The Appeal of Therapeutic Jurisprudence

*Shirley S. Abrahamson**

Therapeutic jurisprudence, a broad and potentially all-encompassing concept, first appeared in mental health law and scholarly literature and has been evolving and growing ever since. According to Professor David Wexler, a leader of the therapeutic jurisprudence movement, therapeutic jurisprudence "tries to eschew doctrinal niceties and symmetries in favor of looking at a problem and trying to develop reasonably workable solutions."[1] Therapeutic jurisprudence is, he writes, "centrist"[2] and "leads us to probe beneath a rhetoric of rights and to focus instead on needs and interests, all the while seeking a creative convergence or compromise."[3] This approach to jurisprudence moves away from the "argument culture" that infuses the adversarial system, in which the culture of critique, opposition, and debate are preferred over a culture of dialogue, cooperation, and other approaches of intellectual inquiry.[4]

Therapeutic jurisprudence examines whether the law and legal institutions have healing effects or detrimental effects. Therapeutic jurisprudence proposes reforms that enable the legal system to focus more on problem-solving without sacrificing the rule of law and the principles that our legal system serves, such as predictability and stability.

Therapeutic jurisprudence has, in recent months, come out of the scholarly literature and become part of the everyday judicial lexicon. Therapeutic jurisprudence has also become the subject of various judicial education programs. Chief justices of state courts speak enthusiastically about therapeutic courts, namely federally-funded drug courts.[5] The drug courts, labor-intensive and expensive, are charac-

* Chief Justice, Wisconsin Supreme Court.

1. David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 272 (1999).

2. *Id.* at 273.

3. *Id.*

4. *See id.* at 264-65.

5. *See, e.g.*, Chief Justice Warren W. Matthews, *Message to the Second Session of the Twenty-First Alaska Legislature* (Mar. 8, 2000) <http://www.Alaska.net/~akctlib/state.htm>

terized as problem-solving and community-oriented courts using interdisciplinary knowledge and diverse professionals. Their goal: to help eradicate drug addiction rather than imprison individuals who are likely to reenter the criminal justice system on release from prison. State court judges are also talking about creating mental health law courts, using the drug courts as models.[6]

If therapeutic jurisprudence is so good, its applicability should not be limited to the trial courts. This Article offers some examples of how appellate courts can join the trial courts in applying therapeutic jurisprudence, but it also raises some concerns.

Appellate practice is part of the adversarial system and the "argument culture."[7] An appeal pits at least two sides against each other and lets them slug it out in public. Yet appellate courts, like trial courts, are concerned about the inappropriateness of the adversarial system, at least in certain settings.

Appellate judges are becoming more interested in alternatives to the "argument culture"; they are increasingly interested in enabling the parties to create solutions to complex problems in addition to declaring rights and naming winners and losers. Appellate courts are beginning to use mediation to resolve disputes. Ellen Waldman describes mediation as "conflict resolution in a 'therapeutic key.'"[8]

In a recent case, *Gillen v. City of Neenah*,[9] the justices of the Wisconsin Supreme Court concluded that the parties should be encouraged to resolve their differences themselves and to seek a creative convergence or compromise instead of having a legal resolution thrust upon them.[10] The case involved a dispute about water rights and the construction and operation of a wastewater treatment plant. Multiple parties were involved, including the state, local governments, associations of local governmental units, nongovernmental environmental groups, the community, individuals, and corporate entities.[11] These parties were intimately familiar with the many aspects of this dispute and might, in the future, be involved in matters relating to this wastewater treatment plant or other environmental matters.

("We are encouraging therapeutic court and restorative justice initiatives. We will monitor the results. Only time will tell whether these movements become important permanent elements of the administration of justice in Alaska.").

6. *See id.*

7. Wexler, *supra* note 1, at 263-67 (applying linguist Deborah Tannen's concept of the argument culture to our legal system).

8. Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 160 (1998).

9. 580 N.W.2d 628 (1998).

10. *See id.* at 632.

11. *See id.* at 630-31.

After briefs were submitted and oral arguments heard, the Wisconsin Supreme Court asked the parties to consider using negotiation and mediation to resolve their dispute, which involved a public issue of widespread concern. The parties did not negotiate a settlement. Instead, they asked the court to proceed to a decision in the case, which the court did.[12] This attempt at seeking the mediation of an issue that affected a whole community was not successful in that case, but perhaps the court will be successful the next time.

The experience of the Wisconsin Supreme Court raises an interesting question of whether appellate courts can or should impose a culture of dialogue on parties who seek resolution through adversarial means. In any event, no criteria have been developed to determine whether the therapeutic effect on disputants differs depending on whether a third party (the court) makes the decision or the parties engage in autonomous decision-making.[13]

As another example of therapeutic jurisprudence at the appellate level, in 1999, the Vermont Supreme Court reached a decision that encouraged community resolution of individual rights claims.[14] Although the Vermont Supreme Court declared that the state is constitutionally required to extend to same-sex couples the benefits and protections that flow from marriage under Vermont law, the court did not determine the method for extending those benefits and protections to same-sex couples.[15] Instead, the court left to the legislature the task of developing the method to be employed, whether it be inclusion within the marriage laws, a domestic partnership system, or some equivalent statutory alternative.[16]

The Vermont Supreme Court declared that it was not infringing upon the prerogatives of the legislature to craft an appropriate means of addressing the constitutional mandate.[17] Furthermore, to avoid disruptive and unforeseen consequences, the court ruled that the current statutory scheme would remain in effect for a reasonable time to enable the legislature to consider and enact implementing legislation in an orderly and expeditious fashion.[18] The court explicitly acknowl-

12. *See id.* at 630 (reversing the judgment of the circuit court and remanding for further proceedings).

13. *See* Waldman, *supra* note 8, at 160-61 (viewing the controversy between the evaluative and facilitative modes of mediation through the lens of therapeutic jurisprudence).

14. Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

15. *See id.* at 867.

16. *See id.*

17. *See id.* at 886.

18. *See id.* at 887.

edged that judicial authority is not ultimate authority and is not the only repository of wisdom.[19]

The Vermont Supreme Court embraced the value of dialogue and discussion as a means to reach an appropriate resolution of a difficult issue. After the court decision, the dialogue would be among the legislators and the citizens of Vermont.

The Vermont Supreme Court interpreted and applied social science research, recognized a wide range of participants and stakeholders, emphasized post-adjudicative dispute resolution, and encouraged a collaborative process to satisfy the interests at stake. "Courts do best," wrote the Vermont Supreme Court, "by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation."[20] Sounds like therapeutic jurisprudence to me!

Vermont Supreme Court Justice Denise Johnson disagreed with this "therapeutic" type of remedy. She argued that because the court properly found a constitutional violation, it should "simply enjoin the State from denying marriage licenses to plaintiffs based on sex or sexual orientation."[21] Justice Johnson contended that the majority's remedy misunderstood the proper roles played by the legislature and the judiciary in a tripartite system of government.[22] She stated that "the judiciary's obligation to remedy constitutional violations is central to our form of government."[23] Justice Johnson concluded by asserting her belief that the majority's mandate will "only increase the uncertainty and confusion that the majority states it is designed to avoid."[24]

Commentators variously heaped both praise and criticism on the Vermont Supreme Court decision. The public and the political branches of government—separately and together—engaged in discussions about appropriate legislation to respond to the supreme court

---

19. *See id.* at 888.

20. *Id.* (quoting C. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 101 (1996)).

21. *Baker*, 744 A.2d at 898 (Johnson, J., dissenting in part).

22. *See id.*

23. *Id.* at 899-900.

24. *Id.* at 904 (internal quotation marks omitted). Indeed, Justice Johnson's dissent presents a critique of fashioning therapeutic remedies in cases involving constitutional rights. She writes,

> No decision of this Court will abate the moral and political debate over same-sex marriage. My view as to the appropriateness of granting plaintiffs the license they seek is not based on any overestimate (or *any* estimate) of its effectiveness, nor on a miscalculation (or *any* calculation) as to its likely permanence, were it to have received the support of a majority of this Court. Rather, it is based on what I believe are the commands of our Constitution.

Id.

decision. The Vermont legislature and the governor endorsed broad public involvement in resolving this controversial issue. In keeping with Vermont's tradition of town meetings, thousands of Vermont residents appeared at public meetings to express their views.[25]

Individuals and groups from across the country set up shop in Vermont to make their views known.[26] The Vermont political branches and the Vermont media did not welcome them. There was "an atmosphere within Vermont that this is our issue and we will resolve it. And outsiders, . . . thank you very much, but why don't you go skiing?"[27]

Although both the people and the legislative bodies of Vermont were deeply divided, the debates were characterized as civil and the participants as well-behaved.[28] On April 26, 2000, both houses of the legislature adopted a law creating "civil unions" for same-sex couples, sending the bill to Governor Howard Dean.[29] The Governor signed the legislation on the same day he received it, out of media view. Governor Dean stated that "he signed the bill privately because he did not want the ceremony to be a triumphal party by supporters of the law. Instead, he said it was time for the state to begin the healing."[30]

Both the Vermont Supreme Court's approach in *Baker v. Vermont* and the concept of therapeutic jurisprudence raise important questions about the relationship among the branches of government and the institutional competence of each, as well as the judiciary's relation with the public. More attention needs to be paid in evaluating the areas in which therapeutic jurisprudence can be effectively applied. Professor Wexler says that dialogue-producing doctrines like therapeutic jurisprudence are likely to be helpful.[31] We'll see whether that prediction proves correct in Vermont.

A *New York Times* article detailed how the Vermont legislators who voted to approve marriage-like civil unions for gay couples wondered whether the vote would be one of their last as elected officials.[32]

---

25. *See* Elaine Stuart, *Book Review*, 73 SPECTRUM 28 (2000) (Reviewing WILLIAM DOYLE, THE VERMONT POLITICAL TRADITION: AND THOSE WHO HELPED MAKE IT (1998)).

26. Carey Goldberg, *Forced into Action on Gay Marriage, Vermont Finds Itself Deeply Split*, N.Y. TIMES, Feb. 3, 2000, at A16.

27. *Id.* (quoting Stephen Kiernen, *Burlington Free Press* editorial page editor).

28. *Id.*

29. Ross Sneyd, *Vermont Governor Signs Gay Union Law*, WIS. ST. J., Apr. 27, 2000, at 2.

30. *Id.* The Governor is quoted saying, "In politics, bill-signings are triumphal. They represent overcoming of one side over another. These celebrations, as the subject matter of the bill, will be private." *Id.* Some Vermont lawmakers, however, were disappointed that no public ceremony marked the adoption of this historical legislation.

31. *See* Wexler, *supra* note 1, at 264-67.

32. Carey Goldberg, *Vermont Senate Votes for Gay Civil Unions*, N.Y. TIMES, Apr. 20,

Senator Peter E. Shulmin, president pro tem of the Vermont Senate, was quoted as saying, "You see senators in tears. . . . I've never seen a vote that required more courage."[33] The pundits watched to see how legislators, both proponents and opponents of any law enacted in response to the Vermont Supreme Court's decision, would be received by the electorate in the 2000 fall elections and how the public would react to the new law. The jury, as we say, is still out on the Vermont Supreme Court's application of the concept of therapeutic jurisprudence in appellate decision-making.

2000, at A12.

33. *Id.*