CORE
Metadata, citation and similar papers at core.ac.uk

NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 10
Issue 3 *THERAPEUTIC JURISPRUDENCE: RESTRUCTURING MENTAL DISABILITY LAW*

Article 9

1993

THERAPEUTIC JURISPRUDENCE: A VIEW FROM A FORENSIC PSYCHIATRIST

Robert L. Sadoff, M.D.

Follow this and additional works at: https://digitalcommons.nyls.edu/journal_of_human_rights

 Part of the Law Commons

Recommended Citation

Sadoff, M.D., Robert L. (1993) "THERAPEUTIC JURISPRUDENCE: A VIEW FROM A FORENSIC PSYCHIATRIST," *NYLS Journal of Human Rights*: Vol. 10 : Iss. 3 , Article 9.
Available at: https://digitalcommons.nyls.edu/journal_of_human_rights/vol10/iss3/9

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of Human Rights by an authorized editor of DigitalCommons@NYLS.

THERAPEUTIC JURISPRUDENCE: A VIEW FROM A FORENSIC PSYCHIATRIST

Robert L. Sadoff, M.D. *

Therapeutic jurisprudence appears to be a revolutionary new and progressive concept in the law, eschewing the traditional principle of precedent. Professor David Wexler has introduced this concept initially in terms of mental health law;[1] it has been expanded to include civil law and personal injury matters as well as criminal cases.[2]

It is certainly clear to consider the application of mental health law wherein the consumer or patient becomes the focus of therapeutic attention. Is the decision made in keeping with the patient's best interest? Does the patient have autonomy in this particular case or is the patient the product of the paternalistic mental health system? The whole area of patients' rights, including right to treatment and right to refuse treatment, focuses on the welfare of the patient in terms of legal rights rather than medical needs.[3] Some critics have complained that the law has gone too far in granting patients the right to refuse treatment when courts have already declared that patients have a right to adequate treatment if they are involuntarily confined to mental hospitals.[4] Other cases have proclaimed the professional

---

© Copyright 1993 by the *New York Law School Journal of Human Rights.*

* Clinical Professor of Psychiatry, University of Pennsylvania School of Medicine.

[1] David B. Wexler, *An Introduction to Therapeutic Jurisprudence, in* THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 3, 4 (David B. Wexler ed., 1990).

[2] *See* Robert F. Schopp & David B. Wexler, *Shooting Yourself in the Foot with Due Care: Psychotherapists and Crystallized Standards of Tort Liability, in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 157 (David B. Wexler & Bruce J. Winick eds., 1991) [hereinafter ESSAYS].

[3] *Cf.* Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection, in* ESSAYS, *supra* note 2, at 41, 50 (discussing policy concerns in determining the appropriate level of ability required of patients to be competent to make treatment decisions).

[4] *See* Rael J. Isaac & Samuel J. Braken, *Subverting Good Intentions: A Brief History of Mental Health Law "Reform"*, 2 CORNELL J.L. & PUB. POL. 89, 108 (1992) (stating it would be incongruous if an individual could frustrate the very reason for the state's

judgment of the therapists as the central focus when deciding treatment issues.[5]

With respect to involuntary commitment, the law has changed in every state to include "dangerousness" as one of the major criteria for commitment.[6] It is not sufficient for an individual to be deprived of rights by being committed solely because the person is mentally ill and in need of hospital treatment. The person must pose a risk of harm to self or others as a result of mental illness in order for the courts to sanction a deprivation of liberty.[7]

Mental health professionals have always maintained that voluntary hospitalization, when available, is preferable to involuntary commitment for treatment of the mentally ill.[8] The United States Supreme Court case of *Zinermon v. Birch* held that incompetent patients may not be voluntarily admitted to hospitals for treatment.[9] They must be involuntarily committed if they meet the requirements of mental illness and dangerousness, or they must be given alternative treatment.[10] Suppose that the patient is incompetent to sign into the hospital and yet does not meet the criteria for involuntary commitment? What are the treatment options? Must the patient go untreated? Can a compromise be found? Many psychiatrists are still not familiar with this case and continue to hospitalize severely mentally ill patients who agree to voluntary hospitalization.

---

action by refusing treatment); *see also* Delila M.J. Ledwith, Jones v. Gerhardstein: *The Involuntarily Committed Mental Patient's Right to Refuse Treatment With Psychotropic Drugs*, 1990 WIS. L. REV. 1367 (1990) (discussing the controversy between the legal and medical communities over treatment refusal by mentally ill patients in light of the impact of the *Jones* decision on institutional practice and on refusing patients).

[5] *See* Foucha v. Louisiana, 112 S. Ct. 1780 (1992); Tran Van Khiem v. United States, 612 A.2d 160, 179 (D.C. Cir. 1992); Dautremont v. Broadlawns Hospital, 827 F.2d 291, 300 (8th Cir. 1987); Johnson v. Silvers, 742 F.2d 823, 825 (4th Cir. 1984).

[6] *See* Jackson v. Indiana, 406 U.S. 715, 728 (1972). *See also* Gilliam v. Martin, 589 F. Supp. 680, 682 (W.D. Okla. 1984) (holding forcible medication constitutional when clear indication that petitioner will revert to dangerous and psychotic behavior).

[7] *See* Zinermon v. Burch, 494 U.S. 113, 134 (1990) (citing O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)).

[8] *See* Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV 15, 50 (1991).

[9] 494 U.S. 113 (1990).

[10] *Id.* at 133.

Professor Bruce Winick has specifically criticized the *Zinermon* case as not being therapeutic for the patient while giving the patient the legally logical right to be competent before signing into the hospital as a voluntary admission.[11] He points to the fact that many people are so sorely in need of hospitalization and would benefit from voluntary hospitalization if they were allowed to sign in even though they are severely mentally ill and likely incompetent.[12] Voluntary hospitalization has been shown to be more effective therapeutically than involuntary commitment.[13] Nevertheless, the legal rights of the patient have to be upheld and the patient may not be admitted on his/her own signature if the patient is incompetent.[14]

When leaving the area of mental health law and entering the arena of civil and criminal law, many other controversial cases are noted to be antitherapeutic rather than adhering to the concepts of therapeutic jurisprudence.[15] Especially in the area of domestic relations law, children are often harmed by the system that is designed to protect them.[16] Recently, guardians have been appointed to represent the best interests of the children;[17] however, traditionally (and continuing in many jurisdictions), it is the rights of the parents, battling for custody in a bitter dispute, that are recognized, often at

---

[11] Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of* Zinermon v. Burch, 14 INT'L. J. L. & PSYCHIATRY 169, 172 (1991).

[12] *Id.*

[13] *Id.* at 192-95.

[14] *Zinermon*, 494 U.S. at 135.

[15] *See, e.g.*, David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy, Analysis and Research*, 45 U. MIAMI L. REV. 979, 996 n.57 (1991) (criticizing the Court's decision in Ford v. Wainwright, 477 U.S. 399 (1986), that incompetent death row inmates have their executions suspended, as encouraging psychological dysfunction).

[16] *See generally* Douglas J. Besharov, *State Intervention to Protect Children: New York's Definition of "Child Abuse" and "Child Neglect"*, 26 N.Y.L. SCH. L. REV. 723 (1981) (arguing that over-intervention by the state places too many children in foster care for too long a period of time).

[17] Elizabeth A. Sammann, *The Reality of Family Preservation Under* Norman v. Johnson, 42 DEPAUL L. REV. 675, 706 n.251 (1992).

the expense of the rights of the children.[18] Only recently did a case develop in which a child was allowed to divorce his parents, to free himself of their control in order to be adopted by a family that provided a more therapeutic environment for him.[19]

In the field of civil law, especially personal injury, a number of plaintiffs have not been given sufficient information about the effects of litigation on their well-being.[20] Many plaintiffs complain that, had they known how difficult the litigation would be, how much of an invasion of their privacy and how time-consuming and probing the process is, they would have chosen not to sue in the first place. Can something be done to modify the procedures so that the plaintiffs (and, in some cases, defendants) are not subject to the antitherapeutic zeal of the current system of interrogatories, depositions, and invasions of privacy?

In criminal cases, efforts have been made to modify the traditional law in terms of providing psychiatric assessment for those in need[21] and expanding the areas in which psychiatric and mental health assessments are allowed (e.g., heat of passion, voluntary intoxication, battered spouse syndrome, post-traumatic stress disorder).[22] Efforts are made at tailoring the sentence to the needs of the convicted.[23] Therapy is recommended for those individuals who have significant emotional or mental disorders that have been a part

---

[18] *See generally* Melissa D. Philbrick, *Agreements to Arbitrate Post-Divorce Custody*, 18 COLUM. J.L. & SOC. PROBS. 419, 419 (1985) (goal of custody dispute should be to protect the child's interests).

[19] *See* Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993) (affirming in part termination of parental rights but reversing in part and remanding case for resolution of procedural deficiency).

[20] *See generally* JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME (1987) (examining the problems with personal injury litigation).

[21] *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985) (recognizing an expanded role of mental-health professionals in capital cases).

[22] *See, e.g.*, Chapman v. State, 386 S.E.2d 129, 131 (Ga. 1989) (holding evidence of battered wife syndrome in homicide case is admissible); State v. Allewalt, 517 A.2d 741 (Md. 1986) (stating general testimony regarding post-traumatic stress syndrome is admissible).

[23] David B. Wexler & Bruce J. Winick, *Introduction* to ESSAYS, *supra* note 2 at ix, x.

of their criminal history.[24] There are special programs for the treatment of gambling addicts, drug and alcohol abusers, sex offenders, and mentally ill or psychotic individuals.[25]

What about treatment for individuals confined to correctional institutions? Can effective therapy be conducted in a primarily punitive or security-conscious environment rather than a therapeutic environment such as a hospital? Can one have effective treatment in an environment where the therapist has limited confidentiality and must report to the authorities when the patient threatens to harm himself or others or to escape or, in some way, to jeopardize the tranquility of the secure institution? Therapy is conducted in such an environment and may be effective within the concept of limited confidentiality.[26] As long as individuals are told in advance what they can expect and what the limits on confidentiality are, they can work within those parameters. However, the treatment offered in corrections or on probation is often very sporadic and ineffective with little or no follow-up.[27]

One result of this lack of treatment is illustrated by a recent, well-publicized release of a mentally ill criminal. Donald Chapman of Wyckoff, New Jersey[28] was sentenced to serve 10 to 20 years for

---

[24] *See generally* Fred Cohen & Joel Dvoskin, *Inmates With Mental Disorders: A Guide to Law and Practice*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 462 (1992) (prisoners with psychological problems should seek therapy).

[25] *E.g.*, David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL L. REP. 229, 229-30 (1992).

[26] David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, *in* ESSAYS, *supra* note 2, at 24.

[27] Connie Mayer, *Survey of Case Law Establishing Constitutional Minima for the Provision of Mental Health Services to Psychiatrically Involved Inmates*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 258 (1989); Lois G. Forer, *The Prisoner and the Psychiatrist*, 31 EMORY L. J. 61, 61 (1982); Daniel Golden, *Sex-cons*, BOSTON GLOBE MAGAZINE, Apr. 4, 1993, at 12; Bill Sanderson, *Prisoners of Their Own Minds: Inmate Mental-Health Care Criticized*, RECORD (NORTHERN NJ), Aug. 22, 1993 at A1; Ruth Bonapace, *Storm Clouds Are Building At Prison for Sex Offenders*, N.Y. TIMES, July 25, 1993, 13NJ at 1.

[28] Mary Jo Layton, *Rapist Will Be Committed, Judge: Chapman Danger to Society*, RECORD (NORTHERN NJ), Feb. 20, 1993, at A1.

aggravated sexual assault[29] at the Adult Diagnostic and Treatment Center at Avenel, New Jersey's prison for sex offenders.[30] Donald Chapman's maximum sentence was reduced to twelve years because of good time and work time.[31] Once Chapman had completed the maximum sentence he had to be released.[32] Upon his release, county officials began an around-the-clock surveillance of Chapman.[33] The surveillance was undertaken because it was reported that Chapman had not improved during the twelve years he spent at Avenel.[34] While maintaining the surveillance, the State Attorney General's office worked to obtain a court order to confine Chapman for psychiatric testing.[35] The Attorney General's office prevailed and Chapman was sent to Bergen Pines Hospital in Paramus for testing.[36]

There were, of course, disputes as to Chapman's condition between experts who examined him.[37] During his twelve years at Avenel, Donald Chapman's behavior was "without incident."[38] The doctors at Avenel determined that Chapman was not mentally ill.[39] To order Chapman's commitment, the state was required to prove by "clear and convincing evidence" that Chapman was mentally ill and

---

[29] State v. Chapman, 472 A.2d 559 (N.J. 1984); Jim Consoli & Seamus McGraw, *County Won't Probe Freed Rapist's Claims Statute of Limitations Protects Him*, RECORD (NORTHERN N.J.), Dec. 21, 1992 at A1.

[30] N.J. STAT. ANN. §2c:47-1 (West 1992); Bonapace, *supra* note 27.

[31] Tracy Schroth, *Should Punishment Precede the Crime*, N.J.L.J., Jan. 11, 1993 at 1.

[32] David Glovin, *Chapman Likely to Get Doctors' OK: Attorney General Will Fight to Keep Rapist Hospitalized*, RECORD (NORTHERN N.J.), Jun. 4, 1993 at A1.

[33] *Id.*

[34] Kay Jackson, a psychologist at Avenel, was so concerned about Chapman's release that she contacted police and advised them that Chapman "entertained continuing fantasies of sexual torture and mutilation of women" and that he "intended to commit another sex crime." Schroth, *supra* note 31. Chapman's lawyer conceded that whatever therapy Chapman had received in prison "did not work." Malcolm Gladwell, *A Small Town Lives in Dread That Freed Rapist 'Could Snap' Again*, WASH. POST, Feb. 7, 1993 at A3.

[35] David Glovin, *Lawyer: Hospital Ignoring Rapist Says Chapman's Going Untreated*, RECORD (NORTHERN N.J.), Mar. 11, 1993 at B1.

[36] *Id.*

[37] *Id.*

[38] Layton, *supra* note 28.

[39] *Id.*

poses a danger to himself or others.[40] John LaFond, a professor at the University of Puget Sound School of Law, reports that "most sex offenders are not mentally ill."[41] Professor LaFond stated that "sexually violent predators generally have antisocial personality features" and that they are often not responsive to mental health treatment.[42] Chapman was, however, following a series of closed hearings held at Bergen Pines, found to be "mentally ill as defined by statute"[43] and a danger to society.[44] The State Division of Mental Health and Hospitals ordered Chapman held at the Forensic Psychiatric Hospital in Trenton, a maximum security facility for prisoners needing psychiatric help and for defendants found not guilty of crimes by reason of insanity.[45]

What should be done with an individual like Donald Chapman who becomes a medical-legal quandary and has implications for mental health law and questions for therapeutic jurisprudence.[46] The question remains whether Chapman's detention was preventive detention or whether this was an appropriate use of mental health law in order to prevent violent behavior and offer further treatment to this individual.[47] Would the State have acted similarly if this were a man who committed an aggravated assault in the course of robbery and served his maximum sentence?[48] Would the State have attempted to

---

[40] Glovin, *supra* note 35.

[41] Professor LaFond wrote the ACLU's amicus brief in support of a Washington State Supreme Court challenge to the state's sex offender law, *In re* Young, 857 P.2d 989 (Wash. 1993), claiming that the purpose of the commitment is lifetime preventive detention not treatment which is blatantly unconstitutional. Schroth, *supra* note 31.

[42] *Id.*

[43] In New Jersey, "[b]y law, patients must be overtly psychotic before they can be committed." Schroth, *supra* note 31.

[44] Layton, *supra* note 28.

[45] Glovin, *supra* note 32.

[46] *See generally* Elyce H. Zenoff, *Symposium on the ABA Criminal Justice Mental Health Standards: Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562 (1985) (evaluating recommendations regarding future offenders and balance between crime prevention and individual autonomy).

[47] The Supreme Court has held that the "government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." United States v. Salerno, 481 U.S. 739, 748 (1987); Schroth, *supra* note 31; Glovin, *supra* note 32.

[48] Gladwell, *supra* note 34.

have this man committed even though he had said that he was going to attack others and would commit further robberies after he served his maximum sentence and was discharged from the prison system? Is there a bias against the sex offender or others who have questionable mental illness, such that the community can act to detain them in involuntary hospitalization?[49]

Within criminal law, perhaps the most important therapeutic decision was in the case of *Jackson v. Indiana*.[50] In that case, the Supreme Court said that the State could not "constitutionally commit" a defendant for an indefinite period simply on account of "his incompetency to stand trial on the charges filed against him."[51] The Court held that an individual charged with a criminal offense who is committed solely due to his incompetency to stand trial "cannot be held more than a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."[52] If it is determined that it the individual will not attain the capacity to stand trial in the foreseeable future, "the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen or release the defendant."[53] It is very difficult to treat an individual while he has the prospect of standing trial for matters that may result in a life sentence or even the death penalty.[54] It is not "therapeutic" to hold a person indefinitely until competency is restored; therapy in such instances may not be very effective.[55]

In a similar manner, in civil law, it is almost impossible to do effective therapy on an individual who is a plaintiff in a personal injury case or a malpractice suit where he raises his mental state as

---

[49] *See* Sean P. Murphy, *Nation Getting Tougher On Its Sex Offenders*, BOSTON GLOBE, June 16, 1992, at 16.

[50] 406 U.S. 715 (1972)

[51] *Id.* at 720.

[52] *Id.* at 738.

[53] *Id.*

[54] *See* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979, 995 (1991) ("Defendants facing serious charges were thereby given an incentive to become permanently incompetent . . . .").

[55] *Id.* at 996.

an issue in that suit.[56] If, in the course of litigation, the individual requires treatment, all of his treatment notes are discoverable by subpoena to the other side.[57] Thus, there is no privacy of his treatment and no effective therapy without such privacy.[58]

These are a few concerns of a forensic psychiatrist regarding the concept of therapeutic jurisprudence. The notion is sound as long as it is applied consistently and pursued by the courts where mentally ill clients, defendants or plaintiffs, are involved. However, the rights of patients and the needs of the law are not always in concert with therapeutic principles regarding the best medical interest of the individuals concerned.[59]

---

[56] A patient's introduction of the issue of his mental competency into an action is interpreted as the waiver of the statutory privilege against disclosure of psychotherapist-patient communications. B.W. Best, Annotation, *Privilege, in Judicial or Quasi Judicial Proceedings, Arising from Relationship Between Psychiatrist or Psychologist and Patient*, 44 A.L.R. 3rd 24 (1972). *See* Abernathy v. United States, 773 F.2d 184 (8th Cir. 1985); Florida v. Axelson, 363 N.Y.S. 2d 200 (N.Y. Sup. Ct. 1974).

[57] *See* Friedlander v. Morales, 415 N.Y.S.2d 831 (1979).

[58] William W. Hague, Comment, *The Psychotherapist-Patient Privilege in Washington: Extending the Privilege to Community Mental Health Clinics*, 58 WASH. L. REV. 565, 570 (1983); Mayer *supra* note 27, at 274.

[59] Golden *supra* note 27; Murphy *supra* note 49.