

## Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development\*

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**Summary:** This essay, based on the 3rd Annual Martin Tansey Memorial Lecture, delivered 26 May 2010 at the Criminal Courts of Justice in Dublin, and sponsored by the Association of Criminal Justice Research and Development, introduces the perspective of therapeutic jurisprudence (TJ) and applies the perspective to several criminal justice issues, such as sentencing, probation, and parole. It calls for an academic–practitioner interdisciplinary and international partnership to enable the field to grow and flourish.

**Keywords:** Therapeutic jurisprudence, criminal justice, criminal law and procedure, sentencing, probation, parole.

### Introduction

On 26 May 2010, I was honoured to present, at the Criminal Courts of Justice in Dublin, the 3rd Annual Martin Tansey Memorial Lecture. I am grateful to Maura Butler and the Association of Criminal Justice Research and Development (ACJRD) for the invitation, and to Kieran McGrath for recognizing the relevance of therapeutic jurisprudence (TJ) to the mission of the ACJRD and for serving as matchmaker.

The present paper is not identical to the lecture, but it does capture its essential substance and is presented, I hope, in a form – and with

\* Portions of this paper (tracing the history, development, and scope of therapeutic jurisprudence) are drawn with permission from *Thomas M. Cooley Law Review*, 2000, vol. 17, pp. 125–134. The original essay has been substantially edited, updated, and tailored to the specific interests of the Association for Criminal Justice Research and Development.

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references – to enable the interested reader to grasp the notion of therapeutic jurisprudence and to use the perspective and its literature to contribute to the areas of interest of the ACJRD. Indeed, from a mere glance at the ACJRD website, one can see the overlap of TJ with the focus of several of the Association’s existing working groups, such as those of Mental Health, Reintegration, and Restorative Justice.

Let me begin, then, by defining TJ, putting it in a conceptual framework, and tracing its development *from* a new twist on mental health law *to* a broad mental health approach to the law in general. I will conclude by discussing TJ’s interest in issues specific to criminal justice research and development.

## Defining TJ

Therapeutic jurisprudence is the “study of the role of the law as a therapeutic agent” (Wexler and Winick, 1996). It focuses on the law’s impact on emotional life and on psychological well-being. Clearly, these are areas that have not received very much attention in the law until recently. TJ turns the spotlight on this previously underappreciated aspect, humanizing the law and concerning itself with the human, emotional, and psychological side of law, legal process, and legal practice.

Basically, therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviours and consequences. Sometimes these consequences fall within the realm of what we call therapeutic; other times antitherapeutic consequences are produced. Therapeutic jurisprudence urges us to be aware of this and asks 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 (Wexler and Winick, 1996).

It is important to recognize that therapeutic jurisprudence does not itself suggest that therapeutic goals should trump other ones. It does not support paternalism, coercion, and the like. It is merely 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. Therapeutic jurisprudence simply suggests that we think about these issues and see if they can be factored into our law-making, lawyering, or judging (Wexler and Winick, 1996).

TJ, then, is the study of therapeutic and antitherapeutic consequences of the law. When we speak of the law, we mean the law *in action*, not

simply the law on the books. Conceptually, it is helpful to think of “the law” as consisting of the following three categories: (1) *legal rules*, such as the again newsworthy “Don’t Ask, Don’t Tell” provision regarding gays in the US military (Kavanagh, 1995); (2) *legal procedures*, such as hearings and trials (see Weinstein, 1999a, which provides a detailed analysis of legal procedures, hearings, and trials involving the custody of children); and (3) the *roles* of legal actors such as the behaviour of judges, lawyers, and therapists acting in a legal context (Wexler, 1996). Much of what legal actors do has an impact on the psychological well-being or emotional life of persons affected by the law (Silver, 1999). I refer here, for example, to matters such as the dialogue that judges have with defendants or that lawyers have with clients.

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 (Kavanagh, 1995). 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.

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. 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 that, then that person may also be afraid to talk about many other things because those other things are likely to raise the question of the legally prohibited topic. 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 (Kavanagh, 1995).

Therefore, 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. Perhaps it was drafted with the thought that one’s sexual life is personal and doesn’t spill over into other aspects of social life, and that it makes sense, therefore, for us simply not to ask about it and for people not to talk about it. Kavanagh’s (1995) 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.

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 Kavanagh 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 and 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. Next, let’s look at a *legal procedure*.

An example of a legal procedure looked at through the lens of therapeutic jurisprudence is an article by Professor Janet Weinstein (1999) regarding child custody disputes. 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.

Weinstein’s analysis is very interesting because it exposes how the adversary process encourages us to find and portray the *worst* thing about the other party – to bring it out in the open and to talk about just how terrible that other parent is. This is traumatic to children and, of course, damaging to the relationship of the parents. TJ asks whether there are other, less damaging ways of resolving these issues, such as through mediation or rather new mechanisms such as collaborative divorce.

Therapeutic jurisprudence focuses on these creative explorations (Wexler, 1999a), as did Kieran McGrath (2005) in an important analysis of the Irish childcare system. Like Weinstein, McGrath found the adversary system – in his case the Irish adversary adjudication of childcare questions – problematic. His proposal? To consider moving, in this legal context, towards the continental inquisitorial system, such as the one in place in The Netherlands. Under that procedural model the judge plays a more active role, and the lawyers are more passive, perhaps tempering some of the stress and contentiousness that pervade adversarial hearings.

Finally, we turn to the third category – that of *legal roles*. This category examines the *behaviour* of lawyers, judges, and other actors in the legal system (Wexler, 1996, pp. 167–168). 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.

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 (Wexler, 1996, pp. 167–168). How a judge behaves at a hearing can affect whether someone complies (Meichenbaum and Turk, 1987). Later I will come back to that issue and examine it in a much more complex context.

### **The substantive scope of TJ**

Therapeutic jurisprudence grew out of mental health law. It cut its teeth on civil commitment, the insanity defence, and incompetency to stand trial (Wexler, 1990). 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 (Wexler et al., 1991; an early example that started me thinking along lines that culminated in the development of the therapeutic jurisprudence perspective was encountering 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).

Therefore, a perspective developed recognizing that the law *itself*, know it or not, like it or not, often functions as a therapeutic or an antitherapeutic agent (Wexler and Winick, 1996, p. xvii).<sup>1</sup> This is, of course, highly relevant to mental health law. The therapeutic jurisprudence perspective, however, now applies to other legal areas – probably to all legal areas – and especially to mental health law, criminal law, juvenile law, and family law. Personal injury law has also received attention (Shuman, 1996, p. 438). We think of compensation in personal injury law as a clumsy 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 (Shuman, 1996).

What therapeutic jurisprudence adds to this mix is that compensation may *itself* affect the course of recovery (Shuman, 1996, p. 433).

<sup>1</sup> 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 field of inquiry. For a historical account, see Wexler (1999b).

Sometimes time simply does not heal (Shuman, 2000). 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 (Lippel, 1999). 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 virtually all legal areas.

One of the things therapeutic jurisprudence tries to do is to look carefully at promising literature from psychology, psychiatry, criminology, and social work to see whether those insights can be imported into the legal system (Wexler and Winick, 1996). 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 (Wexler, 1996). 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.

### **The interdisciplinary element**

Current therapeutic jurisprudence thinking encourages us to look very hard for promising developments, even if the behavioural science literature itself has nothing directly to do with the law. It also encourages people to think creatively about how these promising developments might be brought into the legal system (Wexler, 1996, p. 167). 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 (Meichenbaum and Turk, 1987, pp. 159–160).

*Facilitating Treatment Adherence* (Meichenbaum and Turk, 1987) is a book written by psychologists on psychological principles that could help doctors and other healthcare providers to have their patients adhere better to medical advice. It is not specifically about psychiatry, although it could include that medical specialty, and it has nothing at all to do with law. But the words "facilitating treatment adherence" (Meichenbaum

and Turk, 1987), 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 commonsensical things, such as speaking in simple terms (Meichenbaum and Turk, 1987, pp. 81, 116). 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?" (Meichenbaum and Turk, 1987, p. 122). Thus, noncompliance sometimes results from insufficient clarity in giving instructions (Meichenbaum and Turk, 1987, p. 113).

Another principle that Meichenbaum and Turk (pp. 164–173) dealt with was signing a behavioural contract. When people sign behavioural 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 healthcare provider, they were more likely to comply (Meichenbaum and Turk, 1987, pp. 124–125). 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 (Meichenbaum and Turk, 1987, p. 164). 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 behavioural 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 (Wexler, 1996, pp. 167–168). You might also see whether agreed-upon family members could be present at that hearing.

These are ways of trying to bring these psychological healthcare 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? Those are the normative questions that get 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 behavioural science relates to cognitive distortions of offenders, especially sex offenders (Wexler, 1996, p. 159). 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 (Wexler, 1996, pp. 159, 161–2). 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,” or “I did it and it was my idea but it wasn’t for sexual gratification” (Wexler, 1996, p. 159).

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 behaviours (Wexler, 1996, pp. 159–164).

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 defence counsel, or something in the file that will establish the factual basis for the plea. Those courts involve the defendants minimally (Wexler, 1996, pp. 162–163).

Other judges have an open colloquy with the defendant, such as: “Okay, you realize this is the offence that you’re pleading to. Please tell me in your own words what happened, when, and so on.” The second type of judicial behaviour 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 (Wexler, 1996; see also Eastman, 1999, and Kadan, 1998).

## **Current criminal justice applications**

Another important TJ project in the criminal law area, one that seems to tie in closely with the goals of the ACJRD, relates to relapse prevention planning principles and how they may be brought into the law. This is a very welcome development because, for years, there was a real pessimism in rehabilitation and about rehabilitative efforts (see Martinson, 1974, stating that the evidence did not suggest that rehabilitation worked). 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.

More recently, as James McGuire's excellent anthology documents, it looks like there are certain kinds of rehabilitative programmes and packages, particularly the cognitive/behavioural variety, that seem rather promising (McGuire, 1995). One type of cognitive behavioural treatment encourages offenders to think through the chain of events that lead to criminality and then tries to get them to stop and think in advance (Bush, 1994, pp. 139, 141). 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? (2) How can the high-risk situations be avoided, or how can the situations be coped with if they arise? (Bush, 1994).

These situations may be things such as realizing you are very much at risk on Friday nights after having partied with such and such a person. The offender may decide that he or she shouldn't go out Friday nights. This determination is a way of avoiding high-risk behaviours (Bush, 1994). Instead of going out on Friday night with Joe and getting into trouble, the offender may choose to stay home or go to a movie. But what happens the next night when Joe calls or knocks on the offender's door?

Therapists have developed approaches to working with these issues, and of having offenders prepare relapse prevention plans (Knott, 1995). There are also certain programmes, such as "reasoning and rehabilitation" type programmes, that teach offenders cognitive self-change, to stop and think and figure out the consequences, to anticipate high-risk situations, and to learn to avoid and cope with them (Knott, 1995).

These programmes seem to be reasonably successful (Knott, 1995), and, as Janet McClinton noted just last year (McClinton, 2009), the "Think First" programme – itself developed by James McGuire – is now being piloted in Northern Ireland.

One of the issues that I am interested in now, from a therapeutic jurisprudence standpoint, is just how these important developments might be brought into the law. In one obvious sense, these problem-solving, reasoning and rehabilitation types of programs can be made widely available in correctional and community settings. 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.

A more subtle and nuanced way of thinking about this in TJ terms, however, is to ask how reasoning and rehabilitation can be made part of the legal process *itself* (Wexler, 1997). 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 as high-risk situations and how you're going to avoid them or cope with them" (Wexler, 1997, pp. 367–368).

If that approach is followed, courts will be promoting cognitive self-charge as part and parcel of the sentencing process *itself*. The process might 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 have a voice in it, should understand it, and should think it fair. Accordingly, your compliance with this condition should also be enhanced (Wexler, 1997).

Efforts are now under way to augment cognitive/behavioural techniques with approaches less focused on mere risk reduction and "deficiencies". This healthy and respectful trend seeks to combine cognitive/behavioural approaches with ones that seek the active participation of the client, that look to locate and build on client strengths, and that allow clients to envision leading "good lives" (Ward and Stewart, 2003). Some of these programmes and approaches were the subject of Fergus McNeill's Martin Tansey Memorial Lecture last year (McNeill, 2009).

Recent TJ scholarship is surely in line with the attempt to infuse rehabilitative efforts with active client involvement and choice. The superb recently-released TJ-oriented bench book for judges, authored by

Western Australia magistrate Michael King, for example, eschews the designation of “problem-solving courts” because of that term’s connotation of putting the court, instead of the client, in the role of the problem-solver. King (2009) opted for the term “solution-focused” courts, implying that it is clients themselves that, with the facilitative efforts and atmosphere of the court, do the essential work. His *tour de force*, easily accessible online, should be required reading for judges. So should the earlier – and much shorter – judicial TJ manual produced by the Canadian National Judicial Institute (Goldberg, 2005; see also Wexler and Winick, 1996).

In a similar attempt to blend cognitive/behavioural with strength-based and restorative approaches, I have proposed a “practice court” procedure for incarcerated persons about to face the parole process. The idea of this “re-entry moot court” (Wexler, 2010a) would be for the prospective parolee to do a “dry run” of his or her parole board interview or appearance before a group of incarcerated peers and a trained facilitator or two. The hope is that the moot court would help the prospective parolee think through important points regarding reentry, and that participation in the process would also be helpful to the peers who would themselves soon be eligible for a similar personal appearance.

The criminal court has certainly been a fertile field for TJ writing. That writing extends to the role of the criminal lawyer as well. My 2008 volume entitled *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* was designed to be a work of practical interdisciplinary scholarship for day-to-day use by the criminal law practitioner. A number of contributions to the book, in fact, are authored by criminal lawyers, public defenders, and faculty working in law school criminal law and juvenile law clinical programmes.

## Conclusion

Important contributions involving creative TJ “practices and techniques”<sup>2</sup> convince me that the future development of therapeutic

<sup>2</sup> In the criminal law area, TJ has used a “tripartite framework” for looking at needed TJ knowledge and competencies. This includes (1) the applicable legal landscape, (2) the relevant available treatments and services, and (3) the practices and techniques employed by legal actors. The impressive development of the “practices and techniques” category shows the importance of the study of legal and judicial *roles* to effective reform. The study and development of such techniques as a part of interdisciplinary legal scholarship may be TJ’s most important contribution and break from traditional legal scholarship.

jurisprudence will depend as much on the activity and involvement of practitioners – legal, judicial, mental health, social work – as on the work of academics. That, in fact, was the thrust of a plenary address I recently gave at the Nonadversarial Justice Conference in Melbourne, Australia, which I entitled *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part* (Wexler, 2010b).

For this important international, interdisciplinary academic-professional partnership to succeed, active participation in the therapeutic jurisprudence project by groups such as the ACJRD is essential. In that connection, I urge you to make use of the International Network on Therapeutic Jurisprudence (INTJ) website and bibliography at [www.therapeuticjurisprudence.org](http://www.therapeuticjurisprudence.org) and, more than that, invite you to join the TJ listserv, where you can remain up to date and also ensure that your own contributions are shared with the international community. The listserv may be joined by a few clicks on the relevant links on the TJ website. Moreover, as Director of the INTJ, I invite you to contact me for needed information or hard-to-find references. You may do so most easily by email (address on first page of paper). I very much look forward to continued contact with Ireland and the ACJRD.

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