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Therapeutic Jurisprudence

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THERAPEUTIC JURISPRUDENCE

*David Wexler*¹

What I would like to do is talk a little bit about therapeutic jurisprudence and its relationship to the bulk of the other vectors in the comprehensive law movement. Many of these vectors fall within the “processes” category, and frustrated and creative judges and practitioners who were trying intuitively to grapple with certain practical problems and situations developed many of those, atheoretically. For example, in collaborative divorce,² Stu Webb, a Minneapolis attorney, described himself as burned out and ready to leave the practice of law when it occurred to him that perhaps he could turn things around creatively, by having attorneys serve as settlement attorneys and agree to bow out of the case if it went to court.³ This served to align their interests with the clients' interests. Therefore, it was no longer true that the lawyer wins in either case; the lawyers really had something to lose if the case didn't settle. Thus arose collaborative divorce, founded by a

¹ Lyons Professor of Law and Professor of Psychology, University of Arizona College of Law; Professor of Law and Director, International Network on Therapeutic Jurisprudence, University of Puerto Rico School of Law. J.D., New York University School of Law, 1964; B.A., State University of New York at Binghamton, 1961.

² Collaborative divorce is “a highly evolved interdisciplinary team model which utilizes attorneys, therapists and financial experts in an effort to avoid some of the destructive aspects of divorce.” Nora Bushfield, *History and Development of Collaborative Law*, at http://www.iahl.org/articles/04_History_and_Development.htm (last visited Dec. 21, 2003).

³ *Id.*

practitioner. It is very creative, very intuitive, not really based on theory.

Other examples include restorative justice,⁴ preventive law,⁵ and problem-solving courts.⁶ Restorative justice has its roots in indigenous and tribal justice systems.⁷ Preventive law really came about through a practitioner, Louis Brown, who was trying to think of ways in which legal disputes could be avoided altogether.⁸ Problem-solving courts began with drug treatment court in Dade County, Florida, where the judges were just tired of dishing out revolving-door justice and said, we've got to do something different.⁹ The judges kept seeing defendants coming back and back and back. They did not feel they were dispensing anything except revolving-door justice. They questioned whether there was a way to have some kind of diversion with ongoing judicial

⁴ See Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 476 (Dennis P. Stolle, Bruce J. Winick, & David B. Wexler eds., 2000) explaining:

Restorative justice refers to a movement in criminal law in which criminal justice and criminal sentencing are carried out by the community, the victim, and the offender in a collaborative process. In this process, all players are present and the process focuses on the relationship between the offender, the victim, and the community.

⁵ *Id.* Preventive law “advocates proactive intervention to avoid litigation and other conflicts. It emphasizes the lawyer-client relationship, clients’ relationship with others in general, and planning.” *Id.* at 474.

⁶ *Id.* at 483.

⁷ Restorative justice “bears a resemblance to traditional Native American and aboriginal justice in its emphasis on the community and on therapeutic value of ‘normal, reintegrative shame.’” *Id.* at 483.

⁸ See, e.g., http://www.preventivelawyer.org/main/default.asp?pid=brown_program.htm (last visited Dec. 21, 2003).

⁹ See JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 4 (Bruce Winick & David B. Wexler eds., 2003).

supervision that could break this cycle.¹⁰ Maybe there was something in the air, a dissatisfaction of the public and the profession itself with what linguist Deborah Tannen calls the argument culture,¹¹ the culture of critique, because most of these developing vectors were really responses against a culture that privileges contentiousness, argumentation, and adversarialness while disparaging other kinds of dispute-avoiding or dispute-resolving methods.¹²

At about the same time that most of these were popping up, therapeutic jurisprudence began. Its origins can be traced to the universities, and it grew out of mental health law. It developed as an interdisciplinary look at how the law, meaning rules of law, legal procedures, and roles of lawyers and judges, operates as a therapeutic or antitherapeutic agent.¹³ It operates that way whether

¹⁰ See William F. Dressel, *Foreword to JUDGING IN A THERAPEUTIC KEY*, *supra* note 9, at xiii.

¹¹ See Deborah Tannen, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* 3-4 (1998) where she explains:

[Argument culture] rests on the assumption that opposition is the best way to get anything done: The best way to discuss an idea is to set up a debate; the best way to cover news is to find spokespeople who express the most extreme views, polarized views and present them as 'both sides'; the best way to settle disputes is litigation that pits one party against the other; the best way to begin an essay is to attack someone; the best way to show you're really thinking is to criticize.

¹² See Hon. William G. Schma, *Judging for the New Millenium*, 37 CT. REV. 4 (Spring 2000), *reprinted in JUDGING IN A THERAPEUTIC KEY*, *supra* note 9, at 87.

¹³ See *JUDGING IN A THERAPEUTIC KEY*, *supra* note 9, at 7 noting: Therapeutic Jurisprudence focuses our attention on the traditionally under-appreciated area of the law's considerable impact on emotional life and psychological well-being. Its essential premise is a simple one: that the law is a social force

we like it or not, whether we know it or not. Therapeutic jurisprudence focuses on the law's impact on psychological well-being and on emotional life.¹⁴

The law's influence on emotional life and psychological well-being has traditionally been ignored by the law or regarded as something apart from the law and its concern. But therapeutic jurisprudence as an academic discipline started focusing on different kinds of legal arrangements and therapeutic outcomes. An obvious and familiar example, which is the subject of a very lengthy law review article by Janet Weinstein, is the traumatic and detrimental consequences caused by adversarial child custody adjudication.¹⁵ The legal system itself causes additional damage in the divorce context by motivating the parties to portray each other in the worst possible light.¹⁶ The legal system was actually causing distress and trauma, along with a further deterioration in the

that can produce therapeutic or antitherapeutic consequences. The law consists of legal rules and legal procedures, and the roles and behaviors of legal actors, like lawyers and judges. Therapeutic jurisprudence proposes that we use the tools of the behavioral sciences to study the therapeutic and antitherapeutic impact of the law, and that we think creatively about improving the therapeutic functioning of the law without violating other important values.

¹⁴ See Daicoff, *supra* note 4, at 472. Therapeutic jurisprudence “proposes that the practicing lawyer identify, consider, and seek to improve the psychological effects any proposed legal action or process may have on the individuals and groups involved.” *Id.*

¹⁵ See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

¹⁶ *Id.* at 133.

relationship between the divorcing parties.¹⁷ This is what Hawaii Judge Michael Town calls jurigenic harm, the legal equivalent of iatrogenic harm in medicine;¹⁸ this is when the legal system itself causes harm.

Therapeutic jurisprudence explores antitherapeutic or jurigenic aspects of legal roles and procedures, but it is also interested in what elements of legal procedure and practice seem to work and why. Consequently, the incentive structure of collaborative divorce and its alignment of the interests of the parties and attorneys is intriguing to therapeutic jurisprudence. Moreover, the apparent effectiveness in drug treatment courts of the process of ongoing judicial supervision, frequent review hearings, and the respectful judge/client interaction is of interest as well.¹⁹

As a consequence, this lens or perspective of therapeutic jurisprudence has become an active partner of many of these practical processes, looking at them as laboratories and as ways in which we can extract psycholegal principles from some of their

¹⁷ *Id.* at 132-33.

¹⁸ See Hon. Michael A. Town, *The Unified Family Court: Preventive, Therapeutic and Restorative Justice for America's Families*, at <http://www.preventivelawyer.org/main/default.asp?pid=essays/town.htm> (last visited Dec. 21, 2003). Judge Michael A. Town coined the term "jurigenic harm," based on his analogy to "iatrogenic effects" in medical care, to describe the systemic harms that courts inflict in the course of well-intentioned interventions. Iatrogenic effects are inadvertent but generally avoidable harms. *Id.*

¹⁹ Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

successes. Through the psychological sensitivity of therapeutic jurisprudence, its interest in keeping abreast of developments in psychiatry, social work, criminology and so forth, it has developed many principles and has explored their possible importation into the legal system, into the various vectors, into the court system, or into the lawyers' offices in lawyers' interactions with clients. For example, I have done work on how courts can increase compliance of defendants with conditions of release, probation conditions, and the different devices that courts might use to do that.²⁰ Things like having family members present and aware of the conditions of probation seem to increase the compliance with those conditions.²¹ Thus, therapeutic jurisprudence is an example of an academic-professional partnership at its best because the kind of research that is generated by the therapeutic jurisprudence lens as it interacts with these other vectors in the comprehensive law movement really leads to practical suggestions and to some different types of know-how and new and effective legal arrangements.

Two areas that I would like to quickly talk about with therapeutic jurisprudence interaction, two vectors, are preventive law and problem-solving courts. Each of these has resulted in a book. The first, the interaction between therapeutic jurisprudence and preventive law, led to the book edited by Dennis Stolle, Bruce Winick, and myself called "Practicing Therapeutic Jurisprudence:

²⁰ David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993).

²¹ *Id.* at 292

Law as a Helping Profession."²² Most recently, Bruce Winick and I have edited a book, "Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts,"²³ which is therapeutic jurisprudence in relationship with the problem-solving court movement.

Let's return for a moment to preventive law. Preventive law is really a set of very careful lawyering procedures, such as periodic legal checkups, ways of anticipating and avoiding legal traps. In a way, it is a legal counterpart to what medical checkups would be in preventive medicine. Preventive law was very useful to therapeutic jurisprudence because it gave therapeutic jurisprudence some of these practical procedures for lawyers to use if they wanted to sit down with a client and apply the law therapeutically.²⁴ Therapeutic jurisprudence also contributed to preventive law because preventive law had been this kind of careful lawyering, careful drafting, and careful checklist, but it had lacked the human face; it lacked an ethic of care. I am sure it had some, depending on the lawyers who did it, but as a perspective or discipline or set of procedures it seemed to be rather arid. It lacked the psychological knowledge being brought into all of this.

The combination of therapeutic jurisprudence and preventive law led lawyers to explicitly and systematically bring an ethic of care and some of that psycholegal know-how into the lawyer/client relationship. One very quick example is a lawyer counseling or working with a client who is HIV positive and has

²² STOLLE, *supra* note 4.

²³ WINICK, *supra* note 9.

²⁴ Daicoff, *supra* note 4, at 474-75.

come into the office, say, to draft a will or to draft an instrument like a health care instrument or a living will. Very often, people who are HIV positive, because of lifestyle issues, have had fallings out with family members. In a traditional law office, very often, that is taken for granted and kind of put to one side when someone is naming an executor, beneficiary, or substitute decision maker.

A therapeutic jurisprudence lawyer coming in and doing a legal checkup with someone who is HIV positive will discuss the possibility of an advanced directive instrument, health care instrument, or a will, and would presumably raise with the client the issue of the family friction. In addition, the therapeutic jurisprudence lawyer would at least discuss with the client how the preparation of this document might serve as an occasion to attempt some kind of family reconciliation and might talk with the client about how other clients have actually done that. It is just an example, but it is just one example of so many. When you start looking through this lens of therapeutic jurisprudence and bringing it into the preventive law setting, you find loads and loads of opportunities where you can explicitly and systematically start discussing these types of psycholegal soft spots and strategies for dealing with them.

In closing, let me talk about the second relationship between therapeutic jurisprudence and one of these vectors, the problem-solving court vector. This also shows you that therapeutic jurisprudence and the comprehensive law movement are not all about mediation or dispute resolution.

The problem-solving court movement, as I mentioned, developed first with drug treatment courts in Dade County, Florida, and then drug treatment courts proliferated.²⁵ One judge, who describes herself as having baby-sat in drug treatment court while that judge was on vacation, saw how it worked and decided to see if, in a modified fashion, it might be used for her pet project, which was domestic violence. This was how the domestic violence courts began.²⁶ Since then, there have been many different types of problem-solving courts: mental health courts,²⁷ juvenile drug courts,²⁸ dependency drug courts,²⁹ and a whole host of these. There was a resolution, a couple of years ago, by the Conference of Chief Justices and Conference of State Court Administrators supportive of problem-solving courts, methods, and their use of principles of therapeutic jurisprudence in doing their work.³⁰ It was a tremendous boost for this entire movement: practitioners and judges who otherwise felt on the margin or alone now can say what they are doing is legitimate, and is indeed even a preferred method of behaving professionally.

The book that Bruce Winick and I have edited and dedicated to three judges and in which there are contributions from many people, some academic, some judges, starts out with a description of problem-solving courts and of the problem-solving

²⁵ WINICK, *supra* note 9, at 4.

²⁶ See WINICK, *supra* note 9, at 21.

²⁷ WINICK, *supra* note 9, at 4.

²⁸ WINICK, *supra* note 9, at 4.

²⁹ WINICK, *supra* note 9, at 4.

³⁰ WINICK, *supra* note 9, at 112.

approach, which also can be used in courts generally.³¹ It doesn't have to be used only in problem-solving courts. Part two of the book, however, which demonstrates the relationship between problem-solving courts and therapeutic jurisprudence, is called, "From Description to Prescription: Emerging Principles and Proposals." The purpose of this section is to try and transcend the particular context of problem-solving courts and look to see what underlying psycholegal principles are at work that presumably make these courts successful. It explains how courts can increase the compliance with orders of conditional release and how courts can set the stage for allowing an offender to use the crisis of arrest and criminal prosecution as an opportunity to turn one's life around.³² Additionally, it shows how courts can help offenders develop problem-solving skills and law-abiding, coping skills. It demonstrates how courts can confront offenders' denial and minimization of criminal behavior; how to motivate, as well as encourage and reinforce offender reform.

³¹ WINICK, *supra* note 9, at 3-9.

³² *Id.* at 221, 249.