

Rehabilitating Lawyers

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*Principles of Therapeutic Jurisprudence
for Criminal Law Practice*

Edited by
David B. Wexler

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To my wife, Ghislaine Laraque, with much love

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Foreword

James P. Cooney III*

I keep a different office than most lawyers. In one corner I have a full-sized skeleton who hangs by his head (I fancy him a male) and who wears a T-shirt for the 12th Human Remains Recovery Institute that I was given by a forensic pathologist from the “Body Farm.” There is a camouflaged GI Joe on one of my shelves, given to me by a client who liked the way I “parachuted” into tough cases. I have an assortment of medical equipment—surgical stapling guns, needles, scalpels, syringes—constituting the general detritus of 25 years of defending malpractice cases. On the walls there are an assortment of courtroom sketches—I can watch as my hair slowly vanishes from drawing to drawing. There are framed newspaper headlines, photographs from articles and other courtroom sketches. There is even a large picture of my middle daughter with Eeorye. All of these surround my files and books and casebooks and pleadings.

One thing that is quite traditional in my office, though, is something that appears in nearly every lawyer’s office that I have ever seen. It is as if we are all genetically programmed to know that if nothing else is in our offices, this one thing must be: a law license. My license, issued in 1984, is telling for what it says, and I glance at it from time to time to remind myself:

Attorney and Counselor at Law

There it is: “Counselor at Law.” For many people, that phrase simply means that a lawyer gives advice about the law—he or she offers “counsel.” And, I am sure, for many lawyers that may be enough, or at least it is all that is asked of them.

* James P. Cooney III is a Partner in the law firm of Womble Carlyle Sandridge & Rice, PLLC, one of the “AmLaw 100” firms. Based in Charlotte, North Carolina, he is recognized as one of the best trial lawyers in the South. In 2000 he was the youngest attorney in North Carolina ever inducted into the American College of Trial Lawyers. In 2004, he was presented the William Thorp Pro Bono award for his representation of Alan Gell an innocent man wrongly convicted of murder and sentenced to death. The Gell case led to the establishment of one of the most comprehensive reforms in criminal law in the history of North Carolina. In 2006, he was recognized as one of the premier civil litigators in North Carolina, and in 2007 was selected as the top criminal trial lawyer in the State. In his career he has freed 5 men from Death Row and, in 2006 and 2007, was one of the defense attorneys who successfully defended the young men wrongfully charged with rape in what came to be known as the “Duke Lacrosse Rape case.” He is a summa cum laude, Phi Beta Kappa, graduate of Duke University and received his law degree from the University of Virginia, where he was an editor of the *Virginia Law Review* and a member of the Order of the Coif.

For any attorney who practices trial law, and particularly trial law at its rawest—criminal defense, personal injury, domestic litigation—offering “counsel” does not begin to describe our task. We are, in the full-blooded meaning of the word, truly “counselors.” If you have ever had the task of telling someone that they may go to jail, or lose their practice or their fortune, or that he or she has lost a marriage or a spouse, you use much more than your knowledge of the law to see your client through this crisis. Handling, coaching, coaxing, and above all else counseling another human being is the essence of the practice of law in these arenas. In many ways, trial law is as much about psychology and therapy as it is briefs and motions; for in the end, no matter the case, it is always about human beings and their emotions—and the cases will always be decided by other human beings and their emotions.

This book, and the concepts embodied in it, take the role of lawyer as “counselor” to the next level. It does so by positing that rather than simply counseling clients through a legal crisis—doing what it takes to preserve their humanity while representing them fully—a lawyer may need to act to ensure that his or her clients are treated through the process. The goal of such an approach—of “therapeutic jurisprudence”—becomes more than the survival of the client and the achievement of the best possible outcome. Rather, the goal now embraces a healing component, one in which the client may achieve the best possible outcome by becoming “better.”

This is a radical concept. For many of us this approach has been in front of us, unknown, for years. In capital murder cases in which life itself is in the balance, defense attorneys have for years had clients evaluated, tested and oftentimes medicated. It is the unusual capital murder case in which a defendant is not diagnosed, finally, with a mental illness—sometimes treatable, often controllable—which, when exposed to therapy, recedes and suddenly the client is clearer, more rational, more human, than he has ever been.

The capital case, however, has always been therapeutic jurisprudence in the setting of a MASH unit—taking horribly damaged people and providing them with enough “therapy” so that they may try to survive the ordeal of the capital murder trial and its aftermath. This book and its chapters posit something altogether different, a proactive approach to “therapy” in a broad spectrum of cases, an approach that has at its core the concept that if the client can be made “better”—or even healed—that act will help both the client and the client’s case.

This is in many ways both a simple and breath-taking proposition. It asks the attorney as zealous advocate to seek to heal—or at least begin to heal—the client as an explicit strategy in advocating the client’s cause. It is in many ways the antithesis of how the lawyer—and particularly the trial lawyer—is often viewed and frequently portrayed: the hired gunslinger performing a task for money with little regard for anything other than winning. Yet, in its goal, therapeutic jurisprudence embodies the essence of the adversary process, but does so by turning it on its head. It contemplates a client who still makes the ultimate decisions, but is presented with choices beyond the strategic ones that present themselves in contested cases; rather, rehabilitative as well as litigative choices are now actively presented, and both merge to form a new paradigm for zealous advocacy.

Thus, therapeutic jurisprudence is the ultimate fulfillment of a lawyer’s charge as “counselor” at law. It gives a potent and aching human weapon to the advocate, and permits a lawyer to do well while actually doing some good. In this premise this concept is transformative—taken to the endpoint of its natural evolution, it promises to change

the very way that law in this country is seen, practiced and taught. This is a change that I, and those clients who have sat in my office confronted with the reality of their situations, welcome and will benefit from.

James P. Cooney III
March 10, 2008
Charlotte, North Carolina

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As always, many, many thanks to Carolina Academic Press and its President Keith Sipe for their interest in therapeutic jurisprudence and for the pleasure of working with them. Tim Colton (along with his superb production team of Karen Clayton and Kasia Krzysztowska) has again worked tirelessly to usher the book through the production process. And much of the on-the-ground work has been done by my research assistant, Cristina Hernandez, at the University of Puerto Rico Law School, and by Lucy Hoffman, of the support staff at the University of Arizona, James E. Rogers College of Law. My deep thanks to all of them.

This book is dedicated to my wife, Ghislaine (“Gigi”) Laraque, and she did the artwork for the book cover. Cuca del Rincon took my book jacket photo, and she and Jesus Maria (“Bibi”) del Rincon created the jacket’s graphic design. Although “Gigi, Cuca, and Bibi” may sound like a pre-school playgroup, they formed a superb artistic committee—and one that indeed “works and plays well together.” I am very much indebted to them.

Introduction

Rehabilitating Lawyers. Surely, I don't really believe lawyers need to be "rehabilitated." Nor do I believe they should become therapists, in the business of actually and actively rehabilitating their clients.

Why then the "cutesy" *double entendre* title? Well, clearly as a hoped-for attention-grabber, an antidote for the more accurate but indisputably arid subtitle, "Principles of Therapeutic Jurisprudence for Criminal Law Practice."

Moreover, using "rehabilitating" in its "softer" sense, I do think—as many essays in this book demonstrate—that the therapeutic jurisprudence (TJ) perspective enables lawyers easily to inject an ethic of care into their practices and to serve as "positive change agents" for their clients.¹ And my hope and expectation is that a practice infused with therapeutic jurisprudence type approaches can help immeasurably to improve the image of lawyers—with their clients² and with the public at large³—and can, as well, enhance in a major way the professional and personal satisfaction derived from a life of lawyering.⁴

To be sure, many lawyers already practice along the lines suggested in this volume, whether or not they use the term "therapeutic jurisprudence." Those working in specific problem-solving courts (e.g., drug treatment court, mental health court) come quickly to mind, and the general criminal lawyer can learn much from these attorneys. Indeed, as we will see, many criminal defense attorneys practicing in general criminal courts also adopt such an approach.

The TJ community of scholars and practitioners can learn an enormous amount from these creative lawyers, and we should be continually encouraging them to write and to share their experiences. At the same time, my claim is that by familiarizing themselves with therapeutic jurisprudence and its interdisciplinary literature, and by invoking a TJ perspective explicitly and systematically, lawyers will see even more opportunities to practice in an enriched, beneficial and meaningful way.

Another aim of this book is to bridge the wide academic/practitioner divide that exists in the world of law. Commenting by e-mail on a recent essay of mine, a law professor wrote, "I don't think I have ever seen anything quite like this, in terms of connecting

1. Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts 137 (Bruce J. Winick and David B. Wexler, eds.) (2003) (excerpting work of Michael D. Clark, MSW).

2. Marcus T. Boccaccini, et al., Development and Effects of Client Trust in Criminal Defense Attorneys, 22 Behavioral Science and Law 197 (2004).

3. Judging in a Therapeutic Key, supra note 1, at 132 (excerpting work of Judge Roger K. Warren).

4. Deborah J. Chase and Peggy F. Hora, The Implications of Therapeutic Jurisprudence for Judicial Satisfaction, 37 Coast Review 12 (2000).

the theoretical work on procedural justice and therapeutic jurisprudence with some very specific examples of what a thoughtful judge and a thoughtful defense lawyer are actually doing.”

Unfortunately, and to me shockingly, this observation is largely true. More than fifteen years ago, Judge Harry Edwards, a former academic, wrote an article, famous at least in the world of law school teaching, entitled, “The Growing Disjunction Between Legal Education and the Legal Profession.”⁵ Judge Edwards was especially critical of interdisciplinary or “law and” scholarship, which he too often found to be of no value to the practicing profession. And in a *Harvard Law Review* essay published in 2006, another author claimed the disjunction comments to be “truer today than when Judge Edwards penned these words in 1992.”⁶

But I am pleased to note that, even in the era of Judge Edwards’ original indictment, he dropped an approving footnote characterizing therapeutic jurisprudence academic writing as “practical interdisciplinary scholarship.”⁷ And in this book I have sought further to create and nourish practical interdisciplinary scholarship. In fact, as it turns out, the lion’s share of this book is composed of contributions from practitioners and their academic counterparts—faculty members attached to law school clinical programs. I very much hope the book will stimulate further scholarship from those sectors of the profession—and from their behavioral science counterparts.

The book itself is divided into five parts. Part I lays out a framework for therapeutic jurisprudence criminal law practice. Part II is devoted to a discussion of concerns and criticisms of the TJ approach. Part III, the most practical part of all, is dedicated to specific practices and techniques. Part IV explores settings where therapeutic jurisprudence skills can be practiced or honed. And Part V looks at TJ in a comparative law context, exploring issues in a continental context and in a profession distinguishing between barristers and solicitors.

In many ways, this entire project is a work in progress, and the enterprise will develop only through the input, reactions, and continued commentary of this broad interdisciplinary and international community. Interested persons can keep abreast and participate by visiting the website of the International Network on Therapeutic Jurisprudence at www.therapeuticjurisprudence.org and by joining its listserve or mailing list.

5. 91 *Michigan Law Review* 34 (1992).

6. Neil Kumar Katyal, “*Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice”, 120 *Harvard Law Review* 65, 66 (2006).

7. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 *Michigan Law Review* 2191, 2196 n. 20 (1993).