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Therapeutic jurisprudence's future in health law: Bringing the patient back into the picture

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ABSTRACT

More than 25 years ago, Professors David Wexler and Bruce Winick envisioned broad application of therapeutic jurisprudence (TJ), an interdisciplinary theory of law suggesting that legislatures, regulators, and judges consider the extent to which their decisions impact the psychological well-being of those upon whom the law acts. TJ most obviously plays a significant role in mental health and criminal law, where it originated, but Wexler and Winick long ago opined that TJ could be useful in a wide variety of other disciplines as well. Indeed, TJ has expanded exponentially in application over the years. Yet, although Wexler and Winick originally suggested that health law was an "obvious" field in which it could expand, application of TJ in that discipline has been less robust than one might have expected. This article will examine the extent to which TJ has been applied in health law other than mental health law, categorize the areas of health law in which it has been applied, and suggest future paths for expansive application in this most obvious of areas.

1. Introduction

Professor Michael Perlin, both in this issue and elsewhere, has comprehensively addressed the wide range of fields into which TJ has expanded since Professors David Wexler and Bruce Winick conceived of it. (Perlin, 2017; Perlin, 2018). While acknowledging that, "to a great extent, TJ grew out of mental health law," Perlin lists a number of additional areas of the law inviting TJ analysis, ranging from contracts and commercial law to regulation of the legal profession, with a great number in between. As Perlin says, TJ can "no longer be seen as simply an offshoot of mental disability law." (Perlin, 2017). Indeed, in 1991, Wexler and Winick wrote: "It seems only natural (at least to those of us who specialize in mental health law) that initial forays into therapeutic jurisprudence take place within the core content areas of mental health law. 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." (Wexler & Winick, 1991).

Development in health law has not yet happened to the extent Wexler and Winick likely anticipated it, given their belief that it was "obvious" that therapeutic jurisprudence would be applied in that field. This article will examine what "health law" is as compared with "mental health law," noting that patient representation is not part of a typical health lawyer's job in America. Academics have proposed that health law should be patient-centered, and this article follows their lead, suggesting that TJ is the perfect tool to use in taking a patient-centric look at the various areas of law implicated within the broad catchall category of "health law." Toward that end, it will examine some of the ways TJ has been applied in health law thus far and suggest some fertile ground within the field in which TJ can and should flourish, assisting health law in helping patients reach the best health outcomes possible.

2. Health law versus (?) mental health law

The first issue to consider is what health law separate from mental health law is. Importantly, this raises the issue whether "mental health law" is a separate field from "health law" or whether the former is a subset of the latter. Mental health law can be seen as a field separate from health law, much as similarly situated fields such as disability law and public health law are. Certainly, Wexler and Winick identified "health law" as a field separate from "mental health law," despite obvious overlap.

On the other hand, Professor Mark Hall, writing in the early 2000s, noted that "[u]ntil very recently, the literature applying therapeutic jurisprudence concepts to medical care *other than* mental health was sparse and addressed only a few specific issues." (Hall, 2002) (emphasis added). The assumption contained within this statement, that "mental health" is a subset of "medical care," implies a conception of mental health law as a subset of the broader field of health law.

That makes sense because the two obviously overlap in important ways. For example, competency is an issue at several junctions of the traditional conception of mental health law: at every stage of a criminal proceeding, for example, the defendant's competency to proceed is crucial. But competency is also key in medical treatment and research;

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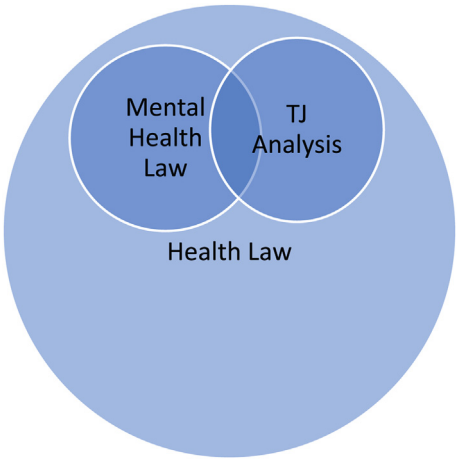
generally speaking, if a patient is not competent to consent, either consent must be obtained from a surrogate decisionmaker or the treatment or research may not proceed. (Winick, 1991). If treatment or research does proceed, tort law (i.e., the law of personal injury) will provide a remedy through malpractice litigation for lack of informed consent. Within tort law, the standard of care may, in certain limited circumstances, be affected by competency issues – not the standard of care applicable to health care providers in malpractice litigation, but the standard of care to which a tortfeasor may be held when lacking competency. (Donaldson, 1999; Schopp & Wexler, 1991).

In sum, although Wexler and Winick spoke of health law as a field distinct from mental health law, there is a fair argument that a Venn diagram of the two fields would reveal that they are related, with the latter a subset of the former and with TJ analysis potentially applying to both, as follows:



The interesting question is why TJ analysis has not expanded as far into health law as it has within mental health law. Part of that may be because of TJ's roots in mental health law, well-documented by Wexler (Wexler, 2018) and others. (Perlin, 2017; Perlin, 2018). Additionally, however, part of it may be that to engage in TJ analysis with respect to what the practicing bar calls health law is to deviate from the primary focus of health law as it has evolved thus far. That deviation would help direct focus onto the patient when debating the wisdom or lack thereof of various health law proposals. Thus, it would be welcome in the definitional struggle for the soul of health law.

3. Health Law's definitional struggle

What, then, is the primary focus of health law as defined by the practicing bar? In legal practice, health law generally encompasses commercial and regulatory practice representing provider entities, health insurers, and pharmaceutical manufacturers. The American Health Lawyers Association (AHLA), which describes itself as "the nation's largest, nonpartisan, 501(c)(3) educational organization devoted to legal issues in the health care field," defines the term as follows:

> Health Law is the body of federal, state, and local laws, rules, regulations and cases that governs the health care industry, including the delivery of all health related services to patients by all of its individual and institutional participants. The health care industry is very heavily regulated, and all of its activities and operations are subject to numerous, complex state and federal rules. Health lawyers have in-depth knowledge and experience working in this regulatory framework, and provide advice to *hospitals, physician organizations, long term care facilities, home health agencies, health insurance companies, pharmaceutical companies, as well as to physicians and other individual health care providers* on how to comply with these rules.
>
> [(American Health Lawyers Association (AHLA), 2018a) (emphasis added).]

In this conception, the practice of health law focuses "on a number of different areas, the most significant of which include: antitrust, corporate compliance, fraud and abuse, finance, health information technology, health insurance and regulation, labor and employment, liability medical records, reimbursement, patient privacy, quality of care, research and clinical trials, and tax and nonprofit." While some of those areas of law clearly primarily affect the corporate players in health care, some just as clearly affect patients a great deal. (Those chiefly are liability, medical records, patient privacy, quality of care, and research and clinical trials.) Yet the American Bar Association Health Law Section says its members represent "clients in all segments of the health care industry, including physicians, hospitals and other institutional providers, teaching and research organizations, managed care organizations and other third-party payors, pharmaceutical companies and device manufacturers. In addition, [its] members work in governmental health care programs, federal and state regulatory bodies and the academic community." ABA Health Law Section, 2018

Health law as practiced, then, generally does *not* include patient representation. AHLA's website explains: "AHLA provides resources to address the issues facing its active members who practice in law firms, government, in-house settings and academia and who represent the entire spectrum of the health industry: physicians, hospitals and health systems, health maintenance organizations, health insurers, life sciences, managed care companies, nursing facilities, home care providers, and consumers." (AHLA, 2018b). While "consumers" are included in that list, note that they are last on that list. Note also that AHLA has conceptualized individuals receiving medical care, having their care paid for, or serving as subjects of research as "consumers" rather than "patients," raising a TJ issue simply through the use of that terminology. Johnson, 2010

Patient representation generally concerns quality of care, insurance coverage, other health-care-related benefits, and other tort-related issues. It generally does not – although it could – include anticipatory planning to ensure individuals' future ability to finance health care coverage. It certainly does not relate to debates over corporate compliance and tax status. While one can imagine consideration of the effects on patients of legal determinations relating to the latter issues, those effects are not usually part of the legal conversation. AHLA includes quality of care within its bailiwick in the list above, but licensure complaints, medical malpractice, and elder law are missing. Litigators, sometimes even defense counsel, generally do not belong to the Health Law Bar (as measured by the ABA and Florida Health Law Sections). Rather, they generally belong to the Tort Trial and Insurance Practice sections of the Bar (at least in the ABA and the Florida Bar). Elder law attorneys are often associated with estate planning in law offices.

Within academia, entire symposia have been devoted to analysis of the definition of "health law," but no consensus has been reached. In 2004, scholars gathered in Cleveland to discuss, inter alia, "where the field is going, and whether its trajectory is sound." (Mehlman, 2004). In 2005, a symposium was convened at Wake Forest University School of Law to "consider the scope, content, and future direction of health law." At that symposium, Professors Mark Hall, Carl E. Schneider, and Lois Shepherd proposed a "patient-centered approach to [re]conceptualizing the field" of health law, somewhat in contrast to the conception of "health law" prevailing in practice. They suggested three possibilities as bases for thinking about the breadth and scope of health law: "a relational perspective, patient-centered professionalism, and patient-centered empiricism." Hall, Schneider, & Shepherd, 2006.

3.1. Resolution: focusing on the patient

This article expressly adopts Hall, Schneider & Shepherd's patient-centered approach. Therapeutic jurisprudence would be most impactful within health law if scholars focus on "(1) the role of the law in producing psychological dysfunction [among patients], (2) therapeutic aspects of legal rules [for patients], (3) therapeutic aspects of legal procedures

[for patients], and (4) therapeutic aspects of judicial and legal roles [for patients]." (Wexler, 1991). By incorporating research from the social sciences about the impact on patients of legal rules and process, TJ can give meaning to the patient in a health care system that often seems to have forgotten that its central focus should be good outcomes for those patients.

Of course, research should not ignore effects on providers. Some of the impact on patients will derive from the effects of laws regulating providers, which shape their behavior. For example, a statute or legal ruling defining "medical necessity" in a certain way will result in coverage for those treatments satisfying the definition and refusal of coverage for those not satisfying the definition. Whether insurers will pay for treatments will affect the number of such treatments that are administered – or, perhaps more accurately, providers will recommend what insurers cover, forsaking those insurers will not cover, simply because the vast majority of patients cannot pay for treatment absent insurance coverage of it. Patients are inevitably affected, whether therapeutically or anti-therapeutically, in that their choices regarding treatment are limited somewhat depending on the legal definition of "medical necessity," which governs providers' behavior in terms of administering the treatment or not. At all times, however, the overriding focus should be on the therapeutic and anti-therapeutic effects on patients of a legal rule or process, even if those effects derive from changes in providers' behavior as a result of that legal rule or process.

A related possible focus could be on the effect of laws, procedures, regulations or practice on individual caregivers, such as patients' family members and friends. Today's health care system sorely tests that population, and, as with patients, the health law bar does not tend to represent these important actors in the system. Research shows that more than 40 million spouses, children aged 15 and older, and extended family members took care of elderly citizens in America in 2015–2016. (Bureau of Labor Statistics, 2017). The majority were women, and 45% of them provided care daily or several times a week. In 2005, more than one million children aged 8 to 18 provided assistance in the home with activities of daily living, with some also assisting in crucial tasks such as taking medicine. (Caregiver Action Network, 2018). TJ could help improve this situation, for example, by contributing social science research examining the effect of increased health insurance coverage of the services of adult, non-familial caregivers. It would not be surprising if such research revealed that professional caregivers produce better health outcomes than do well-meaning family members. Better health outcomes could translate into lower health-care costs, paving the way to insurers welcoming the passage of such laws, quite unlike their response to most coverage mandates. Measuring the effects of such laws on both patients and individual caregivers would provide a way for TJ to improve on and solidify health law as being relational and patient-centered, as Hall Schneider, and Shepherd proposed.

Indeed, focusing on the lived experiences of patients and other individuals caught up in the health care system is consistent with a recommendation offered by Professor Hall, who may have addressed TJ most among health law academics. In a notable article addressing the interaction of law, medicine, and trust, Hall suggested that TJ could be useful in analyzing a wide variety of subjects within the *aegis* of health law from the viewpoint of effects on patient experiences. (Hall, 2002). As Hall noted, the "central objective" of the health care industry "is individual health and well being." (Hall, 2002; Hall, 2010). The central focus of TJ in analyzing the law governing that industry similarly should be on the individual, the patient. In 2006, Hall recommended TJ as "one path that legal analysis could follow toward greater patient-centeredness [in health law]." He also has described TJ as "ask[ing] what legal principles are most beneficial to patient welfare and consistent with the actual experience of being sick."

Such a focus would not necessitate, and indeed should not involve, total disregard of the effect of law on corporate players in the health care industry. TJ theorists consistently have refrained from suggesting that consideration of therapeutic effects should be privileged over others, simply that they should be measured and considered. One cannot deny that the incentives the law establishes for corporate entities to take or refrain from action are important considerations in health law. However, it does not seem to make sense to consider as a primary focus the therapeutic and anti-therapeutic consequences of legal rules and process on corporate entities. There are names for considering effects on corporate actors other than therapeutic jurisprudence; if a legal rule or process would cause corporate entities to consolidate, for example, free-market theory and antitrust law will take those effects into account. Effects on patients are not irrelevant, for antitrust law revolves around market definition and one consideration in defining a market is patient willingness to switch providers. Similarly, it is true that consolidation into a mega-corporation may result in patients at a local hospital feeling neglected, which could affect their health status for a variety of reasons. *Corporations*, however, do not yet have psychological profiles, while patients do. TJ's appropriate focus is on the patients.

3.2. Sharpening the focus

One reason TJ has not yet been applied frequently within health law may be that adopting a TJ approach to analysis of health law brings into sharp relief the puzzle of what sorts of outcomes health law should value. Seemingly, health law should contribute to the health care system's overall goal of producing the best health outcomes among patients. This seems like the analog to TJ's roots in applying psychological research to analyze the effects of mental health laws intended to assist those with mental illnesses. In Wexler's words, TJ initially focused on law regarding civil commitment, the insanity defense, and competency to stand trial to "[look] at the way in which a system designed to help people recover or achieve mental health often backfires and causes just the opposite." (Wexler, 1991). In other words, measuring the psychological therapeutic or anti-therapeutic effect of a mental health law immediately and directly sheds light on whether or not the law in question is achieving its (supposed) goal of improving the mental health of those upon whom it acts.

Consideration of therapeutic or anti-therapeutic effects of a law, rule, or legal process within health law is a bit more complex. The question becomes whether TJ analysis within health law should focus on effects on mental health, effects on mental health that result in effects on physical health, effects directly on physical health, or all three.

Labeling analysis of effects solely on physical health as a TJ approach seems unsatisfactory. Wexler has resisted efforts to define the term "therapeutic," instead urging each scholar or researcher to explicitly define the term for purposes of her own work, within that work itself. He has, however, described it as focusing on "the sociopsychological ways in which mental health, health, and mental illness might be promoted or inhibited by law," opining that TJ "deserves to retain its distinctiveness as a discipline relating to mental health and psychological aspects of health." (Wexler, 1995). Digging a bit more deeply into the subject, on one hand, he has lauded Slobogin's definition of TJ as "the use of social science to study the extent to which a legal rule or practice promotes the psychological *or* physical well-being of the people it affects" (Slobogin, 1995, emphasis added). But on the other hand, in the same article (indeed, in the same paragraph), he has supported limiting definitional efforts to a "focus on the mental health and psychological aspects of health …, recognizing that even this is (and should remain) very rough around the edges." (Wexler, 1995). Wexler's primary concern seems to be the psychological effects of law, rules, or processes, although Slobogin may have conceived TJ more broadly, including effects on either psychological or physical well-being as appropriate fields of study.

While one possible TJ inquiry into health law might involve analyzing the effect of legal rules or processes directly on the physical health of patients, and thus satisfy Slobogin's definition, it does not seem to adequately address Wexler's primary concern. For example, state laws

requiring regulatory approval for the establishment of new health care facilities may require regulators to examine, among other factors, "[t]he extent to which the proposed services will enhance access to health care for residents of the service district." (Fla. Stat. Ann. § 408.035). Adopting Wexler's suggestion that each scholar define the term for herself, this article does not consider such an analysis to be a TJ approach. Presumably consideration of the impact on access to health care includes consideration of therapeutic or anti-therapeutic effects of the decision on residents – whether the residents would be better off, health-wise, with or without the new facility. But while the law explicitly instructs regulators to consider therapeutic effects on patients and potential patients, it does not instruct them to engage in a TJ analysis in the sense used here. Rather, it identifies effects on the residents' physical health as an essential topic for consideration in forming health policy – a laudable proposition but not necessarily a consideration of therapeutic effects in the way Wexler and Winick have conceptualized TJ.

It is essential, then, to define what a TJ analysis of a health law would examine. On one hand, conducting a TJ analysis of a health law issue could require a two-step process: first consider the psychological impact on patients as a result of a given legal rule or process, and then connect the anticipated psychological impact to a potential physical health outcome. Within *mental* health law, the link is easier to comprehend; the psychological effect, whether therapeutic or anti-therapeutic, of a law may obviously and directly be tied to a mental health benefit or detriment for the patient or defendant in question. Within health law, there is one more link in the causal chain. Application in health law, in this conception, would be analogous to TJ analysis of employment law in terms of whether the psychological consequences of a law, practice, or role produce more productive, "better" workers. (Yamada, 2010).

Another conception, however, could analyze the psychological effect of legal rules or processes as an end in and of itself. Considering the psychological impact on victims' families of coroners' actions and the law governing coroners' inquests is a valuable exercise, for example. (Freckelton, 2007). At such a traumatic time, it stands to reason that a coroner's office might wish to reduce the negative psychological impact on the family of what is being done. Combining preventive measures intended to guard against anti-therapeutic impacts could combine with the principles of procedural justice, another underlying plank of therapeutic jurisprudence. The principles of procedural justice advise us that those caught up in the legal system will feel better if they are permitted to share their stories, even if the system did not treat them well. (Lind & Tyler, 1988). In an entirely different medical arena, TJ research could advise lawmakers on whether patients who are dissatisfied or disgruntled with their health care similarly benefit from voice and validation – the type of voice and validation that might result from a conversation with a health care provider during which the provider apologizes, for example. (Hall, 2005).

It is a matter for future TJ development whether TJ should directly consider physical effects on patients, whether it solely should measure the psychological effect of health laws on patients caught up in the health care system, or whether it should measure the latter and explore connections between that psychological effect and physical health outcomes. Judging from the breadth of TJ literature in other fields, there is room for a variety of types of TJ analysis within the field, precisely as Wexler has anticipated and encouraged. Research into the law's psychological effects is the *sine qua non* of a TJ analysis, but it seems researchers and authors can decide on a case-by-case basis whether to examine only psychological effects or to go farther, examining psychological impact and any physical health outcomes that may result from that psychological impact.

3.3. The areas of health law in which TJ has been applied thus far

Consideration of varying levels of impact is possible; indeed, scholars have accomplished both of those rooted in mental health and psychological considerations already in health law. For example, Professors Bruce Winick and Alina Perez analyzed the anti-therapeutic psychological effect on elders of laws preventing them from driving, finding that "the deprivation of the right to drive strikes a devastating blow to an elderly individual's lifestyle, autonomy, ability to undertake the everyday tasks of life and sense of self-identity." (Winick & Perez, 2010). Winick & Perez considered those and other psychological impacts on elderly individuals themselves, the families of those prevented from driving by such laws, and the individuals' relationships with their physicians. They did not investigate a link between the psychological effects and (public) health outcomes, but they recommended a balance in policy-making in this arena between "the public health needs of the community with the desire to minimize the negative consequences existing practices pose on the psychological well-being of elder drivers and their families."

In contrast, TJ research might reveal a link between the availability of a legally authorized method of medical aid in dying and a feeling of more control in an unpredictable and stressful situation for terminal patients. (Perez & Cerminara, 2010). In addition, TJ research also might show that patients requesting and receiving the medication provided to them as a result of the statutorily required process might choose not to take the medication once they had achieved the sought-after sense of control. That, in fact, is what has resulted in states that have passed medical aid-in-dying legislation. TJ research that finds a causal link among the correlation could be used to inform future public policy in other states considering such laws.

Medical aid in dying is a matter of bioethics and the law, the field that has seen the most common application of TJ within health law thus far. Bioethics topics seem to have lent themselves to TJ analysis more than other topics within health law, perhaps because medical ethical principles such as autonomy are directly related to patients' mental states. Professor Winick himself conducted a "legal autopsy" of the famous bioethics case of Theresa Marie Schiavo through a TJ and preventive law lens. After reviewing what was publicly available about the lawyering in that case, he concluded that the lawyers involved had failed in terms of attending to their clients' psychological needs throughout a long series of lawsuits. (Winick, 2007). Others have written about "therapeutic death" in analyzing the nation's first state law authorizing medical aid in dying, as described above. Psychological principles support the conclusion that having the option of taking medication to end their lives could relieve patients' concerns about loss of control near the end of life. TJ research could affirm that and provide evidence upon which to ground the rationale for the fairly large number of prescriptions going unused each year as patients live to the ends of their days naturally. Such feelings of control also, perhaps paradoxically, may produce physical health benefits such as increased physical comfort, even as those patients' overall physical states decline due to their terminal illness. (Cerminara & Perez, 2000). Much earlier, although not using the term "therapeutic jurisprudence," one article considered the potentially therapeutic effects on patients of an American Medical Association Council on Ethical and Judicial Affairs' recommendation that physicians discuss advance directives with those patients. (Cerminara, 1999).

Another topic within health law that has inspired TJ analysis has been coverage. Professor Bill Sage has argued "that health plans should make a serious attempt to identify traditional ethical values associated with healing and build them into coverage determinations." (Sage, 2003). In advocating for "therapeutic coverage," Professor Sage has recommended that health plans communicate through physicians whenever possible and compensate physicians for taking on the burdens of communication regarding coverage matters with patients. He also has urged that insurance companies consider the therapeutic effect of choice, focus more on dispute resolution rather than on being adversarial, and consider "relational contracting," meaning writing coverage contracts from the perspective of one planning a long-term relationship with those who are covered. Coverage considerations relating to hospice care and last-chance therapies also have received TJ treatment in

the legal academic literature. (Cerminara, 2005, 2010, 2011; Perez & Cerminara, 2010).

TJ also sparingly has surfaced in discussions of the law governing medical malpractice. Professor Edward Dauer has suggested that TJ research could enhance both substantive and procedural aspects of medical malpractice cases. (Dauer, 2003). Psychological research on patients and their families identifies the goals of medical malpractice plaintiff-side litigants as achieving accountability, finding emotional resolution, learning the real story about what happened, and assuring that others will not similarly be harmed in the future. Instead, they are caught in a flawed system of litigation that is economically motivated, which Hall analyzes in terms of trust. (Hall, 2005). Psychological research also points to anti-therapeutic effects of medical malpractice cases on defendant physicians, many of whom have been found to suffer from "depressive symptom cluster," with some potential for additional, rather than fewer, medical errors in the future as a result. Wexler and Schopp also have highlighted the potential for TJ to assist in another sub-part of medical malpractice law, that of mental health malpractice. Schopp & Wexler, 1991

In sum, there is room for a realignment of psychological reality with goals and effects of the legal system in many aspects of health law, both substantive and procedural.

3.4. Fertile fields for TJ's future growth in health law

While scholars have only sparingly applied TJ in health law thus far, there are many indications that, as Wexler and Winick predicted, it is a natural space into which TJ should expand. Perlin has written that "any area of the law that involves marginalized persons, that involves state power, that involves potential coercion screams out for a TJ analysis." (Perlin, 2017). Both Perlin and Wexler have concentrated their TJ efforts in fields involving extreme state power, such as the potential for civil commitment or criminal repercussions such as prosecution and imprisonment. Other areas of mental health, such as guardianship proceedings, also involve such a potential for exercise of state power over an individual, thus screaming out for TJ analysis.

Various aspects of the broader field of health law also involve marginalized persons, state power or potential coercion. Prisoner patients, of course, satisfy all of these conditions. State power is exercised over marginalized persons – those in medical distress, with serious chronic conditions, with physical or mental disabilities, and/or the elderly – every day through Medicaid, Medicare and the Social Security laws. Even those not subject to state control who are caught up in a huge, confusing health care system are susceptible to coercion. The system is dominated by persons with expertise no individual patient, other than perhaps one trained in medicine, can muster, making patients potentially psychologically (if not physically) vulnerable. Even in settings in which state power is not being exercised directly over patients, it is omnipresent in relation to health care organizations via state and federal regulatory agency oversight and enforcement efforts.

TJ-like concepts already have emerged in health law analysis without use of the term. Hall, Schneider, and Shepherd, in convening the earlier-mentioned academic symposium, asked participants to focus on three questions, one of which was quintessentially therapeutic-jurisprudence-focused: "How can health law accommodate the special psychological, emotional, and moral aspects of its subject?" (Hall et al., 2006). Professor Sandra Johnson's article in that issue "briefly discusses the sometimes perverse interaction between law and medicine and argues that a focus on the outcomes of law [presumably at least some of which are either therapeutic or anti-therapeutic] should be an essential component of a more patient-centered health law." (Johnson, 2010). The relational perspective toward health law that Hall advocates (Hall, 2015) envisions a TJ approach "focusing on patients' actual experiences in their interactions with physicians, hospitals and other facilities, insurers and health plans, employers, and various government agencies" and thus implicitly on the therapeutic or anti-therapeutic effects of those interactions on patients. As Hall says, "This relational approach contrasts with the more transactional perspective that predominates elsewhere in [health] law," treating health law as a business like any other.

Rather than detailing a number of individual subjects into which TJ might expand within health law, it seems more productive at this time to consider some over-arching themes that implicate TJ and are especially relevant today in health care, and thus health law. Such themes, or areas ripe for TJ analysis within health law, may relate to either the design or the application of the law. Wexler has provided powerful imagery to distinguish between design matters and matters of application. He envisions the former as bottles, providing structure giving shape to the wine within. In Wexler's vision, TJ is applied within the legal system's structure, much as wine is stored in bottles. (Wexler, 2014). Four themes are considered here, with two constituting "bottles" and two constituting "wine" in Wexler's parlance. Adopting this imagery, following are four broad themes ripe for TJ exploration within the field of health law: two about bottles and two about wine.

3.4.1. Legal practice structure: Interprofessional partnerships as bottles

Traditionally, lawyers representing clients with medical problems have done so in settings divorced from the operation of the medical system. Other than dealing with medical professionals as defendants or as supporting or opposing expert witnesses, plaintiffs' lawyers, at least, did not view themselves as part of any medical team. During medical school, in fact, many physicians are inculcated with an anti-lawyer/anti-law attitude counseling against teaming up with any attorney.

Such a view on the part of physicians is counterproductive because lawyers can be physicians' best friends. In structuring practices, reviewing leases, or approving billing methods, for example, attorneys working with physicians can, and indeed do, play an important preventive lawyering role. The goal is to structure, draft, and review transactions, documents, or physician office practices with an eye toward avoiding negative attention from federal and state regulatory agencies. Occupying much the same role as corporate counsel, or as in-house counsel at health care institutions, even outside counsel can adopt preventive lawyering strategies in representation of health care clients, just as in other corporate practices.

An interprofessional form of practice called the medical-legal partnership (MLP) provides attorneys with opportunities to engage in preventive lawyering and potentially proactively assist in better patient health outcomes. In circumstances in which a health care team can only accomplish so much alone, lawyers can help a great deal. To achieve truly better outcomes in some cases, some health care teams have begun including lawyers as part of the team treating their patients. At Boston Medical Center in the early 1990s, for example, physicians noticed that many children visiting the hospital returned repeatedly with asthma. They discovered mold in the children's homes, resulting in inclusion of lawyers on the team – lawyers who could threaten legal action if the problems were not remediated. The mold vanished, and the children became healthier on a long-term basis.

This was the first example of an MLP, in which physicians recognized that they could not address the social determinants of health on their own, yet those social determinants had to be addressed for true recovery on the part of their patients. Lawyers can be helpful, indeed instrumental, in addressing such social determinants of health in the quest for better health outcomes. Matthew, 2017

Medical-legal partnerships have developed in a variety of settings. Some address veterans' many mental and physical health needs in addition to legal problems that exacerbate their medical conditions. Others deal with housing issues, immigration matters, employment, and various types of benefits. MLPs in palliative care settings can assist in giving dying patients dignity and peach of mind by helping them get their affairs in order and provide for the care of their children after their death. Hallerman & Snow, 2012

In sum, this dynamic practice setting offers great promise as a method of structuring blended health care and legal practices, with both the

medical and the legal professions working together for the good of the patient. Social sciences research can and should be used to track the results of such effort and connect those results to both psychological and physical health outcomes. Anecdotal evidence indicates that MLPS succeed spectacularly in this mission, and TJ research about this sort of "bottle" (i.e., this structure of legal practice) could support development of the law governing the legal profession to enhance practice in MLPs.

3.4.2. Judicial structure: Specialized courts as bottles

From time to time as calls for medical malpractice reform surface and resurface, "health courts" are proposed as a fix for what many health care providers see as an unfair system. These health courts are proposed to be administrative proceedings, outside of the judicial system, with specially trained judges. (Mello et al., 2006). Several different health courts have been proposed, some in federal legislation and some in various states. Calls for health courts raise the questions of whether to develop specialized courts for health-care-related litigation; whether those courts would be analogous to the problem-solving courts that have sprung partially out of TJ; and, if not, whether TJ principles should be utilized more in the mainstream courts that typically hear such cases.

Some proposed health court structures appear at first glance to combine problem-solving courts and mainstream courts, but others are pure administrative proceedings rather than a part of the judiciary. As these proposals surface and resurface from time to the time, social science research into the various proposals, their structures, their procedural justice implications for patients, and other ways in which the shuttling-aside of medical malpractice claims into a separate dispute resolution system might have therapeutic or anti-therapeutic effects on them.

3.4.3. Dignity as wine

Dignity provides one unifying theme important in health law that should support expansion of TJ as a method of analysis. End-of-life care is predicated on preserving the dignity of the patient as he or she fades; one of the palliative care MLPs mentioned above helped a dying patient by providing her with peace of mind about her daughter's fate after her death. Without fretting about what would happen to her daughter, the patient was free to experience her final days in peace, and with a dignity that she might not have felt had she still been worried about her daughter's future (Hall, 2006).

In the United States, where the health care "non-system" results in millions of patients falling through the cracks each year, the policy issue of whether to have health care coverage itself involves dignity. Professor David Yamada in this issue suggests that policy decisions about access to health care through health care coverage can advance or diminish a person's dignity (Yamada, 2018). The conditions under which health care is equitably or inequitably available deserve psychological study and TJ analysis, to learn their effects on basic human dignity.

Perlin has focused on dignity extensively, providing blueprints for the consideration of dignity through TJ research on a number of subjects. (Perlin, 2017). Medical matters are quintessentially a matter of dignity, involving very personal and private facts about our bodies and our well-being. TJ research into this topic could inform a number of health law subjects.

3.4.4. Last but not least: Trust as wine

Professor Hall has written extensively about trust in the health law setting. Trust is foundational to the health care system. As Hall notes:

> We expect to open the most private domains of our bodies, minds, and social and family relationships to [our doctor's] probing gaze. Our vices, foibles, and weaknesses will be exposed to a stranger. Even our living and dying will engage her attention and invite her counsel ….
>
> The features of our trust relationships with professionals are, taken singly, not unique. What is specific to them is the peculiar constellation of urgency, intimacy, unavoidability, unpredictability, and extraordinary vulnerability ….
>
> [Hall, 2002]

Consequently, he urges that therapeutic insights can be gained by studying trust in conjunction with health law doctrine and structures.

Examples of the ways TJ can inform health law through investigations into trust abound. One is informed consent; while informed consent ideally is the result of a process of discussion about a treatment or procedure, it is easy for the process to be reduced to the presentation of a pre-printed form and a request for the patient to sign it. This likely is especially true in jurisdictions such as Florida, where the presence of a signed informed consent form constitutes a rebuttable presumption that informed consent was obtained. Research into that statement, further comparing the psychological effect of the full informed consent process with the shortened, "please sign-the-form" process could help establish ways patients can gain more trust in the system when undergoing treatments or procedures.

Additionally, the above-described examples of business law within the medical and health related field involve trust as a regular component. If trust is broken between companies in a transaction, or if an insurer loses the trust of either its insureds or its contracted providers, there can result a loss of business forever. Inquiries into the impact on patient trust of various health law principles and practices would advance the field a great deal. In a broader sense, too, the therapeutic insights that might be gained from those TJ-focused inquiries could also help develop health care policy in a broader scale.

3.5. Conclusion

As Professor Hall has suggested:

> It is obvious that law has therapeutic consequences meriting study when, for instance, it affects the behavior of physicians or the availability of treatment. Beyond these fairly prosaic applications, the notion of law as a therapeutic agent can advance the understanding of how law might affect the more subtle and subjective aspects of medical care that are revealed, for example, in the powerful placebo effect or the growing popularity of alternative medicine. Applied in a more thoroughgoing fashion, therapeutic jurisprudence analyzes health care law from a phenomenological perspective, focusing on patients' actual experiences in their relationship with physicians and other care providers, hospitals and other facilities, insurers and health plans, and various government agencies. Relationships among and within these components of the health care delivery system (doctor to hospital, hospital to insurer, government to profession, etc.) also can be viewed from a therapeutic perspective by considering how these internal or overarching relationships affect patients' experience in the delivery of care.
>
> [Hall, 2002]

Ranging throughout the field, then, are opportunities for the application of TJ to improve the health care system and patients' health. In both structure and content, health law can benefit from TJ research. Because mental health and physical health are interconnected, it is time for TJ's focus on mental health implications and outcomes to broaden into the physical realm.

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