Practicing Therapeutic Jurisprudence

Practicing Therapeutic Jurisprudence

Law as a Helping Profession

Edited by

Dennis P. Stolle

David B. Wexler

Bruce J. Winick

Carolina Academic Press
Durham, North Carolina

For my father
D.P.S.

For Rhoda
D.B.W.

For Soia Mentschikoff, mother of legal realism, who brought me from law practice into legal education, was my mentor, friend, and on one occasion, lawyer, and who would have liked therapeutic jurisprudence and its contribution to the craft of lawyering; and for my new granddaughter, Beatrix Pearl Kinney Winick, born June 26, 2000, who one day will read this book and I hope will apply its principles in whatever she decides to do.
B.J.W.

Contents

Acknowledgments

Bruce Winick thanks Dean Dennis O. Lynch for his and the law school's support, and his secretary Eileen Russell and work study/assistant Jaymy Bengio for their secretarial assistance. He also thanks research assistants Cheryl Potter, Tricia Shakelford, and Frank Anzalone. David Wexler thanks Deans Toni Massaro (University of Arizona) and Antonio Garcia Padilla (University of Puerto Rico) for their encouragement and support, Jessica Cousineau for her research assistance, and Norma Kelly for her secretarial and administrative services. Dennis Stolle gratefully acknowledges the support of the University of Nebraska Law/Psychology Program during a portion of the preparation of this volume and thanks many of his colleagues at Barnes & Thornburg for their encouragement. We also thank Carolina Academic Press, especially its President Keith Sipe, and also Tim Colton and Kathy Kay.

Special thanks goes to Ed Dauer and Susan Daicoff for contributing the Foreword and Afterword, respectively. Finally, we are most grateful to the authors who contributed to this volume and their publishers. In their order of appearance, they are:

Chapter 1 (Dennis P. Stolle, David B. Wexler, Bruce J. Winick, & Edward A. Dauer) "Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering," 34 California Western Law Review 15 (1997). Reprinted with permission.

Chapter 2 (David B. Wexler) "Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies," 67 Revista Juridica Universidad de Puerto Rico 317 (1998). Reprinted with permission.

Chapter 3 (Marc W. Patry, David B. Wexler, Dennis P. Stolle, & Alan J. Tomkins) "Better Legal Counseling Through Empirical Research," 34 California Western Law Review 440 (1998). Reprinted with permission.

Chapter 4 (Dennis P. Stolle) "Advance Directives, AIDS, and Mental Health: TJ Preventive Law for the HIV-Positive Client," 4 Psychology, Public Policy & Law 954 (1998). Copyright 1998 by the American Psychological Association. Reprinted with permission.

Chapter 5 (Jennifer K. Robbennolt & Monica Kirkpatrick Johnson) "Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Pre-

Foreword

Few things have captured the tide of the times so well. In the scant five years since Wexler and Winick first described the wide angle lens of Therapeutic Jurisprudence in their book "Law in a Therapeutic Key," TJ has become a managing partner in the enterprise of fashioning the 21st century's lawyer; and Wexler, Winick and Stolle are—though they might disclaim the role—the managers of TJ. It was their vision that uncovered the benefits of a liaison among TJ and Preventive Law and ADR and Creative Problem Solving, and the crises of purpose with which the profession and many of its members are grappling today: How might the humane objectives of law and lawyering be returned, from being the platitudes and abstractions that drive public policy to become the daily rewards of lawyers and their clients? Their energy continues to integrate the seemingly diverse ideas (and their proponents) that together offer promise for a new legal reality. This book is the latest product of that effort, and one of the most immediately useful.

This is no small or unimportant task. When the legal history of the twentieth century is written, it will in all likelihood tell of an unparalleled explosion of legal protections for those members of society perceived to be disadvantaged in a world otherwise red in tooth and claw. The resulting character was, perhaps, inevitable, for America has had two driving traditions. The first is cultural diversity.

In monocultural societies, norms are born in history, embedded in expectation and tradition, learned almost since weaning, seldom debated. The common denominators are the fabric of everyday life. In authoritarian societies, norms are simply dictated, even less often debated. In America—by hope and definition a non-authoritarian and poly-cultural place—there is little unanimity about norms, and much of our Constitutional structure is designed precisely to prevent the views of a majority from becoming inescapable common denominators. Lacking confidence in the universality of substance, we have invested heavily in the construction of process.

The second tradition has been, throughout our legal history, the adversarial nature of legal process. For better or worse, dialectical advocacy (with all of its effects and extremes) has been legal truth's primary source of nutrition. No wonder, then, that as American society matured to recognize the imperative of inclusiveness and the protection of the less advan-

Introduction

How can mental-health law maximize therapeutic outcomes? This was the fundamental question presented by my co-editors, David Wexler and Bruce Winick, when they formally introduced therapeutic jurisprudence as a distinct legal theory, about a decade ago. The subsequent impact of this question on mental-health law scholarship, and legal scholarship in general, has been nothing short of phenomenal. Therapeutic jurisprudence offered a fresh and creative new perspective, which served as a catalyst for a cooperative and truly interdisciplinary approach to legal scholarship. The result has been scores of authors writing hundreds of articles addressing this fundamental question in legal contexts ranging from traditional areas of mental-health law, such as involuntary commitment, to areas far beyond traditional mental-health law, such as commercial law and contracts.[1]

Much of the success of therapeutic jurisprudence stems from its refusal to displace other values or priorities. Like law and economics, which often asks "how can the law maximize economic utility?," therapeutic jurisprudence takes a quasi-utilitarian approach to jurisprudence, asking "how can the law maximize therapeutic outcomes?" However, therapeutic jurisprudence does not attempt to displace the maximization of economic utility with the maximization of therapeutic outcomes, nor does it attempt to trump individual rights, or other values or priorities, in the name of avoiding anti-therapeutic consequences. Rather, therapeutic jurisprudence places the psychological and emotional health of persons affected by the law and by legal actors as one important consideration among many.

The question of how to maximize therapeutic outcomes has most often been approached from a systemic, or "top-down," perspective. This systemic approach tends to focus on law reform and its methodology tends to identify anti-therapeutic (or potentially anti-therapeutic) aspects of existing laws, legal institutions, or legal procedures and then advocate specific legal reforms, often at the legislative level, with the intention of maximizing therapeutic outcomes. By the mid 1990's, though, my co-editors were also thinking about "bottom-up" approaches to therapeutic jurisprudence. That is, they were thinking not only about how laws could be *changed* to

1. *See e.g.*, David B. Wexler & Bruce J. Winick, LAW IN A THERAPEUTIC KEY (1996). *See also,* Therapeutic Jurisprudence Bibliography available at www.law.arizona.edu/uprintj.

Bruce, Ed, myself, and others met in Los Angeles to begin planning a program of scholarship focused on integrating therapeutic jurisprudence and preventive law. The first step, it seemed, would be the preparation of a fully-integrated theory, to which we each would contribute. We first presented that theory at the May 1997 meeting of the Law and Society Association in St. Louis, Missouri. The Law and Society presentation elicited insightful comments from the audience, leading to a spirited and constructive discussion that continued over dinner and into the evening. That discussion formed the basis for, and essentially became, chapter one of this book—"Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering." Together, Chapters One, Two, and Three present the fundamentals of therapeutic jurisprudence, preventive law, and the integrated theory, with particular emphasis on the practice, unique to the integrated theory, of identifying "psycholegal soft spots."

This book, however, is not intended to merely present a theory, but, rather, to present potential and actual applications of the principles underlying that theory, regardless of whether the application of those principles expressly proceeds under the name "therapeutic jurisprudence," "preventive law," or neither. To that end, Chapters Four through Fourteen present applications of the integrated theory as well as related theories, such as collaborative law and affective lawyering, in the contexts of civil practice, criminal practice, litigation, and client counseling. However, I believe that the scope of the potential applications of the principles underlying these theories is much broader than the few topic areas presented in this volume. My hope is that this book will encourage practitioners, scholars, teachers, and students of the law to take the application of these principles beyond the contexts presented in this volume and to more fully develop and apply them in such contexts as juvenile law, health law, commercial law, and tort law.

If the principles espoused in this book, regardless of whether or not they are advanced under the names "therapeutic jurisprudence" or "preventive law," are to have an impact on legal practice, the principles need to become part of law school education and, ultimately, the broader legal (and social) culture in which modern practitioners must function. Together, Chapter Fifteen and Susan Daicoff's Afterword consider the place of therapeutic jurisprudence in our "culture of critique," including the context in which that culture is perhaps most palpable, law school education. My hope, and that of my co-editors, is that the principles embodied in this book will become a part of law school education and that therapeutic concerns, a preventive orientation, and creative problem solving might, thereby, become as much the hallmarks of legal culture as argument, debate, and critique.

Dennis P. Stolle
August 2000