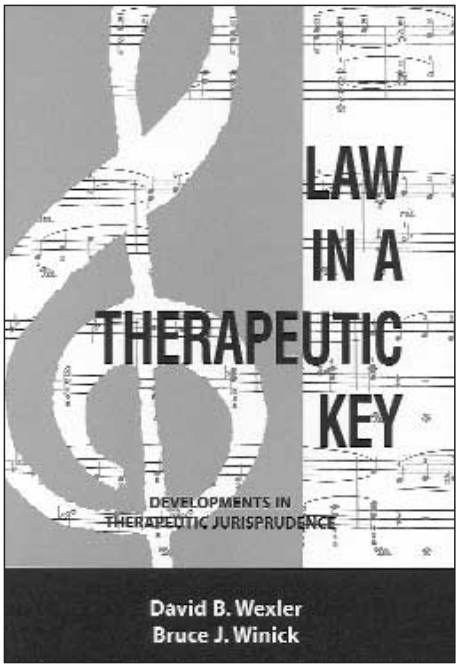
Law in a Therapeutic Key:
A Resource for Judges

Thomas T. Merrigan

LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, David B. Wexler & Bruce J. Winick, editors. Carolina Academic Press, 1996. 1012 pp. $65.

Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence is a comprehensive collection of articles by a wide range of authors on the subject of therapeutic jurisprudence. It is a helpful resource for judges willing to consider the potentially therapeutic consequences of judicial actions.



In three sections covering almost 1,000 pages, ***Law in a Therapeutic Key*** illustrates the broad application of the principles of therapeutic jurisprudence to many legal practices and concepts. "Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent, exploring the extent to which substantive rules, legal procedures, and the role of judges and lawyers produce therapeutic or antitherapeutic consequences."[1] The compendium of 50 articles included in ***Law in a Therapeutic Key*** demonstrates the enormous contribution made to the discussion and development of the subject of therapeutic jurisprudence by the book's editors, David Wexler and Bruce Winick. The seminal therapeutic jurisprudence thinking stems from writings first by Wexler, and then by Winick and Wexler, in the late 1980s and early 1990s. Both have written extensively on the subject and they have stimulated many others, primarily those involved in various facets of mental health law and academia, to jump into the discussion.

Part One of the book is entitled, *The Wide Angle Lens of Therapeutic Jurisprudence*. In this section, there are many articles concerning the application of therapeutic jurisprudence to specific issues. This section includes several subpart topics addressing mental health law (civil commitments, the insanity defense, and competency) as well as other articles that illustrate the widening lens of therapeutic jurisprudence. These subjects include civil commitments of sexual predators and drug addicts as well as articles concerning sentencing and corrections law, criminal law, rights of crime victims, domestic violence, family and juvenile law, sexual orientation law, disability law, health law, personal injury and tort law, the law of evidence, labor arbitration law, contract and commercial law, and the legal profession.

Part Two is entitled, *Commentary About Therapeutic Jurisprudence*. Chapters in this section explore therapeutic jurisprudence as a concept. The writers in Part Two express a wide range of opinions concerning the intellectual merit of therapeutic jurisprudence. For the most part, the articles in this section assess the strengths and weaknesses and the value of therapeutic jurisprudence as an intellectual proposition. This section includes an interesting chapter by John Petrila entitled, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*.[2] Besides a number of criticisms that are a little forced,[3] Petrila points out that although courts have not yet been responsive to therapeutic jurisprudence, the concept has nevertheless attracted attention and a following in the academic community. Petrila also presents some important and appropriate questions and

Footnotes

1. Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes, in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 171, 177 (David B. Wexler & Bruce J. Winick, eds., 1996)[hereafter "LAW IN A THERAPEUTIC KEY."].
2. John Petrila, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence, in* LAW IN A THERAPEUTIC KEY 685. *See also* David B. Wexler & Bruce J. Winick, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991), an earlier work by Wexler and Winick to which Petrila responded.
3. Pertrila's criticism appears to be based upon an erroneous perception, *i.e.*, that therapeutic jurisprudence posits that therapeutic outcomes should be a dominant consideration in judicial decision making. Contrary to Petrila's view, however, therapeutic jurisprudence does not propose refashioning the conventional jurisprudence paradigm into a therapeutic outcome paradigm. In addition, citing the decision of the U.S. Supreme Court in *Parham v. J. R.*, 442 U.S. 584 (1979), Petrila disputes the claim that therapeutic jurisprudence represents new thinking. In *Parham*, the Supreme Court upheld the validity of a Georgia statute permitting civil commitment of children without a judicial hearing because of the Court's concern that the judicial process might impede the treatment of children. Petrila also challenges Wexler's and Winick's assertion that there is "general agreement that other things being equal, mental health law should be restricted to better accomplish therapeutic values."

concerns. For example, Petrila asks *who* decides *what* is therapeutic, and *what* represents a therapeutic outcome. In particular, he is concerned that the determination of what represents a therapeutic outcome will be dominated by research scientists and lawyers who will decide which legal rule and intervention has therapeutic value. Arguing that the consumer, the patient, is omitted from the discussion, Petrila asserts that therapeutic jurisprudence as it has been conceptualized to date is a conservative, arguably paternalistic, approach to mental disability law.

Not surprisingly, Wexler and Winick, in the following chapter, respond.[4] As they summarize Petrila's argument, he "indicts our compilation, . . . and therapeutic jurisprudence generally, for subordinating patient/consumer interests and endorsing professional dominance." They reply, "The indictment lacks probable cause." Citing a strong and pervasive emphasis on the constitutional rights and interests of patients by those interested in therapeutic jurisprudence, Wexler and Winick adequately refute Petrila's criticism on this issue. As therapeutic jurisprudence continues to evolve, in academia and in actual application, concerns for the rights and interests of the patient consumer must remain paramount.

In Part Three, *Empirical Explorations*, several writers present the results of research aimed at understanding the application of therapeutic jurisprudence in specific situations. The purpose of this section is "to provide the reader with an immediate understanding of the wide gap between therapeutic jurisprudence theorizing and the empirical testing of the assumptions underlying such theorizing."

A JUDGE'S LENS

Judges will first want to consider whether therapeutic jurisprudence offers them an opportunity to be better judges in a practical way as they perform their duties. Many of the chapters are interesting but are quite academic and theoretical in their focus.

For example, two chapters analyze and discuss the pros and cons of the objective reasonable person tort liability standard from the perspective of therapeutic jurisprudence.[5] Unlike criminal law, which recognizes the lack of criminal responsibility, or contract law, which allows factual considerations of capacity to contract issues to be raised in contract enforcement proceedings, tort law takes no account of the subjective capacities of the tortfeasor. One argument favors the use of a limited subjective standard of care. This approach would allow the fact-finder to weigh the efforts of the tortfeasor to avoid the likelihood of harm derived from the effects of a mental disability when the tortfeasor has obtained treatment prior to the injury producing conduct. Shuman believes that this is akin to a comparative negligence standard. Opposing this view are those who observe that allowing a reduced standard of care is actually antitherapeutic because it allows those with mental disabilities to avoid responsibility for their conduct. In effect, a reduced standard of care would be an enabler of mentally handicapped individuals by supporting their proclivities to non-conforming conduct.

The second concern of judges will be to what extent will *Law in a Therapeutic Key* assist judges in making the principles of therapeutic jurisprudence useful in their work. Some of the more relevant chapters for trial judges who are interested in the more functional application of the underlying principles of therapeutic jurisprudence include *Therapeutic Jurisprudence and the Criminal Courts* (chapter 9), *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes* (chapter 10), *A Sentencing Model for the 21st Century* (chapter 11), and *A T. J. Approach to the Legal Processing of Domestic Violence Cases* (chapter 13).

At the outset, most judges will likely conclude that therapeutic jurisprudence has no application to situations where judges function as fact-finder in evidentiary hearings. Rarely, if ever, will there be a choice available to a judge between a therapeutic outcome versus a non-therapeutic outcome when determining whether a party has satisfied the required burden of proof in a particular proceeding. For example, the petitioner in a civil commitment hearing in Massachusetts must prove beyond a reasonable doubt (1) that the person is mentally ill, and (2) that discharge of the person from a facility would create a likelihood of serious harm. Commitment of a person on less than sufficient evidence may be very therapeutic. Likewise, release of such a person might be very anti-therapeutic. However, these considerations will have no bearing in the fact-finding that occurs in a civil commitment proceeding. Rather, the outcome of the civil commitment proceeding will be a function of whether the petitioner has satisfied the required burden of proof.

On the other hand, there are many situations when a judge is involved in a dispositional matter, usually after the fact-finding has been done, that will permit therapeutic jurisprudence considerations to enter the picture. Often, in these situations, the manner or method of disposition by the judge may have a therapeutic impact or an anti-therapeutic impact on a litigant. For example, therapeutic jurisprudence principles play a central role in drug courts. Drug court judges engage weekly in dialogues with offenders offering both support and admonitions to them. It is this interchange that occurs between the judge and the offender that is seen as having a therapeutic impact on drug court offenders. Likewise, restorative justice practices enable judges to have therapeutic impact on both victims and offenders. This happens when the court allows victims, and "encourages" offenders, to address the story of the crime in a felt way. Similarly, judges who hear family law cases involving custody, visitation, and neglect can utilize the opportunity for dialogue with litigants to have a therapeutic effect on them.

Although these specific examples—drug court, restorative

4. David B. Wexler & Bruce J. Winick, *Patients, Professionals, and the Path of Therapeutic Jurisprudence: A Response to Petrila*, *in* LAW IN A THERAPEUTIC KEY 707.

5. *See* David W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, *in* LAW IN A THERAPEUTIC KEY 385; Grant H. Morris, *Requiring Sound Judgments of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurisprudence*, *in* LAW IN A THERAPEUTIC KEY 409.

justice and family court—are not topics covered in *Law in a Therapeutic Key*, several of the articles in the book do illustrate that there are many situations when trial court judges will have occasion to infuse a therapeutic element into judicial proceedings. For example, some of the articles point out that when judges deal with sentencing, make orders setting conditions of probation, accept guilty pleas, or address abusers in domestic violence cases, the judge has an opportunity through direct dialogue with the offender to affect the cognitive distortions harbored by an offender with respect to the events that brought him or her into court. It is anti-therapeutic when the judge allows the offender to dispose of the case without being truthful or requiring that the offender accept responsibility for what occurred. These articles make it clear that when judges allow offenders to leave the courtroom still blaming the victim, the police, or otherwise minimizing and rationalizing, it is anti-therapeutic. Whether on probation, continuing in a relationship, or participating in visitation (all of which often involve substance abuse problems), anti-therapeutic or therapeutically neutral outcomes are wasted possibilities for therapeutic results. Therapeutic outcomes are more likely to produce a better quality of life for litigants and their families. Such outcomes will also be more likely to improve individual and public safety, and aid the quality of community life. Many of the articles in *Law in a Therapeutic Key* will be of interest to those judges comfortable with the therapeutic role of the robe.

Thomas T. Merrigan is the presiding justice of the Orange District Court in Orange, Massachusetts. Appointed a district judge in 1990, he is vice chair of the Massachusetts Supreme Judicial Court Standing Committee on Substance Abuse. Judge Merrigan served for three years on the Community-Focused Courts Advisory Committee of the National Center for State Courts. In his own court, Merrigan's innovations include a drug court session, restorative justice probation, and other restorative justice methods for conflict resolution. Judge Merrigan teaches undergraduate and graduate courses at local universities, primarily on the subject of restorative justice. He received his B.S. degree in political science in 1973 from the University of Massachusetts and his J.D. degree in 1976 from the University of Kentucky.

THERAPEUTIC JURISPRUDENCE
The Second International Conference

University of Cincinnati
Cincinnati, Ohio
May 3-5, 2001

The Second International Conference on Therapeutic Jurisprudence will be held May 3-5, 2001, at the Kingsgate Conference Center at the University of Cincinnati. A call for papers, travel and accommodation details, and other conference information will be made available in the coming months at the conference Web site—http://www.law.uc.edu/tj2001. To be added to a mailing list for the conference, send your name, address, and e-mail address to univconf@email.uc.edu.

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