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Therapeutic Jurisprudence as a Needed Framework for a Behavioral Health Integrated Criminal Justice System

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Abstract

Increasingly, psychologists and other mental health professionals are working with the court order and offender populations in the human service and the criminal justice systems as a result of the deinstitutionalization of the mentally ill. A therapeutic jurisprudence (TJ) framework is offered as and integrative paradigm, which aims to serve the best interests of the community, while nevertheless limiting the overly punitive and unmerited aspects of offender treatment. A therapeutic jurisprudence framework requires a legal system informed by the research of psychology and integration of the mental health practice system with the criminal justice system. This paper calls for a broader adoption of the TJ approach across the criminal justice systems.

Keywords: Therapeutic jurisprudence; Trans-institutionalization; Deinstitutionalization; Mentally ill offenders

Commentary

How we got here: "trans-institutionalization"

It is well known that The United States incarcerates a greater percentage of its population than any other nation on Earth, with nearly 2.4 million Americans behind bars (with over 6 million altogether either in jail, prison or community control). Within this fact, it is less well known that prisons are exceedingly filled with more inmates who suffer from mental illness [1]. When one ethically examines the prevalence of mental illness in American jails and prisons-there are significant ethical and practice approach implications of this explosion in the mentally ill behind bars (including the government's duty) as well as some needed recommendations to effectively deal with this fact.

Soderstrom [2] comments that it is unfortunate that most individuals hold ill-informed views of the mentally ill who commit crimes (e.g., either they are vicious killers, try to use mental illness as an excuse, or get off by Not Guilty by Reason of Insanity-NGRI). These ill-informed views are suggested by the media either through popular television programs (such as "criminal minds") or sensationalistic news stories. In reality, the rate of mental illness among inmates is estimated to be two to three times higher than in the general community and more likely to be more "mundane" crimes like burglary or drug possession [3].

Soderstrom [2] notes various reasons for the mentally ill offender statistic:

- Deinstitutionalization of state mental hospitals resulted in the mentally ill residing in communities rather than hospitals. Thus, there are increased opportunities for them to behave in ways that come to the attention of police officers. This behavior is often a manifestation of their illness.
- Mentally ill offenders of minor crimes are often subjected to inappropriate arrest and incarceration.
- The more formal and rigid criteria now in place for civil commitment to a state mental facility.
- The lack of adequate support systems for mentally ill persons in the community.
- Released mentally ill offenders have difficulty gaining access to both community mental health treatments in general, as well as treatment that is appropriate to their specific needs.

Estimates vary-but most documentation put the number of mentally ill (with an actual DSM diagnosis) in the criminal justice system to an estimated 600,000 to 900,000 individuals (this number includes offenders in U.S. jails and prisons as well as those on probation and parole). Numbers for jails and prisons in the United States are currently nearing 500,000 [4]. Faiver and Lanham [5] notes that since the deinstitutionalization of the public mental health system since the 1980s has resulted in correctional institutions becoming the "poor person's mental health facility" as our societal "safety net" has become a cage.

The United States has lost effectively 93% of our state psychiatric hospital beds since 1955 [6]. While well intentioned, reform efforts meant to protect the liberties of people with mental illnesses resulted in many of the most severely ill going without needed treatment. That, along with major cost-shifting by the states to the federal government following the advent of Medicare and Medicaid, has led to the often unspoken component of today's health crisis: A dramatic increase of Americans with severe psychiatric illnesses on the streets and within the criminal justice system. America's jails and prisons have become surrogate psychiatric hospitals for thousands of individuals with the most serious brain diseases.

Therapeutic jurisprudence

Behavioral health understandings of mental illnesses utilize scientific and naturalistic explanations based on what one can understand through careful observations and scientific and medical methods. Constructs like "evil" and the "devil" places mental illness in the moral arena (which may not be appropriate). The concern is that use of only the ethical "moral model" to explain mental illness is that this gets overgeneralized and translated into criminalizing the entirety of mental illness (and addiction). This "moral model" lands us right where we are in the United States with a society that has "trans-institutionalized" the mentally ill into our prison and criminal justice systems. Prisons and jails have become our new 'insane asylums' where punishment has often replaced treatment. This is a step backward ethically in the treatment of the mentally ill in the 21st century.

There is a newer proposition for an interdisciplinary approach to social deviance and violence, which has emerged out of the approach called "Therapeutic Jurisprudence" (TJ). TJ is the study of the role of law as a therapeutic agent. It suggests that society should utilize the theories, philosophies, and findings of various disciplines to help shape and develop the law with applications to the criminal justice system. It uses social science to study the extent to which the legal rule promotes the psychological and physical well-being of the people it affects. TJ focuses on the socio-psychological ways in which laws and legal processes affect individuals. Legal policy determinations should be made based upon empirical studies. The TJ framework has a reliance on the social sciences to guide analysis of the law. TJ proposes that the legal community look to the other social sciences for their solutions before enacting law [7].

This model suggests collaborations between the human service/mental health systems and the criminal justice systems provide opportunities. TJ contends that legal processes can influence upon the well-being of those participating in them. The scope of TJ is broad. It studies the impact of legal processes on all participants including judges, magistrates, lawyers, victims, witnesses, jurors, defendants, and justice or human service system professionals [8].

Problem-solving courts and beyond

"Problem-Solving Courts" are typically thought of as the most direct and successful application of a therapeutic jurisprudence approach. Problem-Solving Courts are lower courts that have jurisdiction over one specific area of criminal activity, such as illegal drugs, domestic violence, or mental illness [9]. Studies have shown that when offenders have the ability to go through a problem solving court, (such as Veterans Court, Drug Court, Domestic Violence Court, etc.) there is a 70% decrease in the likelihood that offenders will commit another crime [10]. This newer problem-solving approach to the criminal justice system (sometimes called the Community Collaborative Courts CCC approach). These courts are designed as partnership with other justice agencies, to provide courts that can better address the needs of several at-risk and vulnerable populations. The non-adversarial court is designed to identify the best treatment for individuals and will address cases with issues including: veterans' issues, mental illness, homelessness, substance abuse and transition-aged at-risk youth (TAY). The individuals in these populations who enter the criminal justice system are often met with and present complex issues that require collaborative solutions to promote public safety in both the near and long term [11].

Alternative options to prison for drug offenders or mentally ill offenders have been expanding in recent years have been with increasing availability of treatment and counseling through the hundreds of drug and mental health courts now operating in jurisdictions around the country-but more are still needed. The evaluation research from these programs has been very encouraging [12]. Someone with an untreated mental illness is 16 times more likely to be killed by police than other civilians approached or stopped by law enforcement, according to a 2015 report by the Treatment Advocacy Center [13]. Over the years, America has depleted the public mental health system and as a result, police are often the first responders to mental health crises-even when they don't have the training for it.

A collaborative, integrative response for criminal behavior and violence must go beyond "problem-solving courts" and must be embedded in all legal, criminal justice and mental health systems. This begins with education and training, not just in practice situation but as the bedrock of legal and criminal justice education. An effective response would include collaborative partnerships between law schools, universities, human services subsystems, criminal justice personnel, as well as a coordinated development and implementation of training programs based on ongoing needs assessment and research-based "best practices" models. These training models must include clinical issues relevant and critical to each type of worker in response to crime and violence (e.g., substance abuse, safety issues, assessment, etc.). Clark et al. [14] stressed that each service system must appreciate the pressures and constraints under which the other is operating. A cross training TJ framework that includes training and education on the tasks and roles of each system could help create a better understanding of the stress, strains, and goals of each human service/mental health and criminal justice system roles and tasks.

The TJ approach presumes that access to mental health and other human services can provide the legal system with opportunities to develop more appropriate resolutions to behavioral problems, therefore reducing recidivism [15]. It appears that the adult, juvenile, and family courts and human service/mental health agencies and their staffs have crucial roles in the in addressing violence, deviance, mental illness, and addiction. Human service and mental health agencies are the designated system for delivering prevention, intervention, and supportive services to individuals and families in crisis. The court provides the legal framework for state intervention into family and individuals' lives. However, it is both the criminal justice and the mental health systems that must work in tandem, which is essential for an effective answer to crime and violence.

Confounding those we are "mad at" vs. "those we should be afraid of": "big a" and "little a"

Ethically, one is not advocating that there are individuals that must not be taken out of society for the protection of the community. What is evident is that we have been locking up some of the wrong individuals. Within this fact, it is the less well known issue that as mentioned, prisons are exceedingly being filled with more inmates who suffer from addiction and mental illness. While prisons do incarcerate high numbers of individuals who likely suffer from antisocial personality disorder or APD (and some with a related yet distinct disorder called psychopathy which was just offered in the Diagnostic and Statistical Manual of Mental Disorders (DSM). Many of these individuals rightfully need to be segregated from society for the protection of the community. People who are psychopathic or antisocial prey ruthlessly on others using charm, deceit, violence or

other methods that allow them to get with they want. The symptoms include lack of a conscience or sense of guilt, lack of empathy, egocentricity, pathological lying, repeated violations of social norms, and disregard for the law, shallow emotions, and a history of victimizing others [16]. A related clinical, research, and a diagnostic issue is that many anti-social personality disordered individuals (APD) also have addictive disorders or other symptoms of mental illnesses but which perhaps is still part of their larger psychopathological personality or criminal personality [17]. These individuals will prey on others until stopped.

Non-Antisocial Personality Disordered mentally ill or the chemically addicted offenders of crimes are often subjected to inappropriate arrest and incarceration or stay incarcerated for long periods of time (despite minor offenses) [18]. There is an issue that many addicts or mentally ill also develop antisocial behavior as a symptom of the addictive or mental illness processes [17]. These symptoms are not prior to the addiction or mental illness onset and after recovery they do NOT exhibit the antisocial behavior (which would not be true of the APDs). One has to be very careful to make this distinction and not "over-diagnose" addicts or other mentally ill as true APD (we called them "BIG A"). The addicts or the mentally ill who may exhibit anti-social behavior or actions (we call those "little a") need identified as different from the APDs which can be hard to do clinically. The hallmark is to look for very early onset of very intense antisocial behavior, before any use of substance or onset of mental illness. Standard treatment for (little a) is more likely to work and will remit the antisocial behavior.

While it is true that there is no conclusive meta- research that establishes good outcome with APD ("BIG A") with adults (other than waiting for the aging effect) [19]. There is promising research that with early intervention of anti-social behavior in youth. MST (Multiple Systemic Therapy) and FFT (Functional Family Therapy) have indicated some positive impact in diverting the development [20]. Behavioral management and token economies, with vouchers systems (e.g., certificates), are sometimes used for pro-social behavior (which research indicates was absent during parenting). But complete management and ongoing close supervision of "BIG A" must occur [21]. A problem becomes when the criminal justice and even the mental health system confounds the two grouped together and assumes all behaviors are manipulative and the result of the "criminal personality". When working with large sample amounts of anti-socials ("BIG A"), one begins to see the whole population as this (expectancy bias). This bias can happen with criminal justice professionals and even with some mental health professionals. This is complicated by the fact that the two groups ("BIG A" and "little a") appear almost exactly the same. Only extensive psychological assessment and detoxification at critical points in the legal and treatment process will determine the difference. And in our clinical experiences even the highly skilled mental health professionals might miss this differentiation. The jailed and then released mentally ill or substance addicted offenders often have difficulty gaining access to both community mental health treatment in general, as well as treatment that is appropriate to their specific needs [22]. There also must be a call to expand the framework therapeutic jurisprudence beyond the isolation of only the "problem-solving" courts-as be expanded across general court and criminal justice systems with increased psychological assessment and treatment access.

Consequences and "appropriate" offender sentencing are always part of effective intervention but the key is to apply the right consequences at the right time- (also with the right treatment.) "One" size may not fit all, and determining the right mix may takes sophisticated understanding of human behavior and its causes. Appropriate offender treatment is rarely done and when it is done it either the wrong treatment or poorly applied and thus "written off". If one really searches the research one can find effective intervention research with offenders but somehow people assume it as an "either-or" situation (treatment or punishment) but responsibility and consequences go hand-in-hand with good therapy [23]. Unfortunately when budget cuts happen, offender treatment is often one of the first things to go (e.g., sex offender community treatment is often to the first to experience budget cuts) as it often comes down to a political issue.

Developing a behavioral health based integrative education, training and delivery model for criminal behavior

There are concerns that not only are we inhumane by our treatment of the mentally ill and addicts in jails and prison-but we are also being self-defeating. Soderstrom [2] makes the following recommendations:

- Suicide prevention programs-because the incarcerated are at a higher risk for depression and suicide-there should be effective therapy and suicide prevention programs within the prison system.
- Least restrictive housing unit for the mentally ill-because as mentioned high restriction and isolated housing can increase mental health symptoms and can be used inappropriately (ineffective symptom reduction)
- Develop mental health policies-jails and prison should develop mental health treatment programs in accordance with the guidelines put forth by the American Correctional Association and the American Psychiatric Association.
- Develop cross-training policies-there should be cross-training staff, whereby security staff and mental health staff are trained beside each other, as well as train each other so that they understand and appreciate the functions of both professional roles.

Mentally ill persons have a 67% greater chance of being arrested than those who are not mentally ill [24]. Further, the recidivism rate for mentally ill offenders is much higher than the rate for offenders without a mental illness [25]. For example, a study by Ditton [26] reported that 49% of federal inmates with a mental illness had three or more probations, incarcerations, or arrests, as compared to 28% of federal inmates without a mental illness. Institutionalism can be reduced with alternate community based programs using tools such as at risk assessment at early points in development of deviant behavior with sentencing guidelines that avoid a misguided "tough love" only approach. Youth of color receive harsher sentences and fewer services than white youth who have committed the same category of offense [27]. Community-based programs including supervision, home confinement, alternative education, family preservation, restitution, community service, education and counseling at day and evening report centers, will help reduce incarceration and have been shown to deliver results well into adulthood [28]. Up to 70% youth entering the juvenile justice system have a mental health disorder [29]. Placement into the juvenile justice system is harmful to such youth and alternative treatment is required. Nearly 100,000 youth are released from institutions yearly. The best re-entry programs begin while the youth is still confined. Helping teens enroll in school and find jobs can be highly motivational and lead to better outcomes [30].

Clearly, meaningful treatment (both in and out of prison), diversion, and community re-integration are sorely needed. And

despite the cries of "too extensive"-there is much data to support that, in the long run, such programs would greatly reduce recidivism and long-term costs [31]. However, given the complexity of cases involving violence, Fleck-Henderson [32] argues that training alone is a "necessary" but "insufficient" response. There also must be wide-spread recognition that drug use and mental health issues can be mediated by prevention and mental health treatment programs in schools, communities, and within jails and prisons. This will require increased behavioral health training and education among criminal justice personnel and programs-with an expansion of funding and increases in behavioral health positions required for success. The field of criminal justice education and law schools will require a greater integration with scientific knowledge from psychology to be more effective in the future. Experts have also noted that current issues in the use of force will require increased knowledge of psychological reactions and responses and the use of psychology in the field of counterterrorism is only in its infancy [33]. Experts in the field of terrorism and security have noted that we must replace the fragmented view of terrorism as a single issue (e.g., religious; or a security issue) and examine the phenomena from a wider interdisciplinary lens that includes psychology and behavioral science [34]. It is from this enlarged vantage point that we might be able to see intervention and reactions of different pathways and new framework of knowledge is needed for homeland and world security. Psychological and behavioral health knowledge and skills are certainly needed for the mediation of traumatic responses to terrorism and other disasters. Law school programs and criminal justice degree programs must continue to examine this type of research and expand curricula offering to include advanced courses on addiction and mental health research to achieve a true TJ framework.

Conclusion

While well intentioned, deinstitutionalization reform efforts (meant to protect the liberties of people with mental illnesses) resulted in many of the most severely ill going without needed treatment. This also resulted in the overrepresentation of persons with mental illnesses and substance use disorders in criminal justice and prison settings. America's jails and prisons have indeed become surrogate psychiatric hospitals for thousands of individuals with the severest brain disorders. In essence, we have criminalized and trans-institutionalized the mentally ill. This article has attempted to define the extent of the issue, the moral and legal obligations, and the implication of using a broader therapeutic jurisprudence framework for criminal justice practice, education, and policy.

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