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ESSAYS IN THERAPEUTIC JURISPRUDENCE. By David B. Wexler and Bruce J. Winick. North Carolina: Carolina Academic Press (1992). 336 Pp. $34.95.

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*Reviewed by Kathryn Kelly**

Mental health law, like other "modern" areas of the law, traces its origin to a list of exceptions in other areas of the law. For example, in the area of tort law there are many older cases addressing the responsibility of those suffering from mental illness for their intentional[1] and negligent[2] torts and the capacity of such persons to give informed consent to medical treatment.[3] In the field of criminal law, there are many cases defining and applying the insanity defense. The field of mental health law came to be recognized as separate and distinct during the last two decades as the law's attitude toward persons with mental disabilities evolved from one of paternalism, doing what is in the "best interest" of the individual, to one of protection of civil rights, guaranteeing a hearing before confinement. This evolution resulted in a flood of new cases.[4] Many of these rights were first recognized in other areas of the law and were then imported into mental health law.[5] This "rights-based" analysis frequently finds the rights of the mentally disabled person battling for primacy with the rights of others.[6] The rights-based focus is also subject to changes in judicial and popular attitudes concerning entitlement

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1. *See, e.g.*, McGuire v. Almy, 8 N.E.2d 760 (Mass. 1937) (holding "insane person" liable for the intentional torts of assault and battery where defendant struck attendant over the head with a leg of furniture). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 135, at 1072 (5th ed. 1984) (discussing common law doctrine that insanity is not a defense for intentional tort).

2. *See, e.g.*, Breunig v. American Family Ins. Co., 173 N.W.2d 619 (Wis. 1970) (holding the defendant, who suffered from an "insane delusion" that her car could fly, to the same reasonable person standard applicable to all defendants involved in automobile accidents).

3. *See, e.g.*, Pratt v. Davis, 79 N.E. 562 (Ill. 1906); *see also* KEETON ET AL., *supra* note 1, § 18, at 114 (discussing common law doctrine of capacity to give consent).

4. *See* DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE 4 (1991) (providing examples of traditional doctrinal development).

5. Professor Wexler provides many examples of rights developed in the area of criminal procedure and extended to civil commitment cases of the mentally disabled. *Id.* at 4-5.

6. For example, the right of the community to be safe may compete with the individual's right to a hearing before being involuntarily confined.

to rights.[7] Professor Wexler fears that such a focus on constitutional rights, if it becomes the exclusive approach to mental health law or even the dominant one, will cause stagnation in this area of the law as it already has affected criminal procedure, which is similarly derivative of constitutional law.[8]

Into this rights-based agenda, Professor Wexler proposes to insert a therapeutic focus to the law of mental health. Professor Wexler defines therapeutic jurisprudence as the study of how substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences.[9] In other words, does the law assist the individual in achieving mental health? Professor Wexler's thesis is that such an inquiry not only will rejuvenate mental health law, saving it from the vagaries of popular rights-based law, but also will provide additional benefits to society.

Those societal benefits are derived from several sources. First, and perhaps most obvious, the medical treatment of individual patients would be enhanced, with a concomitant increase in its success rate, thus allowing the law to play the role of healer. Second, a benefit is derived from the interdisciplinary nature of the inquiry. As the science of psychology advances its understanding of mental illness, its causes, and its treatment, the law is enriched by that better understanding. Without this interdisciplinary approach, there is a danger that the rights-based focus of the law would allow the law to proceed on a track uninformed by the underlying psychology.[10] Finally, weaning mental health law away from its dependence on constitutional issues makes it more open to international and comparative law approaches than is possible under the current focus on the United States Constitution as the source of law.

In 1987, Professor Wexler prepared a paper on law and therapy for a workshop sponsored by the National Institute of Mental Health that established this theme of therapeutic jurisprudence as a preferred approach to mental health law.[11] That paper then became the introductory chapter in

7. Professor Wexler uses the example of the change in popular and judicial attitudes toward standards for confinement of insanity acquitees after the John Hinkley verdict. *Id.* at 5.

8. *Id.* at 6-7.

9. The task of therapeutic jurisprudence is to identify-and ultimately to examine empirically-relationships between legal arrangements and therapeutic outcomes." *Id.* at 8; *see also* DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990).

10. *See* Robert F. Schopp & David B. Wexler, *Shooting Yourself in the Foot with Due Care: Psychotherapists and Crystallized Standards of Tort Liability*, 17 J. Psychiatry & L. 163 (1989), *reprinted in* WEXLER & WINICK, *supra* note 4, at 157-83 (warning that a crystallized standard of liability for medical malpractice may cause the law to be less responsive to advances in diagnosis and treatment in the field of mental health).

11. WEXLER & WINICK, *supra* note 4, at 9.

his 1990 anthology of articles entitled *Therapeutic Jurisprudence: The Law as a Therapeutic Agent.*[12] Professor Winick, who also has authored articles using the therapeutic jurisprudence approach, shares this interest in looking at the law through the eyes of the healer.[13] Professors Wexler and Winick, through their collection in *Essays in Therapeutic Jurisprudence*, play out the theme developed by them in their previous articles and books by applying their therapeutic jurisprudence thesis to several representative areas of mental health law.

Because I am principally interested in the interface between mental health law and tort law, I was particularly intrigued by Professor Wexler's use of the issue of liability of mental health care providers for failure to warn the potential victims of their patients as an example of the therapeutic jurisprudence approach. Through the now famous case of *Tarasoff v. Regents of the University of California,*[14] the California Supreme Court recognized the duty of a therapist to warn potential victims of violent threats made against them by patients during therapy.[15] The case was controversial and stimulated both legal scholarship[16] and public dialogue. The debate focused on the tension between the rights of the patient to therapy enhanced by the patient's trust in the therapist's discretion and the rights of the potential victim to personal safety enhanced by a warning.

Professor Wexler brings his therapeutic approach to this principle of tort

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12. WEXLER, *supra* note 9, at 9.

13. *See, e.g.*, Bruce J. Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. B. FOUND. RES. J. 769; *see also* Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737 (1991). The Introduction describes the development of their shared interest. WEXLER & WINICK, *supra* note 4, at ix-x.

14. 551 P.2d 334 (Cal. 1976).

15. The case involved a patient under the care of a psychologist employed by the University of California. During the course of treatment, the psychologist learned that the patient was obsessed with Tatiana Tarasoff and intended to kill her. The psychologist told the campus police of the threat. The police briefly detained the patient, but subsequently released him after deciding he was rational and admonishing him to stay away from Ms. Tarasoff. Neither the campus police nor the psychologist warned Ms. Tarasoff or her family. Two months later, the patient killed Ms. Tarasoff. Her parents filed wrongful death cases alleging, inter alia, that the psychologist had a duty to warn Ms. Tarasoff or her family of the patient's threat. *Id.* at 339-41.

16. *See, e.g.*, Elizabeth M. Crocker, *Judicial Expansion of the Tarasoff Doctrine: Doctors' Dilemma*, 13 J. PSYCHIATRY & L. 83 (1985) (arguing that *Tarasoff* established a legal duty upon psychotherapists which permits a breach of the patient's confidence in certain circumstances); Mark T. Dykstra, *Duty to Warn of Potentially Dangerous Patients*, 29 RES GESTAE 461 (1986); Thomas A. Goodman, *From Tarasoff to Hopper: The Evolution of the Therapist's Duty to Protect Third Parties*, 3 BEHAV. SCI. & L. 195 (1985); Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982).

law by asking whether there might actually be a therapeutic benefit to the law's imposition of the duty to warn the victim. He notes that "homicidal threats are overwhelmingly made against intimates who themselves play a substantial role in contributing to the violence."[17] He then suggests that it is possible that encouraging a therapist to contact the potential victim not only will meet the law's stated goal of protecting the victim but also will benefit the patient if the therapist is able to involve the potential victim in "conjoint" therapy.[18] If this is true, the apparent conflict between the patient's right to a confidential relationship and the potential victim's right to a warning is revealed as a false dichotomy. Thus, much of the legal system's time and energy that is expended in balancing those "rights" is wasted.

Of course, before Professor Wexler's hypothesis can be proven, it has to be supported by empirical studies in the field of psychology.[19] Therein lies another article. This aspect of therapeutic justice—that it is subject to empirical, interdisciplinary investigation—is one of its most attractive features. Having urged therapeutic effect as something that should be considered in the formation of legal doctrine, Professors Wexler and Winick turn their attention to how both legal and psychological scholarship need to develop in order to provide the necessary data for the courts to consider. In doing so, the authors have set an ambitious research agenda to carry mental health scholars into the next decade.[20]

As is apparent, I was intrigued by the thesis of therapeutic jurisprudence that the authors develop in the first two chapters of the book. The next seven chapters[21] apply the theory to particular circumstances. Then there are chapters proposing a research agenda and exploring the use of therapeutic jurisprudence to teach law students about the interaction between law and the behavioral sciences. The book is a coherent piece that is more satisfying to the reader than Professor Wexler's earlier collection of previously published essays on this topic,[22] which was introduced by a less well-developed explanation of their common theme.[23]

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17. WEXLER & WINICK, *supra* note 4, at 10.

18. *Id.* at 10-11 (citing David B. Wexler, *Patients, Therapists, and Third Parties: The Victimological Virtues of Tarasoff*, 2 INT'L J.L. & PSYCHIATRY 1 (1979), *reprinted in* WEXLER, *supra* note 9, at 201).

19. As the authors point out, "[l]egal judgments . . . are often based on factual predicates that remain unexamined empirically and that might turn out not to be true . . . ." WEXLER & WINICK, *supra* note 4, at xi.

20. *Id.* at 303-20. *See also* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991).

21. Each chapter is a separate, previously published article.

22. WEXLER, *supra* note 9.

23. *See* John W. Parry, *Psychological Treatment and Justice at Odds*, 15 MENTAL &

The authors recognize that in a particular case the therapeutic values may conflict with competing values of patient autonomy or community safety and thus might have to be sacrificed or at least compromised.[24] Yet, Professor Wexler maintains a world view of harmony between therapeutic and other aims, to see not conflict but balance in the potentially competing demands society places on the law. It will be interesting to see if this proves to be true. I look forward to reading the articles of those who take up the challenge of the research agenda issued as the concluding chapter of the book.

PHYSICAL DISABILITY L. REP. 119, 123 (1991) (reviewing DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990)) (recommending that the Introduction's explanation of the thesis of therapeutic jurisprudence be expanded, and suggesting that the book not be purchased for the accompanying articles alone because they are available from other sources).

24. "Let us, at the outset, emphasize that therapeutic jurisprudence does not embrace a vision of law or even of mental health law as serving exclusively or primarily therapeutic ends . . . . The law serves many ends, and our suggestion that the impact on therapeutic values of legal rules and practices should be analyzed does not mean that therapeutic values should predominate over others." WEXLER & WINICK, *supra* note 4, at xi.