



## “Changing of the Guards”: David Wexler, Therapeutic jurisprudence, and the transformation of legal scholarship☆



Michael L. Perlin

Professor of Law Emeritus, New York Law School

International Mental Disability Law Reform Project, Mental Disability Law and Policy Associates, New York Law School, 185 West Broadway, New York, NY 10013, United States

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### 1. Introduction

I was so flattered when I was asked to write this article as a tribute to Professor David Wexler's years of work and leadership in the creation, development, and perpetuation of therapeutic jurisprudence (sometimes TJ). I have known David for about 40 years, and over that time, we have become close personal and professional friends, as many readers already know. I had even threatened David with the promise that I would visit Fort Hamilton High School in Brooklyn, NY, to unearth some really embarrassing bit of information about him from the late 1950s, but prudence dictated that I did not do that.<sup>1</sup> More on point: since I first met David (we both were on The Task Force on Legal and Ethical Issues of the President's (Carter's) Commission on Mental Health),<sup>2</sup> we stayed connected, through the remainder of my years as a litigator on behalf of persons with mental disabilities<sup>3</sup> (he was already on the faculty of the University of Arizona College of Law when we

met),<sup>4</sup> during my years as a professor at New York Law School and since (although David has taken on *emeritus* status at Arizona, he remains on the active-teaching faculty at the University of Puerto Rico). David's influence on my career, my writing and thinking has been profound; that will not be a surprise to any reader of this essay who is familiar with my work.

What I am will be focusing on in this piece, however, transcends this personal view (though that will certainly be part of what I am aiming for here), and aspires to a grander and broader focus. I believe that – through his insights (first with his initial collaborator, the late Professor Bruce Winick, and since Bruce's untimely death, on his own and with other colleagues) into the meaning and implications of therapeutic jurisprudence – David has transformed legal scholarship in significant ways that the academy is just gradually beginning to realize. I hope that this essay helps illuminate this transformation for readers.

My article will proceed in this manner.<sup>5</sup> First, I will discuss how the idea of therapeutic jurisprudence first came to David, and its early development. Then, I will contextualize it in the changes in modern mental disability law (which had its start in the early 1970s, but, by the time David was first theorizing therapeutic jurisprudence in the late 1980s, had already changed substantially from its original, bold statements about liberty and the expanse of patients' rights). I will then sketch out the core principles of this school of legal thought. Next, I will look at its expansion *beyond* mental disability law, both substantively (as it was applied to other areas of the law, some “sort of like” mental disability law, and some utterly different), procedurally (as David and others began to think about how using therapeutic jurisprudence methodologies could restructure all of the legal system, including the role of courts, legislatures, administrative agencies and lawyers), and professionally (as others beyond lawyers began to embrace it). Finally, I will speculate

☆ This article is dedicated to the late Bruce Winick and Michael Jones. Their memories will always be a blessing.

E-mail addresses: [mlperlin@mdlpa.net](mailto:mlperlin@mdlpa.net), [michael.perlin@nyls.edu](mailto:michael.perlin@nyls.edu).

<sup>1</sup> Since my first footnote had to reference Bob Dylan, I need to point out that I am currently reading Richard Thomas's stunning biography of Dylan, *WHY BOB DYLAN MATTERS* (2017), in which the author, a professor of classics at Harvard, digs out Dylan's high school year book, finds that he was in the Latin Club in 10th grade, and extrapolates from that connections between Dylan, Homer, Virgil, Ovid and much more, connections which have led to lyrics in many Dylan songs (e.g., *When I Paint My Masterpiece*; *Early Roman Kings*). I expect that David's yearbook would have revealed a love for doo-wop music, but will leave it to the cite-checkers if I am wrong...

<sup>2</sup> See *Report of the Task Panel on Legal and Ethical Issues*, in 4 App. TASK PANEL REPORTS SUBMITTED TO THE PRESIDENT'S COMMISSION ON MENTAL HEALTH 1359 (1978), reprinted as *Mental Health and Human Rights: Report of the Task Panel on Legal and Ethical Issues*, 20 ARIZ. L. REV. 49 (1978).

<sup>3</sup> For eight years, I was director of the NJ Division of Mental Health Advocacy. See e.g., Michael L. Perlin, *Mental Patient Advocacy by a Public Advocate*, 54 PSYCHIATRIC Q. 169 (1982).

<sup>4</sup> For details about David's pre-academic life, see Constance Backhouse's wonderful biographical essay, *An Introduction to David Wexler, the Person Behind Therapeutic Jurisprudence*, 1 INT'L J. THER. JURIS. 1 (2016).

<sup>5</sup> This paper draws substantially on Michael L. Perlin, “Have You Seen Dignity?": *The Story of the Development of Therapeutic Jurisprudence*, 27 U.N.Z. LAW REV. 1135 (2017).

as to the future, using as my fulcrum the just-created<sup>6</sup> International Society of Therapeutic Jurisprudence.

My title draws, in part, on Bob Dylan's brilliant song, *Changing of the Guards*.<sup>7</sup> As I have previously noted, the song, "per the great Dylanologist Oliver Trager, is about "control of a world ruled by power and death."<sup>8</sup> My focus here, though, is on this verse:

Gentlemen, he said  
I don't need your organization, I've shined your shoes  
I've moved your mountains and marked your cards  
But Eden is burning, either brace yourself for elimination  
Or else your hearts must have the courage for the changing of the guards.<sup>9</sup>

David's turn to therapeutic jurisprudence was solidified in the early 1990s when he drew on an article of mine noting the shift by mental disability law litigators from federal to state courts<sup>10</sup> that provided evidence to him that "traditional [constitutionally-based] mental health law was dying."<sup>11</sup> He saw therapeutic jurisprudence as the "new perspective [that was] needed to rejuvenate the area and to infuse it with academic appeal."<sup>12</sup> Before this time, David had written articles that had "moved [the] mountains" of mental disability law,<sup>13</sup> but he presciently saw that, by the early 1990s, "Eden [was] burning." Rather than "brac[ing] for elimination," he embraced, totally, therapeutic jurisprudence as a way of saving, resuscitating and rejuvenating mental disability law. And I believe that he has succeeded magnificently.

It is in this spirit that I have written this article.

#### I. The origins of therapeutic jurisprudence<sup>14</sup>

Wexler has written often about how the idea of TJ germinated in his brain. As a young professor, he had written regularly about criminal law, criminal procedure and mental health law topics, but, after a while, came to realize that his *true* interest was in "law as therapy."<sup>15</sup> Thus, when he was invited to present a paper at a workshop sponsored by

the National Institutes of Mental Health, he used that opportunity "to lay out a perspective of law as therapy –of therapy *through* law–and reviewed the work, by [himself] and others, that fell –implicitly–within that framework. That paper, therefore, made the therapeutic jurisprudence perspective explicit."<sup>16</sup>

Wexler then published the first explicitly-focused therapeutic jurisprudence book, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT*. His guiding principle was that "mental health law would better serve society if major efforts were undertaken to study, and improve, the role of the law as a therapeutic agent."<sup>17</sup> That book brought together many "forerunner" pieces – articles that were written from the perspective of therapeutic jurisprudence before that phrase became part of the legal literature.<sup>18</sup> Therapeutic jurisprudence was never intended to be a *theory*, he has since written, but rather, "a 'field of inquiry' – in essence a research agenda – focusing attention on the often overlooked area of the impact of the law on psychological wellbeing and the like."<sup>19</sup>

Wexler continued his work –often with his friend and colleague, Prof. Bruce Winick – and, the next year, they published their first co-edited book, *Essays in Therapeutic Jurisprudence*. This book included essays by each separately, by both, and in two cases, by Wexler and another co-author.<sup>20</sup> In the *Introduction* to this book, Wexler and Winick articulated what has remained for over a quarter of a century as the heart of therapeutic jurisprudence, describing it as a consideration of "the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences."<sup>21</sup> Even at this early stage, Wexler and Winick realized that, to be viable, therapeutic jurisprudence had to be a discipline for others *in additions* to mental disability lawyers and mental disability law professors<sup>22</sup>:

<sup>16</sup> Wexler, *supra* note 14, at 693. See also, e.g., David B. Wexler, *Therapeutic Jurisprudence: New Directions in Law / Mental Health Scholarship*, in *MENTAL HEALTH AND LAW: RESEARCH, POLICY AND SERVICES* 357 (Bruce D. Sales & Saleem A. Shah, eds. 1996).

<sup>17</sup> David B. Wexler, *Preface*, in DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* vii, vii (1990) (WEXLER, *THERAPEUTIC JURISPRUDENCE*).

<sup>18</sup> I was so flattered that he chose one of my pieces – a take-no-prisoners criticism of the US Supreme Court's decision in *Parham v. J.R.*, a case that countenanced fewer procedural safeguards for juveniles facing involuntary civil commitment than for adults facing such commitment – as one of the "forerunner" articles in their collection (an article, *An Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger's Time-Consuming Procedural Minuets Theory in Parham v. J.R.*, *An Invitation to the Dance: An Empirical Response to Chief Justice Warren Burger's Time-Consuming Procedural Minuets Theory in Parham v. J.R.*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 149 (1981), reprinted in WEXLER, *THERAPEUTIC JURISPRUDENCE*, *supra* note 17, at 291, that I had written years before the phrase "therapeutic jurisprudence" was ever uttered).

<sup>19</sup> David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part*, 35 MONASH U. L. REV. 35, 35 (2011).

<sup>20</sup> David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Law Malpractice Litigation: Some Preliminary Observations*, in DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 135 (1991) (ESSAYS); Robert F. Schopp & David B. Wexler, *Shooting Yourself in the Foot with Due Care: Psychotherapists and Crystallized Standards of Tort Liability*, in *ESSAYS*, *supra*, at 157. Schopp was Wexler's former research assistant.

<sup>21</sup> David B. Wexler & Bruce J. Winick, *Introduction*, in *ESSAYS*, *supra* note 20, at ix, ix. See also, *id.* at 8.

This book was immediately hailed by Dr. Paul Appelbaum as "a tonic for what ails mental health law." (book jacket review).

<sup>22</sup> As with Wexler, Winick's early scholarship had also focused on mental health law and criminal law. See, e.g., Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982); Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921 (1985); Bruce J. Winick, *Forfeiture of Attorneys' Fees under RICO and CCE, and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765 (1989). Of course, Winick and Wexler wrote extensively together. See e.g., David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225 (1992); David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, 89 A.B.A. J. 54 (May 2003); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605 (2006); David B. Wexler & Bruce J. Winick, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. WEST. L. REV. 15 (1997).

<sup>6</sup> This essay is being written in January 2018.

<sup>7</sup> <http://www.bobdylan.com/us/songs/changing-guards>

<sup>8</sup> OLIVER TRAGER, *KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA* 104 (2004). I draw on a lyric of that song as part of the title of a TJ-focused article I have written about prosecutorial misconduct in death penalty cases involving defendants with mental disabilities. See Michael L. Perlin, "Merchants and Thieves, Hungry for Power": *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501 (2016).

<sup>9</sup> <http://www.bobdylan.com/us/songs/changing-guards>. On the significance of this verse in the song in question, see IAN BELL, *TIME OUT OF MIND: THE LIVES OF BOB DYLAN* 164–66 (2015 edition).

<sup>10</sup> Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?* 20 LOY. L.A. L. REV. 1249 (1987).

<sup>11</sup> David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence* 16 LAW & HUM. BEHAV. 27, 30 (1992) (Wexler, *Putting Mental Health*). See generally, David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 18 (2008) (Wexler, *Two Decades*).

<sup>12</sup> 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, 980–81 (1991).

<sup>13</sup> See e.g., David B. Wexler & Stanley Scoville, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1 (1971); David B. Wexler, *The Structure of Civil Commitment*, 7 LAW & HUM. BEHAV. 1 (1983) (Wexler, *Structure*); David B. Wexler, *Therapeutic Justice*, 57 MINN L. REV. 289 (1972) (Wexler, *Justice*); David B. Wexler, *Patients, Therapists and Third Parties: The Victimological Virtues of Tarasoff*, 2 INT'L J. L. & PSYCHIATRY 1 (1979) (Wexler, *Victimological Virtues*).

<sup>14</sup> This section is adapted from Perlin, *supra* note 5, at 1137–43.

<sup>15</sup> David B. Wexler, *Therapeutic Jurisprudence Forum: The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691, 693 (1999). In an email to the author of this article (March 7, 2017; on file with author), Wexler underscored this: "The lightbulb is that I was asked to write on law AND therapy but realized my true interest was law AS therapy; some of my earlier work even had titles consistent with that view," referring *inter alia*, to Wexler & Scoville, *supra* note 13; Wexler, *Structure*, *supra* note 13; Wexler, *Justice*, *supra* note 13, and Wexler, *Victimological Virtues*, *supra* note 13.

Obviously, however, therapeutic jurisprudence will also have applications in forensic psychiatry generally, in health law, in a variety of allied legal fields (criminal law, juvenile law, family law), and probably across the entire legal spectrum.<sup>23</sup>

The timing here was critical. After the initial euphoria felt by patients' rights advocates in the early-mid 1970s,<sup>24</sup> in many areas Supreme Court decisions began to shift away from expansive federal court readings of individual rights, and these decisions significantly slowed down rights expansion in many such areas of the law.<sup>25</sup> As I already noted, this led to a shift to state courts as a major venue for mental disability litigation and state constitutions and statutes as major sources of those rights.<sup>26</sup> And that led Wexler to write that "traditional mental health law was dying,"<sup>27</sup> and that a "new perspective [was] needed to rejuvenate the area and to infuse it with academic appeal."<sup>28</sup> The turn to TJ was, no question about it, a "changing of the guards."

So, by 1991, the groundwork for TJ was laid. The question remained. Were others going to embrace it, write about it, and expand it? We soon learned that the answer was "yes."

## II. The expansion of therapeutic jurisprudence

As it was clear to David that the boundaries of therapeutic jurisprudence had to be "pushed" beyond the world of mental disability law and mental disability law professors, so it was similarly clear to me. Thus, in early 1993, abetted substantially by David's urging, I brought him and Winick and others – not insignificantly, including Bob Sadoff (a forensic psychiatrist), Joel Dvoskin (a forensic psychologist, and a former student of Wexler's), Murray Levine (an academic psychologist), and Debbie Dorfman (my former research assistant and, at the time, a litigator for the Mental Health Advocacy Project in San Jose, CA) – to New York Law School (where I taught) for the first academic conference on therapeutic jurisprudence. I note the pedigrees of some of the other speakers since this was a part of a conscious effort on my part to expand the vistas of therapeutic

jurisprudence beyond simply law professors – by including mental health professionals and practicing lawyers, I hoped to make the statement that this enterprise was an expansive and expanding one and that there was room for all under our tent.<sup>29</sup>

The other papers at this symposium covered a wide range of topics – the *gestalt* of mental health law scholarship,<sup>30</sup> correctional law,<sup>31</sup> forensic psychiatry,<sup>32</sup> tort law,<sup>33</sup> the autonomy of persons with mental disabilities in the court process,<sup>34</sup> reporting of child abuse,<sup>35</sup> criminal procedure (in the context of the Federal Sentencing Guidelines),<sup>36</sup> and the use of involuntary medication in the criminal trial process.<sup>37</sup> Although many had their roots in mental disability law, this greater breadth made it clear to other scholars that mental disability law was not the only TJ "game in town," a breadth that Wexler definitely appreciated.<sup>38</sup>

The expansion of therapeutic jurisprudence took on further life some three years later, when Wexler and Winick published their massive book, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*. There, the editors collected a robust and exhaustive grouping of TJ-based articles applying the concepts in question to totally "new" areas of the law, including, but not limited to, sexual orientation law,<sup>39</sup> contracts and commercial law,<sup>40</sup> labor arbitration law,<sup>41</sup> physical disability law,<sup>42</sup> and the regulation of the legal profession.<sup>43</sup> And this began an important trend. In more recent years, there have been TJ-based pieces on such diverse areas as legal writing,<sup>44</sup> estate planning,<sup>45</sup>

<sup>23</sup> Wexler & Winick, *supra* note 18, at 21.

<sup>24</sup> See generally, Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?* 1 *PSYCHOLOGY, PUB. POL'Y & L.* 80 (1995), reprinted in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 739 (D. Wexler & B. Winick eds. 1996) (KEY); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* (3d ed. 2017), §§ 1–2.1 to 1–2.1.1, at 1–8 to 1–26, discussing, *inter alia*, O'Connor v. Donaldson, 422 U.S. 563 (1975) (right to liberty); Jackson v. Indiana, 406 U.S. 715 (1972) (application of Due Process Clause to commitments following incompetency to stand trial findings); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (application of substantive and procedural Due Process Clauses to involuntary civil commitment process).

<sup>25</sup> See e.g., *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (finding that an inmate is entitled to due process before he is found to be mentally ill and transferred to a mental hospital, but rejected request for appointment of counsel in all cases); *Parham v. J.R.*, 442 U.S. 584, 606–08 (1979) (holding that a statute requiring a neutral fact finder to determine admission of children to state mental health hospitals in a post-admission context comports with due process, but rejecting argument seeking same rights to pre-admission hearing as mandated in adult cases); *Addington v. Texas*, 441 U.S. 418, 431–32 (1979) (holding that mental illness and dangerousness must be proven by more than "clear and convincing evidence" in civil commitment hearings, but rejecting argument that "beyond a reasonable doubt" standard should be employed); *Youngberg v. Romeo*, 457 U.S. 307 (1982) ((establishing a pallid "substantial professional judgment" test in assessing liability in institutional cases); *Mills v. Rogers*, 457 U.S. 291 (1982) (sidestepping the issue of a federal constitutional basis of a right to refuse antipsychotic drug treatment); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) (expanding the scope of the Eleventh Amendment's sovereign immunity theory in institutional rights litigation).

<sup>26</sup> PERLIN & CUCOLO, *supra* note 24, § 1–2.1, at 1–9 to 1–10.

<sup>27</sup> Wexler, *Putting Mental Health*, *supra* note 11, at 30.

<sup>28</sup> Wexler & Winick, *supra* note 12, at 980–81.

<sup>29</sup> My paper, simply titled, *What Is Therapeutic Jurisprudence*, began this way:

The most important and exciting new jurisprudential insights into mental disability law of the last two decades have come from the development—primarily by two of the contributors to this Symposium, David Wexler and Bruce Winick—of the construct of "therapeutic jurisprudence."

Michael L. Perlin, *What Is Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 623, 623 (1993).

And nothing that has happened in the intervening years has made me question that opening line.

<sup>30</sup> David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759 (1993).

<sup>31</sup> Fred Cohen & Joel A. Dvoskin, *Therapeutic Jurisprudence and Corrections: A Glimpse*, 10 N.Y.L. SCH. J. HUM. RTS. 777 (1993).

<sup>32</sup> Robert L. Sadoff, *Therapeutic Jurisprudence: A View from a Forensic Psychiatrist*, 10 N.Y.L. SCH. J. HUM. RTS. 825 (1993).

<sup>33</sup> Daniel W. Shuman, *Making the World a Better Place Through Tort Law?: Through the Therapeutic Looking Glass*, 10 N.Y.L. SCH. J. HUM. RTS. 739 (1993).

<sup>34</sup> Deborah A. Dorfman, *Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 805 (1993).

<sup>35</sup> Murray Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. SCH. J. HUM. RTS. 711 (1993).

<sup>36</sup> Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?* 10 N.Y.L. SCH. J. HUM. RTS. 835 (1993).

<sup>37</sup> Bruce J. Winick, *Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of Riggins v. Nevada*, 10 N.Y.L. SCH. J. HUM. RTS. 637 (1993).

<sup>38</sup> See Wexler, *Two Decades*, *supra* note 11, at 21: "A major development in therapeutic jurisprudence has been in terms of its interdisciplinary nature."

<sup>39</sup> Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 *PSYCHOL. PUB. POL'Y & L.* 142 (1992), reprinted in KEY, *supra* note 24, at 343.

<sup>40</sup> Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 *WM. & MARY. L. REV.* 445 (1994), reprinted in KEY, *supra* note 24, at 525.

<sup>41</sup> Roger I. Abrams, Frances E. Abrams & Dennis R. Nolan, *Arbitral Therapy*, 46 *RUTGERS L. REV.* 1751 (1994), reprinted in KEY, *supra* note 24, at 499.

<sup>42</sup> Rose A. Daly-Rooney, *Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act*, 8 *J.L. & HEALTH* 89 (1993–94), reprinted in KEY, *supra* note 24, at 365.

<sup>43</sup> Amiram Elwork & G. Andrew Benjamin, *Lawyers in Distress*, 23 *J. PSYCHIATRY & L.* 205 (1995), reprinted in KEY, *supra* note 24, at 569.

<sup>44</sup> Shelley Kierstead, *Legal Writing, Therapeutic Jurisprudence, and Professionalism*, 3 *SUFFOLK U. L. REV. ONLINE* 29 (2015).

<sup>45</sup> Mark Glover, *The Solemn Moment: Expanding Therapeutic Jurisprudence Throughout Estate Planning*, 3 *SUFFOLK U. L. REV. ONLINE* 19 (2015).



correctional law,<sup>46</sup> land use planning,<sup>47</sup> classroom teaching,<sup>48</sup> domestic violence,<sup>49</sup> and negotiation theory and practice.<sup>50</sup> It could no longer be seen as simply an off-shoot of mental disability law.

### III. The core principles

The core of the *philosophy* of therapeutic jurisprudence was being well-established at the same time. The first question remained this: whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.<sup>51</sup> Here, David made clear how these tensions must be resolved: the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."<sup>52</sup> As part of the ethos of TJ, the law and legal processes, as far as possible, should avoid causing harm.<sup>53</sup> There is no question, as Professor Kristine Huskey points out, "Though thoroughly submerged in academia, TJ has a reform agenda."<sup>54</sup>

Therapeutic jurisprudence, Wexler has emphasized, forces us to look at law through its actual impact on the lives of individuals, and focuses on the law's influence on emotional life and psychological well-being.<sup>55</sup> It supports an ethic of care.<sup>56</sup> Importantly, he has underscored how therapeutic jurisprudence had to explore "insights from other fields—such as psychiatry, psychology, criminology, and social work—are useful to the law and how they can simultaneously be consistent with the due process framework."<sup>57</sup> As he has said more recently, "TJ... looks to ... other disciplines for nourishment and growth."<sup>58</sup>

<sup>46</sup> Warren Brookbanks, *Therapeutic Jurisprudence and Its Role in Corrections*, in THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES 63, 170–71 (Warren Brookbanks ed. 2015) (NEW ZEALAND PERSPECTIVES).

<sup>47</sup> Michael Widener, *Land Use Consultations Advancing Therapeutic Jurisprudence: Ripe for Clinical Trials*, 18 CARDOZO J. CONFLICT RESOL. 85 (2016).

<sup>48</sup> Michael L. Perlin & Alison J. Lynch, *How Teaching about Therapeutic Jurisprudence Can Be a Tool of Social Justice, and Lead Law Students to Personally and Socially Rewarding Careers: Sexuality and Disability as a Case Example*, 16 NEVADA L.J. 209 (2015)..

<sup>49</sup> Peter Johnsen & Elia Robertson, *Protecting, Restoring, Improving: Incorporating Therapeutic Jurisprudence and Restorative Justice Concepts into Civil Domestic Violence Cases*, 164 U. PA. L. REV. 1557 (2016).

<sup>50</sup> Carol L. Zeiner, *Getting Deals Done: Enhancing Negotiation Theory and Practice through a Therapeutic Jurisprudence/Comprehensive Law Mindset*, 21 HARV. NEGOT. L. REV. 279 (2016)..

<sup>51</sup> See Michael L. Perlin, "And My Best Friend, My Doctor/ Won't Even Say What It Is I've Got": *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 750–51 (2005); Michael L. Perlin, "Everybody Is Making Love/Or Else Expecting Rain": *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 U. WASH. L. REV. 481, 509 (2008); Michael L. Perlin, "You Have Discussed Lepers and Crooks": *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 719 (2003).

<sup>52</sup> David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); see also, e.g., David Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTATIVE PSYCHOL. 179, 182 (1996) (explaining that the right to refuse treatment encourages therapists to respect the dignity and autonomy of patients).

<sup>53</sup> Elizabeth Richardson, Pauline Spencer & David B. Wexler, *The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing*, 25 J. JUD'L ADMIN. 148 (2016). See also, Kent Madsen, *Therapeutic Jurisprudence in Investigative Interviews: The Effects of a Humanitarian Rapport-Orientated and a Dominant Non-Rapport Orientated Approach on Adult's Memory Performance and Psychological Well-Being* (2017), manuscript at 18 (available at <http://www.doria.fi/handle/10024/143227>) (same).

<sup>54</sup> Kristine Huskey, *Justice for Veterans: Does Therapy Matter?*, 59 ARIZ. L. REV. 697, 712 (2017), quoting Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 TOURO L. REV. 479, 479 (2002).

<sup>55</sup> David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis P. Stolle et al. eds., 2000).

<sup>56</sup> David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007)

<sup>57</sup> Wexler, *Two Decades*, *supra* note 11, at 23.

<sup>58</sup> David B. Wexler, *Guiding Court Conversation Along Pathways Conductive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence*, 1 INT'L J. THERAPEUTIC JURIS. 367, 367 (2016).

### IV. A new turn

Wexler has devoted much time and energy to the question of how to create "a new TJ case law and new TJ treatises of techniques in specific practice areas, and for academic commentary on the practices, on their possible improvements, on their compatibility with psychological principles and on ethical considerations."<sup>59</sup> In more recent years, in an effort to further "mainstream" TJ,<sup>60</sup> Wexler has built on these principles, arguing that TJ "has sought to look at the law in a richer way by pondering the therapeutic and antitherapeutic impact of 'legal landscapes' (legal rules and legal procedures) and of the 'practices and techniques' (legal roles) of actors such as lawyers, judges, and other professionals operating in a legal context."<sup>61</sup> Put another way, he has argued, "a useful heuristic is to think of TJ professional practices and techniques as 'liquid' or 'wine,' and to think of the governing legal rules and legal procedures—the pertinent legal landscape—as 'bottles'":<sup>62</sup> to what extent can "the various practices and techniques of TJ—the 'liquid' (or 'wine') – be poured into those bottles?"<sup>63</sup> TJ is thus both a metaphor and a methodology.<sup>64</sup>

At this point, Wexler has proposed the adoption of "TJ-friendly legal processes," and how a TJ-focused legal practice – supported by a sort of "model code of TJ processes and practices" – "might facilitate new judging."<sup>65</sup> He has built on this by suggesting that there is an "intricate and intimate relationship between the wine and the bottles— between what we might call the Therapeutic Design of Law (TDL) and the Therapeutic Application of the Law (TAL),"<sup>66</sup> emphasizing that this relationship must be a "seamless process."<sup>67</sup> And in this process, he has noted that TJ has gone beyond the typical boundaries of procedural justice, by its embrace of psychological insights.<sup>68</sup>

In connection with this development, he has also expanded his focus to assess the impact of the law on individuals' well-being,<sup>69</sup> most

<sup>59</sup> Wexler, *supra* note 19, at 40–41.

<sup>60</sup> See e.g., David B. Wexler, *Getting Started with the Mainstreaming of Therapeutic Jurisprudence in Criminal Cases: Tips on How and Where to Begin*, 14 REVISTA ESPAÑOLA DE INVESTIGACIÓN CRIMINOLÓGICA (2017) (forthcoming), accessible at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2858589](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858589). For some recent rich (international and interdisciplinary) examples of this mainstreaming, see e.g., Sharon Bessell & Tali Gal, *Forming Partnerships: The Human Rights of Children in Need of Care and Protection*, 17 INT'L J. CHILDREN'S RTS. 283 (2009); Dana Segev, *The TJ Mainstreaming Project: An Evaluation of the Israeli Youth Act*, 7 ARIZ. SUMMIT L. REV. 527 (2014); Michel Vois, *Neighbors from Hell: Problem-Solving and Housing Laws in the Netherlands*, 7 ARIZ. SUMMIT L. REV. 507 (2014).

Wexler has been discussing "mainstreaming" TJ since the first TJ conference at New York Law School 25 years ago: "Perhaps we will all benefit as therapeutic jurisprudence enters the mainstream of jurisprudential thought." Wexler, *supra* note 30, at 776.

<sup>61</sup> David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. 463, 463 (2014).

<sup>62</sup> *Id.* at 464.

<sup>63</sup> David B. Wexler & Michael D. Jones, *Employing the "Last Best Offer" Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation*, 6 PHOENIX L. REV. 843, 844 (2013).

<sup>64</sup> David B. Wexler, *Wine & Bottles: A Metaphor & Methodology for Mainstreaming TJ*, Therapeutic Jurisprudence in the Mainstream Blog (June 15, 2015), available at <https://mainstreamtj.wordpress.com/2014/07/29/wine-bottles-a-metaphor-a-methodology-for-mainstreaming-tj-by-david-wexler/#more-111>. See also, Helen Crew, *Can Therapeutic Jurisprudence Improve the Rights of Female Prisoners*, in THERAPEUTIC JURISPRUDENCE AND OVERCOMING VIOLENCE AGAINST WOMEN 248, 254 (Debarati Halder & K. Jaishankar, eds. 2017) (same).

<sup>65</sup> Wexler, *supra* note 61, at 467, 478.

<sup>66</sup> David B. Wexler, *Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law*, in NEW ZEALAND PERSPECTIVES, *supra* note 42.

<sup>67</sup> *Id.*

<sup>68</sup> Wexler, *supra* note 58, at 370 (examining the application of TJ to relapse prevention planning and health care compliance). See e.g., David B. Wexler, *Just Some Juvenile Thinking About Delinquent Behavior: A Therapeutic Jurisprudence Approach to Relapse Prevention Planning and Youth Advisory Juries*, 69 UMKC L. REV. 93 (2000); David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18 (1991).

<sup>69</sup> Although Bruce Winick initially explored this some years ago – see Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009) – Wexler expands on this significantly in Richardson, Spencer & Wexler, *supra* note 53.

importantly in the context of the International Framework for Court Excellence.<sup>70</sup> If the objective of a justice system is to “enhance community wellbeing or quality of life,”<sup>71</sup> then, according to Wexler, TJ is the perfect tool to bring this to fruition.

## V. Quo vadis

Wexler has been instrumental in the creation of the International Society of Therapeutic Jurisprudence (unveiled to the public the summer of 2017 in Prague at the International Academy of Law and Mental Health biannual conference)<sup>72</sup> and in the promotion of the *Mainstreaming TJ* blog, created by Judge Pauline Spencer.<sup>73</sup> As part of this effort, a group of us have created an International Society for Therapeutic Jurisprudence as a “a new, non-profit, learned association established to advance therapeutic jurisprudence (TJ).”<sup>74</sup> David and I and Retired Judge Peggy Hora are the three honorary lifetime Presidents of this Society; David and I are also members of the Board of Trustees.<sup>75</sup>

The Society hopes to continue ongoing connections with currently-operating TJ centers across the world, including ones in Japan, Israel, Australia and New Zealand, a reflection of how international the TJ movement has become,<sup>76</sup> a development which owes much to the work David has done around the world.

## 2. Conclusion

This special issue of the INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY is testament to the work David Wexler has been doing for three decades,

and to the work of all of those who he has inspired – as a teacher, a colleague, a co-author, and as a karaoke partner.<sup>77</sup> When I first met David, those of us whose focus was mental disability law were still euphoric as a result of the first decisions by the US Supreme Court and other appellate courts, that maximized patients' rights, applied the due process clause expansively, and took seriously the individual autonomy of persons with mental disabilities.<sup>78</sup> That “euphoria ... crashed ... with the ascension of a new, conservative federal judiciary and a Rehnquist-driven Supreme Court.”<sup>79</sup> David's embrace of therapeutic jurisprudence, at first, was in response to those developments.<sup>80</sup>

But TJ has moved far beyond the narrow base of mental disability law in the past quarter century. It now become a truly interdisciplinary and international scholarship, connecting practitioners and scholars, lawyers and mental health professionals, judges and judicial agency professionals.<sup>81</sup> The creation of the new International Society will, we hope, bring it to the attention of many who are as of yet, not familiar with its precepts and its actions. There is no question: David Wexler is the person most responsible for that. David saw– three decades ago – that, in Bob Dylan's words, what we had seen as “Eden<sup>82</sup> [was] burning,” and that, if we continued to follow the same path as we had traditionally done, we would have to “brace [ourselves] for elimination.”<sup>83</sup> David knew that it was the time for the “changing of the guards.” And we all will always owe him a tremendous debt of gratitude for that.

<sup>70</sup> As developed by the International Consortium for Court Excellence, of which he is a member. See [www.courtexcellence.com](http://www.courtexcellence.com).

<sup>71</sup> Richardson, Spencer & Wexler, *supra* note 53, at 149.

<sup>72</sup> See <https://newworkplace.wordpress.com/2017/07/14/launched-in-prague-the-international-society-for-therapeutic-jurisprudence/>. For the past decade, there has always been a robust TJ stream of papers at this conference. See <http://ialmh.org/congress/prague-2017/>.

<sup>73</sup> See <https://mainstreamtj.wordpress.com>.

<sup>74</sup> <https://mainstreamtj.wordpress.com/2017/06/26/forming-the-international-society-for-therapeutic-jurisprudence/>.

<sup>75</sup> Members of the Board of Trustees include, besides David Wexler and myself, the editors of this special issue, Amy Campbell and Kathy Cerminara. For the full list, see <https://www.intlji.com/about/leadership/>.

<sup>76</sup> TJ work has been published in 14 languages. See Perlin, *supra* note 5, at 1146. The Advisory Board to the *Mainstreaming TJ* blog includes individuals from 18 nations. See <https://mainstreamtj.wordpress.com>.

<sup>77</sup> I add the last not be frivolous but to point out the joyful collegiality of the TJ group, a stark contrast to many of the other professional organizations that most of us have been involved in during our careers.

<sup>78</sup> When I was a litigator on behalf of persons with mental disabilities, I filed a case, *Falter v. Veterans' Administration*, 502 F. Supp. 1178 (D.N.J. 1980) (*Falter I*), a class action suit on behalf of all the residents of the VA. Following that litigation, the VA promulgated the first Patients' Bill of Rights on behalf of persons in its facilities, and attention was paid to substantive areas of patients' rights that all too often were previously ignored. *Falter v. Veterans Admin.*, 632 F. Supp. 196, 203 (D.N.J. 1986) (“In December 1982, the V.A. Patients' Bill of Rights was promulgated.”), and see *id.* at 203, 205–08 (noting patients' rights such as rights to privacy while using telephones, to privacy in reading mail, to visitation, and to attend religious services). Writing some years later about the notion of “equality” in the context of mental disability law, I said this about the *Falter* case:

But, what has lasted with me most vividly from *Falter I* was one line of Judge Harold Ackerman's initial decision:

In this opinion, “I am referring to how [[plaintiffs] are treated as human beings.” *Falter I*, 502 F. Supp. at 1185.

I read that line in the slip opinion, and for a moment, my breath stopped. Prior to that time, I had been representing persons with mental disabilities for nearly a decade, and litigated other class actions that truly had a vast impact on the New Jersey mental health system. But never before had a judge written a line like this in an opinion in one of my cases. Michael L. Perlin, “*John Brown Went Off to War*”: *Considering Veterans' Courts as Problem-Solving Courts*, 37 *NOVA L. REV.* 445, 448–49 (2013), quoting, in part, Michael L. Perlin & John Douard, “*Equality, I Spoke That Word/As If a Wedding Vow*”: *Mental Disability Law and How We Treat Marginalized Persons*, 53 *N.Y.L. SCH. L. REV.* 9, 10 (2008–2009).

<sup>79</sup> Michael L. Perlin, “*Make Promises by the Hour*”: *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 *DEPAUL L. REV.* 947, 952 (1997).

<sup>80</sup> See Wexler, *Putting Mental Health*, *supra* note 11.

<sup>81</sup> See Wexler, *supra* note 61.

<sup>82</sup> The robust and expansive development of constitutional mental disability law.

<sup>83</sup> <http://www.bobdylan.com/us/songs/changing-guards>.