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INTRODUCTION

This Essay explores the therapeutic jurisprudence movement from theory to practice and the role of lawyers and judges as therapeutic agents. An overview of the history of therapeutic jurisprudence is given, followed by a discussion of the major developments of therapeutic jurisprudence from its inception to the present—a span of approximately twenty years.

The Essay covers the five main developments of therapeutic jurisprudence over the two decades. One quite recent development is the movement of therapeutic jurisprudence into legal (and other) education. Another is its growing international dimension. Still another is the transition of therapeutic jurisprudence to a thoroughly interdisciplinary venture. The fourth development is the advance of therapeutic jurisprudence from its starting point in mental health law to its present involvement in the entire legal spectrum. Finally, the fifth development is the evolution of therapeutic jurisprudence from the-

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ory to practice.

I. THERAPEUTIC JURISPRUDENCE AND LEGAL EDUCATION

The growth of therapeutic jurisprudence is beginning to have important ramifications in legal education. A number of law schools are teaching therapeutic jurisprudence in courses and clinics, and in 2005 an entire St. Thomas Law Review Symposium was devoted to therapeutic jurisprudence and clinical legal education. The website therapeuticjurisprudence.org is a major resource in the field and includes a bibliography, a list of upcoming activities, and course listings and syllabi from various law schools. Under the guidance of Judge Greg Baker, the Therapeutic Jurisprudence Society at William and Mary Law School has just launched on its website a posting of therapeutic jurisprudence student work, open to students at all schools.

II. THE INTERNATIONAL DIMENSION OF THERAPEUTIC JURISPRUDENCE

Once you begin thinking of the law less in terms of rules and more about various legal arrangements and therapeutic outcomes, you become less wedded to thinking of the law as a purely domestic discipline.[1] In other words, you are less committed to what Congress, the Supreme Court, or state legislatures might say. Thinking in terms of therapeutic outcomes makes you more open to what may be occurring elsewhere and more willing to incorporate different develop-

[1] *See* Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 204 (1997) (explaining the reaches of therapeutic jurisprudence in the international arena and its benefits from scholarly exchange and debate).

ments into your own legal practice or legal system.

Accordingly, there has been significant international interest in therapeutic jurisprudence. The first international conference on therapeutic jurisprudence was held in England in 1998. The second took place at the University of Cincinnati in 2001. A third was in Perth, Australia in 2006. Additionally, this June, John Jay College will be hosting an international conference in San Juan,[2] which will have a therapeutic jurisprudence component of approximately eleven panels composed of presenters from thirteen different countries. In fact, therapeutic jurisprudence literature has been translated into a number of different languages: Spanish, French, Portuguese, Italian, Dutch, Swedish, Japanese, Hebrew, and Urdu.[3]

At the meeting in Perth, I was fascinated hearing from the attendees about their practices. For instance, one community court judge from the United Kingdom sends follow-up letters to defendants within a few days of sentencing. The judge explains that he will have a staff member from his team visit the person to discuss any needs expressed at the hearing. Such novel techniques as this should be disseminated, discussed, commented on, embellished, modified, and applied by others.

There was another judge, this one from Australia, who discussed how she would rearrange the seating in her courtroom, especially when she had an aboriginal client and family, to accommodate and facilitate participation from the family members. Simple ideas

[2] http://www.therapeuticjurisprudence.org (follow the "announcements" hyperlink in the left hand column).

[3] http://www.therapeuticjurisprudence.org (follow the "TJ Bibliography" hyperlink and choose a language from the scroll-down menu).

such as these are very important but are hardly ever discussed in scholarship. They need to be, and are particularly likely to come to light in discussions with participants from many jurisdictions.

III. INTERDISCIPLINARY DEVELOPMENTS

A major development in therapeutic jurisprudence has been in terms of its interdisciplinary nature. Generally, therapeutic jurisprudence looks at the traditionally underappreciated area of the law's impact on emotional life and psychological well-being.[4] It recognizes that, whether we know it or not, whether we like it or not, the law is a social force with consequences in the psychological domain. Also, therapeutic jurisprudence examines the role of the law as a therapeutic agent and its enormous potential to heal.[5] Therapeutic jurisprudence looks not merely at the law on the books but rather at the law in action—how the law manifests itself in law offices, client behavior, and courtrooms around the world.[6] The underlying concern is how legal systems actually function and affect people.

Therapeutic jurisprudence also attempts to reconcile or accommodate its paradigm with traditional legal values, such as due process.[7] It is important to note, therefore, that therapeutic jurispru-

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[4] David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000).

[5] DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE at xvii (1996) [hereinafter LAW IN A THERAPEUTIC KEY].

[6] *See, e.g.*, *id.* (listing a number of topics as the subject of therapeutic jurisprudence, including "how the criminal system might traumatize victims of sexual battery . . . how workers' compensation laws might create the moral hazard of prolonging work-related injury . . . how the current law of contracts might operate to reinforce the low self-esteem of disadvantaged contracting parties") (citations omitted).

[7] *Id.*

dence does not seek to promote therapeutic goals over other ones.[8] Rather, its objective is to creatively make the law as therapeutic as possible without offending those other values.

Therapeutic jurisprudence has its origins in the area of mental health law. Mental health law is explicitly designed to help people, but curiously, countless provisions are actually (albeit unintentionally) detrimental in practice.

For example, I once observed a mild-mannered, cooperative patient at a psychiatric hospital held in a higher security status than was clinically required. His status was elevated because he was a court-ordered patient, though he had only been deemed a court-ordered patient so he could receive transportation from his rural residence to the state hospital at public expense. As a voluntary patient, he would have been ineligible for public assistance with transportation expenses. Thus, his home community conjured up the idea to have him committed so that he could be transported at no charge to the state hospital. But the law exacted an anti-therapeutic cost in terms of his elevated security status as a court-committed patient.

Over time, I began taking note of incidents where the law seemed to unintentionally harm and also instances where the law seemed to help. During that period, I was publishing in the mental health law area and in a number of areas relating to law and therapy: law and psycho-surgery; law and token economies; behavior modification; law and confidentiality. In 1987, I was asked by the National Institute of Mental Health to write a paper for a law-and-psychology

[8] *Id.*

workshop on the general area of law and therapy—the area they believed I was working in. In preparing that paper, I realized that my enduring interest was not so much in law and therapy, but really in the sub-area of law *as* therapy. That was the therapeutic jurisprudence light bulb for me. Without consciously recognizing it at the time, I actually had written a number of pieces about law *as* therapy. I wrote articles entitled, "A Second Opinion on Talk Therapy Through Law,"[9] for example, and "The Therapeutic Potential of Civil Libertarian Commitment Codes."[10] These articles, as well as publications from other authors, such as Bruce Winick,[11] implicitly looked at the therapeutic and anti-therapeutic consequence of the law.

Notably, there have always been lawyers, professors and judges who have intuitively and implicitly embraced this more humanistic healing perspective. But explicitly identifying therapeutic jurisprudence allows these people to share ideas and to look for and apply techniques explicitly and systematically. Like any practice, a common vocabulary, framework, and conceptual scheme help effective implementation, application, and growth.

Many people ask whether this is just good lawyering or good judging. This is indeed what a number of good lawyers and good judges intuitively do. But the explicit focus fueled by the therapeutic jurisprudence literature can make for even better lawyering and judg-

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[9] David B. Wexler, *Robert A. Burt's Doctor-Patient Dialogue: A Second Opinion on Talk Therapy Through Law*, 90 YALE L. J. 458 (1980) (book review).

[10] David B. Wexler, *Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian Commitment Codes*, 9 INT'L. J. L. & PSYCHIATRY 39 (1986).

[11] Professor of Law, University of Miami School of Law. A.B., Brooklyn College, 1965; J.D., New York University School of Law, 1968.

ing and for much more of it.

When therapeutic jurisprudence originated, within the area of mental health law, it was quite different because traditional mental health law had developed, in part, because of the serious abuses that occurred in commitment proceedings.[12] There were unexamined and maybe unscrupulous psychiatric practices and undue judicial deference to both psychiatrists and to the field of psychiatry. Mental health law was thus created as a rights-orientated approach, bringing many of the lessons of the *Gault*[13] case into mental health procedures and civil commitment hearings.[14] While these developments were very important, this enterprise was not truly interdisciplinary. Instead, mental health law examined the limits of psychiatry, the inaccurate predictions of dangerousness, and the possible adverse side effects of psychotropic medication. Mainly, mental health law attempted to keep psychiatrists within their proper bounds. In essence, it was part of the anti-psychiatry movement.[15] Accordingly,

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[12] *See* Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37 (1999). Professor Winick explains that although the Due Process Clause mandates certain procedural protections in the civil commitment process, in practice these protections are largely ineffective, and serve only as empty formalities. *Id.* at 40-44. Specifically, Professor Winick notes civil commitment hearings are often "extremely informal," usually occurring in the hospital while patients are still wearing hospital garb, and that "[j]udges frequently fail to advise patients of their rights or permit them to speak" and the entire hearing may last "from 3.8 to 9.2 minutes." *Id.* at 42.

[13] *In re* Gault, 387 U.S. 1 (1967) (holding that a juvenile has the right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to privilege against self-incrimination).

[14] "Therapeutic jurisprudence grew out of mental health law. . . . Therapeutic jurisprudence cut its teeth on civil commitment, the insanity defense, and incompetency to stand trial." *Wexler*, *supra* note 4, at 128 (internal citations omitted).

[15] Samuel Jan Brakel, *Searching for the Therapy in Therapeutic Jurisprudence*, 33 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 455, 469 (2007) ("Modern mental health law was conceived when courts and commentators recognized that psychiatrists and other mental health professionals often promised society—and the legal system—far more than they were able to deliver . . . .") (internal citations omitted).

books were written by prominent advocates, such as Bruce Ennis, with titles such as "Prisoners of Psychiatry."[16]

These articles and books basically focused on law *versus* psychiatry, rather than law *and* psychiatry. This is where therapeutic jurisprudence took a different path. Therapeutic jurisprudence recognizes the important due process safeguards and the need to keep psychiatry within its bounds,[17] but it also attempts something more than simply discrediting psychiatry or psychological practices.[18]

Therapeutic jurisprudence explores how 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.[19] Lawyers should always be mindful of the important origins of mental health law and the due process safeguards, as well as the lessons of the *Gault* case, but, with that in mind, should not shy away from the behavioral sciences.

Thus, therapeutic jurisprudence actively sought out other disciplines and sought to become truly interdisciplinary. Initially, there were some growing pains. Some attorneys were suspicious, shocked, even angry, that lawyers would take anything that the behavioral sciences said seriously. This was a misunderstanding of the therapeutic

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[16] BRUCE J. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS, AND THE LAW (1972).

[17] LAW IN A THERAPEUTIC KEY, *supra* note 5, at 4.

[18] *E.g.*, Ingrid Loreen, *Therapeutic Jurisprudence and the Law School Asylum Clinic*, 17 ST. THOMAS L. REV. 835, 847 (2005) ("Therapeutic Jurisprudence encourages people to think about the law's emotional impact and study potential ways to lessen such an impact.").

[19] "Current therapeutic jurisprudence thinking encourages us to look very hard for promising developments, even if the behavioral science literature itself has nothing to do with the law. It also encourages people to think creatively about how these promising developments might be brought into the legal system." Wexler, *supra* note 4, at 128.

jurisprudence objective. Many erroneously thought it was a return to pre-*Gault* days or an effort for therapeutic aims to trump other values. Even mental health professionals were not enthusiastic about suddenly being embraced by the law. They had a tradition of being badgered by trial attorneys and courts, and were put off by the legal field, lawyers, and law professors. To be suddenly embraced by the law and lawyers was jarring and perhaps there was a belief that the lawyers had something up their sleeves.[20]

Today, however, there is an excellent partnership between law and these allied disciplines, principally psychology, social work, criminology, and psychiatry. More recently, public health and anthropology are influencing therapeutic jurisprudence.[21] Many indigenous justice systems, for example, boast elements that therapeutic jurisprudence is only now beginning to discover and the relationship is surely fruitful for therapeutic jurisprudence and, we hope, for tribal courts as well.[22]

IV. EXPANSION ACROSS THE LEGAL SPECTRUM

Another major therapeutic jurisprudence development is the move from a new look at mental health law to a mental health or psychological well-being look at the law in general.[23] This was largely

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[20] *See generally* Brakel, *supra* note 15, at 472.

[21] Wexler, *supra* note 4, at 129 ("One of the things therapeutic jurisprudence tries to do is to look carefully at promising literature from psychology, psychiatry, clinical behavior sciences, criminology and social work to see whether those insights can be incorporated or brought into the legal system.").

[22] *See e.g.*, Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV 1049, 1086 (2007) (describing a local Native American-run drug court as highly effective and successful "because it is rooted in the tradition of the people").

[23] Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invi-*

accomplished by law professors who were hungry for new approaches. These professors lived through the rights revolution and saw that they had made great strides, but to them it looked as though the movement was running out of steam. The changed composition of the Supreme Court was just one of a number of factors.[24] Therapeutic jurisprudence offered an approach that was consistent with hard-won rights but that was new and exciting because it was truly interdisciplinary. These law professors incorporated therapeutic jurisprudence into class and into their writing, and saw applications not only in mental health law but in criminal law, tort law, and family law.

For instance, Janet Weinstein wrote about how so much time in the child custody arena is devoted to what the term "the best interests of the child" actually meant,[25] even though adjudicating the best interest of the child in an adversarial context is per se *not* acting in the best interest of the child.[26] Divorce is stressful in and of itself, and the legal system, more often than not, contributes to that stress.[27]

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tation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged, 48 B.C. L. REV. 539, 545 (2007) ("Thus, TJ's initial underlying premise was 'that mental health law would better serve society if major efforts were undertaken to study, and improve, the role of law as a therapeutic agent.' ").

[24] Joel Haycock, *Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 319 (1994) ("In the face of the changing composition of the Supreme Court and corresponding ideological trends in the country at large, Wexler warns that a continued focus on rights-based appeals has led to an attrition in mental health legal scholarship.").

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

[26] *Id.* at 82 ("For many reasons, the adversarial system . . . may be contrary to a determination of the best interests of the child.").

[27] *See* Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 286 (1999) ("Results from studies of mediation versus litigation . . . lend support for the idea that less adversarial methods of dispute resolution benefit parents and children eco-

The system actually encourages divorcing parents to see and portray each other in the worst possible light and then to bring that out in open court. By the time their damaged relationship is legally severed, it is worse than it would ever have been without the legal proceedings. Accordingly, other dispute resolution techniques would, Weinstein argued, be superior.

In the tort realm, Professor Daniel Shuman, who taught torts as well as mental health law, was interested in the role of compensation as actually prolonging injury and illness through the psychological factor of secondary gain.[28] He wrote an article entitled, "When Time Does Not Heal," urging prompt resolution of certain kinds of personal injury cases so people could fully heal and move on.[29]

V. FROM THEORY TO PRACTICE

In the law office counseling context, the movement from theory to practice can largely be traced to the work of Dennis Stolle,

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nomically as well as psychologically.").

[28] *See* 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, 757 (1993).

> Although the studies differ on the impact of termination of the litigation, they consistently show an association of the reduction of post-accident psychopathology with a shorter time between accident and settlement, a longer time after the settlement of the lawsuit, and having less severe symptomatology after the accident. . . . If plaintiffs dramatically improve following the receipt of tort compensation it may be because the anti-therapeutic effect of the litigation has ended or because the therapeutic effect of the litigation has occurred.

Id. (citations omitted). *See also* Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409, 410 (1992) ("Tort law and therapeutic jurisprudence share a common agenda, the reduction of injury and the restoration of the injured.").

[29] Daniel W. Shuman, *When Time Does Not Heal*, 6 PSYCHOL. PUB. POL'Y & L. 880, 883 (2000) (examining the effects "of unnecessary delay in the resolution of tort claims" on plaintiffs and defendants, as opposed to analyzing these effects "from the perspective of . . . liability or damage determinations").

now an Indianapolis attorney. Stolle was, at the time, however, a twenty-four-year-old law and psychology student at the University of Nebraska. He published a piece that showed how preventive law techniques are enhanced when infused with therapeutic jurisprudence.[30] He suggested a fusion of therapeutic jurisprudence and preventive law for counseling elder clients. That fusion proved profitable in general, not simply in elder law. Therapeutic jurisprudence gave preventive law an interdisciplinary and more humanistic face. And preventive law gave therapeutic jurisprudence practical law office procedures, like legal checkups, that allow lawyers to work with clients to apply the law more therapeutically.

In the criminal law area, I attribute the therapeutic jurisprudence move from theory to practice to a phone call I received from Judge William Schma, then a drug treatment judge in Michigan. Judge Schma had read some therapeutic jurisprudence, found it useful in his work, and urged a meeting of himself, his colleague Judge Peggy Hora, and myself and Professor Bruce Winick. That meeting began a wonderful collaboration where the four of us gave presentations to the National Institute of Drug Court Professionals, to the National Association of Women Judges, to the American Judges Association, and more. The collaboration not only helped bring concepts of therapeutic jurisprudence to the judiciary but also led directly to a book Professor Winick and I co-edited, "Judging in a Therapeutic

[30] *See* Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 27 (1997) (positing that "preventive law, and the legal checkup in particular, at least when used by a lawyer keenly attuned to how the law may affect a client's psychological well-being, can provide the very legal context or mechanism needed for lawyers to work with clients to apply the law therapeutically").

Key: Therapeutic Jurisprudence and the Courts."[31] The book is dedicated to Judges Schma and Hora for starting us on that journey.

In my own work, the exploration of therapeutic jurisprudence and judging—largely in a criminal law context—has led directly to my most recent project, an edited book on therapeutic jurisprudence criminal lawyering. The book, now in press, is entitled "Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice."[32] Emphasizing therapeutic jurisprudence's move from theory to practice, the book begins with academic therapeutic jurisprudence articles but is brought to life by a large number of contributions from private practitioners, public defenders, and clinical law professors.

[31] JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003).

[32] REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (David B. Wexler ed., forthcoming 2008).