The Development of Therapeutic Jurisprudence: From Theory to Practice

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I have been explicitly working in the area of therapeutic jurisprudence—the study of the role of the law as a therapeutic agent—for over a decade. I had been implicitly working in the area for somewhat over a decade before that. On this occasion of a 25 year retrospective in the area of law and mental health, I will try to trace the development of therapeutic jurisprudence, to see where it is today, and to suggest what might be its most profitable paths for the future.

I began working in the law and mental health field in the early 1970s, and wrote many different types of pieces: an empirical study of Arizona's civil commitment system,1 a conceptual critique of a psychosurgery case,2 a constitutional and behavioral look at token economies,3 an analysis of the links between the civil commitment and the criminal commitment systems,4 and a warning—which remains terribly important to the appropriate development of therapeutic jurisprudence5—against sub-

* Professor of Law and Director, International Network on Therapeutic Jurisprudence, University of Puerto Rico, and John D. Lyons Professor of Law and Professor of Psychology, University of Arizona. This is a revised version of a lecture presented in October, 1997 at the University of Virginia School of Law. The lecture was part of a conference featuring a 25-year retrospective of developments in the field of law and mental health. The conference papers, including a somewhat different version of this one (published with the permission of the American Psychological Association), will be published in Lynda Frost Clausel & Richard J. Bonnie, Mental Health Law in Evolution: A 25-Year Retrospective 1972-1997 (A.P.A. forthcoming).

5 See Rights/Justice chapters (chapters 33-38), in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce 691
ordinating justice concerns to therapeutic ones.⁶

In addition, during that period I wrote some other pieces which, we can perhaps tell from their titles, shared more of a common thread. One was entitled Criminal Commitment Contingency Structures,⁷ and focused on how the contingencies operative in the legal system encouraged or discouraged certain behaviors and activities in either a therapeutic or an antitherapeutic way.

Likewise, an analysis of the Tarasoff case, which concluded that the decision might actually prompt therapists to think in terms of couple or conjoint therapy, was entitled Patients, Therapists, and Third Parties: The Victimological Virtues of Tarasoff.⁸ Another—a review essay of Robert Burt’s book, Taking Care of Strangers: The Rule of Law in Doctor-Patient Relations—was entitled Doctor-Patient Dialogue: A Second Opinion on Talk Therapy Through Law.⁹ Finally, an article speculating that the evidence-gathering requirements of civil libertarian commitment codes might induce parents to act in therapeutically-appropriate ways with disturbed young adult children, and thus might ironically render commitment unnecessary, was entitled Grave Disability and Family Therapy: The Therapeutic Potential of Civil Libertarian Commitment Codes.¹⁰

There was something about the common thread that ran through those articles that excited me. And when the same thread appeared in the works of others, those works too held special appeal to me. Bruce Winick’s critique, on grounds of its antitherapeutic impact, of the rule in some jurisdictions barring the trial of those rendered “artificially” competent (i.e., by virtue of taking psychotropic medications), was a case in point,¹¹ as was the article by John Ensminger and Thomas Liguori entitled The Therapeutic Significance of the Civil Commitment Hearing:


⁷ David B. Wexler, Criminal Commitment Contingency Structures, in 1 Perspectives in Law and Psychology - The Criminal Justice System 121 (Bruce D. Sales ed., 1977).
⁹ 90 YALE L.J. 458 (1980).
An Unexplored Potential.¹²

In the summer of 1987, at the invitation of Saleem Shah and Bruce Sales, I worked on a paper for an NIMH workshop, scheduled to be held in Tucson the following October. Given my interests, I was asked to write in the general area of law and therapy.

It became clear to me, however, that my particular interest was not in all areas that fell under the general rubric of law and therapy—I did not want to review the psychosurgery case, nor did I want to rehearse the arguments for or against a right to treatment or a right to refuse treatment. My interest was not so much in law and therapy as it was in law as therapy, and that in fact is the common thread that ran through the pieces, by myself and others, that most attracted my attention.

Accordingly, I used the opportunity of writing the paper for the NIMH workshop to layout a perspective of law as therapy—of therapy through law—and reviewed the work, by myself and others, that fell—implicitly—within that framework. That paper, therefore, made the therapeutic jurisprudence perspective explicit.

The original draft, however, did not refer to the law-as-therapy perspective as therapeutic jurisprudence. The original term used was juridical psychotherapy, but that term did not survive the feedback of the October meeting, especially in light of Bruce Sales' persistent mispronunciation of juridical as juridicial. When the draft was revised in the immediate aftermath of the meeting—conforming to Saleem's massive single-spaced typed comments and the strong editorial suggestion by Sales (and echoed by other attendees) that the perspective be described in another fashion—I struggled with many alternatives and ultimately settled on therapeutic jurisprudence, a des-

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¹³ The term juridical psychopathology, invoked to refer to what is sometimes called law-related psychological dysfunction, did barely survive the meeting. See Norman G. Poythress & Stanley L. Brodsky, In the Wake of a Negligent Release Law Suit: An Investigation of Professional Consequences and Institutional Impact on a State Psychiatric Hospital, 16 LAW & HUM. BEHAV. 155 (1992). Judge Michael Town has described the phenomenon by the far less tongue-twisting phrase jurigenic effects. See Michael A. Town, The Unified Family Court: Therapeutic Justice for Families and Children (Mar. 11, 1994) (transcript available in the Chicago Bar Association).
ignation that had merely been an also-ran when I wrote the original draft.

The term \textit{therapeutic jurisprudence} has, of course, itself been often criticized. As one commentator noted, “the words ‘therapeutic jurisprudence’ roll uneasily off the tongue”\footnote{James R. Acker, Book Review, 20 J. Psychiatry & Law 273 (1992).}, though Bruce Sales, at least, does do somewhat better with it than with its predecessor. The use of the word \textit{therapeutic} has been criticized (“too vague; too medical-sounding”), as has the use of the word \textit{jurisprudence} (“where’s the comprehensive theory?”)\footnote{Apart from those two words, everyone seems pleased with the designation!}.\footnote{David Carson, \textit{Therapeutic Jurisprudence for the United Kingdom?}, 6 J. Forensic Psychiatry 463 (1995).} I understand and appreciate the concerns and criticisms, though to this day cannot think of a term that would better capture the general notion —and the major focus— of what the perspective is all about. Thus, although commentators claim that therapeutic jurisprudence “in retrospect may not have been the wisest of titles to adopt”\footnote{David B. Wexler, \textit{Therapeutic Jurisprudence: New Directions in Law / Mental Health Scholarship}, in \textit{Mental Health and Law: Research, Policy and Services} 357 (Bruce D. Sales & Saleem A. Shah 1996).}, I personally cannot, after all these years, suggest a more suitable designation. In any event, for better or worse, the term has now stuck.

Saleem’s tragic and untimely death resulted in a very substantial delay in the publication of the workshop proceedings. When they were finally published, in a very revised and updated form, I chose to place a different —and more current— paper on therapeutic jurisprudence in the volume.\footnote{David B. Wexler, \textit{Therapeutic Jurisprudence: New Directions in Law / Mental Health Scholarship}, in \textit{Mental Health and Law: Research, Policy and Services} 357 (Bruce D. Sales & Saleem A. Shah 1996).} My workshop paper itself was published under the title \textit{An Introduction to Therapeutic Jurisprudence}, as the introductory chapter to my edited anthology, released by Carolina Academic Press in early 1990, entitled \textit{Therapeutic Jurisprudence: The Law as a Therapeutic Agent}.

Apart from the NIMH workshop paper explicating the therapeutic jurisprudence perspective, the other material in that anthology were works, by myself and a number of others, that fell \textit{implicitly} within the newly-named perspective. Substantially,
the chapters related to core mental health law topics — incompetency, insanity, involuntary civil commitment, and the such.

Following on the heels of that book, Bruce Winick and I published, in 1991, a volume entitled *Essays in Therapeutic Jurisprudence*.\(^{19}\) Winick and I have been intellectual partners in crime—or is it partners in intellectual crime?—since 1975, when I took a sabbatical in Miami and discovered that we shared an interest in mental health law. Since then, we have served as mutual catalysts and sounding boards for ideas.

The 1991 volume reprinted works written by Winick and me, including two chapters jointly authored by Robert Schopp and myself. In *Essays*, all of the chapters explicitly used the therapeutic jurisprudence perspective. Like the predecessor volume, the substantive thrust of the book was in mental health law. We recognized, however, the much broader potential of the framework. In the introduction, in fact, Winick and I 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.\(^{20}\)

The *Essays* book included one chapter addressed principally to trial courts—a chapter relating to how judges holding insanity acquittee release hearings might use psychological principles to increase the probability that acquitees will comply with imposed conditions of release.\(^{21}\) *Essays* also called for empirical inquiry to ascertain the therapeutic consequences of various legal arrangements,\(^{22}\) and it advocated a more comparative law approach to therapeutic jurisprudence—to releasing legal scholarship from the confines of United States constitutional construction, to regarding law as something more than a domestic discipline, to enriching our understanding by studying and dis-

\(^{19}\) DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991) [hereinafter *Essays*].

\(^{20}\) Id. at x.

\(^{21}\) Id. at 199.

\(^{22}\) Id. at 303.
cussing, in a truly international context, the relationship between legal arrangements and therapeutic outcome.²³

It is extremely gratifying that, in 1996, five years after the publication of Essays, Bruce Winick and I were able to edit and publish a weighty —1,000 page— anthology, Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence,²⁴ that includes much work consistent with the recommendations made in Essays. Law in a Therapeutic Key contains work by 50 or so authors, all expressly falling within the realm of therapeutic jurisprudence.

The anthology includes some of the empirical work that has begun, but is most different from is predecessors in terms of its substantive coverage. True, the subject matter of traditional mental health law is again included, but so is “quasi”-mental health law (commitment of addicts and sex offenders), correctional law, criminal law and procedure (including sentencing), family and juvenile law, sexual orientation law, disability law, health law, personal injury and tort law, the law of evidence, labor arbitration law, contracts and commercial law, and legal profession.

Therapeutic jurisprudence is no longer merely a special way of looking at mental health law. Instead, it is now a therapeutic perspective on the law in general. Further, the explicit perspective seems to have raised some interesting questions and generated some interesting research and writing that might otherwise not have occurred, and it brings together under a single conceptual umbrella a number of areas that otherwise might not seem to be particularly related: how the criminal justice system might traumatize victims of sexual battery, how workers’ compensation laws might create the moral hazard of prolonging work-related injury, how a fault-based (rather than a no-fault) tort compensation scheme might enhance recovery from personal injury, and how the current law of contracts might operate to reinforce the low self-esteem of disadvantaged contracting parties.

Therapeutic jurisprudence seems to be an optimistic perspective —it sees the can of Diet Pepsi as half-full rather than half-empty— as it searches for promising developments in the


²⁴ LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996).
clinical behavioral sciences and tries to think creatively about how such work may be imported into the legal arena. One promising new approach looks not so much to law reform as to the reform of practice: it concentrates on how existing law, whatever its nature, may be therapeutically applied. In addition, therapeutic jurisprudence work is now being enriched by the efforts of some to explore intellectual links between it and related approaches—such as procedural justice, restorative justice, the ecology of human development, alternative dispute resolution, and preventive law.

I now divide my academic appointment between the University of Arizona and the University of Puerto Rico School of Law.


where I direct the newly-created International Network on Therapeutic Jurisprudence. The Network, with an International Advisory Board, has been established to encourage work in therapeutic jurisprudence by serving internationally as a clearinghouse and resource center. It maintains a web site (http://www.law.arizona.edu/upr-intj) and an up-to-date bibliography, and sponsors conferences. In fact, it co-sponsored, in July 1998 in Winchester, England, the First International Conference on Therapeutic Jurisprudence, principally organized and sponsored by David Carson’s Behavioural Science and Law Network at the University of Southampton.

Another aspect of the Network is the Therapeutic Jurisprudence Forum, a new regular feature of the University of Puerto Rico’s law review (Revista Jurídica U.P.R.). The Forum will publish, in English or Spanish, therapeutic jurisprudence writing, relating to any legal system, by academics, professionals, and students in all relevant fields (e.g., law, psychology, psychiatry, social work, criminal justice and corrections, public health). Its inaugural issue carried an article by University of California sociologist Thomas Scheff on community conferences and offender-victim mediation, an article by Eilis Magner, a law dean in Australia, about the problems and prospects of adapting the therapeutic jurisprudence approach to Australia, and an article by University of Arizona law student Kathryn Maxwell on preventive law strategies for minimizing psychological trauma to the children of divorcing couples.

Academically-speaking, therapeutic jurisprudence seems now to have a rather firm footing. But, for an approach developed largely in the universities, what sort of movement can we expect “from the top down”—from the towers to the trenches?— As Professor Melanie Abbott has recently written, “the fact that the impact has so far been limited to the academic realm suggests that the effect of therapeutic jurisprudence has yet to be felt by

32 See supra note 27.
33 Magner, supra note 23.
practitioners.\textsuperscript{36} Fortunately, the movement of therapeutic jurisprudence from the academic realm to real-world activity is now beginning to occur, especially in the realm of the therapeutic application of the law by trial judges and by attorneys.

It is no surprise that some members of the judiciary will balk at considering the therapeutic consequences of their behavior and rulings. They will resist the suggestion that, know it or not, like it or not, they actually inevitably play a role as social worker, and ought, therefore, at least try to become "less lousy"\textsuperscript{37} in that role. It is also no surprise, however, that some other judges will gravitate toward the therapeutic jurisprudence approach. Many of them will have been engaging in therapeutic jurisprudence judging implicitly and intuitively, if unsystematically—much as I and many others were engaging implicitly and unsystematically in therapeutic jurisprudence scholarship in the years before 1987. This is probably especially true of family and juvenile court judges, and of special treatment court judges, such as drug court professionals.\textsuperscript{38} It is also true of a number of general jurisdiction judges,\textsuperscript{39} and for its September 1997, Annual Convention in Salt Lake City, the National Association of Women Judges chose therapeutic jurisprudence as its theme, and invited two drug court professionals—Judge Peggy Hora and Judge William Schma, along with Bruce Winick and myself, to


address the opening plenary session. 40

Judges Hora and Schma have for some time kept abreast of the therapeutic jurisprudence literature, and regard themselves as explicitly using therapeutic jurisprudence to inform their judicial behavior. 41 They discussed with the attendees certain practices and situations—such as how the acceptance of no contest pleas may frustrate later attempts at rehabilitation—and elicited from the attendees instances where trials or hearings were shaped or managed, within legal limits, to themselves promote healing or to reduce trauma.

At the meeting, Winick and I proposed a collaborative effort at research and judicial education: Judges sensitive to the therapeutic jurisprudence approach might make notes of certain relevant situations—psychojudicial soft spots and the strategies used to manage them. Those accounts can be collected, shared, discussed, and written about, just as are other traditional topics of judicial interest. In that way, therapeutic jurisprudence research can take a more practical turn, and, at the same time, judicial education in therapeutic jurisprudence can become a regular activity, leading to the explicit use of the therapeutic jurisprudence perspective in day-to-day judging.

And what of therapeutic jurisprudence and lawyering? Of course, if judges—who help create the legal culture in their courtrooms and often in their communities—begin to care about the psychological dimension in their courtrooms, savvy lawyers will surely follow suit. 42 In fact, Judge Schma has recently met with a group of lawyers in his community to talk with them about therapeutic jurisprudence and practice issues.

With lawyering, however, the judicial influence has its limits. Judges sensitive to the therapeutic jurisprudence perspective can act accordingly in their courtrooms, or during pretrial or settlement conferences, when they are presented with what Bruce Winick has termed a therapeutic moment—such as a hearing to accept a plea. For lawyers, however, the most crucial

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40 The four of us had, the previous spring, conducted a therapeutic jurisprudence panel in Los Angeles at the Annual Conference of Drug Court Professionals. I had also, in 1994, been invited to Lake of the Ozarks, Missouri, to address a group of newly-appointed family and juvenile court judges.

41 See supra note 38.

42 See Wexler, supra note 25 (if courts use “relapse prevention planning” principles in probation hearing, counsel will follow suit).
therapeutic moment may not occur in a judicial setting at all, but may instead occur in the office during a client consultation.

If lawyers are to be effective in advising clients to manage legal situations in therapeutically beneficial ways, the lawyers must be sensitive to these situations, and clients must also, of course, be persuaded to come for the client consultation in the first place. For all of this to occur the perspective of therapeutic jurisprudence should ideally be integrated with the perspective of preventive law—an integration first proposed by Dennis Stolle in the legal context of elder law.43

Preventive law involves careful client interviewing and counseling, and careful planning and drafting to avoid legal conflicts and disputes. Preventive law practice emphasizes the importance of "periodic legal checkups".44 It also seeks to identify legal soft spots —potential trouble points—and to come up with strategies to avoid or minimize the anticipated legal trouble.45 As a pedagogical device—in law school teaching, for example—preventive law proponents suggest a rewind technique.46 For example, after discussing an appellate decision in contract law, we might rewind the situation back to the stage of drafting, and ask what might have been done differently to avoid the legal problem that was presented by the case.

When integrated with preventive law, therapeutic jurisprudence would suggest that, during legal checkups and client interviewing and counseling sessions, lawyers look not only to legal soft spots —areas that can lead to future legal trouble—but also to "psycholegal soft spots"47—areas where a legal intervention or procedure may not lead to a lawsuit but may lead to anxiety, distress, depression, hard and hurt feelings, etc. The lawyer should then raise that issue with the client, and discuss possible strategies for dealing with it. For example, consider the situation of elderly parents with two adult children, one of whom functions marginally because of drug and alcohol

43 Stolle, supra note 31.
45 Id. at 192.
46 Id. at xlii.
problems. If, in drafting a will, the parents leave funds outright to one child, but leave the money to the other one—the one with drug problems—in trust, they may be creating a situation of hurt and hard feelings—toward them and toward the sibling left funds without strings attached. A lawyer combining the perspectives of therapeutic jurisprudence and preventive law will anticipate this situation, will regard the proposed testamentary disposition as a psycholegal soft spot (though not necessarily as a legal soft spot, vulnerable to legal attack), and will discuss with the clients possible strategies of dealing with—and minimizing—the law-related psychological distress. For instance, the clients might speak now with the adult children, or they might specify in the will why they are taking the action they are taking, and so forth.

Preventive law gives to therapeutic jurisprudence a set of practical, law office procedures, whereby lawyers may counsel clients to apply the law therapeutically. Therapeutic jurisprudence gives to preventive law a human/psychological dimension and adds structure and substance to the function of lawyers as counselor.

Stolle’s proposed integration of the two in his paper on elder law has sparked the interest of the therapeutic jurisprudence and preventive law communities. For example, Stolle, Winick and I recently collaborated with Professor Edward Dauer, president of the National Center of Preventive Law, on an article entitled Integrating Therapeutic Jurisprudence and Preventive Law: A Psychology and Law Based Approach to Lawyering. In it, we propose, among other things, the systematic research into psycholegal soft spots and effective strategies for handling them, and call for interested practitioners to develop a combined concentration in therapeutic jurisprudence and preventive law. We refer to such lawyers as TJ preventive lawyers, and seek to develop a truly psychology and law-based model of lawyering.

Under the direction of Professor Mariluz Jimenez, the University of Puerto Rico law clinic is already at work implementing


49 Stolle, supra note 47.
the approach. Students working in the legal clinic are already keeping journals of the psycholegal soft spots they are encountering—parallel to the judicial journals of psychojudicial soft spots discussed at the conference of the National Association of Women Judges. In fact, the two projects can obviously enrich each other. Consider, for example, a therapeutic moment discussed by Judge Peggy Hora at the plenary session.

Judge Hora was once called upon to hear a will contest involving a brother and sister. The brother sought to overturn, on the grounds of undue influence by the sister, a disposition of the mother's broken down house to the sister, who had cared for the mother in her later years. The brother, unlike the sister, had a decent income and a home of his own. Judge Hora found no undue influence, and upheld the will. She sensed, however, that the case had little to do with money and had to do, instead, with the brother's hurt feelings. At the close of the hearing, she remarked to the brother that, given the different situations between the siblings, the disposition seemed understandable and didn't seem to her to suggest that the mother loved him any less. The brother broke down in tears.

Judge Hora’s case is itself the kind of vignette that should be collected, discussed, and debated, for these are the psychojudicial soft spots and therapeutic moments that can form the basis of research and judicial education. But with the pre-
ventive law *rewind* technique, they can also be used as a database for educating TJ preventive lawyers. In fact, Judge Hora’s case can be rewound twice.

First, we can rewind to the lawyer’s office when the brother and his lawyer are contemplating the challenge of the will. If, after ascertaining the facts (as Judge Hora did at the hearing), the lawyer had given to the brother the same assessment —legally and psychologically— of the case that Judge Hora gave at trial, perhaps the brother would not have brought the case at all. Of course, this raises many questions about the lawyer’s role, about financial incentives, and about professional responsibility —but these are matters for discussion in shaping a TJ preventive lawyer.

The second rewind of Judge Hora’s will contest case takes us to the law office not of the brother’s lawyer, but rather to the law office of the mother’s lawyer, at the time of the drafting of her will. In that setting, a TJ preventive lawyer might recognize the proposed disposition as a *psycholegal soft spot* and might discuss with the client possible preventive strategies: perhaps talk with your son now, or state in the will, or in a separate letter, or on an audiotape or videotape, that you love your son, but know his situation is good and that his sister is struggling.

Just as many judges have intuitively used therapeutic jurisprudence, there are obviously many lawyers who have basically practiced implicitly as TJ preventive lawyers. We hope, however, that by making the approach explicit —by giving it a name—receptive lawyers will begin to practice explicitly, regularly, and systematically as TJ preventive lawyers. As with the therapeutic jurisprudence perspective itself, making the TJ preventive lawyering approach explicit may lead to substantially greater activity. With any luck, it may lead to it taking on a vigorous life of its own.

As therapeutic jurisprudence begins more and more to influence legal and judicial practice, the practice vignettes that emerge will constitute not only part of the stock in trade of TJ
preventive lawyers and of judges interested in a therapeutic jurisprudence approach. The practice vignettes will also provide fodder for academics, who can seek to categorize, discuss, and critique them. That way, the theory-practice relationship can, in this area, become the two-way street that it surely ought to be.

51 For a call for scholarship that runs in the direction of practice to theory, see Finkelman & Grisso, supra note 35. A very recent attempt to involve practitioners in therapeutic jurisprudence and preventive law research is Marc W. Patry et al., Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies, 34 Cal. W. L. Rev. 439 (1998).