers and include works by thoughtful and experienced practitioners and administrators. In that way, the articles in this Symposium which were authored or co-authored by leading professionals, contributes uniquely and deeply to the evolution of therapeutic jurisprudence.  