

# Court Review

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THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

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## EDITOR'S NOTE

For more than a decade, legal scholars, psychologists, and academics have been writing about something they call "therapeutic jurisprudence," a new way of looking at many of the cases and proceedings that judges deal with daily. Despite the existence of several books and more than 200 articles on therapeutic jurisprudence, a LEXIS search shows only one published state or federal court decision even mentioning the term—and that was only because it cited to statistics from an article that had "therapeutic jurisprudence" in its title.

The American Judges Association has recognized the potential value of therapeutic jurisprudence (TJ for short) for our work. The AJA has a committee on TJ issues and has arranged for a special TJ educational conference for its May 2000 midyear meeting. To coincide with that conference, we are devoting this issue of *Court Review* to an exploration of TJ and its potential applications. With the help of David Rottman, who assisted with the editing for this special issue, we have food for thought for judges who have never heard of TJ principles, for judges wondering what TJ might be about, and for judges already familiar with the basic TJ philosophy.

Judge William Schma leads off the issue with an overview of TJ and its relation to traditional notions of judging. Judge Peggy Hora and researcher Deborah Chase provide a further reason for judges to study TJ concepts—preliminary data seem to indicate that judges who get to use TJ concepts in their daily work are happier and more satisfied with their work than those who do not. David Rottman discusses how TJ fits into a growing use of specialized courts, contrary trends in the overall court reform movement, and changing roles played by judges in recent years. Judge Thomas Merrigan reviews the leading book on therapeutic jurisprudence.

After those articles, which focus on TJ broadly, we consider its application in more specific situations. Judge Randal Fritzler and Professor Leonore Simon describe its application to a domestic violence court, while also providing practical advice for setting up such a court. Kate Paradine offers a closer look at some of the emotional issues involved in domestic violence cases and ways to deal with them therapeutically. Nicola Ferencz and James McGuire discuss application of TJ concepts to the Mental Health Review Tribunals of England and Wales, which handle civil and criminal mental commitment proceedings there.

We also consider TJ's application to the appellate courts—a topic that, to our knowledge, has not previously been discussed even in the academic world. Nathalie Des Rossiers discusses an intriguing application of TJ concepts in an appellate court in the handling by the Supreme Court of Canada of the issue of Quebec secession. Amy Ronner discusses the issue generally as well as its application in criminal cases.

Last, we close with our normal Resource Page feature, including an overview of therapeutic jurisprudence books, articles, and Web sites. We hope you'll find the issue of interest. — SL



*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 66. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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# President's Column

Gerald T. Elliott

If public trust and confidence is a fundamental issue for the courts as an institution, the Trial Court Performance Standards can be the fundamental response.

We, as judges, understand that trust and confidence is a foundation essential of our justice system. Justice Sandra Day O'Connor, at the National Conference on Public Trust and Confidence in the Justice System in May 1999, expressed it clearly and simply: "As judges, court administrators and attorneys, we all rely on public confidence and trust to give the courts' decisions their force. We don't having standing armies to enforce opinions, we rely on the confidence of the public in the correctness of those decisions. That's why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust."

Justice O'Connor's statement serves to remind that the relationship of the public with the courts has always been a fundamental issue, and always will be. Maintaining trust and confidence is and ought to be an ongoing effort for all of us involved with the courts.

The American Judges Association, the National Association of Court Management (NACM), and the National Association of State Judicial Educators (NASJE) believe that to be so, and are committed to leading an ongoing initiative to disseminate the Trial Court Performance Standards to courts and judges to support that important effort.

The Trial Court Performance Standards are a statement of the values and goals for our courts that, as judges, we all share. They are aspirational, describing what optimal performance by the courts as an entire system involves.

The standards comprehensively set out the fundamental purposes and responsibilities of courts in terms of the outcomes that both judges, and the public, expect. They consist of 22 guiding principles, or performance values, distributed in five broad areas: access to justice, expedition and timeliness, equality, fairness and integrity, independence and accountability, and public trust and confidence. *Court Review*, in its Winter 1998 issue, published an article describing the standards and their use in greater detail to which you may wish to refer.

The usefulness of the standards for us as judges lies not in the fact that they introduce new ideas or values—they don't. Their usefulness lies in the fact that they provide us in one place with the values and goals we as judges and court managers try to achieve. They set out these values in a logical, useful way that courts, both judges and managers, can use to administer, assess, prioritize, and plan their use of the court's judicial space, personnel, and funding assets to best serve the public.

Attendees of the National Conference on Public Trust and Confidence (to which *Court Review* devoted its entire Fall 1999 issue), after being informed by public surveys, identified six issues impacting public trust and confidence that were deserving of priority attention: unequal treatment, high costs, lack of public understanding, inconsistent judicial process, selection of judges, and poor customer relations. The six priority issues selected at the conference are provided for in the standards, as are the other nine issues that were identified.

AJA, NACM, and NASJE leadership all participated in the conference, which placed emphasis and attention on action national organizations such as ours could take that would support strategies to address public trust and confidence.

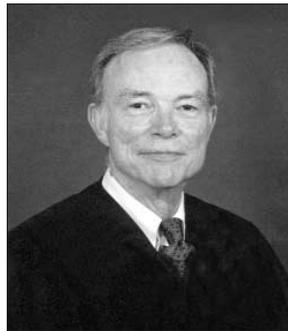
Conference attendees also considered and ranked the roles and actions such national organizations could carry out. The top action was to develop and disseminate "best" models and practices that courts and judges could use. While there are many models and practices, the Trial Court Performance Standards are a good place to begin.

The standards are already fully developed and, in fact, are beginning to be utilized by courts throughout the states. The growing interest, universal usefulness, and ability to focus on the

issues of trust and confidence identify the standards as the first model or practice for these three national organizations to disseminate institutionally.

For all of these reasons, the American Judges Association on behalf of judges, NACM on behalf of court management, and NASJE on behalf of state judicial educators, have come together to develop the Trial Court Performance Standards Initiative. The initiative expects to work with the National Center for State Courts to develop a curriculum presenting the Trial Court Performance Standards to the state courts, their judges, and managers in a practical, useful way. We hope that most presenters will be judges and managers with actual involvement in using the standards and that judicial educators will lend their considerable experience and expertise in program planning and distribution to all interested states and courts. The program is an ambitious one and will require, of course, the support of the Conference of Chief Justices as well as the Conference of State Court Administrators.

Public trust and confidence is a fundamental issue for the courts as an institution; the standards can be a fundamental institutional response and can contribute significantly to keeping and building the trust of which Justice O'Connor spoke. We hope that this initiative will become an important part of the national and state efforts to build and maintain public trust that follows the national conference.



# Judging for the New Millennium

William Schma

Quickly complete this sentence: "The role of the law in society is \_\_\_\_\_." If you thought "to heal," close this journal and go to your next. You won't find much here you haven't thought about. Everyone else, read on to explore an emerging role for courts and judges in this new millennium.

The topic of this special issue of *Court Review* is "Therapeutic Jurisprudence," or "TJ" as it is commonly known. No single definition of TJ captures it fully.

One author offers the following definition as best capturing the essence of TJ: "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."<sup>1</sup> It is the study of the role of law as a healing agent, and it offers fresh insights into the role of law in society and those who practice it.

TJ can be thought of as a "lens" through which to view regulations and laws as well as the roles and behavior of legal actors—legislators, lawyers, judges, administrators. It may be used to identify the potential effects of proposed legal arrangements on therapeutic outcomes. It is useful to inform and shape policies and procedures in the law and the legal process. TJ posits that, when appropriate, the law apply an "ethic of care" to those affected.

TJ does not "trump" other considerations or override important societal values such as due process or the freedoms of speech and press. It suggests, rather, that mental and physical health aspects of law should be examined to inform us of potential success in achieving proposed goals. It proposes to consider possible negative psychological effects that a proposal may cause unwittingly. TJ doesn't necessarily dominate, but

rather informs and in so doing provides insight and effective results. Such considerations enter into the mix to balance when considering a law, or a legal decision, or course of legal action.

It is important for judges to practice TJ because—like it or not—the law does have therapeutic and anti-therapeutic consequences. This is empirical fact. Consider the following situations; they are familiar to judges.

In busy dockets, it is common for judges to accept "no contest" or *nolo contendere* pleas in sex offense cases in lieu of a guilty plea. TJ will not dictate whether a judge should do this or not. It will, rather, ask the judge to consider the therapeutic effects that may follow as a consequence of such a plea. They may be considerable, because in the case of sex offenders a *nolo* plea may reinforce a process of denial that will frustrate the offender's rehabilitation. If the offender does not have to admit the crime to the judge, he or she may more easily deny it later to a probation officer or sex abuse counselor. Anti-therapeutic consequences such as frustration of rehabilitation and return to abusive behavior may result from the judge's acceptance of the plea. Ironically, this process would be started by the judge—the very person society most expects to promote the rule of law.

The same may be said of criminal cases involving an addiction to alcohol or other drugs. The biggest hurdle that an addict or alcoholic usually must overcome is denial. It is difficult to admit affliction with an uncontrollable disease, especially one to which our society has attached moral overtones. Nevertheless, those experienced with recovery know that this admission is critical. If, for whatever reason, a judge accepts a *nolo* plea in such a case and does not require

the defendant to confront his or her addiction openly, the judge misses a critical "therapeutic moment." Moreover, as in the case with sex offenders, the judge may have set in motion a course of denial that will virtually guarantee the failure of subsequent rehabilitation efforts and the eventual return of the offender to the system.

Consider this final example: the role of apology in tort law. Practitioners familiar with medical malpractice cases know that many plaintiffs only want an apology from their health care provider for the adverse outcome they experienced. A lawsuit is the furthest action on their mind. And for negligent care providers, an apology for a regrettable mistake would be a therapeutic event. Unfortunately, some professional insurance practices prohibit an insured from having any contact with a patient who may file a claim. There is a good reason for this from the standpoint of the insured and the insurer: a non-privileged admission could end up in court as a *coup de grace*. The anti-therapeutic result, however, can be that the patient is deprived of what the patient may want most, and the health care provider cannot take necessary steps to cleanse his or her mind and return to productive work. Moreover, because the provider is forced by the law into a position of denial, the likelihood of reoccurrence increases.

TJ first identifies these anti-therapeutic elements that might otherwise go unexplored. Next, it asks whether an action could be taken to avoid them without "trumping" the established legal principles involved. It proposes such action and methods to evaluate it. TJ is, therefore, not merely a speculative exercise, but rather action-oriented. It seeks tangible results.

Permit me to describe some personal

## Footnotes

1. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL., PUB. POL. AND LAW 193, 196 (1995).

experience I have had in each of these areas to demonstrate how TJ applies. For more than five years I have refused to routinely accept *nolo* pleas in felony sexual abuse cases. Once my practice became known among local lawyers, no defendant has refused to go forward with a guilty plea. The attorneys prepare their clients for this in advance if they are in my court. (This suggests, of course, the significant role lawyers play to prepare clients for therapeutic or anti-therapeutic court experiences, but that is a separate topic I leave for another day.) Moreover, since then I have never had a sexual abuser appear at sentence and deny to me that he or she committed the crime. Nor have I received a single letter from a family member denying that the defendant was capable of such an act. These were routine when I accepted *nolo* pleas. As a result, at sentencing, I can confront defendants much more effectively with the reality of their behavior and the wrongfulness of their conduct. This result is also more therapeutic for victims of such crimes.

Beginning in 1992, I presided over a drug treatment court in my community. A drug court diverts certain non-violent, substance-abusing criminal defendants from the traditional adversarial criminal justice system into treatment and rehabilitation. Since then, more than 800 adult felony offenders addicted to alcohol or other drugs have been enrolled in this program. Fifty-five percent of women and 64% of men remain engaged in their recovery while they are in the program. The recidivism rate of participants is less than 15%. For graduates, it is less than 2%. This drug court and more than 400 others across the country apply TJ principles to criminal justice.

Recently in my court, I have experimented in medical malpractice cases

with what I call "good faith conferences." As part of the settlement of two cases, one involving a death, a meeting was held between the interested parties, including the plaintiff or the family of the deceased and the physician-defendant. Attorneys were present at both conferences. One was held in my presence; the other occurred in the office of a neutral, experienced personal injury attorney. All participants agreed that anything said could not be used for any purpose. During these conferences, each side was permitted to speak about the feelings they had experienced because of the perceived malpractice and the lawsuit. The physicians explained why they had done what they had believed to have been medically appropriate in the circumstance, yet apologized to the family or plaintiff. Patients and their families expressed frustration and anger over everything from the physician's attitude to the care administered. The results have been mixed. However, the attorneys involved—all experienced in medical malpractice—and I agree that this method of dispute resolution meets significant litigant needs and is worth further refinement. But for the Therapeutic Jurisprudence movement, this project may never have occurred.

These are not radical concepts; they are mainstream. They do give a fresh perspective on honored principles of the legal profession. Abraham Lincoln advised lawyers (and presumably judges): "Discourage litigation. Persuade your neighbor to compromise wherever you can. . . . As a peace-maker, the lawyer has a superior opportunity of being a good man."<sup>2</sup> Roscoe Pound spoke of "sociological jurisprudence," arguing that law must look to the relationship between itself and the social effects it creates.<sup>3</sup> Oliver Wendell Holmes

said "the life of the law has not been logic: it has been experience," and he noted that the practical necessities of the times have always shaped the rules of law and the legal practices of a given age.<sup>4</sup>

At a presentation to the annual meeting of the National Association for Court Management in 1996, the need to become "more therapeutic" in outcome was described as one of the top ten issues facing the courts in the future.<sup>5</sup> In 1996, in a cover story in the American Bar Association *Journal* entitled, "The Lawyer Turns Peacemaker," the author noted public dissatisfaction with the justice system and argued for the need to apply a more therapeutic approach to litigation so that the parties' feelings of anger, resentment, or rejection could give way to a healing process.<sup>6</sup>

Recently, David Rottman and Pamela Casey, staff members of the National Center for State Courts and frequent authors on this topic, observed that courts are moving towards a "problem-solving" orientation to their responsibilities and forming problem-solving partnerships to address more effectively the complex social problems that have come to dominate their dockets in recent years.<sup>7</sup> The Commission on Trial Court Performance Standards also raised the level of court consciousness on these matters through its Trial Court Performance Standards. Standard 3.5 is: "The trial court takes appropriate responsibility for the enforcement of its orders. No court should be unaware of or unresponsive to realities that cause its orders to be ignored."<sup>8</sup> And Standard 4.5 states:

The trial court anticipates new conditions and emergent events and adjusts its operations as necessary. Effective trial courts are responsive to emergent public

2. Abraham Lincoln, in QUOTE IT! MEMORABLE LEGAL QUOTATIONS, 429-430 (Eugene Gerhart, ed. 1987).

3. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140 (1912).

4. Oliver Wendell Holmes, in THE SOCIOLOGY OF LAW 4 (James Simon, ed. 1968).

5. Francis Gavin and James Thomas, *The Top Ten Issues Facing State Courts in 1996 and What You Can Do About Them*, Workshop at Eleventh Annual Conference, National Association for Court Management, Albuquerque, New Mexico, July 18, 1996.

6. Richard Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J.,

August 1996 at 54.

7. David Rottman & Pamela Casey, *A New Role for Courts?*, NAT'L INST. JUST. J., July 1999 at 12.

8. TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 16 (Bureau of Justice Assistance, 1997). For more information about the Trial Court Performance Standards, see Pamela Casey, *Defining Optimal Court Performance: The Trial Court Performance Standards*, COURT REVIEW, Winter 1998 at 24 [available on the Web at <http://aja.ncsc.dni.us/courtrv/cr35-4/CR35-4Casey.pdf> (last visited March 26, 2000)].

issues such as drug abuse, child and spousal abuse, AIDS, drunken driving, child support enforcement, crime and public safety, consumer rights, gender bias, and the more efficient use of fewer resources. A trial court that moves deliberately in response to emergent issues is a stabilizing force in society and acts consistently with its role of maintaining the rule of law.<sup>9</sup>

There is already significant judicial leadership in this movement. Judith S. Kaye, Chief Judge of New York, wrote recently about the emergence of what she called “hands-on courts.” She made these useful observations:

In these new courts, judges are active participants in a problem-solving process . . . . What’s so different about this approach? First is the court’s belief that we can and should play a role in trying to solve the problems that are fueling our caseloads. Second is the belief that outcomes—not just process and precedents—matter.<sup>10</sup>

In a speech at the Holocaust Museum in 1997, Justice Richard J. Goldstone of the Constitutional Court in South Africa described this same role this way: “One thinks of justice in the context of deterrents, of retribution. But too infrequently is justice looked at as a form of heal-

ing.”<sup>11</sup> That healing role is at the heart of TJ, as noted by Michael D. Zimmerman, a member of the Utah Supreme Court and its former chief justice.<sup>12</sup> He called for “involved judging” in which “judges and courts assume a stronger administrative, protective, or rehabilitative role toward those appearing before them, that they become more involved in what some have termed ‘therapeutic jurisprudence.’”<sup>13</sup> He recognized that this was a “new cultural reality” for most judges.<sup>14</sup> Yet he pointed out that it will not go away, and, unless we craft our own response, it will be thrust upon us by society.<sup>15</sup>

TJ acknowledges that the healing roots of the legal profession can be in tension with our highly developed adversarial system and with our emphasis on process. As David Wexler, co-founder with Bruce Winick of the school of TJ, has pointed out, the adversarial nature of our system has legitimate and crucial value for critical thinking. However, the legal system suffers from a culture of adversarial representation and relationships, in which argument rises to the level of a privileged status.<sup>16</sup> This can obscure many important societal values that the legal system need not and should not ignore, such as outcome, social harmony, and the ethic of care. TJ is receiving attention precisely because it requires that we recognize such values, balance them with others, and make choices. Practitioners are discovering

that TJ strikes a resonant chord in the legal system and community for beneficial and sensible outcomes of problems that come to light in legal trappings.

Judges must take the lead and assume appropriate responsibility for these issues. If we do not, as Justice Zimmerman observed, they may be resolved without us.<sup>17</sup> More important, we will have failed in our responsibility as leaders. We will reap the resulting public disaffection with us and the system we supervise. We’ll deserve it.



*William G. Schma was appointed as a Kalamazoo County (Mich.) Circuit Court Judge in 1987. He was elected in 1988 and re-elected in 1990 and 1996. He has lectured, published articles and law reviews, and made presentations on substance abuse and criminal justice, drug treatment courts, and Therapeutic Jurisprudence. Judge Schma has presided over the Kalamazoo County Substance Abuse Diversion Program, a diversion program for felony substance abusers. He is a founding member of the National Association of Drug Court Professionals, and he is past president of the Michigan Association of Drug Court Professionals.*

9. TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY, *supra* note 8, at 20.
10. Judith S. Kaye, *Making the Case for Hands On Courts*, NEWSWEEK, Oct. 11, 1999, at 13 [available on the Web at [http://www.newsweek.com/nw-srv/printed/us/dept/my/my0115\\_1.htm](http://www.newsweek.com/nw-srv/printed/us/dept/my/my0115_1.htm) (last visited March 26, 2000)].
11. Richard Goldston, speech given at the Holocaust Museum, Washington, D.C. (Jan. 27, 1997).
12. Michael Zimmerman, *A New Approach to Court Reform*, 82

- JUDICATURE 108 (1998).
13. *Id.* at 109.
14. *Id.* at 109-10.
15. *Id.* at 110.
16. David Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999).
17. Zimmerman, *supra* note 12, at 110 (“We can choose to be the agents of innovation, or the subjects of innovation.”).

## Court Review thanks

- David Rottman for assisting with the editing chores for this special issue
- David Wexler and Bruce Winick for helping to identify potential authors for this issue and otherwise lending their encouragement
- Lynn Grimes for helping coordinate all of the people and paper involved in this issue





# Law in a Therapeutic Key: A Resource for Judges

Thomas T. Merrigan

**LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE**, David B. Wexler & Bruce J. Winick, editors. Carolina Academic Press, 1996. 1012 pp. \$65.

**Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence** is a comprehensive collection of articles by a wide range of authors on the subject of therapeutic jurisprudence. It is a helpful resource for judges willing to consider the potentially therapeutic consequences of judicial actions.

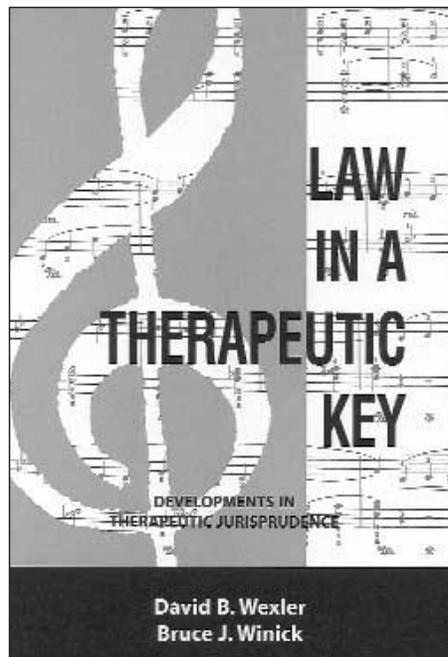
In three sections covering almost 1,000 pages, **Law in a Therapeutic Key** illustrates the broad application of the principles of therapeutic jurisprudence to many legal practices and concepts. "Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent, exploring the extent to which substantive rules, legal procedures, and the role of judges and lawyers produce therapeutic or antitherapeutic consequences."<sup>1</sup> The compendium of 50 articles included in **Law in a Therapeutic Key** demonstrates the enormous contribution made to the discussion and development of the subject of therapeutic jurisprudence by the book's editors, David Wexler and Bruce Winick. The seminal therapeutic jurisprudence thinking stems from writings first by Wexler, and then by Winick and Wexler, in the late 1980s and early 1990s. Both have written extensively on the subject and they have stimulated many others, primarily those involved in various facets of mental health law and academia, to jump into the discussion.

Part One of the book is entitled, *The Wide Angle Lens of*

*Therapeutic Jurisprudence*. In this section, there are many articles concerning the application of therapeutic jurisprudence to specific issues. This section includes several subpart topics addressing mental health law (civil commitments, the insanity defense, and competency) as well as other articles that illustrate the widening lens of therapeutic jurisprudence. These subjects include civil commitments of sexual predators and drug addicts as well as articles concerning sentencing and corrections law, criminal law, rights of crime victims, domestic violence, family and juvenile law, sexual orientation law, disability law, health law, personal injury and tort law, the law of evidence, labor arbitration law, contract and commercial law, and the legal profession.

Part Two is entitled, *Commentary About Therapeutic Jurisprudence*. Chapters in this section explore therapeutic jurisprudence as a concept. The writers in Part Two express a wide range of opinions concerning the intellectual merit of therapeutic jurisprudence. For the most part, the articles in this section assess the strengths and weaknesses and the value of therapeutic jurisprudence as an intellectual proposition. This section includes an interesting chapter by John Petrila entitled, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*.<sup>2</sup> Besides a

number of criticisms that are a little forced,<sup>3</sup> Petrila points out that although courts have not yet been responsive to therapeutic jurisprudence, the concept has nevertheless attracted attention and a following in the academic community. Petrila also presents some important and appropriate questions and



## Footnotes

1. Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes*, in **LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE** 171, 177 (David B. Wexler & Bruce J. Winick, eds., 1996) [hereafter "LAW IN A THERAPEUTIC KEY."].
2. John Petrila, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*, in **LAW IN A THERAPEUTIC KEY** 685. See also David B. Wexler & Bruce J. Winick, **ESSAYS IN THERAPEUTIC JURISPRUDENCE** (1991), an earlier work by Wexler and Winick to which Petrila responded.
3. Petrila's criticism appears to be based upon an erroneous perception, i.e., that therapeutic jurisprudence posits that therapeutic outcomes should be a dominant consideration in judicial decision making.

Contrary to Petrila's view, however, therapeutic jurisprudence does not propose refashioning the conventional jurisprudence paradigm into a therapeutic outcome paradigm. In addition, citing the decision of the U.S. Supreme Court in *Parham v. J. R.*, 442 U.S. 584 (1979), Petrila disputes the claim that therapeutic jurisprudence represents new thinking. In *Parham*, the Supreme Court upheld the validity of a Georgia statute permitting civil commitment of children without a judicial hearing because of the Court's concern that the judicial process might impede the treatment of children. Petrila also challenges Wexler's and Winick's assertion that there is "general agreement that other things being equal, mental health law should be restricted to better accomplish therapeutic values."

concerns. For example, Petrilu asks *who* decides *what* is therapeutic, and *what* represents a therapeutic outcome. In particular, he is concerned that the determination of what represents a therapeutic outcome will be dominated by research scientists and lawyers who will decide which legal rule and intervention has therapeutic value. Arguing that the consumer, the patient, is omitted from the discussion, Petrilu asserts that therapeutic jurisprudence as it has been conceptualized to date is a conservative, arguably paternalistic, approach to mental disability law.

Not surprisingly, Wexler and Winick, in the following chapter, respond.<sup>4</sup> As they summarize Petrilu's argument, he "indicts our compilation, . . . and therapeutic jurisprudence generally, for subordinating patient/consumer interests and endorsing professional dominance." They reply, "The indictment lacks probable cause." Citing a strong and pervasive emphasis on the constitutional rights and interests of patients by those interested in therapeutic jurisprudence, Wexler and Winick adequately refute Petrilu's criticism on this issue. As therapeutic jurisprudence continues to evolve, in academia and in actual application, concerns for the rights and interests of the patient consumer must remain paramount.

In Part Three, *Empirical Explorations*, several writers present the results of research aimed at understanding the application of therapeutic jurisprudence in specific situations. The purpose of this section is "to provide the reader with an immediate understanding of the wide gap between therapeutic jurisprudence theorizing and the empirical testing of the assumptions underlying such theorizing."

### A JUDGE'S LENS

Judges will first want to consider whether therapeutic jurisprudence offers them an opportunity to be better judges in a practical way as they perform their duties. Many of the chapters are interesting but are quite academic and theoretical in their focus.

For example, two chapters analyze and discuss the pros and cons of the objective reasonable person tort liability standard from the perspective of therapeutic jurisprudence.<sup>5</sup> Unlike criminal law, which recognizes the lack of criminal responsibility, or contract law, which allows factual considerations of capacity to contract issues to be raised in contract enforcement proceedings, tort law takes no account of the subjective capacities of the tortfeasor. One argument favors the use of a limited subjective standard of care. This approach would allow the fact-finder to weigh the efforts of the tortfeasor to avoid the likelihood of harm derived from the effects of a mental disability when the tortfeasor has obtained treatment prior to the injury producing conduct. Shuman believes that this is akin to a comparative negligence standard. Opposing this view are those who observe that allowing a reduced standard of care is actually antitherapeutic because it allows those with mental

disabilities to avoid responsibility for their conduct. In effect, a reduced standard of care would be an enabler of mentally handicapped individuals by supporting their proclivities to non-conforming conduct.

The second concern of judges will be to what extent will *Law in a Therapeutic Key* assist judges in making the principles of therapeutic jurisprudence useful in their work. Some of the more relevant chapters for trial judges who are interested in the more functional application of the underlying principles of therapeutic jurisprudence include *Therapeutic Jurisprudence and the Criminal Courts* (chapter 9), *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes* (chapter 10), *A Sentencing Model for the 21st Century* (chapter 11), and *A T. J. Approach to the Legal Processing of Domestic Violence Cases* (chapter 13).

At the outset, most judges will likely conclude that therapeutic jurisprudence has no application to situations where judges function as fact-finder in evidentiary hearings. Rarely, if ever, will there be a choice available to a judge between a therapeutic outcome versus a non-therapeutic outcome when determining whether a party has satisfied the required burden of proof in a particular proceeding. For example, the petitioner in a civil commitment hearing in Massachusetts must prove beyond a reasonable doubt (1) that the person is mentally ill, and (2) that discharge of the person from a facility would create a likelihood of serious harm. Commitment of a person on less than sufficient evidence may be very therapeutic. Likewise, release of such a person might be very anti-therapeutic. However, these considerations will have no bearing in the fact-finding that occurs in a civil commitment proceeding. Rather, the outcome of the civil commitment proceeding will be a function of whether the petitioner has satisfied the required burden of proof.

On the other hand, there are many situations when a judge is involved in a dispositional matter, usually after the fact-finding has been done, that will permit therapeutic jurisprudence considerations to enter the picture. Often, in these situations, the manner or method of disposition by the judge may have a therapeutic impact or an anti-therapeutic impact on a litigant. For example, therapeutic jurisprudence principles play a central role in drug courts. Drug court judges engage weekly in dialogues with offenders offering both support and admonitions to them. It is this interchange that occurs between the judge and the offender that is seen as having a therapeutic impact on drug court offenders. Likewise, restorative justice practices enable judges to have therapeutic impact on both victims and offenders. This happens when the court allows victims, and "encourages" offenders, to address the story of the crime in a felt way. Similarly, judges who hear family law cases involving custody, visitation, and neglect can utilize the opportunity for dialogue with litigants to have a therapeutic effect on them.

Although these specific examples—drug court, restorative

4. David B. Wexler & Bruce J. Winick, *Patients, Professionals, and the Path of Therapeutic Jurisprudence: A Response to Petrilu*, in *LAW IN A THERAPEUTIC KEY* 707.

5. See David W. Shuman, *Therapeutic Jurisprudence and Tort Law: A*

*Limited Subjective Standard of Care*, in *LAW IN A THERAPEUTIC KEY* 385; Grant H. Morris, *Requiring Sound Judgments of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY* 409.

justice and family court—are not topics covered in *Law in a Therapeutic Key*, several of the articles in the book do illustrate that there are many situations when trial court judges will have occasion to infuse a therapeutic element into judicial proceedings. For example, some of the articles point out that when judges deal with sentencing, make orders setting conditions of probation, accept guilty pleas, or address abusers in domestic violence cases, the judge has an opportunity through direct dialogue with the offender to affect the cognitive distortions harbored by an offender with respect to the events that brought him or her into court. It is anti-therapeutic when the judge allows the offender to dispose of the case without being truthful or requiring that the offender accept responsibility for what occurred. These articles make it clear that when judges allow offenders to leave the courtroom still blaming the victim, the police, or otherwise minimizing and rationalizing, it is anti-therapeutic. Whether on probation, continuing in a relationship, or participating in visitation (all of which often involve substance abuse problems), anti-therapeutic or therapeutically neutral outcomes are wasted possibilities for therapeutic results. Therapeutic outcomes are more likely to produce a better quality of life for litigants and their families. Such outcomes will also be more likely to improve individual and public safety, and aid the quality of community life. Many of the articles in *Law in a Therapeutic Key* will be of interest to those judges comfortable with the therapeutic role of the robe.



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## **THERAPEUTIC JURISPRUDENCE** **The Second International Conference**

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# The Implications of Therapeutic Jurisprudence for Judicial Satisfaction

Deborah J. Chase and Peggy Fulton Hora

## “Drug court judges get to color outside the lines.”<sup>1</sup>

Therapeutic jurisprudence has been posited as the jurisprudential underpinning of the burgeoning drug treatment court movement and drug treatment courts as therapeutic jurisprudence in action.<sup>2</sup> Therapeutic jurisprudence is the study of the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences for individuals involved in the legal process.<sup>3</sup>

Drug treatment courts are an alternative to traditional case processing in which judges supervise the treatment and recovery of alcoholics/addicts and where the adversarial system is out of place. Drug treatment courts use a team approach among the judge, prosecutor, defense counsel, treatment provider, probation officer, drug treatment court coordinator, and community policing officer where the “focus is on the participant’s recovery and law-abiding behavior—not on the merits of the pending case.”<sup>4</sup> If, however, a drug treatment court participant is not capable of compliance with the rigors of the drug treatment court program, that individual is returned to the traditional criminal justice system for further processing of his or her case. Drug treatment courts can be either pre- or post-plea and, thus, another court may impose sentence, including jail or prison time, or try the case if there is a program failure.

By shifting the main focus in selected alcohol and other drug cases from legal to therapeutic concerns, the roles of the drug treatment court professionals shift as well. This does not mean that legal concerns, such as due process, are trumped by therapeutic ones. Rather, it means that the therapeutic value of non-adversarial case processing—where the focus is on treatment and recovery—is recognized and utilized. This shift in role appears to benefit staff as well as litigants. Specifically, judges

who work therapeutically seem to experience increased job satisfaction.

For the prosecution, police, and probation, the focus shifts from arrest and conviction to treatment and recovery. Underlying this shift in focus is the belief that it will result in a reduction of criminal behavior, a savings in incarceration costs, and both tangible and intangible benefits to the community, the individual, and the individual’s family.<sup>5</sup> The defense attorney, after analyzing the legal issues and clarifying all options for the client, shifts focus from minimizing a client’s exposure to criminal sanctions to ensuring that the addicted client stays in treatment and recovery.<sup>6</sup> Police officers who are involved in drug treatment courts through community policing efforts see their role change from a “You call, we haul, that’s all” role in drug cases to more of a community monitoring and direct participant encouragement role. Many drug treatment court participants have asked that their arresting officer be present at their graduation and they credit the officer with literally saving their lives.

Finally, the judge goes from being a detached, neutral arbiter to the central figure in the team, which is focused on the participants’ sobriety and accountability. Sanctions for program failures are not primarily for punishment; rather, sanctions are tools for program compliance to enhance treatment and recovery. Sanctions provide the external structure needed until participants can develop their own internal structure to be able to maintain sobriety. The judge’s personal knowledge of a participant’s background, reasons for use, living situation, physical and mental health, family, employment, parenting skills, and other matters is unequaled in the criminal system. The judge is both a cheerleader and stern parent, encouraging and rewarding compliance, as well as attending to lapses. Through weekly, fortnightly, then monthly mandatory court appearances, the judge sees the incredible changes a participant makes. The judge watches as the participant gets a GED, gains employment, recovers children from Child Protective Services, gets off wel-

### Footnotes

1. Remark overheard at a national drug court conference.
2. Peggy Fulton Hora & William G. Schma, *Therapeutic Jurisprudence*, 82 JUDICATURE 9 (1998); and Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime*, 74 NOTRE DAME L. REV. 439 (1999).
3. See David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991).
4. DRUG COURTS PROGRAM OFFICE, U.S. DEP’T OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 6 (1997).
5. DRUG STRATEGIES, *CUTTING CRIME: DRUG COURTS IN ACTION* (1997); See generally, Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT’L DRUG CT. INST. REV. 1 (1998).
6. See Videotape: *Drug Treatment Courts: The Defense Perspective* (The Rutter Group, 1994), in which Michael Judge, Public Defender of Los Angeles, explains the defense role.

fare, kicks out an abusive boyfriend, gains independence and confidence, and, finally, graduates from the program.

The judge cannot help but be changed by this process. Consequently, the hypothesis for this article stemmed from two judges known to the judicial co-author, who discovered their own alcoholism after becoming drug treatment court judges. She also noticed her own attitudes, job satisfaction, and happiness in court being affected by her assignment as a drug treatment court judge. Personal observation makes it clear that the drug treatment court not only can have a therapeutic effect on the recovering participant but also on the other criminal justice players in the courtroom as well.

## THE JUDICIARY

The positive effect of a particular judicial assignment on the judge is not a topic that has received much research attention. In a 1980 study of American trial judges, the perception of their work environment was not found to be related to whether they were sitting on specialized calendars or master calendars.<sup>7</sup> However, in a 1981 survey, judges complained of job stress arising from lack of control over what type of cases they were given.<sup>8</sup> In another 1982 study, 422 juvenile court judges in West Germany were surveyed to assess their attitudes toward social assistance and the administration of justice. The highest job satisfaction was found in the judges who endorsed and practiced with a social science and educational orientation in their work, interacted well with service providers, approved of specialized judicial training, and were involved in community work outside the court.<sup>9</sup> In the 1980 study of American judges, it was found that judges who work long hours, are involved in community relations, and are involved in bar activities are more likely to be satisfied with their environment.<sup>10</sup>

Job stress is the more common focus of research on judicial satisfaction.<sup>11</sup> Job stress in judges is commonly associated with social isolation,<sup>12</sup> feeling disliked by others, lack of interest and understanding, and not feeling appreciated.<sup>13</sup> They also suffer from lack of feedback, a heavy caseload volume, and lack of control over what cases they get.<sup>14</sup> Additionally, frustration with their lack of ability to be helpful to litigants seems to contribute to judicial stress.

Judges express dismay when, due to large caseloads, they have to "process" people, because they have so little time to listen. In such circumstances, there can be a tendency for them

to withdraw empathy and respect for the litigants.<sup>15</sup> The presence of judicial stress is frequently observed in family law court judges, for example. Judicial officers in family law seem to experience high stress, frustration, feelings of helplessness, and burnout.<sup>16</sup>

In contrast, however, many of the factors related to job stress are not as commonly observed in drug treatment court judges. It is proposed that the therapeutic effects of drug treatment courts carry over to the judicial officers and other court workers in increased job satisfaction and possibly overall mental health. Drug treatment court judges and others have stopped smoking, stopped drinking alcohol, realized their own alcoholism, gone on diets, and exercised more. Many have expressed a sense of pride in a job well done and a brighter outlook since taking the drug treatment court assignment. These feelings had not heretofore been experienced in their professional careers.

Family law court judicial officers work with a courtroom process that is quite different from that of the drug treatment court. Although originally conceptualized to be therapeutic in orientation,<sup>17</sup> family law courts, due to increased caseloads and fragmentation of issues, have not broadly employed therapeutic principles.<sup>18</sup> The National Center for State Courts has determined that family law is the largest and fastest growing segment of state courts' civil caseloads.<sup>19</sup> Legal issues related to a family enter the court system in many different ways. Cases of child abuse and/or neglect are heard in criminal court and/or juvenile dependency court. Juvenile delinquency matters are heard in the juvenile court. Cases concerning the guardianship of children are heard in probate court. Divorce, paternity, and district attorney child support cases may be heard in family court. Requests for civil domestic violence restraining orders may be heard in civil domestic violence courts. If there have been criminal charges, those cases are heard in criminal court. While there is movement toward court reform for family law, to date only eleven states have implemented unified family law systems to address these issues.<sup>20</sup>

California has not implemented a therapeutic unified family law system. Cases related to families are still fragmented into multiple departments in the overwhelming majority of California counties. According to California Superior Court Judge Donna Petre, "Each of these departments has minimal knowledge of the decisions of the other, even if the decisions

7. JOHN PAUL RYAN, ET AL., AMERICAN TRIAL JUDGES 160 (1980).  
8. Issiah M. Zimmerman, *Stress—What It Does to Judges and How It Can Be Lessened*, JUDGES J., Summer, 1981, at 4.  
9. R. Pommerening, *Self-Image of German Juvenile Judges*, 65 MONATSSCHRIFT FUER KUMINOLOGIE UND STRAFRECHSREFORM 193 (1982).  
10. RYAN, ET AL., *supra* note 7.  
11. Pommerening, *supra* note 9; Tracy Eells & Robert C. Showalter, *Work Related Stress in American Judges*, 22 BULL. OF AM. ACAD. OF PSYCHIATRY & L. 71 (1994); Joy Rogers, et al., *The Occupational Stress of Judges*, 36 CANADIAN J. OF PSYCHIATRY 317 (1991).  
12. Eells & Showalter, *supra* note 11; Rogers et. al., *supra* note 11. See also Issiah M. Zimmerman, *Isolation in the Judicial Career*, COURT REVIEW, Winter 2000 at 4.  
13. Eells & Showalter, *supra* note 11.

14. Zimmerman, *supra* note 8.  
15. Zimmerman, *supra* note 8.  
16. Jeffrey A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 67, 75-93 (1998).  
17. Herma Hill Kay, *A Family Court: The California Proposal*, 56 CAL. L. REV. 1205, 1205-1248 (1968).  
18. Barbara A. Babb, *America's Family Law Adjudicatory Systems*, 32 FAM. L.Q. 31, 37-50 (1998); Catherine Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3, 6-14 (1998).  
19. Ross, *supra* note 18, at 6.  
20. The states are Delaware, the District of Columbia, Hawaii, New Jersey, Rhode Island, South Carolina, Florida, Massachusetts, New York, Vermont, and Washington. See Babb, *supra* note 18, at 38.

involve the same family and its children. The larger the court, the more the problem is compounded. In large courts, each of these departments may not be just in separate courts, but in different facilities miles away from one another with no technological contact."<sup>21</sup> The lack of a holistic approach by the court to the family law litigants sets it in stark contrast to the approach taken by the drug treatment courts.

## RESEARCH

The authors conducted an informal opinion survey of court professionals, including judicial officers, to compare the opinions in drug treatment courts to those in family law courts. It was hypothesized that the differences in judicial satisfaction observed between drug treatment court and family law court judicial officers might be related to the differences between the operation of a court when incorporating the principles of therapeutic jurisprudence<sup>22</sup> and the operation of a court that functions in a more traditional manner. Such differences were expected to be expressed through significantly different attitudes in the following areas:

- The drug treatment court judicial officers were expected to feel more strongly that the role of the court includes providing help to the litigants in solving the problems that brought them there.
- The drug treatment court judicial officers were expected to hold a more positive view of the individuals who appeared before them.
- The drug treatment court judicial officers were expected to feel more strongly that their assignments had a personally positive emotional effect on them.
- The drug treatment court judicial officers were expected to report a greater increase in personal insights and motivation for healthy change as a result of their assignment.

## THE SURVEY

Participants were given a set of 25 questions with answers on a 5-point scale in which the respondent was to rate each answer from (1) "Very Untrue" to (5) "Very True." The questions were identical for both groups. Questionnaires were distributed to attendees at a January 1999 California conference of drug court professionals; through the California Association of Drug Court Professionals' newsletter in the spring of 1999; and at the National Association of Drug Court Professionals' conference in June 1999. Family law professionals were surveyed at the California Family Support Council's annual training conference in February 1999. There were participants from most of California's counties who were asked to take questionnaires back home and distribute them to judges, attorneys, mediators,

family law facilitators, and others, and to return them by mail. In the summer of 1999, judges attending an advanced family law course in California were surveyed and a direct mail campaign to judicial officers in both assignments was completed in the winter of 1999. Responses from the drug treatment court professionals came from across the country. Responses from the family law court professionals came from within California. The California family law court professionals who responded to this survey were selected from the part of California's fragmented system that handles cases of divorce, legal separation, annulment, paternity, child support, and, in some cases, private guardianships and domestic violence restraining orders.<sup>23</sup> These family law court professionals have not had the benefit of a statewide court strategy that applies the principles of therapeutic jurisprudence to the family law courtroom.

## THE PARTICIPANTS

There were a total of 194 judicial officers who responded to the survey; 98 from the family law courts and 96 from the drug treatment courts. One hundred twenty-three non-judicial officers responded; 68 from the drug treatment courts and 55 from the family law courts.

Overall, the judicial officers<sup>24</sup> responding were 67% male and 33% female. They ranged in age from 35 years to 75 years with a mean age of 52 years. The drug treatment court judicial officers were 72% male and 28% female. The family law court judicial officers were 63% male and 37% female.

The judicial officers' professional tenures ranged from 1 year to 50 years, with an overall average of 14 years. The time in their current assignments ranged from 3 months to 19 years, with an average of 4 years. The female judicial officers were slightly younger, on average, and had been in the profession for less time. This was true for both the drug treatment court and the family law court groups.

## THE ROLE OF THE COURT

The judicial officers were asked to respond to several statements meant to reflect their perception of the court's role. A statistical test called an analysis of the variance (ANOVA) was conducted between the responses of drug treatment court and family law court judicial officers.<sup>25</sup>

The first statement was, "I believe that part of our job is to help the litigants/defendants work to solve the problems that brought them to our courts." Although the drug treatment court group was slightly stronger in this belief (average=4.57) than the family law court group (average=4.53), this difference was not statistically significant. Both groups, however, were strong in their positive responses to this inquiry. Overall, the

21. Hon. Donna Petre, *Unified Family Court: A California Proposal*, 1 J. OF THE CENTER FOR CHILDREN & THE CTS. 161 (1999).

22. Hora & Schma, *supra* note 2.

23. This survey did not seek respondents from the juvenile court or criminal courts, which deal with cases of child abuse or neglect, delinquency, or domestic violence.

24. Both judges and subordinate judicial officers, such as commissioners and referees, responded to this survey.

25. The statistical size of these differences is represented by the F-val-

ues, which are set out in the footnotes. These differences are considered statistically significant if they are not likely to have occurred by chance. In social science research, the point at which the results are considered not to have occurred by chance is referred to as the probability value or p-value, and is commonly set at a minimum level of p=.05. The p=.05 value indicates that there is only a 5% probability that the observed effect has occurred by chance. Likewise, a value of p=.01 indicates probability of 1% that the effect occurred by chance and a value of p=.001 indicates

judicial officers answered this question in the affirmative 88% of the time.<sup>26</sup>

The second statement was, "I feel like the court I work in is helpful to the litigants/defendants who appear there." Both groups of judges also felt that their courts were helpful to the people who appeared there before them; however, the drug treatment court judicial officers scored significantly higher (average=4.35) than the family law court judicial officers (average =4.09) on this question.<sup>27</sup>

In response to the statement "I have seen the litigants/defendants make significant improvement in their lives," there was also a significant difference between the drug treatment court group (average=4.58) and the family law court group (average=3.71).<sup>28</sup> While 92% of the drug treatment court judicial officers reported seeing improvement in those appearing before them, only 56% of the family law court judicial officers responded similarly. The non-judicial personnel from the drug treatment court also responded significantly more often that they believe their courts are helpful and witness improvement in the litigants.

A drug treatment courtroom clerk had this to say:

I am part of the solution. Before Drug Court there was a feeling that there were a lot more probation violations and offenders and I would feel, 'Here they are again. They're back.' I feel confident that I won't see graduates [from the Drug Treatment Court] again and the caseload will be less. I am in touch with the community with Drug Court and I know the faces and names of the defendants who are actually smiling and happy.

<b>TABLE NO. 1 WITNESS OF LITIGANT IMPROVEMENT (N=183*)</b>			
	<b>No</b>	<b>Sometimes</b>	<b>Yes</b>
<b>(answers)</b>	<b>(1,2)</b>	<b>(3)</b>	<b>(4,5)</b>
<b>Drug Treatment Court (n=87)</b>	0	8%	92%
<b>Family Law Court (n=96)</b>	4%	40%	56%

\* 11 missing responses

Working relationships among the personnel in the courtroom were also addressed. Both the drug treatment court and family law court judicial officers perceived that their courtrooms worked in a teamlike fashion. However, there is a difference in the way the non-judicial professionals view their

courtroom relationships. The drug treatment court professionals indicated that there was more teamwork in their courtrooms than did the family law court professionals.<sup>29</sup>

Both the drug treatment court and family law court judicial officers felt respected by their co-workers. There was, however, a difference between the responses of each court's non-judicial professionals: the drug treatment court group felt significantly more respect from their co-workers than the family law court group.<sup>30</sup>

#### ATTITUDE TOWARD LITIGANTS/DEFENDANTS

The next set of statements dealt with the respondents' attitudes toward the litigants. There were significant differences between the drug treatment court judicial officers and the family law court judicial officers in every question about their attitudes toward those appearing in their courtrooms.

The first statement was, "I believe that the litigants/defendants are really trying hard to solve their problems and improve their lives." The drug treatment court judicial officers seemed more convinced that the individuals in their courts were working hard to solve their problems, while the family law court judicial officers did not express this view. Neither group of judicial officers ranked remarkably high in their view of litigant motivation; however, the drug treatment court responses were significantly higher (average=3.79) than the family law court responses (average=3.08) in this respect.<sup>31</sup> Fifty-seven percent of the drug treatment court group believed that the litigants were genuinely working to solve their problems. Another 43% of this group expressed the belief that the litigants are making an effort at least some of the time. No drug treatment court respondents thought that the litigants completely lacked motivation to address their problems. Comparatively, only 18% of the family law court respondents felt that the litigants were trying to make progress; 74% reported that they saw this motivation in litigants at least some of the time; and 8% reported that litigants were simply not trying at all.

<b>TABLE NO. 2 LITIGANT MOTIVATION (N=184*)</b>			
	<b>No</b>	<b>Sometimes</b>	<b>Yes</b>
<b>(answers)</b>	<b>(1,2)</b>	<b>(3)</b>	<b>(4,5)</b>
<b>Drug Treatment Court (n=89)</b>	0	43%	57%
<b>Family Law Court (n=95)</b>	8%	74%	18%

\* 10 missing responses

.1% probability of a chance occurrence. Statistically, a significant difference is important because it allows a mathematical inference that the differences found between these particular drug treatment court and family law court respondents would be present in a larger population of similar participants.

26. The percentage figures for survey responses were calculated as follows: responses of 1 and 2 were coded as "NO"; responses of 3

were coded as "SOMETIMES"; responses of 4 and 5 were coded as "YES."

- 27. F= 4.94      p=.03
- 28. F= 64.69    p=.0001
- 29. F= 4.85      p=.03
- 30. F= 3.84      p=.05
- 31. F= 51.98     p=.0001

The second statement was, "I believe that the litigants/defendants have a good chance for improvement if they are given some help by the court." The drug treatment court judicial officers were significantly more hopeful (average=4.27) than the family law court judges (average=3.68) that the litigants in their courtrooms could make significant improvements if provided with some help from the court.<sup>32</sup> The drug treatment court group expressed hope for the litigants' prospects for improvement 84% of the time while the family law court group reported such hopefulness only 54% of the time. All of the drug treatment court judicial officers had at least some hope for the litigants; however, 3% of family law court judicial officers saw no hope at all for improvement in their litigants.

**TABLE NO. 3  
HOPE FOR LITIGANT  
(N=185\*)**

(answers)	No (1,2)	Sometimes (3)	Yes (4,5)
<b>Drug Treatment Court (n=89)</b>	0	16%	84%
<b>Family Law Court (n=96)</b>	3%	43%	54%

\* 9 missing responses

The next statement was, "I feel I am respected by the litigants/defendants." The drug treatment court judicial officers (average=4.45) felt significantly more respected by the individuals who appear in front of them than the family law court judicial officers (average=3.89).<sup>33</sup> Ninety-two percent of the drug treatment court group reported that they felt respected by the litigants while only 72% of the family law court group felt respected by litigants.

**TABLE NO. 4  
RESPECTED BY LITIGANTS  
(N=184\*)**

(answers)	No (1,2)	Sometimes (3)	Yes (4,5)
<b>Drug Treatment Court (n=88)</b>	0	8%	92%
<b>Family Law Court (n=96)</b>	1%	27%	72%

\* 10 missing responses

The most significant difference between the two groups was in their responses to the statement, "I feel that the litigants/defendants are grateful for the help our court is providing to them." The drug treatment court group perceived gratitude from the litigants far more frequently (average=4.21)

32. F= 28.12 p=.0001  
 33. F= 33.68 p=.0001  
 34. F= 70.57 p=.0001

than did the family court group (average=3.34).<sup>34</sup> The drug treatment court judicial officers perceived the litigants as grateful for the help that they had received from the court 81% of the time. In the family law court group, only 33% felt that the litigants were grateful for help received from the court.

**TABLE NO. 5  
LITIGANT GRATITUDE  
(N=184\*)**

(answers)	No (1,2)	Sometimes (3)	Yes (4,5)
<b>Drug Treatment Court (n=88)</b>	1%	18%	81%
<b>Family Law Court (n=96)</b>	4%	63%	33%

\* 10 missing responses

Additional differences were found in the responses to the statement, "I admire the litigant/defendants for their efforts in trying to change their lives for the better." The drug treatment court judicial officers were significantly more admiring (average=4.37) than the family law court judicial officers (average=3.69) of efforts made by the litigant/defendants to change their lives for the better.<sup>35</sup> Of the drug treatment court group, 86% expressed admiration for the litigants. In the family law court group, only 55% reported that they admired the litigants for their efforts. The non-judicial drug treatment court professionals were also significantly more likely than those in the family law court group to admire the litigant/defendants for their efforts to change their lives for the better.<sup>36</sup> One drug treatment court judge added the comment: "I have a great respect for what our participants accomplish; I don't even have the ability to stay on a diet."

**TABLE NO. 6  
ADMIRE LITIGANTS' EFFORTS  
(N=178\*)**

(answers)	No (1,2)	Sometimes (3)	Yes (4,5)
<b>Drug Treatment Court (n=83)</b>	0	14%	86%
<b>Family Law Court (n=95)</b>	7%	38%	55%

\* 16 missing responses

**POSITIVE EFFECT OF JUDICIAL ASSIGNMENT**

Other statements were included to elicit responses pertaining to personal beliefs about being influenced by one's court assignment. Significantly more drug treatment court judicial officers enjoyed talking with family and friends about their work,<sup>37</sup> were

35. F= 30.46 p=.0001  
 36. F= 11.9 p=.001  
 37. F= 40.66 p=.0001

happier in their assignments,<sup>38</sup> and felt more pride in their work<sup>39</sup> than those from the family law court. Drug treatment court judicial officers were slightly less likely than family law court judicial officers to think they might want to transfer to another assignment; however, neither group exhibited much motivation to change assignments. Nevertheless, drug treatment court judicial officers were significantly more likely (average=4.48) than family law court judicial officers (average=3.76) to feel that they had been positively affected by their judicial assignments.<sup>40</sup> Ninety-one percent of judicial officers in the drug treatment court group reported feeling that their assignment had affected them in a positive way emotionally. Family law court judicial officers felt this way only 64% of the time.

A California drug treatment court judge said:

[I]t's a passion and working with passion is more energizing and worthwhile. . . . I have become more honest and direct in my dealings with others and myself which is a tremendous growth. One reason is that you cannot ask others to be honest without being honest yourself. . . .

[W]orking with a team has increased my skills in that area. My leadership skills have sharpened. Best of all, I am a happier person because I believe that what we are doing in our DTC is making a difference.

Another California drug treatment court judge said she would have left the bench had it not been for Drug Treatment Court:

My involvement with drug court is the most meaningful contribution I have made in my life other than raising my children. . . . I would have quit this job without drug court. I love my job because of drug court. Drug court gives meaning in my life; I am part of a solution rather than part of the problem

## FACTORS MOST ASSOCIATED WITH POSITIVE AFFECT OF JUDICIAL ASSIGNMENT

In drug treatment courts the three answers most highly correlated to the feeling that the “judicial assignment was beneficial” were: (1) “litigants are grateful for the help they received”;<sup>41</sup> (2) “witnessing the litigants improve”;<sup>42</sup> and (3) “hope for litigant improvement.”<sup>43</sup> For the family court judicial officers, the order was: (1) “belief that the court is helpful”;<sup>44</sup> (2) “feeling admiration for the efforts of the litigants”;<sup>45</sup> and (3) “feeling that the litigants were grateful for the help they received.”<sup>46</sup> Overall, it was found that the most common predictor of positive emotional effect was the perception by the judicial officers that the “litigants are grateful for the help they are given by the court.”<sup>47</sup>

## INCREASED INSIGHT AND MOTIVATION FOR HEALTHY CHANGE

The final set of statements were designed to measure insight and motivation for healthy change. Thirty-seven percent of the drug treatment court judicial officers indicated that they had learned a lot about domestic violence from working in their assignment and 95% had reported learning about alcoholism/addiction. Of the family law court judicial officers, 70% reported learning a lot about domestic violence and 57% reported learning about substance abuse. Given the correlation between substance abuse by both the perpetrator and the victim in domestic violence cases, it appears that more training needs to be done in this area.<sup>48</sup>

Twenty percent of both family law court and drug treatment court judicial officers responded that they had gained some insight into their own personal problems. Overall, the drug treatment court professionals (both judicial and non-judicial) far more frequently than the family law court professionals (both judicial and non-judicial) have discovered their own addiction during their court assignments,<sup>49</sup> have stopped drinking or using other substances,<sup>50</sup> or have stopped smoking.<sup>51</sup> These differences were more pronounced in the non-judicial professionals than in the judicial officers. However, the drug treatment court judicial officers were still significantly more likely to have stopped drinking or using other substances than the family law court judicial officers.<sup>52</sup> There was no significant difference between the drug treatment court and family law court groups with regard to diet and exercise.

## DISCUSSION

All groups of judicial officers agreed that part of their job is to help those appearing before them solve the problems that brought them to court. Likewise, both groups felt that their

**TABLE NO. 7**  
**AFFECTED POSITIVELY BY ASSIGNMENT**  
(N=177\*)

(answers)	No (1,2)	Sometimes (3)	Yes (4,5)
<b>Drug Treatment Court</b> (n=82)	1%	8%	91%
<b>Family Law Court</b> (n=95)	11%	25%	64%

\* 17 missing responses

- 38. F= 10.01 p=.002
- 39. F= 6.1 p=.01
- 40. F= 31.70 p=.0001
- 41. r = .56 p=.0001
- 42. r = .49 p=.0001
- 43. r = .44 p=.0001
- 44. r = .34 p=.0007
- 45. r = .33 p=.0009
- 46. r = .30 p=.003
- 47. r = .52 p=.0001

- 48. Using self-reports of substance abuse from assailants and victims, one study found that nearly all of the assailants (94%) and almost half of the victims (43%) used alcohol or other drugs in the six hours prior to the assault. See Daniel Brookoff, Drug Use and Domestic Violence (unpublished National Institute of Justice Research in Progress Seminar Series) (1996).
- 49. F= 7.21 p=.008
- 50. F= 10.96 p=.001
- 51. F=4.53 p=.04
- 52. F= 3.97 p=.05

courts were helpful to the litigants. However, the drug treatment court group was far more likely to report actually getting to witness changes for the better in their litigants. For this group, seeing the litigants improve was highly correlated with viewing their judicial assignment as positive. The drug treatment courts commonly use frequent reviews as part of the therapeutic strategy. This allows the judicial officers to see the litigants on an ordered, routine basis and view their progress. Such is not the case in most family law courts. For the most part, the only time the family law court judicial officers have contact with their litigants is when something has gone wrong. The opportunity to see the effect of the court on the litigants provides the drug treatment court judicial officers with positive feedback about their work and may serve to relieve stress.<sup>53</sup>

The greatest difference between the drug treatment court and the family law court judicial officers was in their attitude toward the litigants. The drug treatment court judicial officers expressed a far more positive attitude toward those appearing before them. They were more likely to believe that the litigants were actually trying to solve their problems and had a good chance for improvement if given some help from the court. They felt more respected by the litigants, were more likely to feel that the litigants were grateful for the help they received from the court, and were more likely to admire the litigants for their efforts.

Perception of litigant gratitude was the most important overall predictor of feeling positively about the judicial assignment. This suggests that recognition by the litigants of the help they have received is an important part of the helping process and that the effect on both judicial officer and litigant is dependent on the relationship between them. It has been a principle in the drug treatment court literature that the therapeutic effect on the litigant is dependent on the relationship that develops with the judicial officer. Interestingly, this survey suggests that the judicial officers' satisfaction in their work also is a product of the relationship with the litigant. The greatest difference between these two groups of judicial officers is in the perception of litigant gratitude. The family law court group scored remarkably low in this category. Perhaps predictably, the drug treatment court respondents were far more likely than those in the family law court group to report that their assignments had affected them positively.

## CONCLUSION

As a final observation, it must be stated that the enthusiasm of drug treatment court professionals for their work is not only infectious but is almost unheard of in a profession which experiences a high degree of "burnout" and job dissatisfaction.<sup>54</sup> Still, therapeutic jurisprudence is a relatively young field, and much research remains to be done.<sup>55</sup>

For example, there are other factors affecting judicial satisfac-

tion that differentiate drug treatment courts and family law courts and seem to exist independently from the application of therapeutic jurisprudence. The family law court is a civil court in which the two parties are emotionally involved in an inability to resolve their differences. The emotional dynamics of the adversarial system in a criminal court is different when one of the parties is the state. Another difference is that litigants are entitled to attorneys in the criminal court; in family law court, however, the litigants frequently appear pro se. It has also been suggested that family law litigants appear less sympathetic because their actions are often harmful to others, such as in domestic violence or contested custody cases. Of course, drug treatment court defendants, while being basically harmful to themselves, do inflict injury on others as well. Another difference is that the drug treatment court assignment is usually self-selected by judicial officers. For the most part, this is not true for the family law judicial officers. Family law courts are routinely understaffed, underfunded, and are not high-ranking in the judicial status hierarchy. Consequently, family law judicial assignments are frequently entry-level positions of short duration, usually held by those who are younger and have less experience.<sup>56</sup>

Future research is needed to assess the significance of these and other factors in relation to the questions we have posed herein. It would be helpful, for example, to survey a group of family law court judicial officers who are actually working in therapeutic courts, either in the increasing number of therapeutic civil domestic violence courts or from a jurisdiction that employs a unified family court system. Likewise, it would be informative to survey a group of criminal court judicial officers that work in a traditional criminal justice setting.

The study of judicial satisfaction is important because it can be used as an indicator of the efficacy of the court. This research suggests that if, indeed, the work of the court is beneficial to the litigants, this success will express itself in the attitudes of judges and other court professionals with regard to their own job satisfaction. If the work of the court results in fewer criminal cases or fewer protracted family law litigations, both litigants and the court benefit. If stress reduction and job satisfaction result in improved mental and physical health for judges, such benefits are both personal and systemic. Moreover, the ambiance in a courtroom where the judge is happy and satisfied provides an atmosphere in which the litigants are more likely to be comfortable and perform at their maximum. Recognition of the relationship between a judge's perception of litigant gratitude and his or her own job satisfaction shows that judges, too, remain social and human, even while on the bench. It is also believed that the therapeutic effects of these new types of courts, which employ the social sciences and are orientated to problem solving, not only will continue to have beneficial effects on the litigants and court personnel, but also will result in an increased quality of justice for all.

53. Zimmerman, *supra* note 8.

54. See generally, the work of Susan Daicoff, Associate Professor of Law, Capital University Law School, Columbus, Ohio, on lawyer job satisfaction, mental health, and alcoholism/addiction at <http://users.law.capital.edu/sdaicoff> (last visited April 1, 2000). See also, Isaiah Zimmerman, *supra* notes 8 and 12; and Isaiah

Zimmerman, *Dealing With Professional Stress: Insights for Judges*, 31 THE BOSTON B.J. Nov./Dec. 1987, at 39.

55. Professor David Wexler first used the term in 1987 in a paper delivered to the National Institute of Mental Health. The concept began to appear frequently in law literature only in the early 1990s. Hora et al., *supra* note 2.

56. Ross, *supra* note 18.



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Editor's note: The survey instrument used in the research reported in this article is reprinted in its entirety at page 20.

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# APPENDIX DRUG COURT PROFESSIONALS SURVEY

JOB TITLE: \_\_\_\_\_      \_\_\_ MALE      \_\_\_ FEMALE      AGE: \_\_\_\_\_

Total years spent in your profession \_\_\_\_\_      Time in your current assignment \_\_\_\_\_

**This is part of a study about working in the court. Your answers to the following items are anonymous; please do not put your name on this questionnaire. Please answer each question using the 1 to 5 response scale indicated below.**

	Very untrue of me OR strongly disagree	Not true of me OR disagree	Sometimes true and sometimes not true OR undecided	True of me OR agree	Very true of me OR strongly agree
1) I believe that part of our job is to help the litigants/defendants work to solve the problems that brought them to our court.	1	2	3	4	5
2) I feel like the court I work in is helpful to the litigants/defendants who appear there.	1	2	3	4	5
3) I have seen litigants/defendants make significant improvement in their lives.	1	2	3	4	5
4) I believe that the litigants/defendants are really trying to solve their problems and improve their lives.	1	2	3	4	5
5) I believe that the litigants/defendants have a good chance for improvement if they are given some help from the court.	1	2	3	4	5
6) I feel that the judge and other members of our court staff work together as a team.	1	2	3	4	5
7) The judge in our court often talks to staff about the cases.	1	2	3	4	5
8) I feel respected by the other members of my court's staff, including the judge.	1	2	3	4	5
9) I feel that I am respected by the litigants/defendants.	1	2	3	4	5
10) I feel that the litigants/defendants are grateful for the help our court is providing to them.	1	2	3	4	5
11) I admire the litigants/defendants for their efforts in trying to change their lives for the better.	1	2	3	4	5
12) I feel I have been affected in a positive way emotionally by my work in this assignment.	1	2	3	4	5
13) I enjoy discussing my work with family and friends.	1	2	3	4	5
14) I feel proud of what I am doing at work.	1	2	3	4	5
15) I feel happier in this assignment than I have in others I have had.	1	2	3	4	5
16) I think I would rather go to another assignment or job.	1	2	3	4	5
17) As a result of this assignment I have learned a lot about domestic violence.	1	2	3	4	5
18) As a result of this assignment I have learned a lot about alcoholism and drug addiction.	1	2	3	4	5
19) As a result of this assignment I feel I have gained some insight into personal problems I have been struggling with.	1	2	3	4	5
20) Since I have been working in this court:					
a. my relationship with my significant other has improved.	1	2	3	4	5
b. I have discovered I was an alcoholic/addict.	1	2	3	4	5
c. I have stopped drinking or using other substances.	1	2	3	4	5
d. I have stopped smoking.	1	2	3	4	5
e. I have been trying to eat a healthier diet.	1	2	3	4	5
f. I have been trying to exercise more.	1	2	3	4	5



# Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?

David B. Rottman

An implicit answer is emerging to the question of whether the effective practice of therapeutic jurisprudence requires a specialized court. Without much debate or deliberation, specialized courts are proliferating nationally: drug courts, domestic violence courts, mental health courts, tobacco courts, and the like are commonplace.<sup>1</sup> Already the new specialized courts are evolving into hybrid forms—such as family drug courts or juvenile domestic violence courts—that bring together several specialties. It is increasingly likely that the kinds of cases traditionally regarded as rich in therapeutic opportunities will be heard within a specialized court forum. At the same time, the fortunes of therapeutic jurisprudence are being tied to the new wave of court specialization, which may yet prove to have shallow roots.

This essay offers a more deliberative answer to the question of whether therapeutic jurisprudence requires specialized courts and judges by tracing the paths of three powerful contemporary trends: the new special court movement, the logic of American court reform, and the changing role of judges. The intersection of these trends is the best vantage point to assess where and how TJ might be most effectively applied in the courts.

## THE NEW SPECIAL COURT MOVEMENT

The purpose of the new specialized courts is to qualitatively improve outcomes for litigants and society in cases involving individuals with underlying social and emotional problems. Previous waves of specialty courts tended to be designed to meet concerns over efficiency and timeliness by using dif-

ferentiated case management techniques to make events in a case happen more quickly.

The rationale for the current trend toward court specialization goes something like this. First, some categories of cases (and associated litigants) are marginalized within the vast volume and mix of cases in courts of limited and general jurisdiction. Second, a problem-solving approach is more appropriate and effective than the traditional adversarial process for those categories of cases. Third, special knowledge and special personal attributes (and perhaps special technology) are needed to be a judicial problem-solver. Fourth, the necessary special knowledge is as likely or more likely to be drawn from the fields of mental health and psychology than from knowledge of the law. Fifth, a judge needs continuous access to social and psychological services to problem solve effectively.<sup>2</sup>

A problem-solving orientation is the most fundamental characteristic of the new specialized courts. Problem solving requires a shift in what is valued in the adjudication process: outcomes (rather than outputs), flexibility in decision making, listening to people's concerns, participation by community organizations, and consideration of what is best for communities as well as for individual defendants or victims. Problem solving also places greater emphasis on post-disposition events, a significant change in focus from traditional models of case processing. Traditional caseload management, for example, is based on cases rather than persons, while "effective management of post-disposition matters may require much more attention to the persons involved in cases."<sup>4</sup>

Another characteristic of the new specialized courts is that

1. SEE DAVID ROTTMAN, CAROL FLANGO, MELISSA CANTRELL, RANDALL HANSEN & NEIL LAFOUNTAIN, STATE COURT ORGANIZATION 1998 236, TABLE 33 (2000). The most current estimates indicate 320 drug courts.
2. Some observers might point to a sixth rationale, the desirability of having a single judge hear all of the cases of a particular type in a jurisdiction.
3. Specialization has also been proposed as a basis for a therapeutic model of tort reform. Specifically, specialized forums may offer a less costly and less emotionally draining alternative to the stan-

- dard civil process to establish responsibility for a harm, the real issue underlying a significant proportion of tort claims. See Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 433, 465 (David B. Wexler & Bruce J. Winick, eds, 1996); and *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000).
4. See DAVID C. STEELMAN, CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM 33 (2000).

they are not, strictly speaking, courts.<sup>5</sup> A court is a judicial body established by constitution or statute to which judges are selected to serve and (where relevant) be retained in offices. Courts can be generalist or specialist in nature.<sup>6</sup> Specialized courts are “courts that possess limited subject matter jurisdiction and are staffed by permanent judges who have substantive expertise in the area.”<sup>7</sup> Established probate and juvenile courts often meet that definition, as did an array of specialized courts earlier in this century, such as water courts, tax courts, and land courts. However, the combination of judicial expertise and permanency of assignment is rare in the new specialized courts, at least at this point in their evolution. That rarity is important to understanding the implications of focusing therapeutic jurisprudence in specialty courts. One of the defining features of the new specialized courts is the ease with which they can be dismantled.

A third characteristic of the new specialized courts is that they have tended to develop by trial and error as the experience of one court is passed on to other courts. Specialized court thus grew into a movement without an underlying legal theory to justify and guide, for example, the relaxation of the adversarial process. The lack of a jurisprudential base left drug treatment and similar courts open to criticism over their status and without an effective response beyond pragmatism. Therapeutic jurisprudence has been put forward to fill this void by serving as the legal theory for drug treatment and similar courts,<sup>8</sup> as well as the rationale for why unified family courts should be created.<sup>9</sup>

### THE PROS AND CONS OF SPECIALIZATION

The growing concentration in specialized courts of cases ripe for TJ intervention makes it prudent for therapeutic jurisprudence proponents to carefully weigh the benefits and costs of specialization. The pros and cons of court and judicial

specialization have been examined thus far primarily for federal appellate and trial courts such as the Tax Court, the Bankruptcy Court, and the Court of Federal Claims.<sup>10</sup> It is nonetheless possible to derive a balance sheet of aspects of specialization that are likely to promote or inhibit therapeutic court outcomes.<sup>11</sup>

Problem solving in specialized courts promotes therapeutic outcomes in the following ways:

- Specialized courts provide a forum in which the adversarial process can be relaxed and problem solving and treatment processes emphasized.
- Judges and court staff become more sensitive to issues and more adept at developing individual and systemic responses to address these issues when a court’s caseload presents a large proportion of cases in which similar therapeutic jurisprudence issues are likely to arise.<sup>12</sup>
- Skill development in applying therapeutic jurisprudence principles may proceed faster because of a common focus and collegial support among judges.
- Courts with exclusive subject matter jurisdiction are likely to attract a vigilant and involved bar that will further enhance the identification of therapeutic issues and possible remedies.
- A specialized court is in a better position to mobilize and coordinate treatment and social service providers in a locality, providing the court with access to skilled resources.
- The expertise of a specialized judge in a particular subject matter helps the court secure community-wide support for

**A specialized court is in a better position to mobilize and coordinate treatment and social service providers . . . .**

5. The basic rationale for the new era of specialization also is being expressed in the creation of commercial or business courts but generally to achieve some of the traditional reasons for specialization, such as concentrating expertise and promoting efficiency in case processing. Ad Hoc Committee on Business Courts, *The Status of Business Courts in the United States*, in BUSINESS LAW SECTION OF THE AMERICAN BAR ASSOCIATION (1998) <<http://www.abanet.org/buslaw/buscts/ctsurvey.html>>.

6. While court divisions and dockets are often designated as courts in local usage, they are not autonomous courts. I propose that the following distinctions be drawn when discussing court specialization: Special forums are divisions, calendars, dockets, courtrooms, or procedures dedicated to a designated set of cases and to which judges are assigned by the presiding or chief judge of a court. Such forums are often the creatures of local court rules or custom. Thus, the ease with which such entities can be administratively established or disestablished is one of their defining characteristics. Parent courts (or sponsoring courts), then, are judicial bodies that have assigned judges to dockets or units that meet the definition of a special forum.

7. Isaac Unah, THE COURTS OF INTERNATIONAL TRADE: JUDICIAL SPECIALIZATION, EXPERTISE, AND BUREAUCRATIC POLICY-MAKING 7 (1998). Previous work on specialized adjudication suggests that the most basic distinctions are (a) the extent to which jurisdiction is limited and (b) the extent to which it is exclusive. Beyond that,

distinctions are made between courts or forums with generalist judges and those with specialist judges.

8. See Peggy Fulton Hora, William G. Schma, & John T. A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 449 (1999).

9. See Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 71 (1998); see also Pamela Casey & David Rottman, *Therapeutic Jurisprudence in the Courts*, BEHAVIORAL SCIENCES & THE LAW (forthcoming 2000).

10. See e.g., STEPHEN H. LEGOMSKY, *SPECIALIZED JUSTICE: COURT, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION* (1990); and Unah, *supra* note 7. But see also Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 61 (1995) and Dreyfuss, *infra* note 19.

11. This list is a revision to one previously offered by Casey & Rottman, *supra* note 9.

12. This extends to legal issues, as Fritzler and Simon note in their *Principles of an Effective Domestic Violence Court*: “The domestic violence judge who applies therapeutic principles should also be an expert on the special evidentiary issues that arise repeatedly in the context of domestic violence cases.” COURT REVIEW, Spring 2000 at 31 (Principle #9).

**Judges in specialized courts may become overly deferential to experts.**

the court's programs.

- Specialized courts can be structured to retain jurisdiction over defendants, promoting continuity of supervision and accountability of defendants for their behavior in treatment programs. Continuing jurisdiction facilitates a proportionate response by

court to the missteps during the treatment process rather than a one-shot chance at redemption.

Other benefits potentially associated with specialization include reduction of caseload congestion in the generalist court, greater uniformity and predictability of decisions, and prevention of forum shopping. Some observers see the ability to use non-lawyer judges as another benefit from specialization, one not yet taken advantage of in the new wave of specialized courts.

Specialization also inhibits therapeutic outcomes. The reasons that specialization might limit what therapeutic jurisprudence can accomplish include:

- Judges in specialized courts may become overly deferential to experts.
- The perspective promoted by maintaining distance from a subject matter is eroded by specialization.
- Specialized forums become dependent on a particular judge, creating problems of succession when judicial assignments rotate.
- The new generation of specialized forums proliferated in an era of particularly generous funding for criminal justice and an extraordinarily robust economy. The (usually) higher costs associated with specialized courts may prove fatal during an economic downturn.
- Specialized forums may impose costs on the trial court to which they belong by tying up resources, generating tensions within the bench, and creating conflicting loyalties among court staff. Such potential costs have not been taken into account in evaluations of special courts, which look at the outcomes associated with the specific defendants appearing in that court forum.<sup>13</sup>
- Specialized courts are susceptible to capture by special interest groups, who tend to make it "their" court.
- Judicial specialty problem-solving assignments can result in judicial stress and burnout and fewer opportunities for career advancement.<sup>14</sup>

Special courts may tend to emphasize the specific circumstances of the offender rather than the essence of the wrong they committed. Given the uncertainty over the effectiveness of various court-ordered therapies, the most therapeutic approach to some members of this category of offender might be to treat them as if the victim were a stranger, adjudicating their cases as part of the mix with violent felonies in the generalist court. Finally, an emphasis on TJ in specialized courts leaves small trial courts (three or fewer judges) and the residents of their jurisdiction out in the cold without a developed body of writing and guidance relevant to their circumstances.

#### THE LOGIC OF COURT REFORM

The consolidation of specialized courts into generalist courts has been and, in important ways remains, the main vehicle for court reform in this country. Statewide unification and trial court consolidation have incorporated most of the pre-1970s specialized courts as divisions.<sup>15</sup> That process of incorporation was one of the main achievements of court reform in this country. And the unification agenda is still being realized, with significant movement occurring in California and Michigan, and a proposed constitutional amendment (thus far unsuccessful, in part because of special court interests) in New York.

Advocates of unification offer a generic model in which a single trial court has jurisdiction of all cases and proceedings. The most authoritative statement of what that entails is the American Bar Association's *Standards Relating to Court Organization* (as revised in 1990) and *Standards Relating to Trial Courts*. The rationale goes like this:

Simplification makes courts easier for citizens to understand and use, as well as for collateral organizations to service. Flexibility in assigning judges to dockets makes it easier to meet caseload pressures, while also affording judges more diverse dockets. Administrative efficiency is achieved by eliminating duplication of facilities and support services and by creating streamlined management hierarchies. Communication among those involved in processing different kinds of cases is enhanced.<sup>16</sup>

In many respects, though, these presumed administrative advantages from consolidation are less important than concerns over the link between courts and local politics.

The current proliferation of specialized forums clearly cuts against the grain of court reform during the twentieth century. This leaves the burden of proof that the benefits of specializa-

13. The Therapeutic Justice Task Force, consisting of representatives from the Conference of Chief Justices, the Conference of State Court Administrators, the American Judges Association, and the National Association for Court Management, was established in the fall of 1999 to address and advance strategies, policies, and recommendations on the future of therapeutic courts (e.g., community courts, domestic violence courts, drug courts, mental health courts). The Task Force will examine the effects of these courts on the larger state court system.

14. For a review of the relevant research evidence, see Deborah J. Chase and Peggy Fulton Hora, *The Implications of Therapeutic*

*Jurisprudence for Judicial Satisfaction*, COURT REVIEW, Spring 2000 at 12.

15. See Rottman, *supra* note 1 at 15 (Table 3). The surviving specialized courts have jurisdiction over probate matters (and sometimes juvenile cases as well) in 12 states, tax courts exist in 5 states, and worker's compensation courts in 3 states. A number of states retain courts of claims and water courts.

16. See David Rottman & William Hewitt, TRIAL COURT STRUCTURE AND PERFORMANCE: A CONTEMPORARY REAPPRAISAL 12 (1996), for consideration of what this model looks like in practice.

tion outweigh the costs to the larger reform movement on those promoting specialization. One consideration is the source of the impetus to specialize. It is possible that the current wave of specialization will end only when every victim and interest group has his or her own forum. Another consideration is whether the new forums seem headed for absorption into the generalist court or to devolution into independence. The emergence of hybrid specialized forums may be one indication of what lies ahead. A third consideration is what amount of jurisdictional fragmentation can occur in generalist courts before the viability of central administration erodes. One can also ask, of course, whether the new generation of specialized forums can thrive within the confines of a generalist court.

The alternative view of the current wave of court specialization is as a correction to excessive consolidation and centralization. Specialization is the natural response to an overreliance on large, all purpose generalist courts. The creation of special court forums can also be viewed as a reform mechanism in itself, permitting experimentation that allows the judiciary to keep step with changing times. Even Roscoe Pound, the most formidable twentieth century foe of specialized courts (but not of specialist judges), regarded the creation of new courts as an organic process by which court systems adapt to changing social conditions.<sup>17</sup> A similar logic can be found today in the advocacy of specialized courts and forums as the heart of “a problem-oriented approach to court reform”<sup>18</sup> or in the claim “that partial and targeted specialization may promote useful court reform.”<sup>19</sup>

### THE CHANGING ROLE OF JUDGES

A shift toward a more engaged, problem-oriented style of judging probably preceded the growth of specialized courts. Specialized courts and the adoption of therapeutic jurisprudence principles, in this view, are manifestations of a change in the role of judges from “dispassionate, disinterested magistrate” to that of a “sensitive, emphatic counselor.”<sup>20</sup>

Over the last 15 or so years, judges have innovated to find solutions to changing societal conditions and public expectations. The broad impetus to innovate is evident from the changing composition of trial court caseloads. Between 1984 and 1998, *civil* (tort, contract, and real property) case filings increased by 34 percent, *criminal* filings by 50 percent, and *traffic* cases decreased by 11 percent. The largest increases, however, were in the areas of *domestic relations*, where case fil-

ings grew by 75 percent, and in *juvenile cases*, which rose by 73 percent. As a point of comparison, the United States population increased by 15 percent over those years.<sup>21</sup>

Courts, therefore, stood in the frontline response to problems like domestic violence that entered the courts along with changing court caseloads. Courts cannot deflect the flow of cases that bring with them complex emotional and health problems in the form of substance abusers, violent spouses, and neglected children. Specialized dockets or courts were created to bring together defendants facing similar charges, with similar underlying problems, and thus in need of the same type of support services. A growing number become engaged as partners with communities at large and an array of public and private entities to leverage the staff and service resources necessary to solve problems like substance abuse, domestic violence, and neighborhood decline (through community-focused courts). Courts also took on the role of coordinating the delivery of social services to individual families and children. Judges took the lead in establishing local councils and task forces charged with developing and administering a uniform strategy for responding to specific problems. In doing so, judges sought therapeutic outcomes for communities as well as individuals or families: “The purpose of the domestic violence court is to reduce the incidence of domestic violence.”<sup>22</sup>

To meet these new responsibilities, judges have drawn upon aspects of established and widely accepted practices from mental health, family, and juvenile law, which have a long history of judicial specialization, and specialized courts. The effect of judicial specialization on judicial behavior and stress remains uncertain because few research studies have been undertaken.<sup>23</sup> In any case, the kind of specialization in question in most studies is expertise in technical and scientific matters or in complex areas of civil law. Specialized forums like drug or domestic violence courts require a different kind of special qualities, specifically of a judicial temperament in interacting directly with litigants and an openness to insights from fields like mental health.

It is unclear that legal training is the best preparation for

**The current proliferation of specialized forums clearly cuts against the grain of court reform during the twentieth century.**

17. See RUSSELL WHEELER, *infra* note 34, at 525 (quoting Roscoe Pound as the leading figure in the court reform movement: “Multiplying of tribunals is a characteristic of the beginnings of judicial organization. When some new type of controversy or new kind of situation arises and presses for treatment, a new tribunal is set up to deal with it.”) (citation omitted).

18. See BABB, *supra* note 9, at 17.

19. Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995).

20. See Michael D. Zimmerman, *A New Approach to Court Reform*, 82 JUDICATURE 108, 109 (1998) and Fritzler & Simon, *infra*, note 22.

21. See BRIAN J. OSTROM, FRED CHEESEMAN, THOMAS H. COHEN, CAROL R. FLANGO, ANN M. JONES, NEAL B. KAUDER, ROBERT C. LAFOUNTAIN, KAREN GILLIONS WAY, & MELISSA T. CANTRELL, *EXAMINING THE WORK OF THE STATE COURTS 1998* (B. J. Ostrom & N. B. KAUDER, EDS., 1999).

22. Randal B. Fritzler & Lenore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, COURT REVIEW, Spring 2000 at 28.

23. See LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 145-46 (1997).

**It is unclear that legal training is the best preparation for judging in specialized contexts.**

judging in specialized contexts. Research on the attributes of attorneys suggests that they rely disproportionately on analytic, rational thought to make decisions and are not “interpersonally sensitive, meaning not attuned to the emotions, needs, and concerns of other people and not concerned with interpersonal

issues or harmony.”<sup>24</sup> Sensitivity to the lingering love in relationships with a history of domestic violence is one such attribute.<sup>25</sup> Such attributes suggest that the supply of judges for non-adversarial forums may be limited. Indeed, the ability to use non-lawyers as judges is cited as one of the benefits of specialized courts.<sup>26</sup>

The merit of encouraging judicial expertise in specialized subject matters was and remains controversial and examined primarily in the federal court context. On the one hand, the argument has been made that “judges typically are generalists, whose strongest virtue is their ignorance.”<sup>27</sup> Specialist judges in this view duplicate the work of bureaucratic experts (in this instance social service and treatment providers) without adding effective review of decisions, in part, because they become too closely attached to those experts. On the other hand, decisions by judges with substantive knowledge in a subject area tend to be more highly regarded by litigants and the public.<sup>28</sup>

This raises two provocative questions. First, is legal training a prerequisite for presiding in a specialized problem-solving court and, indeed, are there reasons for giving preference to non-lawyer experts with social service and social science training. Second, will specialized TJ inevitably become bureaucratic in a specialized court setting? In other words, will the identification of a therapeutic moment give way to a standard response triggered automatically by a set of predetermined case and litigant circumstances?

## CONCLUSION

There is an affinity between the legal theory and practice of therapeutic jurisprudence on the one hand, and problem-solving courts, on the other hand. Judges striving to respond to changes in American society and the resulting implications for their caseloads created specialized courts as a vehicle for implementing changes. In that sense, specialized courts were laboratories in which traditional adversarial court processes could be modified, collaborations with public and private service providers forged, and judicial oversight extended to cover

the life of a treatment program. Therapeutic jurisprudence formally entered the picture when judges sought a legal theory that could justify and guide their experimentation.

Despite their apparent affinity, specialized courts bring advantages and disadvantages to the judicial pursuit of therapeutic outcomes. The fate of therapeutic jurisprudence in the courts today is linked closely with the future of the new special court forums. While specific pros and cons of specialized courts for the practice of therapeutic jurisprudence were outlined earlier in this essay, there are other, more general, considerations to bear in mind when answering the question of whether TJ requires specialized courts and judges. The long-term future of the new specialized courts depends upon their successful incorporation into larger trial court systems. Otherwise, they are likely to have limited life spans and do as much harm as good.

In my view, the investment of so many resources in special courts must ultimately be justified in terms of their role as agents of change beyond a few courtrooms. A concentration on special court forums can be justified only if there is the prospect of a long-term payoff for the general trial courts to which the forums belong. Deborah Chase and Peggy Hora suggest the potential for a natural process of diffusion in which drug court and other special court judges take the benefit of their experience with them when they return to civil and criminal dockets.<sup>29</sup> In many courts, though, the nature of the special court movement may prevent the realization of that potential for diffusion. The proponents of special courts are often purists, interested in promoting court forums that function de facto as separate courts and oriented toward a particular class of service providers, victims, or defendants rather than to the work of the rest of the court.

The success of therapeutic jurisprudence as applied in court settings may owe as much to the process that is used as it owes to the content of specific therapeutic interventions. Therapeutic jurisprudence is effective, in part, because it promotes the legal procedures and judge-to-litigant interactions that the public experiences as fair and just. The perception of procedural fairness is more important than the favorability of court outcomes to litigant satisfaction with those outcomes, willingness to comply with court orders, and having confidence in the judiciary.<sup>30</sup>

A sense of procedural fairness is more likely when litigants believe that they were treated with respect, could trust the motives of the judge, received decisions that were made in a neutral manner, and had an opportunity to tell their side of the story. A belief in the trustworthiness of officials is perhaps the strongest contributor to a perception of procedural fairness.<sup>31</sup>

24. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, at footnote 221 (1997).

25. See Kate Paradine, *The Importance of Understanding the Role of Love and Other Feelings in Survivors' Experiences of Domestic Violence*, COURT REVIEW, Spring 2000 at 40.

26. See Legomsky, *supra* note 10, at 23.

27. MARTIN SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* 52 (1968).

28. See Unah, *supra* note 7, at 96.

29. See Chase & Hora, *supra* note 14.

30. See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

31. See T.R. Tyler & P. DeGoey, *Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions*, in *TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH* (R. M. Kramer & T. R. Tyler eds., 1996).

Therapeutic jurisprudence communicates to defendants a sense that the court is concerned about their welfare, and is thus trustworthy. Trustworthiness also is enhanced to the extent that judges explain to defendants the basis for their decisions. Therapeutic judges and courts also communicate respect for defendants by treating them in the round and speaking to them one on one.<sup>32</sup> These are methods likely to promote therapeutic outcomes throughout a trial court.<sup>33</sup> It has been suggested, for example, that small claims courts, “probably work a therapeutic effect, at least when black-robed judges take the time to listen to plaintiffs and defendants explain their sides of a dispute.”<sup>34</sup>

The future of therapeutic jurisprudence in specialized courts is likely to be multi-specialty courts that function at intermediate levels of specialization.<sup>35</sup> Semi-specialization may prove in the long-term a more effective vehicle to both enhance therapeutic outcomes and integrate specialized dockets into the work of a trial court without creating a new class of isolated special forums.

Finally, I have, of course, presented a false dichotomy by asking if the effective practice of therapeutic jurisprudence requires a specialized court or both judge and court. Therapeutic jurisprudence can be practiced inside and outside of specialized court forums at different levels. The most basic and informal level is when a judge interacts with the individuals involved in a particular court case. The second level is a special court forum that incorporates new procedures, disposi-

tion options, information systems, and connections to providers of social and other services (perhaps, but not necessarily, through a special court forum). Yet a third level of therapeutic jurisprudence practice is by changes to state statutes, court rules, and policies that apply across courts.<sup>36</sup> Special courts should not be allowed to distract judges and court managers from the challenge of nurturing TJ practices at all three levels and across the subject matters over which trial (and appellate) courts have jurisdiction.



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32. See Fritzler & Simon, *supra* note 12 at 31 (Principle #4) (“Involve the defendant in contracting with the court and assisting the court in establishing the terms of no contact orders and terms of supervision.”)

33. See Raymond Paternoster, Robert Brame, Ronet Bachman, & Lawrence W. Sherman, *Do Fair Procedures Matter?: The Effect of Procedural Justice on Spouse Assaults*, 163 LAW & SOC’Y REV. 31(1) (1997). The impact of fair procedures is powerful indeed: “When

police acted in a procedurally fair manner when arresting assault suspects, the rate of subsequent domestic violence was significantly lower than when they did not.”

34. Russell Wheeler, *Courts of Limited and Special Jurisdiction*, in ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM 517, 524 (R.J. Janosik ed., 1987).

35. See Legomsky, *supra* note 10, at 38-9.

36. See Casey & Rottman, *supra* note 9.

# Creating a Domestic Violence Court: Combat in the Trenches

Randal B. Fritzler and Leonore M.J. Simon

## I. INTRODUCTION

The prevalence and incidence of domestic violence makes it a major public health problem for many women, with over a third of women treated in emergency rooms having been injured by intimate partners.<sup>1</sup> Since colonial times, and especially over the past 30 years, legal reforms aimed at protecting women from domestic violence have failed at a national and a local level. With half of all battered women living in households with children, these children are at risk for repeating the cycle of violence.

The failure of criminal and civil reforms may be due to the fact that domestic violence cases, especially low-injury or non-injury cases, compete with other crimes for scarce criminal justice resources. These domestic violence cases that are upstaged by "more serious crimes" can, and often do, escalate into high-injury or homicide cases. Including domestic violence cases on dockets with other crimes also ignores the unique characteristics of domestic violence—they warrant separate handling by a specialized court and personnel because of their complicated and often dangerous character. Moreover, the failure of past reforms may be due, in part, to our strict adversarial system, which focuses on procedures and defendants at the expense of victims.

This article describes a court and the community collaboration to develop and implement a dedicated domestic violence court in Vancouver, Washington. The Vancouver Domestic Violence Court is premised on principles of therapeutic jurisprudence, preventive law, and restorative justice with the

aim of holding the offender accountable, ensuring the safety of victims and their children, and improving victim satisfaction with the justice process.

We set forth the strategies that were used to overcome jurisdictional and political obstacles to more efficient and effective processing of domestic violence cases. In doing so, ideas for the role of the specialized judge and other legal actors in achieving therapeutic, preventive, and restorative outcomes in the lives of domestic violence families are explored. Strategies for translating theoretical concepts into daily practice are discussed.

To fully appreciate why the Vancouver court was created, Part II of the article reviews the historical problem of the legal processing of domestic violence cases. Part III then describes domestic violence in Vancouver, Washington. Part IV describes the integration of three innovative jurisprudential paradigms, "therapeutic jurisprudence, preventive law, and restorative justice," that are the foundation for the new domestic violence court. The actual process that Vancouver used to develop its domestic violence court is described in Part V; the idea of "one stop shopping" and coordination of services in the current court are described in Part VI. Part VII discusses some unintended consequences that may flow from creation of a domestic violence court.

## II. HISTORY, CURRENT STATISTICS, AND UNIQUE CHARACTERISTICS OF DOMESTIC VIOLENCE CASES

The social and legal policy toward assisting battered women has a long and checkered history in American society.<sup>2</sup> For

This article is based, in part, on papers presented at the American Society of Criminology Meeting, Washington, D.C. (November 11-14, 1998) and the Joint Meeting of the American Psychology-Law Society and the European Psychology-Law Society, Dublin, Ireland (July 6-9, 1999). We wish to acknowledge comments and suggestions by David Rottman, David Wexler, Peggy Hora, Eugene Hyman, John Whitehead, and Richard Lamma, and the research assistance of Charlene Hiss, Bill Roberts, Kelly Hensley, Laura Komidar, Jaison Geisler, and Sharon Elliott.

### Footnotes

1. The term *domestic violence* carries different meanings across the literature. In this article, the term will be used to refer to actual or threatened physical violence directed toward an intimate that would be considered a crime if it were directed at a stranger.

2. See Elizabeth Pleck, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 33, 66, 163 (1987); Linda Gordon, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 255, 257, 280, 281, 283 (1989); U.S. COMM'N ON CIV. RTS., *UNDER THE RULE OF THUMB [hereinafter CIV. RTS.]: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE* (1982); Jefferey Fagan, *U.S. DEP'T OF JUSTICE, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 3-4, 6-7(1995) [hereinafter *CRIMINALIZATION*]; David A. Ford, *Wife Battery and Criminal Justice: A Study of Victim Decision-Making*, 32 *FAM. REL.* 463, 472 (1983); Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 *PSYCHOL., PUB. POLY & L.* 43, 43-44 (1995).

most of American history, societal responses to domestic violence withheld legal protection.<sup>3</sup> Male batterers have seldom, if ever, experienced arrest<sup>4</sup> or prosecution<sup>5</sup> as severely as other violent offenders.<sup>6</sup> As a result, domestic violence cases have had higher dismissal rates and less serious sentences compared to other violent crimes.<sup>7</sup> In addition to the inability of battered women to prosecute their batterers, women have often been denied restraining orders in civil courts.<sup>8</sup> When protective orders have been available, their enforcement has been weak,

the penalties for violations have been minor or nonexistent, and they have not been available on an emergency basis.<sup>9</sup> Such impediments to prosecution of, and legal protection from, intimate partner violence led the United States Civil Rights Commission to conclude that

**[P]enalties for violations have been minor . . . .**

3. Even today, there are differences of opinion as to whether legal interventions are appropriate to control crime within the family. Some argue that the legal system cannot be expected to understand the unique circumstances of each family and cannot be depended upon to take actions that are in the best interests of the victim, the offender, or the family as a whole. See Murray A. Straus, *Identifying Offenders in Criminal Justice Research on Domestic Assault*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 15-16 (Eve S. Buzawa & Carl G. Buzawa eds., 1996). This argument for applying different standards for criminal acts within families assumes that domestic violence offenders specialize in domestic violence crimes. Research that examines this assumption finds that a large proportion of domestic violence offenders commit other crimes and cannot be considered specialists. See Leonore M.J. Simon, *Do Criminal Offenders Specialize in Crime Types?*, 6 APPLIED & PREVENTIVE PSYCHOL. 35, 39 (1997) (reviewing both the general criminological research as well as the domestic violence research that supports that the majority of offenders are generalists). It is generally true that studies of batterers arrested or brought to police attention reveal that most have prior histories of criminal records. Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183, 194 (1990); J. David Hirschel et al., *The Failure of Arrest to Deter Spousal Abuse*, 29 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 7, 30 (1992); Lawrence Sherman & Richard Berk, *The Specific Effects of Arrest for Domestic Assault*, 49 AMERICAN SOCIOLOGICAL REVIEW 261, 266 (1984); LAWRENCE SHERMAN ET. AL, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 157 (1992).
4. See Sarah Fenstermaker Berk & Donileen R. Loseke, *Handling Family Violence: Situational Determinants of Police Arrests in Domestic Disturbances*, 15 LAW & SOC'Y REV. 317, 319 (1980-1981); Carolyn R. Hathaway, *Case Comment: Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 672 (1986). Virtually all proposals to reform societal responses to domestic violence center heavily on police as gatekeepers, yet police departments tend to devalue the handling of domestic violence calls. Eve S. Buzawa et al., *The Role of Arrest in Domestic Versus Stranger Assault: Is There a Difference*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 161, 163 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (finding that as the level of intimacy between the parties increases, the probability of an arrest for assault decreases).
5. See Naomi R. Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 161 (Eve S. Buzawa & Carl G. Buzawa eds., 1992); Ford, *supra* note 2, at 472; but see Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of A Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 183 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (finding that larger jurisdictions are less likely to allow victim cooperation to affect their decision to prosecute).
6. See Eve S. Buzawa & Carl G. Buzawa, *Introduction*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 1, 4-5 (Eve S. Buzawa & Carl G. Buzawa eds., 1996); Simon, *supra* note 2, at 64-75; CRIMINALIZATION, *supra* note 2, at 8; Morton Bard & Joseph Zacker, *The Prevention of Family Violence: Dilemmas of Community Interaction*, 33 J. MARRIAGE AND THE FAMILY 677 (1971); Ford, *supra* note 5, at 467, 473 (finding an indifferent legal processing of cases that was true of police, prosecutors, and judges); Frances Lawrenz et al., *Time Series Analysis of the Effect of a Domestic Violence Detective on the Number of Arrests Per Day*, 16 J. CRIM. J. 493, 494 (1988).  
 Critics of police behavior have suggested that leniency in the criminal justice system as a whole contributes to the offender's denial. See R. EMERSON DOBASH & RUSSELL DOBASH, *WOMEN, VIOLENCE, AND SOCIAL CHANGE* 146 (1992); Kathleen J. Ferraro, *Policing Woman Battering*, 36 SOCIAL PROBLEMS 61 (1989); Simon, *supra* note 2, at 46-47; Lisa G. Lerman, *Prosecution of Wife Beaters: Institutional Obstacles and Innovations*, in VIOLENCE IN THE HOME: INTERDISCIPLINARY PERSPECTIVES 250, 256-257 (M. Lystad ed., 1986); David A. Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOC. REV. 313, 320 (1991); Rebovich, *supra* note 5, at 185 (indicating that 50 percent of prosecution offices surveyed admitted to the existence postcharge diversion programs effectively dismissing the charges after completion of a domestic violence program); Robert C. Davis & Barbara Smith, *Crimes Between Acquaintances: The Response of the Criminal Courts*, 6 VICTIMOLOGY 175 (1981).
7. See Davis & Smith, *supra* note 6, at 177. Although research suggests that stranger offenders fare worse than nonstranger offenders in sentencing outcome, no specific research examines sentencing differential between domestic violence offenders and stranger offenders. MICHAEL GOTTFREDSON & DON M. GOTTFREDSON, *DECISION MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION* 72 (1988); Simon, 1995, *supra* note 2, at 74.
8. See CIV. RTS., *supra* note 2, at 47-49.
9. See CRIMINALIZATION, *supra* note 2, at 3. Since first enacted in Pennsylvania in 1976, every state and the District of Columbia now provide for the issuance of restraining or protective orders to protect victims of spousal/partner violence. Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 214, 219-229, 235-236, 239-240 (Eve S. Buzawa & Carl G. Buzawa eds., 1996). The issuance of these orders has become the chief means of protecting victims of domestic violence in many jurisdictions. The limited effectiveness of restraining orders in domestic violence cases continues to plague the legal system. A study based on a sample of restraining orders in two jurisdictions within a single

**The reforms have not reduced the problem of domestic violence.**

the American legal system treated battered women as second class citizens.<sup>10</sup>

Although not for the first time in history,<sup>11</sup> the feminist movement in the 1970s focused attention on battered women.<sup>12</sup> The resulting reforms primarily emphasized applying sanctions to offenders. The reforms ranged from increasing access to

criminal and civil legal remedies; to laws mandating arrest; to mandatory treatment and supervision of convicted batterers; and to the creation of specialized courts.<sup>13</sup>

The reforms have not reduced the problem of domestic violence.<sup>14</sup> For example, in 1992-93, females experienced seven times as many incidents of non-fatal violence by an intimate as males did. Each year, women experienced over one million violent victimizations committed by an intimate compared to about 143,000 incidents that men experienced.<sup>15</sup> Many of these incidents require medical attention. Thus, in 1994, 37% of females treated in emergency rooms were injured by an intimate compared to 5% of males.<sup>16</sup> Without legal intervention,

many non-fatal incidents escalate to more serious incidents. Thus, female homicide victims are more than seven times as likely to have been killed by intimates than are male victims.<sup>17</sup> In fact, intimates killed 30% of female murder victims compared to 4% of males.<sup>18</sup>

There also is evidence that the (at least) 3.3 million children a year who witness domestic violence are the "hidden victims."<sup>19</sup> This victimization often results in children repeating the cycle of violence. Battered women are six times as likely to have witnessed violence as a child than adult batterers, whereas males who witness violence are ten times as likely as other children to become abusers.<sup>20</sup>

**A. Unique Characteristics of Domestic Violence Cases Necessitate a Special Court**

The failure of criminal and civil reforms may be due to the fact that domestic violence cases, especially low-injury or non-injury incidents, compete for resources with other crimes.<sup>21</sup> As long as domestic violence cases are processed in the same courts that handle other crimes, they are less likely to be treated seriously. This is problematic because many low-injury, domestic violence cases escalate into high-injury or homicide cases that might have been prevented with effective legal sanc-

state in 1991 found that unwanted contacts in the first three months were reported by over half of the women who obtained temporary restraining orders. Acts of severe violence were experienced by 29% of women who possessed restraining orders. Severe violence in the year before the order predicted severe violence in the year after the order. The level of the man's resistance at the time of the hearing significantly increased the probability of severe violence. Compared to women without children, women with children were 70% more likely to experience violent acts. Women who indicated that they did not get everything they needed from the court order were significantly more likely to report severe violence than women who did receive what they wanted in the order. Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* at 214, 221-237. In another recent study of restraining orders in Quincy, Massachusetts, in 1990, almost 80% of the abusers had prior criminal histories within the state of at least one criminal complaint that ranged from underage drinking to murder. Not only did most have prior records, but also, the average record length was 13 complaints. Only a third restricted their past violence to women. Almost half of the abusers (49%) re-abused their victims within two years of the 1990 restraining order. The percentage arrested for abuse was 34%, whereas 22% were arrested for new crimes. The only statistically significant predictors for new abuse as measured by a new arrest were age and prior criminal history. Andrew R. Klein, *Re-abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 192, 193-202 (Eve S. Buzawa & Carl G. Buzawa eds., 1996). A survey of prosecutors found that the most common response to offender retaliation against victims who testify is the use or protective orders even though they concede that the effectiveness of this option is questionable and that violations of such orders often result in minimal punishment. Rebovich, *supra* note 6, at 189.

10. See CIV. RTS., *supra* note 2, at 91-93.

11. See Pleck, *supra* note 2, at 18.

12. See Pleck, *supra* note 2, at 182-200; CRIMINALIZATION, *supra* note 2, at 8-9; PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE & CENTER FOR DISEASE CONTROL, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 1 (1998).

13. See CRIMINALIZATION, *supra* note 2, at 3; N. Zoe Hilton, *Introduction*, in *LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION*, 3-4, (N. Zoe Hilton ed., 1993); Buzawa & Buzawa, *supra* note 3, at 5-6; Eve Buzawa et al., *The Response to Domestic Violence in a Model Court: Some Initial Findings and Implications*, 16 BEHAV. SCI. & L. 185, 185-86 (1998).

14. See CRIMINALIZATION, *supra* note 2, at 25.

15. See DIANE CRAVEN, U.S. DEP'T OF JUSTICE, *FEMALE VICTIMS OF VIOLENT CRIME 2* (1996).

16. See MICHAEL RAND, U.S. DEP'T OF JUSTICE, *VIOLENCE RELATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS 5* (1997). See also Tjaden & Thoennes, *supra* note 12, at 9 (1998) (finding that 30% of women injured during their most recent physical assault since age 18 received some type of medical treatment that included ambulance/paramedic services, treatment in a hospital emergency department, or physical therapy).

17. See CRAVEN, *supra* note 15, at 2.

18. See LAWRENCE A. GREENFELD ET AL., U.S. DEP'T OF JUSTICE, *VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 6* (1998).

19. See Buzawa & Buzawa, *supra* note, 3 at 3. In fact, more than half of battered women live in households with children under the age of 12. Greenfeld, *supra* note 18, at 15.

20. See Debra Kalmus, *The Intergenerational Transmission of Marital Aggression*, 46 J. MARRIAGE & FAMILY 3, 15 (1984); Alan Rosenbaum & K. Daniel O'Leary, *Marital Violence: Characteristics of Abusive Couples*, 49 J. CONSULTING & CLINICAL PSYCHOL. 63, 69-70 (1981); Barbara Star, *Comparing Battered and Nonbattered Women*, 3 VICTIMOLOGY 32 (1978).

21. See CRIMINALIZATION, *supra* note 2, at 35.

# PRINCIPLES OF AN EFFECTIVE DOMESTIC VIOLENCE COURT

Randal B. Fritzler and Leonore M.J. Simon

**T**herapeutic jurisprudence proposes that judges and lawyers be sensitive to the beneficial or harmful consequences that their actions and decisions have on the parties that come before them. In applying the therapeutic jurisprudence approach, the effectiveness of chosen practices depends upon the legal issues involved and the context in which these issues are presented. In essence, therapeutic jurisprudence is what good judges do anyway on a daily basis. The therapeutic jurisprudence approach forces all judges to reflect on and evaluate their effectiveness. As applied to domestic violence, therapeutic jurisprudence suggests that some basic principles can achieve offender accountability and victim safety. They should be applied only where they do not violate other standards of good court performance.

1. When dealing with domestic violence, it is a mistake to try to force what one is doing into the drug court format. Drug courts ordinarily focus on nonviolent offenders whereas domestic violence cases deal with violent crimes against intimates. Although diversion and dismissal of charges may be appropriate after successful completion of a drug treatment program, the slate cannot be wiped clean in domestic violence cases. Rehabilitation of the domestic violence offender is desirable, but offender accountability and victim protection are paramount. Because of the seriousness of violent behavior and the repetitive nature of domestic violence, a legal record needs to be maintained.
2. Judicial demeanor toward defendants and victims can increase compliance with court orders as well as have therapeutic effects. Judges can use their authority to make victims feel welcome in the court, to express empathy for their injuries, and to mobilize resources on their behalf. With offenders, judges can be respectful while insisting that offenders take responsibility for their violence and acknowledge the court's authority over their behavior. Judicial recognition of offender success in treatment, compliance with court orders, and demonstrated alternatives to violence can give the offender a sense of self-efficacy and achievement.
3. One of the most important roles of a domestic violence court is to confront the perpetrator's cognitive distortions. Distorted thinking includes minimizing or denying the violence and blaming the victim. Seize the opportunity provided by the trauma of the arrest to intervene in the perpetrator's life while he is still receptive, and encourage voluntary mental health activities as well as alcohol evaluation and treatment. Be mindful that accepting a "no contest" plea and other compromises or plea bargains can serve to reinforce distorted thinking by allowing the offender to avoid full responsibility for his behavior. It also can be harmful by causing the victim and the offender to believe that the offender can escape responsibility for present and future acts with some degree of impunity. Instead, stress that domestic violence is a chosen behavior, and that contrary to what the perpetrator has believed in the past, it will not get him what he wants.
4. Involve the defendant in contracting with the court and assisting the court in establishing the terms of no contact orders and terms of supervision (i.e., distances, supervised visitation with children, how items of personal property may be obtained). Including input from the offender in fashioning the order can increase compliance. It also lets the individuals know how seriously the court takes the "no contact" and protection orders.
5. We do not like the phrases "fast track" or "rocket docket," but are convinced that these cases need to be acted on immediately with continual court involvement. Otherwise, the court loses judicial effectiveness. Continuances and other dilatory tactics need to be discouraged in every case.
6. Take advantage of the domestic violence dockets to "red flag" children at risk. Appropriate referrals to child advocacy and child welfare agencies should be initiated.
7. Sentencing should be swift but not severe. Some jail time may get the offender's attention that there are consequences for his behavior, but it should be proportionate to his offense. Excessive fines should be avoided as they can rarely be collected and often take needed resources from the family.
8. Routine post-sentencing reviews should be calendared without cause and need to include domestic violence treatment providers, victim advocates, and probation officers to modify restrictions on the offender when there is substantial compliance, as well as to impose graduated sanctions when there is non-compliance.
9. Within the framework of the American justice system, the domestic violence judge who applies therapeutic jurisprudential principles should also be an expert on the special evidentiary issues that arise repeatedly in the context of domestic violence cases. Using his or her familiarity with the law, the judge may also apply these skills to draft custom jury instructions that better frame the issues for jury consideration.
10. Coordinate domestic violence cases with other cases occurring contemporaneously that may involve the perpetrator, victim, or their family. The domestic violence judge should be particularly aware of related dissolution cases, other criminal matters, juvenile court cases, child abuse and neglect cases, and paternity proceedings. In issuing orders, especially those involving "no contact" or protection order provisions, be careful to avoid conflicting or incompatible orders.

**Including domestic violence cases on dockets with other crimes fails to consider the unique characteristics of domestic violence.**

tions at the outset. For example, in one study, slightly more than half (51%) of the defendants in spouse killings had been previously arrested.<sup>22</sup>

Including domestic violence cases on dockets with other crimes fails to consider the unique characteristics of domestic violence.<sup>23</sup> First, almost a third of battered women who possess a temporary restraining order are likely to experience

acts of severe violence within three months.<sup>24</sup> In fact, by the time they seek injunctive relief, battered women have an extended and severe history of abuse with the offender that suggests that formal intervention through a petition to the court for relief is used, not as a form of early intervention, but rather as a signal of desperation following extensive problems.<sup>25</sup> Most domestic violence victims have suffered previous attacks by the defendant<sup>26</sup> and may be in a relationship with the defendant, possibly living with him.<sup>27</sup> Furthermore, there are strong emotional ties between the victim and the offender, complicated in many cases by the economic dependence of the victim on the offender and the likelihood that she will be continuing contact with him because of their children.<sup>28</sup> Moreover, unlike other cases of violence between acquaintance males that occur in public, the private location of the violence in domestic cases and its recurring nature increase the danger to the victim.<sup>29</sup> Most importantly, battered women are most often killed when seeking legal redress or when leaving a violent relationship.<sup>30</sup> Such factors complicate victim resolve to invoke criminal or civil remedies or to leave the relationship.<sup>31</sup> Women who are economically dependent on the batterer may not have independent transportation to make multiple trips to the courthouse.<sup>32</sup> Women with children may have to find child

care for court appearances.<sup>33</sup> Injured battered women may find employers unwilling to accommodate court appearances even though the employers had been considerate about medical appointments.<sup>34</sup> Most importantly, domestic violence victims may be less concerned with punishing the offender than with guaranteeing their own safety, surviving economically, protecting their children, and obtaining therapy for the offender.<sup>35</sup> They may also see the threat of prosecution as a means of terminating the relationship and escaping the violence.<sup>36</sup>

Another distinguishing characteristic of domestic violence is that victims must confront barriers to effective participation in the legal system.<sup>37</sup> Unlike other victims of violent crime, battered women are often viewed by legal actors as responsible for the crimes committed against them because they are viewed as having provoked the offender<sup>38</sup> or having failed to leave the relationship. Victims often report that legal actors treat them as bringing unimportant family matters to court.<sup>39</sup> In addition, unlike many victims of assault by strangers, but like other categories of victims known to defendants, domestic violence victims may be reluctant witnesses.<sup>40</sup> Some battered women become discouraged because of delays, lack of witness protection, or prosecutor indifference.<sup>41</sup>

The legal system is further hampered when similar attitudes are shared by the offender and victim.<sup>42</sup> The batterer minimizes or denies his violence, underestimating the amount of violence he uses and its frequency.<sup>43</sup> He blames the victim for his behavior, claiming that she provoked him.<sup>44</sup> When the batterer evades responsibility, the battered woman may blame herself, believing she should have been able to prevent the violence or should have left the relationship.<sup>45</sup> This self-blame may cause the victim to feel that the batterer does not deserve to be arrested or prosecuted.

An additional legal obstacle is the common legal actor belief that battered women will be safer once they separate from the offenders and once prosecution has begun.<sup>46</sup> The reality is that a batterer may escalate his violence to coerce the victim to rec-

22. JOHN M. DAWSON & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, MURDER IN FAMILIES 2, 5 (1994). It cannot be determined from this study for what types of offenses those defendants had previously been arrested. It is interesting that the study indicates that 35% of the victims in spouse killings also had prior criminal records. Note that this study's definitions of spouse includes spouses and common-law spouses, but that intimates who were not living together are included in the "other" family category.

23. CRIMINALIZATION, *supra* note 2, at 28.

24. Harrell & Smith, *supra* note 9, at 225.

25. Harrell & Smith, *supra* note 9, at 231.

26. CRIMINALIZATION, *supra* note 2, at 29.

27. Barbara Hart, *Battered Women and the Criminal Justice System, in DO ARRESTS AND RESTRAINING ORDERS WORK?* 100 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

28. Fagan, *supra* note 2, at 29; Harrell & Smith, *supra* note 6, at 231. See also Kate Paradine, *The Importance of Understanding Love and Other Feelings in Survivors' Experiences of Domestic Violence*, COURT REVIEW, Winter 2000 at 40.

29. Fagan, *supra* note 2, at 29.

30. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 114 (1987); BUREAU OF JUSTICE STATISTICS, DOMESTIC VIOLENCE: VIOLENCE BETWEEN

INTIMATES 2 (1994).

31. Hart, *supra* note 27, at 100-01.

32. Hart, *supra* note 27, at 102.

33. *Id.*

34. *Id.*

35. *Id.*; David Ford, *Prosecution as a Power Source: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOCIETY REV. 313 (1991).

36. Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. OF CRIM. L. & CRIMINOLOGY 217 (1992); Ford, *supra* note 34, at 328.

37. Hart, *supra* note 27, at 99.

38. *Id.*, at 101.

39. *Id.*

40. FRANK J. CANNAVALE & WILLIAM D. FALCON, WITNESS COOPERATION 36 (1976).

41. Hart, *supra* note 27, at 102.

42. *Id.*

43. Simon, *supra* note 2, at 52-53.

44. *Id.*

45. Simon, *supra* note 2, at 61.

46. Hart, *supra* note 27, at 100.

oncile with him, to retaliate against her for bringing charges, or to coerce her to drop the charges.<sup>47</sup> As many as half of all batterers threaten retaliatory violence,<sup>48</sup> and at least 30% of batterers may inflict further assaults during the predisposition phase of prosecution.<sup>49</sup> Continuation of violence has been found as well in studies of women who seek civil protection orders.<sup>50</sup> A battered woman who has made prior attempts to seek prosecution or civil protection orders, only to have the perpetrator escalate his violence, may be unwilling to face the risk that legal action may further endanger her.<sup>51</sup> Understandably, victims may be more concerned about preventing future violence than about penalizing the defendant for previous crimes,<sup>52</sup> creating a tension with those in the legal system focused on convictions.<sup>53</sup> This is why any legal intervention in domestic violence cases needs to utilize coordinated outreach services to track and ensure victims' safety.<sup>54</sup>

A final, unique characteristic of domestic violence cases that necessitates special handling by the courts is that these cases may suffer from a strict application of our adversarial legal system, which focuses on procedural issues and society's goals of deterrence, punishment, and retribution at the expense of the victim's welfare. The adversarial system may be better suited to litigating crimes between strangers and certain other issues brought before our court system. However, it may be less effective when dealing with crimes between intimate partners where the adversarial approach may exacerbate the problem and increase the danger to victims.

This article describes the strategy that Vancouver, Washington, developed to facilitate participation of battered women in the legal system. It describes the development and implementation of a misdemeanor domestic violence court that handles civil protection orders as well as criminal proceedings under the direction of one judge.

### III. DOMESTIC VIOLENCE IN VANCOUVER, WASHINGTON

Clark County, the fastest growing county in Washington State, is a jurisdiction of 337,000 people in southwest Washington with a growth rate of 42% percent since 1991.<sup>55</sup> Vancouver, the county seat, is the state's fourth largest city,

47. *Id.*

48. ROBERT DAVIS ET AL., NEW YORK VICTIM SERVICES AGENCY, VICTIM-WITNESS INTIMIDATION IN THE BRONX COURTS (1990).

49. Stephen Goldsmith, *Taking Spouse Abuse Beyond a "Family Affair,"* 17 LAW ENFORCEMENT NEWS 7 (1991).

50. Klein, 1996, *supra* note 9, at 199 (finding that 49% of batterers in Massachusetts restraining order cases re-abused their victims within two years of the issuance of the order); Harrell & Smith, *supra* note 6, at 223-24 (finding that 60% of women reported acts of abuse within a year of the issuance of the restraining order, with 29% reporting severe violence).

51. Harrell & Smith, *supra* note 6, at 223-30, 237-39.

52. Hart, *supra* note 27, at 101.

53. *Id.*

54. *Id.* at 112-13.

55. STATE OF WASHINGTON, OFFICE OF FINANCIAL MANAGEMENT, 1999 POPULATION TRENDS, September 1999, 9.

56. *Id.* at 10.

with a population of 135,100.<sup>56</sup> Within five years, Vancouver is projected to be the second largest city in Washington, after Seattle.<sup>57</sup> The proximity to Portland, Oregon, results in the daily commute of one-third of Clark County's workforce to Portland.<sup>58</sup>

Approximately 30% of emergency 911 calls in Clark County are domestic violence related.<sup>59</sup> A local study indicated that a quarter of the neighborhood population surveyed had been physically assaulted by a domestic partner within the last year.<sup>60</sup> Arrests for domestic abuse increased 74% in the two-year period ending in 1998.<sup>61</sup> In addition, from 1992 through 1998, there was a 200% increase in domestic violence-related homicides.<sup>62</sup> Domestic violence cases represent nearly a fourth of the current cases in the county prosecutor's office.<sup>63</sup> In 1998, there were almost 978 filings for civil domestic violence protection orders<sup>64</sup> and 1,499 misdemeanor criminal domestic violence cases.<sup>65</sup>

In the past, courts, victim advocacy groups, social services, and the medical treatment community in Vancouver have tried to address the domestic violence problem while operating entirely independently. Previous attempts to bolster the response of individual system components may have placed battered women in greater jeopardy, encouraging them to seek legal remedies when systemic response was uneven or focused on offender sanctions. The court system failed to evaluate the efficacy of judicial practices or to incorporate community input. Because of previous failures, the community representatives concluded that a unified vision about the goals and methods of reform were needed.<sup>66</sup>

### IV. INNOVATIVE JURISPRUDENTIAL PARADIGMS IN DOMESTIC VIOLENCE CASE PROCESSING

The purpose of the domestic violence court is to reduce the incidence of domestic violence. The domestic violence court may be able to accomplish this by incorporating principles of

[T]hese cases may suffer from a strict application of our adversarial legal system . . . .

57. VIOLENCE AGAINST WOMEN GRANTS OFFICE, DEPARTMENT OF JUSTICE, CLARK COUNTY DOMESTIC VIOLENCE COURT PROJECT, GRANT PROPOSAL TO ENCOURAGE ARREST POLICIES, OFFICE OF JUSTICE PROGRAMS, April 1998, 3, Resubmitted April (1999) [hereinafter GRANT PROPOSAL], on file with the first author.

58. *Id.* at 3.

59. *Id.*

60. *Id.*

61. See Interview with Charlene Hiss, Clark County District Court Administrator, in Vancouver, Wash. (Dec. 9, 1999).

62. *Id.*

63. See GRANT PROPOSAL, *supra* note 59, at 3.

64. See Interview with Charlene Hiss, *supra* note 61.

65. *Id.*

66. See ANNE L. GANLEY, WASHINGTON STATE GENDER AND JUSTICE COMMISSION, DOMESTIC VIOLENCE: THE WHAT, WHY AND WHO, AS RELEVANT TO CIVIL COURT DOMESTIC VIOLENCE CASES 1-2 (1993).

**A key tool of the preventive lawyer is the "periodic legal checkup."**

therapeutic jurisprudence, preventive law, and restorative justice to assure the safety of the victim and hold the offender accountable.

Therapeutic jurisprudence investigates the law's impact on the emotional lives of participants in the legal system by encouraging sensitivity to thera-

peutic consequences that may result from the legal rules, procedures, and the roles of legal actors.<sup>67</sup> "The fundamental principle underlying therapeutic jurisprudence is the selection of options that promote health and are consistent with the values of the legal system."<sup>68</sup> Simultaneously, therapeutic jurisprudence seeks to avoid perpetrating harm to individuals in the legal system.<sup>69</sup> Although the concept of therapeutic goals in the legal system is not new, courts have limited therapeutic practices to areas such as mental health, family, and juvenile law.<sup>70</sup> The failure to apply therapeutic goals and practices to domestic violence cases, however, has perpetrated a "second assault" on victims.<sup>71</sup>

A specialized court that treats domestic violence cases as seriously as violence between males at each stage of the legal process can enhance therapeutic outcomes by holding the offender accountable and assuring the victim's safety. These benefits can be obtained by coordinating the legal response of the courts, law enforcement, corrections, and victim advocates to these cases. For example, a coordinated, specialized domestic violence court can work with police officers called to the scene of a domestic violence incident by issuing protection orders by phone 24 hours a day, in much the same way search warrants are currently issued in exigent circumstances. The court can facilitate collaboration between police,

probation/pretrial services, the victim, and victim advocates in making decisions to jail a batterer pending criminal proceedings, if no reasonable assurance can be made that the victim will be safe upon the offender's release.<sup>72</sup> The court can proactively enhance the well-being of the victim by routinely issuing a civil order of protection in conjunction with any pending criminal case and encouraging prosecutors to initiate civil protection orders in criminal cases. Probation officers can monitor pre- and post-sentencing compliance of court orders by an offender, and can schedule cases of non-compliance immediately for the judge to determine whether graduated sanctions are warranted.

Preventive law is a second perspective that seeks to minimize and avoid legal disputes and to increase life opportunities through legal planning.<sup>73</sup> A key tool of the preventive lawyer is the "periodic legal checkup."<sup>74</sup> It also seeks to identify "legal soft spots" and potential trouble points, and to come up with strategies to avoid or minimize the anticipated legal trouble.<sup>75</sup> Although preventive law generally is designed so that good, private legal or business practice can avoid legal conflicts or disputes, we suggest that it also can be used by a domestic violence court judge to prevent future violence by proactively monitoring domestic violence cases to insure that court orders are being carried out. For example, calendaring court reviews of domestic violence cases in which protection orders have been issued, whether or not there is a reported problem, can prevent the recurrence of violence, while reducing a woman's sense of hopelessness when a batterer continues to beat her despite the order. An example of the opportunity to identify a "legal soft spot" occurs when the court receives recommendations from offender treatment providers, often based on self-reports of offenders, to dismiss the protection orders and unify the couple. Prior to any decision, the court can consult with victim advocates who may be privy to the fact that the victim

67. PAMELA CASEY & DAVID B. ROTTMAN, NATIONAL CENTER FOR STATE COURTS, *THERAPEUTIC JURISPRUDENCE IN THE COURTS* 1 (1998); Simon, *supra* note 2, at 43, 49-51; Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 525-526 (1999); David Wexler, *The Development of Therapeutic Jurisprudence from Theory to Practice*, 68 REV. JUR. U.P.R. 691 (1999); Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 442-448 (1999). The University of Puerto Rico Law School has begun the International Network on Therapeutic Jurisprudence, directed by David Wexler, as well as creating the Therapeutic Jurisprudence Forum as a regular feature in the University of Puerto Rico Law Review. See also David B. Wexler, *Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence*, 35 REVISTA DE DERECHO PUERTORRIQUEÑO 273, 277 (1996). The International Network maintains a Web site at <http://www.law.arizona.edu/upr-intj>, an up-to-date bibliography, and sponsors conferences. The First International Conference on Therapeutic Jurisprudence took place July 8-11, 1998 at the University of Southampton, Winchester, England, and reflects the prominence of this legal theory in the international legal world. See UNIVERSITY OF SOUTHAMPTON, *THERAPEUTIC JURISPRUDENCE: THE*

FIRST INTERNATIONAL CONFERENCE ON THERAPEUTIC JURISPRUDENCE (1998).

68. Casey & Rottman, *supra* note 67, at 1.

69. Simon 1999, *supra* note 67, at 516-525.

70. Casey & Rottman, *supra* note 67, at 1.

71. Simon, *supra* note 2, at 43-49, 62.

72. The problem of utilizing jail as violence prevention or as a sanction in domestic violence cases often is problematic in jurisdictions like Vancouver that suffer from jail overcrowding. It is not uncommon for sheriff's deputies to reveal that these cases are routinely booked and released. Thus, a more coordinated policy involving the jail staff, the sheriff's office, the prosecution, and the court may need to determine the relative seriousness of cases kept in jail compared to those that are booked and released.

73. See generally LOUIS M. BROWN & EDWARD A. DAUER, *PERSPECTIVES ON THE LAWYER AS PLANNER* (1978); Edward P. Richards III, *Should Preventive Law, Like Some Medicine Be Mandated by Government?*, PREVENTIVE L. REP., June 1992, at 28.

74. See Robert M. Hardway, *PREVENTIVE LAW: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* 189-92 (1997); See also Edward A. Dauer, *Future of the Legal Profession Lies in Utilizing Preventive Law*, PREVENTIVE L. REP., Mar. 1990, at 25.

75. Hardway, *supra* note 74, at 192.

does not want to return to the relationship and does not want the order dismissed. The use of preventive law in domestic violence cases emphasizes that it is good legal practice for public lawyers and actors to apply laws to batterers in a manner calculated to anticipate and prevent future harm to victims.

On an individual basis, the “periodic legal checkup” could consist of calendaring a case after arrest, sentencing, or issuance of a protection order for the victim to come to court every week for two years and report on her freedom from violence and her ability to get services such as child support. On a system basis, once a month, police, prosecutors, judges, probation, and victim advocates could convene to assess how well the law is protecting domestic violence victims.

Preventive law and therapeutic jurisprudence can work in tandem to encourage legal actors to identify “psycholegal soft spots,”<sup>76</sup> areas where legal intervention or procedure may lead to anxiety, distress, or additional trauma for domestic violence victims. For instance, booking and releasing domestic violence offenders due to jail over-crowding can result in further violence to the victim. Court issuance of protection orders without follow-through by law enforcement in entering the order on relevant computer information systems, a problem recently identified in several counties of Maryland,<sup>77</sup> can result in injury or death of the victim and her children. In fact, such publicity about the failure of the system to protect victims despite the issuance of a protection order could have the effect of discouraging other victims from seeking legal redress.

Instead, principles of preventive law and therapeutic jurisprudence suggest that legal actors from police and prosecutors to judges should depart from the more cynical, dispassionate, traditional roles of legal actors to the less emphasized role of sensitive, empathic counselor.<sup>78</sup>

Restorative justice is the third paradigm that could be brought to bear on the restructuring of the legal system to be more therapeutic to domestic violence victims.<sup>79</sup> Restorative justice advocates that victims should have more input into the proceedings, and the state or the community should restore victims as far as possible to their former condition through compensation and neighborly support.<sup>80</sup> Additional goals include holding offenders accountable, requiring them to make amends, offering them the opportunity to rehabilitate themselves, and enabling them to earn re-acceptance into the community.<sup>81</sup> Although restorative justice focuses, in large part, on property crimes between strangers, its principles could work together with therapeutic jurisprudence and preventive law to restore the mental and physical well-being of domestic violence victims. For example, consistent enforcement of protection orders could restore women to the community without the fear and risk of violence that is present

**Restorative justice is the third paradigm that could be brought to bear . . . .**

76. Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL W. L. REV. 15 (1997).

77. Craig Whitlock, *More Risk for Victims of Abuse: Md. Audit Finds Backlog of Unfiled Restraining Orders*, THE WASHINGTON POST, Nov. 14, 1999 at C1 (describing how a batterer killed his two young children with a handgun that he was allowed to buy because a background check failed to show that he was under a restraining order obtained by his wife). This incident exposed the fact that three counties in Maryland have accumulated stacks of restraining orders that sit for several weeks or months before they are logged into computer databases by sheriffs' departments. *Id.* One wonders how many other law enforcement units in other jurisdictions give such low priority to this issue.

78. See Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 116 (1994) (suggesting that the popular dissatisfaction with the legal profession is in part due to lawyers' overemphasis on litigation and underemphasis on counseling). See also Hon. Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685 (1982).

79. The history of the criminal law indicates that early in Anglo-Saxon times, the victims received compensation from the offender and were directly involved in the criminal justice process. As the state took over the responsibility, the victim was removed as a party to a criminal action. This was due to a philosophical shift that reconceptualized harm done to an individual as harm done to the community or state. As a result of this historical shift, until the last two or three decades, victims' needs and wishes have not been considered in criminal prosecutions. See JOANNA SHAPLAND ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 1 (1985) (indicat-

ing that the historical shift from viewing a crime victim as an injured party to conceptualizing the injured party as the state resulted in neglect of the victim in criminal proceedings); MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS 1, 14 (1991); HOWARD ZEHR, MEDIATING VICTIM/OFFENDER CONFLICT (1982); Gilbert Geis, *Victims of Crimes of Violence and the Criminal Justice System*, in PERSPECTIVES ON CRIME VICTIMS 62 (Burt Galaway & Joe Hudson eds., 1981); Daniel W. Van Hess, *Restorative Justice*, in CRIMINAL JUSTICE RESTITUTION, AND RECONCILIATION 5-8 (Burt Galaway & Joe Hudson eds., 1990) (noting that under Henry I, certain offenses became crimes against the king's peace); Howard Zehr & Mark Umbreit, *Victim/Offender Reconciliation: An Incarceration Substitute*, 46 FED. PROBATION 63 (1982) (noting that victims in general want more inclusion in the criminal process).

80. See Joanna Shapland et al., *supra* note 79, at 268; Wright, *supra* note 79, at 14, 19, 20, 27, 116-119, 133; Geis, *supra* note 79, at 70; Anne M. Heniz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, in PERSPECTIVES ON CRIME VICTIMS, *supra* note 79, at 266. In the United States in the 1970s, in addition to rape-law reform, the general victim's rights movement made attempts to provide victims with input into decision making from arrests to sentencing in criminal cases. See Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, in PERSPECTIVES ON CRIME VICTIMS, *supra* note 81, at 318. The U.S. President's Task Force on Victims of Crime suggested that the victim in every prosecution should have a constitutional right to be present and to be heard at all critical stages of judicial proceedings. See LOIS HAIGHT HERRINGTON ET AL., U.S. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 17-36, 63-71, 72-82 (1982).

81. See Hall, *supra* note 79, at 318.

**The organizing committee adopted the "one judge" concept . . .**

in the majority of domestic violence cases. Where desirable, consistent enforcement could include providing effective treatment for the offenders with the goal of reintegrating them in the community. This would not entail reconciling the family at all costs. Instead, the focus would be on having the commu-

nity more involved and responsible for the fate of families in its midst. Restorative justice principles may warrant convicting and incarcerating the offender and providing social services to the victim that will facilitate the transition from economic dependence to economic and self-sufficiency. Families in the community could be enlisted to be available to women and their children when they need safety or social support.

**V. THE PROCESS OF DEVELOPING THE DOMESTIC VIOLENCE COURT**

In 1997, the authors formed the nucleus of a steering committee to develop a domestic violence court. The second author provided academic sources, intern support, and developed a plan for evaluation of the court. A partnership also was forged with the community to foster support for the court by insuring that key players outside the judicial system had a role in the organization and implementation of the court. Key individuals had already been to several national domestic violence conferences. A collaborative team was drawn from a number of agencies, each bringing specific skills and perspectives to the table. Included in the planning and implementation phases were both authors, the county probation department, the city and county prosecutor's offices, city and county law enforcement, YWCA victim advocates, and offender treatment providers.

An attempt was made to include the defense bar. Opposition from defense attorneys has been a major obstacle in similar projects in Florida and California. In Vancouver, the opposition was defused in part because the first author was a former criminal defense attorney in Vancouver and had a good relationship with the defense bar. Although the defense bar chose not to provide much input into the development process, there has been little opposition to the domestic violence court from defense attorneys.

We were not so fortunate with the county prosecutor's office. The county prosecutor selected late 1997 to revive its "domestic violence diversion program." This program allows offenders to pay a substantial fee in exchange for avoiding a conviction. It was not politically feasible to stop the implementation of the diversion program. One tool to control the

diversion process is judicial review of dismissals. This requires that the judge be satisfied that appropriate justification exists before any admission to the diversion program is granted. By exercising this review, the court has been able to limit the number of offenders diverted and cases dismissed. Discussions have taken place with the county prosecutor to examine the diversion program's conflict with the goals of the domestic violence court.

The organizing committee adopted the "one judge" concept for the dedicated court. The Superior Court judges readily accepted the suggestion by the District Court that efficiency could be increased by sharing the domestic violence workload. In the fall of 1997, the Superior Court judges agreed to confer Superior Court jurisdiction on the District Court judges, giving the District Court jurisdiction over civil domestic violence protection orders.<sup>82</sup> Since early 1998, civil protection order petitions were added to the domestic violence court caseload. Ultimately, this consolidation of services between the District and Superior courts may have been the single most important aspect of the process. The consolidation of functions prioritized domestic violence cases and made the services more accessible to victims. The resulting system treated court users as clients who deserved a high level of service while reducing obstacles to those seeking relief.

The cooperation experienced with Superior Court judges was not as easily achieved within District Court itself. The nature of Washington's elected judiciary gives little consideration to the ability of judges to work together, or to their varying abilities. Many judges seem to believe they have a right to conduct their court as if it were their own kingdom. This predisposition, when combined with the desire to protect their own self-contained courtrooms, creates resistance to change among judges. Many judges also fear any change that may increase their workload, or worry that an innovation may infringe on the legislative branch of government, confusing making new law with creating a new organizational structure to enforce existing laws more effectively. These factors, together with jealousy, fear of the unknown, and concern that another judge may obtain some political advantage, are obstacles to developing a new court structure.

The organization and culture of the five Clark County District Court judges had been described by past consultants as highly resistant to change.<sup>83</sup> The presiding judge must obtain majority approval for each decision involving any new initiatives. This can make it difficult to sustain a long-term project, as it can be undermined at any time by a vote of the judges. The first author served as presiding judge for two terms in 1997 and 1998 through the planning and implementation phases of the domestic violence court. From time to time, at the direction of the presiding judge, the judges held retreats to

82. Washington law provides that domestic violence victims may file a petition for a civil protection order with the court. The civil protection order is a broad-based wide-ranging order that provides that the law enforcement agency in the jurisdiction where either the petitioner or respondent resides can restore the petitioner to the common residence of the parties. The order can remove the respondent from the home, grant the petitioner pos-

session of property, and provide that the police effectuate transfer. It can also determine custody and visitation, and direct law enforcement agencies to obtain possession and custody of minor children for the petitioner. WASH. REV. CODE § 26.50 (Supp. 1998).

83. Leland Fish, CLARK COUNTY DISTRICT COURT ORGANIZATION, July 1992. Manuscript on file with first author.

build a consensus and collegiality. In this case, the consensus-building approach met with limited success, and decisions had to be made to proceed with the project without unanimity.

Nevertheless, the majority of the judges did see some value in changing the court's response to domestic violence. They were aware of the active domestic violence task force and the strong interest in the Vancouver City Attorney's office in bringing about change. State legislation also demonstrated the priority that legislators accorded domestic violence. Support also existed in the news media, which reported favorably on the court.<sup>84</sup> Government officials, including the county commissioners, wrote letters of support.<sup>85</sup> There was enthusiastic feedback from probation officers, treatment providers, and victims. The converging political support allowed us to move through the planning phases with little opposition. It did not hurt that the judges who lacked a personal interest in the subject were aware that 1998 was an election year, and the issue was an important one for many political constituents.

Since implementation of the domestic violence court, the other judges have acknowledged for the first time that the presiding judge position should be occupied by a judge who possesses the interest and knowledge to sustain special projects. This is important because the specialized knowledge of the presiding judge is useful when that judge acts as spokesperson for the court with the public, the press, and other county departments. It also is significant because the bar, probation departments, treatment providers, the press, and the public naturally look to the presiding judge for vision and leadership.

## VI. THE COURT IN ITS PRESENT FORM: "ONE STOP SHOPPING" AND COORDINATION OF SERVICES

Implementation of the court has resulted in "one stop shopping" for victims.<sup>86</sup> Prior to implementation of the domestic violence court, victims were shuffled between the District Court clerk's office, the Superior Court clerk's office, and the prosecutor when seeking relief. With the new court, the safety of victims was increased by establishing one place from which to seek relief. The domestic violence court resolves situations of the past where an order issued in a District Court criminal action or pursuant to a civil anti-harassment proceed-

ing was in conflict with the civil domestic violence protection order or an order issued out of a family court proceeding. Court clerks who deal only with these issues help the victim prepare the appropriate paperwork and bring it directly to the judge for consideration.

However, coordination of services is complicated by the victim advocate structure. The City of Vancouver contracts for high-quality victim services from the YWCA domestic violence program. This program makes recommendations to the court about protection orders and offender release from jail. Cases involving persons living outside the city limits or cases involving felonies utilize one county victim advocate, whose role is to ensure the victim is available and prepared to testify in court. Unfortunately, the county advocate neither addresses victim needs nor provides information to the court.

At such time as the offender admits culpability or is convicted, the offender is sentenced to probation. The domestic violence court orders convicted defendants into state-mandated domestic violence treatment at the time of sentencing. The court integrates alcohol and drug treatment services with domestic violence treatment where appropriate. The court has begun to address the issue of economic support for victims and children by including specific provisions in the sentence orders. In 1999 the court began issuing temporary child support orders in both civil and criminal cases where the parties have minor children in common. To ascertain compliance with court orders, the court schedules periodic reviews. If violations are found, the court imposes immediate, graduated sanctions that include more frequent reviews, electronic home confinement, work crews, alternative community service, more restrictive terms of probation, more intensive treatment, or actual jail time. High fines are usually not imposed because they may reduce the funds and support available to victims. The domestic violence court has two years jurisdiction in all misdemeanor domestic violence cases, and jurisdiction in civil

**Implementation of the court has resulted in "one stop shopping" for victims.**

84. See e.g., Stephanie Thomson, *Special Clark County Court, Cited as One of Best in U.S., Strives to Give Victims Better Protection*, COLUMBIAN, Oct. 24, 1999, at A1 (devoting entire section in the local newspaper to various favorable articles about the domestic violence court); Brian Willoughby, *YWCA Praises Court, Still Sees Work To Be Done*, COLUMBIAN, Oct. 24, 1999, at A7 (interviewing the director of the YWCA domestic violence program in Vancouver who praises the workings of the court and the fact that all domestic violence cases are heard by one judge); Stephanie Thomson, *One-Judge System for Domestic Violence Cases Wins Praise*, COLUMBIAN, Oct. 24, 1999, at A8 (noting that having one judge specialize in domestic violence cases insures consistency across cases).

85. Despite county budget problems, the County Commission has been careful to maintain the District Court funding. This budget stability did not occur by chance. District Court judges made presentations to the County Commission explaining the benefits of a domestic violence court. Consequently, implementation of

the court occurred without additional outside funding.

86. The idea of reducing fragmentation of the court system and avoiding the issuance of conflicting orders affecting a family is not new. Advocates of unified family courts point to the fragmented, inefficient, and overlapping system of adjudicating family law cases in the majority of states that creates negative or antitherapeutic consequences for litigants experiencing multiple family law problems. See Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 490-91 (1998). Among other similarities to the Vancouver Domestic Violence Court, Professor Babb's advocacy of unified family courts suggest that judicial specialization in family law provides an efficient manner to resolve complex matters. *Id.* at 500-03. The Vancouver Domestic Violence Court has attracted positive attention of the legislature and the judiciary of Washington and may ultimately be a step in the direction of a unified family court.

**A number of unintended consequences occurred.**

protection order cases is for as long as is necessary.

Although past research has been critical of the practice of charging the majority of domestic violence cases as misdemeanors,<sup>87</sup> this is an advantage in the Clark County Domestic

Violence Court because the judge has much more discretion in sentencing of misdemeanors than superior court judges have in sentencing felonies under the sentencing guidelines. Moreover, in Clark County, domestic violence cases charged as felonies are more likely to be diverted, plea bargained, or dismissed because of the focus on what are believed to be more serious crimes such as robbery. The coordination of criminal remedies with civil protection orders in the domestic violence court, moreover, increases the safety of the victim.

#### **VII. UNINTENDED CONSEQUENCES OF THE DOMESTIC VIOLENCE COURT**

As a result of the implementation of the domestic violence court a number of unintended consequences occurred. The referrals we have received from child protective services are an example. They have encouraged complaining parents to file civil domestic violence protection orders against their spouses on behalf of an allegedly abused minor child. This has created a crisis in the provision of guardians ad-litem for juveniles. Ultimately, the court plans to use the domestic violence court to identify high-risk children, and provide them and their families with services.<sup>88</sup> Until we implement that component, we will continue to accept referrals from child protective services and afford them what limited protection is available.

Urgent security problems created by the addition of larger and highly emotionally charged civil and criminal domestic violence dockets are a second unintended consequence. Incidents inside and outside the courtroom have increased. The resulting increase in cases also reduced the number of personnel available to transport offenders to other courts.

A third unintended consequence is the failure of the court to provide a collective solution to the scheduling problems created by the new court. Lack of flexibility in scheduling and management of cases results in limited times during the day when domestic violence matters can be scheduled. Judges failed to recognize the amount of time that is necessary to consider all the complex issues involved in domestic violence cases and the frequent reviews. This caused the domestic violence dockets to run over into other scheduled court proceedings, increasing resentment over the "inefficiency" of the new court. Some of the dockets conflicted with other court matters and constitutionally required hearings.

The fourth unintended consequence was the zeal with which the state prosecutor and city attorney's office went for-

ward in trials without direct participation by the victims. Although Washington evidentiary law restricts the admission of victims' out-of-court statements, recent rulings have provided opportunities to try more cases without the victim testifying in court. At least six such cases have been successfully prosecuted in Clark County to date. In addition, convictions have been obtained in several cases where the victim has recanted her original allegations. Nevertheless, there also have been some acquittals under this system. It is an open question to what extent such prosecutions are therapeutic for the victim.

#### **VIII. CONCLUSION**

National and local statistics indicate that domestic violence creates a need for legal and social services among many women in violent relationships. The practice of mixing domestic violence cases in courts that consider other crimes has resulted in the dismissal of the majority of domestic violence cases. Principles of therapeutic jurisprudence, preventive law, and restorative justice suggest that the legal system can anticipate, terminate, and prevent violence toward women by utilizing a proactive, specialized domestic violence court that coordinates services with other legal agencies, treatment providers, and victim advocacy groups.

The domestic violence court has been the catalyst for new ideas in dealing with problems in our community. Most recently, the Superior Court has begun the development of a family court center that would incorporate not only domestic violence court but also dissolution actions and other family-related actions. In addition, the Clark County Department of Community Services and Corrections joined with the District Court to establish a mental health court. This project hopes to remove barriers that prevent the court from identifying and addressing unique needs of the mentally ill offender. Also, a drug court is now being implemented that began with a pilot program in District Court called "substance abuse court," which shares a common philosophy with drug courts. Lastly, the District Court has begun development of a "teen traffic court" in cooperation with the "legal magnet" program at a local Vancouver high school that has an academic program for high-school students interested in legal careers. High-school students who are cited for minor traffic infractions may request to have their ticket transferred to the high school traffic court for adjudication.

These projects incorporate, wherever possible, principles of therapeutic jurisprudence, preventive law, and restorative justice first pioneered locally in the domestic violence court setting. It is clear that the collaborative domestic violence court development process has facilitated a closer working relationship between the Clark County judiciary and the community to resolve numerous problems shared by other jurisdictions.

It has become clear—in the process of creating the domes-

87. Many police departments unofficially downgrade domestic violence cases to misdemeanor assaults even though they would otherwise fit the textbook definition of a felonious assault. PATRICK A. LANGAN & CHRISTOPHER A. INNES, BUREAU OF JUSTICE STATISTICS, PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 1-2

(1986).

88. See Leonore M.J. Simon, *How a Specialized Domestic Violence Court Can Be Used to Achieve Therapeutic Interventions in the Lives of Children of Violent Families*. Manuscript on file with the second author.

tic violence court as well as subsequent court reforms—that the failure of the criminal justice system to address effectively domestic violence cases is due, in part, to our strict adversarial system and the way our judiciary has processed these cases in the past. The adversarial system may be better suited to litigating with crimes between strangers and certain other issues brought before our court system. We suggest, however, that it may be less effective when dealing with crimes between intimate partners, family law issues, “victimless crimes” such as drug use, and other specific categories where the adversarial approach may actually exacerbate the problems. Thus, in addition to the problem of competition for scarce resources for domestic violence cases, we see a problem in the way in which the resources are applied (or the failure to apply appropriate resources) to the problem. In contrast to the adversarial system’s procedural and other goals that relate to the offender, therapeutic jurisprudence, preventive law, and restorative justice allow more focus on making victims whole again.

The creation and implementation of the Vancouver Domestic Violence Court was a joint effort between the judiciary and the community. The essential ingredients consisted of one judge in a position to exercise leadership and committed to change, a relatively cooperative judiciary, and the input and support of key stakeholders from various community agencies that included legal actors, treatment providers, victim advocates, and academic support. The lessons learned from this process, however, include the fact that creating change in the American court system is difficult. In attempting to create a domestic violence court, one should not underestimate the obstacles and the potential opposition from individuals within and outside the court. In particular, the lesson learned from the Vancouver Domestic Violence Court is to gently resist initial judicial opposition or reluctance to change. As colleagues become more aware of the benefits of the new court, they will be won over. Resistance can also be countered by actively courting the community to generate the needed political support. In turn, a successfully implemented domestic violence court can effect changes in how seriously the community treats domestic violence.<sup>89</sup> Once a new court is established, it

requires continual revision and adaptation of procedures to accommodate court users and legal actors in each jurisdiction. Once change is successfully wrought in one part of the legal system, the remaining components will be less resistant to change.



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89. See Stephanie Thomson, *One-Judge System for Domestic Violence Cases Wins Praise*, COLUMBIAN, Oct. 24, 1999, at A8.

## American Judges Association - Annual Meeting and Educational Conference September 10-15, 2000 Kansas City, Missouri

This year’s AJA annual meeting will be held September 10-15 in Kansas City. The meeting consists of an educational conference plus AJA business meetings, which include a general assembly for all AJA members and meetings of the AJA Executive Committee, Board of Governors, and other committees. For the budget-minded attendee, the educational programs all take place in a three-day period. A tentative schedule for the conference is found at page 53 of this issue. More information can be found by checking the AJA’s general Web site (<http://aja.ncsc.dni.us>) or by checking the special AJA Conference 2000 Web site (<http://www.law.umkc.edu/aja>).

# The Importance of Understanding Love and Other Feelings in Survivors' Experiences of Domestic Violence

Kate Paradine

When responding to situations involving domestic violence,<sup>1</sup> legal actors often have difficulty understanding the complex emotions with which they are faced.<sup>2</sup> This article uses extracts from in-depth interviews with women who have experienced domestic violence.<sup>3</sup> It is argued that legal actors need to listen to survivors<sup>4</sup> and understand their stories so that legal responses to domestic violence maximize safety, condemn violence, and do not have negative or "anti-therapeutic" effects on survivors' emotional and psychological well-being.<sup>5</sup> This article does not consider the possibilities and dangers of mandatory interventions in cases of domes-

tic violence.<sup>6</sup> Instead, the focus is on ways in which the words, attitudes, and personal responses of legal actors can have therapeutic and anti-therapeutic effects on a woman's process of survival when she is voluntarily involved in the legal process.

## LOVE AND OTHER FEELINGS IN THE PROCESS OF SURVIVING DOMESTIC VIOLENCE

A woman's survival of domestic violence is a complex process of changing feelings.<sup>7</sup> A perpetrator can exploit his partner's feelings as part of the pattern of control that often constitutes domestic violence.<sup>8</sup> Many women are trapped in violent rela-

### Footnotes

1. The term "domestic violence" refers here to a pattern of behaviors (including physical, sexual, verbal, and emotional abuse) in an intimate relationship used by one partner against another in order to exert power and control. Examples include threats, intimidation, humiliation, ridicule, isolation, withholding money, jealousy, possessiveness, minimization, denial, and blaming of the victim for the violence. See R.E. DOBASH & R. DOBASH, *VIOLENCE AGAINST WIVES: THE CASE AGAINST PATRIARCHY* (1979); M. PAGELOW, *WOMAN BATTERING: VICTIMS AND THEIR EXPERIENCES* (1981).
2. R. Busch, "Was Mrs. Masina Really 'Lost'?" *An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence* 7 OTAGO L. REV. 17 (1993); R. Busch, "Don't Throw Bouquets At Me. . . . (Judges) Will Say We're in Love": *An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence*, in *WOMEN, MALE VIOLENCE AND THE LAW* (J. Stubbs ed., 1994).
3. Extracts are taken from seven women's stories. A total of 30 in-depth interviews were conducted in England, with women who had experienced violence from their male partners. For these reasons this article is written using language that refers to female survivors and male perpetrators. For a discussion of the dangers in using social science as the basis of legal rules (such as bias, methodological problems, and generalizing from the limited to the universal) see M. Fineman & A. Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, WISC. L. REV. 107-158 (1987).
4. The term "survivor" is used in preference to "victim" because it reflects the strength and resourcefulness shown by those who survive domestic violence. See E. Gondolf & E. Fisher, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* (1988). No one term adequately reflects the experiences of all those who have experienced domestic violence. Each

person will have a unique experience and "survivors" do not constitute a single, homogenous group.

5. See D. Wexler, *Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence* 35 REVISTA DE DERECHO PUERTORRIQUENO 273 (1996) for a useful introduction to therapeutic jurisprudence. See also, L. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL., PUB. POL. & LAW 43 (1995).
6. See Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996); Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998); L. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L. J. 183 (1997); L. Mills, *Mandatory Arrest and Prosecution Policies for Domestic Violence: A Critical Literature Review and the Case for More Research to Test Victim Empowerment Approaches*, 25 CRIM. JUST. & BEHAV. 306 (1998); L. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 551 (1999).
7. J. Brown, *Working Toward Freedom from Violence: The Process of Change in Battered Women*, 3 VIOLENCE AGAINST WOMEN 5 (1997).
8. In Walker's theory of "learned helplessness" she describes the final stage of the cycle of violence when a violent incident is followed by the abuser being loving and apologetic and promising his partner that there will be no further violence. See L. WALKER, *THE BATTERED WOMAN SYNDROME* (1984). This theory does not apply to all experiences of domestic violence and the pattern of violence may change over time. See M. Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993).

tionships by the fear of further violence if they try to leave,<sup>9</sup> their financial dependence, their perception that there are no other options, and their low self-esteem.<sup>10</sup> Some may also remain because of love and attachment<sup>11</sup>—to the partner, family, children, and home.<sup>12</sup> Christine Littleton says that when women give reasons for not leaving, such as absence of options or “love, faith, and fear,” the law hears only fear.<sup>13</sup>

It is crucial for legal actors to understand the experience of fear and real danger<sup>14</sup> as well as the feelings of connection and commitment of women living through domestic violence.<sup>15</sup> This article focuses primarily on feelings of connection, like love and faith, that are often intertwined with fear, financial dependence, and lack of self-esteem.<sup>16</sup> Feelings of connection need to be understood in the context of the power and control of perpetrators, so that legal actors do not misunderstand the complex realities of survivors of domestic violence.<sup>17</sup>

Love appears in some survivors’ stories as faith in the partner tied up with the hopes and dreams of marriage and family life. Love of children and home play an important part in women’s decision making during the experience of surviving domestic violence. Love is also entwined with feelings of loss, hate, anger, pity, guilt, and grief during the process of separation.

#### FAITH IN PARTNER

One ideal of love is that it does not insist on perfection.<sup>18</sup> All relationships require acceptance, patience, and perseverance. However, a woman experiencing domestic violence who continues to have faith and hope<sup>19</sup> in her partner is more likely to be considered a weak victim and irresponsible mother<sup>20</sup> rather

than someone trying to make her relationship “work.”<sup>21</sup>

Some participants in this research described how hard it was to believe that someone whom they loved could also have such a violent side. This sometimes led to self-blame, denial,<sup>22</sup> and minimization of the violence, as well as excuses and explanations, as ways of coping with the perpetrator’s behavior. Violent men may also use denial, minimization, excuses, justifications, and blame of the partner as a means of controlling her.<sup>23</sup> Caroline<sup>24</sup> tried to explain her partner’s violence as affected by alcohol.<sup>25</sup> She said,

He’s never been verbally violent—can’t even say a nasty word to me when he’s sober. I wish I’d have taken a video of him. I had him out in the kitchen baking cakes with the kids, you know. When he’s been sober he’s been fabulous, bathed them, put them to bed for me. He’s somebody else when he’s sober.

In order to escape domestic violence a woman may have to leave aspects of her partner, which she sees as positive, and begin the painful process of separation.<sup>26</sup> To avoid undermining this process, legal actors must be careful to understand some women’s ways of coping with domestic violence, which often entail continued denial, while refusing to accept the denial, excuses, and justifications for violence offered by perpetrators.

The belief that a perpetrator will change is important for

**One ideal of love is that it does not insist on perfection.**

9. This common form of violence is termed “separation assault” in M. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

10. The effects of domestic violence on survivors include fear and terror, depression, anxiety, anger, shame, self-blame, denial, minimization, and low self-esteem. See O. BARNETT & A. LA VIOLETTE, *WHY BATTERED WOMEN STAY: IT COULD HAPPEN TO ANYONE* (1993); K. Ferraro & J. Johnson, *How Women Experience Battering: The Process of Victimization*, 30 SOC. PROB. 325 (1983); TRAUMA AND RECOVERY (1992).

11. D. Dutton & S. Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 VICTIMOLOGY 139 (1981); D. Graham et al., *Battered Women, Hostages and Stockholm Syndrome*, in FEMINIST PERSPECTIVES ON WIFE ABUSE (K. Yllo & M. Bograd eds., 1988); V. Goldner et al., *Love and Violence: Gender Paradoxes in Volatile Attachments*, 29 FAM. PROCESS 343 (1990); L. Lempert, *Women’s Strategies for Survival: Developing Agency in Abusive Relationships*, 11 J. HERMAN, TRAUMA AND RECOVERY (1992). FAM. VIOLENCE 269 (1996).

12. These may be similar reasons why people do not end unsatisfactory relationships where there is no violence. See M. TYSOE, *LOVE ISN’T QUITE ENOUGH: THE PSYCHOLOGY OF MALE-FEMALE RELATIONSHIPS* 180 (1992).

13. C. Littleton, *Women’s Experience and the Problem of Transition: Perspectives on Male Battering of Women*, U. CHI. LEGAL FOR. 23, at 29, 44 (1989).

14. Homicide statistics show that women are in grave danger from their abusive partners and often experience increased risk of violence and murder when separating from a violent partner. See M.

Wilson et. al., *Lethal and Nonlethal Violence Against Wives*, CAN. J. CRIM. 331, 340-341 (1995); See also Mahoney, *supra* note 9.

15. Littleton, *supra* note 13, at 52.

16. See notes 10 and 11.

17. For examples of such misunderstanding by members of the judiciary, see Busch, “Was Masina Really ‘Lost?’”, *supra* note 2; Busch, “Don’t throw bouquets at me. . . .”, *supra* note 2.

18. The Western ideal of love has its roots in Christianity. One biblical definition, from 1 Corinthians 13: 4-8, is sometimes taken as the model of perfect love:

Love suffers long and is kind; love . . . bears all things, believes all things, hopes all things, endures all things. Love never fails.

19. M. Marden & M. Rice, *The Use of Hope as a Coping Mechanism in Abused Women*, 13 J. HOLISTIC NURSING 70 (1995).

20. Mahoney, *supra* note 9.

21. Lempert, *supra* note 11, at 282.

22. It has been suggested that hope can be a form of denial. See Marden & Rice, *supra* 19, at 77.

23. See J. Ptacek, *Why Do Men Batter Their Wives*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, (Yllo & Bograd eds., 1988).

24. The names of the research participants have been changed to protect their identities.

25. There are many competing explanations for domestic violence ranging from a focus on individual psychology to issues of gender and power. Use of alcohol has had a very limited role to play in the search for explanations of domestic violence. A useful analysis of some of these debates can be found in CURRENT CONTROVERSIES ON FAMILY VIOLENCE (Gelles & Loseke eds., 1993).

26. Mills, *supra* note 6, at 598.

**Often, legal actors fail to understand this complex process.**

many women who do not leave violent relationships.<sup>27</sup> Faith in her partner played an important role in Ann's story. She said, "If you've still got strong feelings for your partner you will be optimistic about things getting better."

Emma said,

All my friends say I wouldn't put up with it if a man did that to me. But when you love and trust somebody it isn't as easy as that. Your feelings don't just stop as soon as they hit you.

It is necessary for legal actors to understand that a particular relationship can seem to a survivor to be warm and loving, with the violent nature of it only gradually overtaking the loving one.<sup>28</sup> This process often takes a lengthy period of realization and adjustment and legal actors should not doubt a woman who remains in her relationship or is silent about the violence for a long time.

It is also important that legal actors consider how their responses may play an anti-therapeutic role in encouraging a survivor's hope and faith in her partner.<sup>29</sup> It has been suggested that domestic violence perpetrator programs and other legal interventions can offer false hope for changes in the partner's behavior, which never happen.<sup>30</sup> Research suggests that a woman is most likely to remain with her abuser if he attends treatment and men may use attendance as a way of manipulating both survivors<sup>31</sup> and legal actors.<sup>32</sup> This is one reason why it is considered crucial for domestic violence perpetrator programs to run alongside support services for survivors.<sup>33</sup>

It is important that legal actors give a woman realistic information about the potential effects of perpetrator programs and other responses<sup>34</sup> so that she is able to make informed choices rather than decisions based on false hope. Such choices are complex and it may be appropriate for legal actors to support verbal information with written material so that a woman is able to reflect in her own time. Women should also be encouraged to continue the ongoing process of safety planning<sup>35</sup> by being given information about all the options available, including shelter, support, and advocacy services.

Another aspect of the feelings described in the women's stories was their hope for the relationship itself and their dreams of falling in love, marrying, and building a family.

## HOPE IN THE RELATIONSHIP

The family, particularly for women, is often idealized as the site of altruism, sacrifice, care, patience, and all-forgiving love.<sup>36</sup> This can remain a powerful image even when a woman is experiencing violence in her family. Emma said,

I think I only ever put up with it because I was married and I had taken marriage seriously and tried to work at it. I kept it all to myself for a long time. I'd married so young and had wanted the marriage to work so much. I'd wanted a family. I thought that bad times like good ones were just a part of marriage. I thought that things would get better.

For Emma, commitment to the vision of family life encouraged her to persevere with the relationship.

Amelia said,

I think you need to be ready in yourself to give up on the relationship that you're in, that it's not going to work no more. That you've tried so many times that you can't keep giving him these chances.

Often, legal actors fail to understand this complex process. Caroline was very distrustful of a particular police officer who she felt had "judged" her, dismissed her views, and pressured her to take steps for which she was not ready. She compared him with her solicitor, saying,

She's very, very nice . . . very understanding. . . . And again she listened—she listened to what I wanted and what I was saying and didn't try to tell me what I should be doing. She took me for what I was.

This non-judgmental support and understanding encouraged Caroline to continue seeking advice from her solicitor, whereas she was reluctant to trust the police officer.

The challenge for legal actors is to condemn domestic violence while understanding the complex journeys of survival, so that women are not judged or blamed for their situation. Showing understanding of the woman's position while condemning her partner's behavior may help her gain confidence in herself and trust in legal responses.

The secrecy and shame surrounding the failure of marriage and intimate relationships was another important feature of some women's stories of domestic violence.<sup>37</sup> Talking about the violence or seeking help was often seen as not just risking further violence and breaking the confidence of the relationship,

27. Pagelow, *supra* note 1; Barnett & La Violette, *supra* note 10.

28. Ferraro & Johnson, *supra* note 10, at 334; L. Lempert, *The Line in the Sand: Definitional Dialogues in Abusive Relationships*, in *GROUNDING THEORY IN PRACTICE* 164 (A. Straus & J. Corbin eds., 1997).

29. Hanna, *supra* note 6.

30. Gondolf & Fisher, *supra* note 4, at 87.

31. *Id.* Pagelow, *supra* note 1; R. Busch & N. Robertson, *The Gap Goes on: An Analysis of Issues Under the Domestic Violence Act 1995*, 17 N. Z. U. L. REV. 337 (1997).

32. Busch & Robertson, *id.*

33. R. Busch & N. Robertson, "Ain't No Mountain High Enough (To

Keep Me from Getting to You)" *An Analysis of the Hamilton Abuse Intervention Pilot Project*, in *WOMEN, MALE VIOLENCE & L.*, 50 (J. Stubbs ed., 1994).

34. Hanna, *The Paradox of Hope*, *supra* note 6, discusses some of the limitations of present research into the effects of domestic violence perpetrator programs.

35. J. DAVIES & E. LYON, *SAFETY PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES* (1998).

36. See F. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, in *FEMINIST JURISPRUDENCE* (P. Smith ed., 1993).

37. Lempert, *supra* note 11.

but as admitting to yourself that your marriage had failed. Rachel described this desire to solve her own problems and her reluctance to admit the extent of her partner's violence,

I kept everything to myself. . . . I suppose I tried to hide the fact that it was actually happening. You know, my idea of, you know, you get married and have children and you stay there. You know, basically it's for life and, you know, really that's what I wanted. . . . I think just really why I did keep it in for so long was because I didn't want to accept the fact that my marriage was failing.

Rachel's story shows that hope in the relationship and the reluctance to end that hope by talking about the violence, coupled with the sense of failure, shame, and fear, helps to keep domestic violence hidden.

It is important that legal actors are aware of how important this hope and sense of failure may be to a woman who is trying to cope with domestic violence. Blaming a woman for the violence or reprimanding her for her attempts to make the relationship work can only add to her sense of shame and isolation. Encouraging reconciliation between the parties is also extremely dangerous and may have a detrimental affect on a woman's personal efforts to come to terms with the violence and end the relationship. Legal actors are in a good position to convey the message to the perpetrator and survivor that violence is not acceptable regardless of the relationship between the parties. Encouraging the hope for the future that a woman can survive outside the violent relationship<sup>38</sup> may be one way of having a therapeutic effect on her emotional well-being.

#### LOVE OF CHILDREN

Love of their children featured heavily in mothers' decisions to stay and to leave a violent relationship. Kate's story is an example of how such decisions may appear contradictory. Kate suffered severe violence while pregnant:<sup>39</sup>

He was a pig but I was pregnant, and I've got two children with him. I really wanted to try and make a go of it. And I stood an awful lot of behavior but not for very long, I mean we're talking about a year. He then turned on the children, which was when I phoned my mum. Because he turned on the children, that gave me the impetus to go.

Kate's desire to keep her children with a father led her to continue in the relationship, yet later it was her desire to keep her children safe that drove her to leave.<sup>40</sup> The perpetrator may use the threat of harming the children or a custody battle to prevent a woman from leaving,<sup>41</sup> and some men use legal pro-

ceedings and contact with children as a way to control a woman after separation.<sup>42</sup>

A mother suffering domestic violence is likely to be driven in different directions by love of her children, knowing that leaving and staying with her partner may have potentially negative effects. Legal actors need to be sensitive to the role that love of their children plays in women's decision making and understand that choices in a situation of domestic violence are rarely straightforward.

**Love of their children featured heavily in mothers' decisions to stay and to leave a violent relationship.**

#### ATTACHMENT TO HOME

Love is a word that is not limited to the context of relationships with people. For many of us, the home is a private place of intimacy, safety, memories, and love that can center us amidst family, friends, school, and work. The privacy of the home means that it is not unusual for a woman's experience of domestic violence to be kept secret for a long time. Also, in decisions to end a relationship, women often have to consider leaving their own and their children's home. Legal actors need to understand the painful nature of such decisions.

It is also important for legal actors to realize the damaging effects of experiencing invasion and violence in a place that is usually relied upon for its safety and security. Emma said,

I hate this house because of all the memories. . . . I could never settle here. I won't stay here, it's haunted for me.

Some women's feelings of attachment may make it important for them to remain at home. For others, separation from the home may be a crucial, albeit painful, step in the process of survival. Feelings about the home change throughout the process of surviving domestic violence. Legal actors need to understand those changes, particularly when making decisions and giving advice which has a direct impact on the home and its occupation.

#### FEELINGS DURING THE PROCESS OF SEPARATION

The need for safety and their changing feelings lead many survivors of domestic violence to begin a process of separation<sup>43</sup> from their partner and sometimes from their home. Acknowledging the need for separation often had far-reaching consequences for the women interviewed, including increased danger and determined efforts by the perpetrator to maintain

38. Marden & Rice, *supra* note 19, at 79.

39. See N. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 *VAND. L. REV.* 1041, at 1047 (1991), for a discussion of how violence often begins and becomes acute during pregnancy.

40. For a summary of the impact of domestic violence on children see Cahn (1991) *ibid.* at 1055-1058; A. Holtzworth-Munroe, et al., *A Brief Review of the Research on Husband Violence on Battered Women and Their Children*, 2 *AGGRESSION AND VIOLENT BEHAV.* 179 (1997).

41. Davies & Lyon, *supra* note 35, at 86.

42. Cahn, *supra* note 39; Mahoney, *supra* note 9, at 43-49.

43. Mahoney, *supra* note 9, at 5 discusses the different meaning of separation in domestic violence. Separation is not always an appropriate choice for women. Separation may not be permanent and may be one of many repeated temporary separations. Separation may also mean increased violence rather than an end to violence. See note 14.

**Guilt is another important aspect of women's decision-making . . . .**

control over his partner.<sup>44</sup> The separation process often meant that a woman had to re-examine her own sense of self, sometimes shaking confidence in her ability to make choices and decisions. It also meant coming to terms with the loss of a relationship, a home, and all the hopes and dreams of that relationship, including

the hopes for her children's future.

Trust can be an important part of negotiating a relationship after separation. Feelings of distrust and fear may make it very difficult for a woman to accept contact between her children and her former partner.<sup>45</sup> In the lead-up to separation, many women were implicitly and explicitly advised by legal actors and others not to trust the perpetrator or to believe his promises. In later child contact disputes, women were sometimes encouraged by lawyers and judges to trust the perpetrator and to act "in the best interests" of their children by facilitating contact. Legal actors need to be aware of the difficulty a woman may face in overcoming her fear and regaining trust in her former partner, particularly when the safety of her children is at stake.

Guilt is another important aspect of women's decision making—the guilt of the partner going to prison, the guilt of him losing his job, the guilt of the children losing a father, and the guilt of a father being separated from his children. Kate said,

I felt so guilty for leaving him, even after everything, I felt really guilty, I'd taken his baby girl away and he told me how much that hurt and I felt really guilty.

Lucy's partner spent two weeks in jail while awaiting trial and was later acquitted of attempted rape. Lucy said,

All my friends were [saying], "Why are you feeling so guilty?" I said, "You know, I loved this person once and now I've put them in prison."

The process of separation includes coming to terms with guilt, which contributes to the pressures under which women stay and return to violent relationships. Guilt also helps to explain why women may find it difficult to take the punitive action, which legal responses tend to require. It is crucial for legal actors to understand these feelings of guilt. Words spoken in court should try to avoid exacerbating such feelings by reinforcing the perpetrator's responsibility for the violence and acknowledging the strength it takes to leave a violent relationship.

Survivors of domestic violence are often afraid of experiencing further physical and emotional abuse from their partner in legal forums. For Caroline, the prospect of actually seeing her partner in court after a period of separation was a source of

real concern because she was uncertain of how she would feel when she did see him. Legal proceedings may be an opportunity for the perpetrator to exploit and manipulate that emotional uncertainty in very subtle ways.<sup>46</sup> This emotional dimension of legal proceedings often goes unrecognized by legal actors. Describing her mixed feelings at the court hearing in which she applied for an injunction against her ex-partner, Yvette said,

Obviously the solicitor and the judge deal with this every day but it was happening to me and to think that it was Tim, the father of Beverly [their daughter] and the bloke that I was gonna marry. It was all sort of emotional and I thought, God, I can't do this.

She continued with the application and the injunction was granted by the judge. She described her reaction,

After that, after we came out of the room my solicitor said, "How do you feel?" I said, "A bit relieved, scared, and upset. A bit mixed up really."

It is important that legal actors are aware of how legal proceedings can prompt a complex range of confusing feelings for a survivor of domestic violence. It should come as no surprise when women are sometimes reluctant to continue along certain legal routes and legal actors should *encourage* a woman by emphasizing the perpetrator's responsibility for the violence and acknowledging her courage in taking legal action.

Legal actors should always be aware of the dangers of intervening in the complex process of surviving domestic violence. Emma said,

There was one point during the divorce hearings when the barristers had to move me in the court because he [her husband] was getting aggressive and abusive. The barristers said it's because he's still in love with you. I thought they just don't understand, that's the last thing I needed him to say. I needed him to say, "Don't put up with it." I used to tell myself that he didn't mean to hurt me and he loved me.

At this point Emma needed support in separating from her abuser and space in which to overcome her feelings of attachment. Legal actors need to understand that feelings like love can be used by perpetrators and others to defend and explain the actions of violent men and to manipulate survivors and legal actors<sup>47</sup> in ways that can undermine a woman's efforts to free herself of the violent relationship.

This research showed that legal actors often met women with incomprehension and sometimes condemnation, appearing not even to attempt to understand the complex feelings and demands with which many survivors of domestic violence struggle. Emma referred to her perception of the limits of the law and legal actors,

I said to my doctor, the legal team was OK but I

44. Mahoney, *supra* note 9.

45. Cahn, *supra* note 39.

46. K. Fischer, et al., *The Culture of Battering and the Role of Mediation*

*in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993).

47. Pagelow, *supra* note 1, at 197

didn't really like any of them. They know the law, but I suppose you can't expect them to put themselves in someone else's shoes. The law doesn't have any emotion.

Is law incapable of responding to human emotions as complex as those involved in domestic violence or does it have a future as a therapeutic agent?

#### THE FUTURE OF LAW AS A THERAPEUTIC AGENT RESPONDING TO COMPLEX STORIES OF SURVIVING DOMESTIC VIOLENCE

Law is "founded on the fictions of formal equality and mutual free agency."<sup>48</sup> Therefore, the legal understanding of choice in domestic violence is usually fairly simple<sup>49</sup>—she leaves or she stays.

The reality is that most choices facing survivors of domestic violence involve ambivalent feelings. Leaving is lonely and dangerous and painful. So is staying. Leaving can be an act of hope for a better future. So can staying. Children may be harmed by leaving. They may also be harmed by staying. Choices faced by survivors of domestic violence, like many decisions, are limited by economic, social, religious, cultural, and legal considerations. Decisions are also shaped by many different emotional forces, including fear and feelings of attachment.

When emotional factors like love and attachment are ignored, legal products are not usually flexible enough to meet individual needs. Also, interactions between survivors and legal actors are likely to be based on misunderstanding and distrust. Flawed understandings of domestic violence may also prevent a woman from identifying herself as a sufferer of domestic violence,<sup>50</sup> because she does not think the law has anything to offer her or because the negative image of a victim is not one with which she identifies.<sup>51</sup>

When a woman seeks legal assistance, there is often a contradiction between legal actors' definitions of success and failure and women's own definitions. For the legal actor, success is usually defined in terms of a legal product—an arrest, a conviction, an injunction, or a favorable divorce settlement.<sup>52</sup> The existence of an identifiable legal product or process in relation to domestic violence is very rarely a simplistic and unqualified "success" for the survivor involved. The legal processes required usually involve a great deal of trauma and pain and

most legal products are limited in how far they respond to women's actual needs.

In this study it was found that women measured success in complex ways, which had to do with how they were treated as people, what was said to them, how it was said, and how carefully they were listened to,<sup>53</sup> as well as whether the law helped them to feel safer. Rather than focusing on the legal decisions, survivors tended to concentrate on the impression they had of the legal actors as human beings. Proceedings involving legal actors who were "cold," "distant," and "impersonal" were sometimes perceived negatively, even when the result was a legal success. The legal actors who listened, responded on a personal level, and showed thoughtfulness and human concern could give a woman the encouragement to continue her struggle. Interaction with a legal agency can be a true success if a woman feels as if the balance of power between herself and the perpetrator has been altered,<sup>54</sup> or she returns to her partner knowing that she can go back to a lawyer or judge for help.<sup>55</sup> When a woman's story is ignored, ridiculed, dismissed, or misunderstood by legal actors, she is not likely to feel comfortable to ask for help in the future.

**For the legal actor, success is usually defined in terms of a legal product . . . .**

#### EMPATHY

Knowledge of the lives of others is necessary for meaningful justice<sup>56</sup> and it has been suggested that connection provides the legal process with the "potential for transformation."<sup>57</sup> Empathy is the specific psychological phenomenon of feeling the emotion of another<sup>58</sup> and requires that one affectively and cognitively imagine oneself in the position of someone else,<sup>59</sup> analogizing with similar experiences of one's own.<sup>60</sup> To allow meaningful empathy, it is important for legal actors to see stories of domestic violence in the context of their own lives in order to understand, for instance, how difficult it is to end any relationship.<sup>61</sup>

Displays of empathy can have a therapeutic effect on survivors of domestic violence and can help legal decision makers to make informed choices in their responses.<sup>62</sup> Empathy begins the process of meeting a survivor where she is rather

48. M. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, at 1317 (1992).

49. N. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2524 (1993).

50. Mahoney, *supra* note 9, at 24-26.

51. K. Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987); Littleton, *supra* note 13; Mahoney, *supra* note 9.

52. Cahn, *supra* note 49, at 2491.

53. For a general discussion of the importance of procedural justice, see T. TYLER, *WHY PEOPLE OBEY THE LAW*. (1990).

54. Walker, *supra* note 8, at 143; D. Ford & M. Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND

EVALUATION (N. Hilton ed., 1993); Mills, *supra* note 6.

55. Pagelow, *supra* note 1, at 219

56. R. WEST, *CARING FOR JUSTICE* (1997).

57. N. Cahn, *Styles of Lawyering*, 43 HASTINGS L. J. 1039, 1061 (1992).

58. L. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987).

59. *Id.* at 1579.

60. *Id.* at 1581-1582.

61. Barnett & La Violette, *supra* note 10 at xxii-xxv; D. Loseke & S. Cahill, *The Social Construction of Deviance: Experts on Battered Women*, 31 SOC. PROBLEMS 296 (1984).

62. Henderson, *supra* note 58.

**Displays of empathy can have a therapeutic effect . . . .**

than where we might wish her to be.<sup>63</sup>

**UNDERSTANDING LOVE AND CONNECTION**

While a woman should never be encouraged to stay in a violent relationship, we need to develop ways of under-

standing the attachment described by women and support those who remain with their partners. Both staying and leaving can be normal responses to domestic violence.<sup>64</sup>

We need flexible packages of responses that fit the stage each individual has reached in her journey to escape domestic violence.<sup>65</sup> We also need to “find ways of embracing battered women, of hearing their painful stories, of accepting that they might go back.”<sup>66</sup> Most legal responses assume a woman is leaving her relationship.<sup>67</sup> Injunctions often demand complete and permanent separation of the partners, ignoring the particular circumstances of the relationship from the woman’s point of view. Home alarms and emergency mobile telephones may only be available to women living separately from their partners. Some domestic violence perpetrator programs require a criminal justice system referral, which excludes men whose partners do not wish to use criminal sanctions. The move towards state criminal prosecution and enhanced evidence gathering, which does not rely on victim testimony, begins to acknowledge the difficulties faced by women in cooperating with criminal prosecutions.<sup>68</sup> However, universally applied, inflexible application of criminal sanctions risks disempowering and alienating some survivors, and may ignore their own assessment of their lives.<sup>69</sup>

There are some indications that the legal system is beginning to acknowledge the complex reality for women experiencing domestic violence. Domestic violence support groups and victim advocacy services provide a safe environment for a woman to work through her feelings and make decisions.<sup>70</sup> Encouraging a woman to speak about her emotions may build trust and overcome her feelings of isolation. Talking itself can be empowering and healing,<sup>71</sup> and allowing a woman to

describe positive connections to the abuser may enable her to reflect critically on her relationship and begin the process of separation.<sup>72</sup> Legal actors can listen to a woman’s story and acknowledge the complexity of her situation while condemning the violence of her partner. It is also important that referrals to sources of support are made that enable a survivor to explore her complex feelings and make decisions about her future.

**SUPPORTING SEPARATION**

Many women enter the legal system when they are trying to separate, temporarily or permanently, from their partners. Separation was necessary at different stages for all of the women who participated in this research, but it was rarely the final end to violence that the legal system seems to envisage. Separation often increases violence<sup>73</sup> and is unlikely to end the relationship because of continued emotional commitment or attachment to the partner through a shared history, home, and children. The experiences of the women in this research suggest that the legal system and legal actors were rarely able to appreciate this complexity.

The barristers who told Emma that her ex-partner was intimidating her in court because he loved her failed to understand the dynamics of domestic violence or the tactics of perpetrators. By the time Emma had reached the stage of divorce, she had decided that ending her hope in the relationship was the only way to carry on. She needed support and reassurance in following this difficult decision through.

It has been argued that the recovery and grieving process of divorce may require acknowledgement and revisiting of the pain of the past,<sup>74</sup> and that some degree of conflict, polarization, and imputation of blame is necessary for a true psychological separation from the former partner.<sup>75</sup> The use of divorce mediation and restorative justice conferences in cases of domestic violence may endanger a woman’s physical safety, reproduce unbalanced power relationships, and give an abuser another opportunity to threaten, manipulate, control, blame, beg, and cajole his partner by exploiting her feelings of attachment.<sup>76</sup> This could be potentially destructive at a time when she may be attempting to overcome feelings of love and fear.

63. L. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996).

64. Loseke & Cahill, *supra* note 61; Mahoney, *supra* note 48, at 1285.

65. Brown, *supra* note 7.

66. L. MILLS, THE HEART OF INTIMATE ABUSE - NEW INTERVENTIONS IN CHILD WELFARE, CRIMINAL JUSTICE AND HEALTH CARE SETTINGS 4 (1998).

67. Davies & Lyon, *supra* note 35.

68. See Hanna, *supra* note 6.

69. L. Mills, *supra* note 66, especially ch. 3; Mills, *Mandatory Arrest*, *supra* note 6; Mills, *Killing Her Softly*, *supra* note 6.

70. Busch & Robertson, *supra* note 33.

71. See J. Pennebaker, OPENING UP: THE HEALING POWER OF EXPRESSING EMOTIONS. (1997).

72. Mills, *Killing Her Softly*, *supra* note 6, at 598

73. Homicide statistics show that women are in grave danger from their abusive partners and often experience increased risk of violence and murder when separating from a violent partner. See M.

Wilson, et al., *Lethal and Nonlethal Violence Against Wives*, CAN. J. CRIM. 331, 340-341 (1995); See also Mahoney, *supra* note 9.

74. S. Day Sclater, *Narratives of Divorce*, 19 J. SOC. WELFARE & FAM. L. 423, 424 (1997).

75. *Id.* [citing to D. VAUGHAN, UNCOUPLING: TURNING POINTS IN INTIMATE RELATIONSHIPS (1987)].

76. H. Astor, *Swimming Against the Tide: Keeping Violent Men Out of Mediation*, in WOMEN, MALE VIOLENCE AND THE LAW (J. Stubbs ed., 1994); Fischer, et al., *supra* note 46; N. Hilton, *Mediating Wife Assault: Battered Women and the “New Family,”* 9 CAN. J. FAM. L. 29 (1991); B. Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 J. L. & SOC. 237(1998); L. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN’S L. J. 57 (1984); J. Stubbs, *Shame, Defiance, and Violence Against Women: A Critical Analysis of “Communitarian” Conferencing*, in WOMEN’S ENCOUNTERS WITH VIOLENCE: AUSTRALIAN EXPERIENCES (S. Cook & J. Bessant eds., 1997).

Legal actors must understand the potential role of fear, love, and other emotions in the process of surviving domestic violence. The question remains whether the legal system and legal actors can appreciate the complexity of domestic violence and respond creatively to stories like those of Ann, Emma, Caroline, Amelia, Lucy, Yvette, Rachel, and Kate in ways that are safe, therapeutic, and loving.



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# Mental Health Review Tribunals in the UK: Applying a Therapeutic Jurisprudence Perspective

Nicola Ferencz and James McGuire

Judges and other legal personnel, understandably, have a profound interest in the impact of their decisions on all those who come in contact with the law. Naturally, the outcomes of court decisions, whatever their specific context, are of enormous importance to all individuals concerned. But in recent years there has been a growing recognition that legal processes in themselves, including the ways in which courts and judges interact with citizens, also have significant impacts on people before a tribunal or court. Indeed, Tom Tyler has reviewed evidence that the most influential features of legal practices upon individuals are not “objective characteristics of the case disposition experience,” but rather “their assessment of the fairness of the case disposition process.”<sup>1</sup>

The study described in this article is concerned with the perceptions of the decision-making processes of the Mental Health Review Tribunals in England and Wales. We have interviewed members of tribunals charged with reviewing decisions on detention as well as patients who have appeared before those tribunals. The study analyzes disparate perceptions of tribunal procedures emanating from the two sets of interviewees with the purpose of understanding how those procedures might be made more effective. Understandings gained from this study provide a basis for recommending reforms to law and practice and judicial behavior that promote the psychological and physical well-being of those affected by tribunal proceedings and decisions.

In searching for an intellectual framework within which to locate the research, the perspective of therapeutic jurisprudence appeared to offer the kind of analytic approach required, together with the possibility of affording particularly valuable insights. Therapeutic jurisprudence, the study of law as a therapeutic agent,<sup>2</sup> provided a foundation that was both conceptually and ethically inter-linked with the research aims of this study, which include expanding upon previous research and re-

establishing a dialogue on the merits of the tribunals, and providing an impetus for procedural improvements for tribunal clients.

In this study, a primary focus of interest is upon the impact of legal processes on the individuals who use them or who are subject to them. One possibility raised by this is that in some cases, legal procedures that are designed to safeguard an individual's rights might in reality be anti-therapeutic. If these procedures are identified, it is incumbent on us to be aware of their impact, and to address the necessary steps that could enable more appropriate changes to be introduced.

## LEGAL BACKGROUND OF MENTAL HEALTH REVIEW TRIBUNALS IN THE UK

Like most other countries, the United Kingdom has a special set of laws concerned with the management and care of persons with severe mental disorders.<sup>3</sup> In England and Wales, patients with a defined mental illness or personality disorder who are thought to pose a risk to themselves or others can be compulsorily detained in hospital. The rules that govern such detention are defined by the 1983 *Mental Health Act* (MHA).<sup>4</sup> This states that patients who meet certain criteria in respect of mental disorder and dangerous behavior can be placed under sections of the MHA (colloquially, “sectioned”); patients sectioned can then be confined for varying amounts of time in secure hospital units.

The level of security involved may vary considerably. The majority of patients made subject to these conditions are held in environments such as locked psychiatric wards in district general hospitals; there are wards of this type in local hospitals in most parts of the country, each housing a small number of patients only. Others may be hospitalized in purpose-built “medium secure” units; each administrative health region has

### Footnotes

1. T. R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 6, 7 (D. B. Wexler & B. J. Winick eds. 1996) [the book hereafter referred to as *LAW IN A THERAPEUTIC KEY*].
2. D.B. WEXLER & B.J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); and *LAW IN A THERAPEUTIC KEY*, *supra* note 1. See also J. McGuire, *Can the Criminal Law Ever Be Therapeutic?*, 18 *BEHAV. SCI. & LAW.*, in press (2000).
3. Though we have referred here to the United Kingdom, which

includes England, Wales, Scotland, and Northern Ireland, specific acts of legislation may sometimes apply to only one or other of these divisions of the realm. The most significant aspect of this from a legal perspective is that the Scottish system has its own traditions that are distinct from those in the remainder of the UK, and its administration is largely separate. In this essay, however, we are focusing primarily on the situation of the Mental Health Act (1983), which covers England and Wales only.

4. *Mental Health Act (England and Wales)* (London: Her Majesty's Stationery Office). The MHA is accompanied by a *Code of Practice*, which sets out policies to be followed in respect of a number of key aspects of its operation.

one unit of this type, and their capacity generally varies between 30 and 70 beds. For a proportion of persons who are assessed as presenting the most serious risk, detention may be indeterminate. Such individuals are generally placed in maximum security institutions, familiarly known as the "Special Hospitals." There are three such hospitals in England: Broadmoor (founded in 1863), Rampton, and Ashworth, altogether housing approximately 1,700 patients, many of whom have committed homicides and other of the most serious types of crimes.

Broadly speaking, there are two kinds of sections, or commitments, that can be imposed under the MHA. The first are known as the "civil" sections and, in essence, their usage depends on decisions made by medical practitioners without reference to courts of law. The length of detention that results from implementing these procedures can vary from 28 days to 12 months and longer. The second type includes a range of measures taken by the criminal courts, which may make what is known as a *Hospital Order* (MHA section 37) requiring that the individual in question be detained in hospital for treatment. In a proportion of cases, this order may be further strengthened through imposition of a *Restriction Order*.

When committed to a facility under one of the MHA sections, the patient's care is managed and many aspects of his or her welfare are decided by the *Responsible Medical Officer* (RMO), who, as this title implies legally, is responsible for the patient's care. The RMO is a consultant psychiatrist; this role is itself specified in one of the sections of the MHA. While he or she will typically have the support of, and work alongside, a multidisciplinary team, the RMO's recommendations based on his or her assessments of patients play a pivotal role in influencing how long patients remain in the hospital and whether or not they should be discharged.

There is, however, a purportedly corrective or countervailing power alongside this. Under another MHA provision, the patient has the right to question the legitimacy of his or her detention and can apply to a *Mental Health Review Tribunal* (MHRT) in order to have this issue assessed. The tribunal provides an independent hearing and consists of a three-member panel—respectively, one legal, one medical, and one lay member. The legal member is chairperson or *president* of the tribunal and may be a solicitor (attorney), though, with patients who are detained with restrictions, this may be more likely to be a circuit judge. The medical member is usually a psychiatrist who is independent of the hospital where the patient is detained, and who also interviews the patient beforehand as well as during the tribunal hearing. The lay member, customarily, is not entirely lay in that he or she is likely to have a background in social or community issues. Although tribunal hearings are generally less formal than courts of law, patients are

usually represented by a solicitor (attorney). This is not always the case (some patients choose to represent themselves) and the patient may or may not attend the hearing. In effect, other members in attendance become witnesses; they include the RMO, a social worker, possibly a psychologist who has provided therapy for the patient, and the patient's relatives. The overall function of the process is to act as a check on whether the patient continues to meet the legal and medical criteria for detention under the MHA.<sup>5</sup> If this is found not to be so, the tribunal may order the patient to be discharged.

[L]egal procedures that are designed to safeguard an individual's rights might in reality be anti-therapeutic.

### PRIOR RESEARCH

This article's focus is the working of the Mental Health Review Tribunal, and in what follows we describe how a tribunal is experienced and perceived respectively by patients and tribunal members.<sup>6</sup> To prepare the ground for this, let us first consider available research on the functioning of MHRTs. Very little research has sought to evaluate the role of the tribunal. The major exception is the work of Jill Peay,<sup>7</sup> who conducted an extensive project during the 1980s on the operation of the tribunal and made a number of astute observations. Sadly, neither subsequent policy departures nor research studies have furthered her recommendations. Her research examined two elements of the MHRT's role: first, the impact of the MHA on the tribunal's work (MHRTs had existed prior to the 1983 passage of the MHA); and second, the MHRT's decision-making process.

In her study, Peay used a variety of methods to gather information. These included semi-structured interviews with tribunal members and analysis of case records. She found that patients described a number of concerns, particularly over relationships with their RMO. Patients were disgruntled by erroneous statements written about them in reports prepared by their doctors, and they were unhappy with the overall level of contact they had with their RMOs. Patients valued the role of the tribunal, but not necessarily for the purposes for which it was originally designed. They emphasized the opportunity to state their concerns regarding their hospital care, and to hear what staff had to say about their progress.

Peay concluded that the difficulties expressed by patients were worrying, particularly when they talked about their relationships with their RMO. The RMO's opinion is a crucial factor in whether a patient is detained or discharged. If patients felt that they did not receive adequate time and care, then a true picture of their progress might not be represented at the

5. R. Jones, *MENTAL HEALTH ACT MANUAL* (4th ed. 1994).

6. Further details of this research can be found in the following paper, which is currently being submitted for publication. N. Ferencz and J. McGuire, *Patient's Experiences of the Mental Health Review Tribunal* (1999).

7. J. Peay, *Mental Health Review Tribunals: Just or Efficacious Safeguards?* 5 *LAW AND HUMAN BEHAVIOUR*, at 161-186 (1981); J.

Peay, *Mental Health Review Tribunals after the Act: A Significant Improvement?* 4 *ISSUES IN CRIMINOLOGICAL AND LEGAL PSYCHOLOGY*, at 37-46 (1983); J. Peay, *The Mental Health Act 1983 (England and Wales)*, *Legal Safeguards in Limbo*, 14 *LAW, MEDICINE AND HEALTH CARE* at 180-189 (1986); J. Peay, *TRIBUNALS ON TRIAL: A STUDY OF DECISION-MAKING UNDER THE MENTAL HEALTH ACT 1983* (1989).

**A major . . .  
theme described  
by patients was  
the degree of  
communication  
difficulty they  
experienced . . . .**

tribunal. Furthermore, she found that the tribunal itself often concurred with the RMO's recommendation. In 84% of their decisions, tribunals were found to agree with the recommendation made by the RMO; this led Peay to question whether the tribunal was actually prepared to exercise its discretionary discharge powers.

MHRTs have received little attention from researchers during the last ten years. However, a small number of investigations have thrown light on several aspects of the tribunal's functioning. This work includes analysis of reports presented to tribunal hearings,<sup>8</sup> examination of the difficulties that tribunals face as a result of delays and resultant costs,<sup>9</sup> and descriptive work concerning the patients who use MHRTs.<sup>10</sup>

#### THE PRESENT STUDY

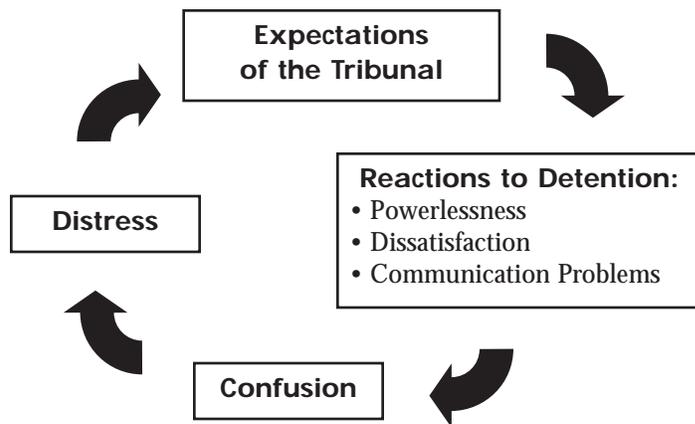
The studies listed above focused on specific aspects of the functioning of the tribunal. There is no research that furthered the earlier concerns expressed by Peay or evaluates the tribunal's role. In the present study we attempted to address some of the issues raised by Peay and to investigate what patients, judges, and other tribunal members think about the tribunal today. Given these objectives, the present study needed to be exploratory and it was decided that a mixture of qualitative (e.g., interviews) and quantitative (e.g., systematic analysis of the interview contents) methods would be used in order to meet the research aims.<sup>11</sup> Those aims were to investigate the experiences of patients who had recently attended their MHRT hearing and to investigate tribunal members' views of the MHRT itself. The main method employed was interviewing; interviewees were chosen using a purposive sampling method and all interviews were tape-recorded, as required by established interviewing techniques.<sup>12</sup> For the patients, the interview began by asking them to describe their most recent tri-

bunal experience. Tribunal members, too, were asked to describe a recent tribunal experience.

#### RESEARCH FINDINGS

Patients and MHRT members demonstrated a number of differences in how they viewed the tribunal procedure. Patients described a number of key themes, which tended to fall into two categories: reactions to their detention in general; and specific reactions to the tribunal experience. Similar, overlapping themes occurred in both categories and patients described a "cycle of distress," which typically begins when they enter hospital. This cycle appears to be perpetuated by the tribunal process (see Figure 1).

**FIGURE 1: THE CYCLE OF DISTRESS**



Furthermore, patients' expectations of the tribunal appeared to be correlated to their tribunal experience. Understanding the elements of this cycle of distress provides critical insights for improving outcomes for patients through improved tribunal procedures.

A major, and in many ways pre-eminent, theme described by patients was the degree of communication difficulty they experienced with their care staff and with the tribunal.

8. P. Davidson and A. Perez de Albeniz, *Reports Prepared for Mental Health Review Tribunals*, 21 *PSYCHIATRIC BULLETIN* at 364-366 (1997); B. Brockman, *Preparing for Mental Health Review Tribunals: Reports and Dilemmas*, 17 *PSYCHIATRIC BULLETIN* at 544-547 (1993).
9. C. A. Kaplan, *Mental Health Review Tribunals and the Council on Tribunals*, 19 *PSYCHIATRIC BULLETIN*, at 438-441 (1995); S. Blumenthal and S. Wesseley, *The Cost of Mental Health Review Tribunals*, 18 *PSYCHIATRIC BULLETIN* at 274-276 (1994); S. Blumenthal and S. Wesseley, *The Pattern of Delays in Mental Health Review Tribunals*, 18 *PSYCHIATRIC BULLETIN* at 398-400 (1994).
10. K. F. G. Saad and S. P. Sashidharan, *Mental Health Review Tribunals*, 16 *PSYCHIATRIC BULLETIN* at 470-472 (1992). These authors reviewed a series of patients who applied for tribunals over an 18-month period. They concluded that the only variable that was related to outcome was gender.
11. Seventeen patients and ten tribunal members agreed to take part in the study. A combination of content analysis and grounded analysis was employed to complete a sequence of steps designed to identify emergent themes in the responses made by patients

- and MHRT members respectively. [For further information on content analysis, see K. Krippendorf, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (1980); on grounded theory, see B. G. Glaser and A. L. Strauss, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967).] First, interview data was transcribed and a content analysis was conducted. The data were also analyzed qualitatively in order to identify any recurring themes. Second, the emerging themes were used as a template for two interviews in order to test out the generated themes. Both authors conducted this process independently and some modifications were made to the classification system. Next, the themes were analyzed so that any linkages between them could be identified. Fourth, agreement ratings were generated between the two authors' use of the classification system. As a separate component of the analysis, similarities and differences between responses from patients and members to the 15 key statements were analyzed using statistical tests.
12. For discussion of these sampling and interview approaches, see M. Q. Patton, *HOW TO USE QUALITATIVE METHODS IN EVALUATION* (1987).

Characteristic statements included:

The tribunal—they weren't even interested in it, I didn't get my say.

They wouldn't let me talk, tell my side of the story. They were listening to all the others first.

Well, I thought they'd listened to me a bit more than they did do. I would have thought they would have done [more].

Patients appeared to feel alienated from proceedings that were designed as an independent review of their detention status:

They're so old, I felt like I was at school . . . They were quite out of touch, they seemed to say things were minor and they were little things when I don't think they were.

Yes you can get confused at a tribunal because they speak amongst themselves. It is like a trial really.

There were, of course, conflicting views expressed, both between members and patients, and amongst members themselves. Members differed in how well they thought patients understood what was happening in the tribunal. Also, they differed in the extent to which they believed that they gained an accurate picture of the patient. Eight out of ten tribunal members said that they were happy with the tribunal. All of those interviewed, however, did describe some problems. These included, for example, a dislike of specific hearings and of how independent reports were used, the need for further training, the wish for feedback concerning patients' subsequent progress, and difficulties with RMOs.

Finally, the results from the rating scales were investigated by conducting significance tests on the average scores for members and patients. These results demonstrated two interesting findings. First, patients showed more variability in their replies than did members (their ratings covered a significantly wider range). Second, there were statistically significant differences (e.g., differences unlikely to be the product of chance factors) between patients and tribunal members on several of the scales. Thus, for example, patients were significantly less likely than MHRT members to agree that the MHRT is an independent body. Also, patients were significantly less likely to agree that the tribunal was fair. These results demonstrated that there are important differences between how patients and tribunal members view the tribunal process, with tribunal members demonstrated a more favorable view.

## CONCLUSIONS

The results strongly suggest that patients and MHRT members have quite different views of the tribunal process. There may be a marked need, therefore, for patients to have more education about the role of the tribunal and of its functioning

and operation. Patients feel that they have not been heard and that their concerns have not been recognized. Communication needs to improve between staff, tribunal members, and patients so that the cycle of distress described by patients can be addressed.

These findings are consistent with and provide further support for the conclusions of other researchers who have examined similar issues. Jack Susman,<sup>13</sup> in a study of conflict resolution in hospitals, found psychiatric patients were "very concerned with receiving fair process" in resolving disputes, and they were certainly capable of discerning the degree of fairness of procedures regardless of the actual outcome for themselves. Such findings underscore a fundamental principle of the therapeutic jurisprudence perspective. In a study with objectives similar to the present one, Alexander Greer and his colleagues<sup>14</sup> interviewed patients involved in civil commitment hearings and found they reported distress and felt they had "little or no voice" in the proceedings. Their perceptions of the legal process appeared inter-linked with their general experiences of treatment in hospital, marked in most cases by a lack of trust in their doctors.

The therapeutic jurisprudence approach helps to draw our attention to these experiences and provides a basis for seeking to remedy these concerns. The proposals of Wexler and Winick,<sup>15</sup> that the role of law must receive attention when its practice proves to be anti-therapeutic, are thought to be particularly relevant to these tribunals. This approach also questions whether a biomedically oriented viewpoint should be paramount in our understanding of and response to mentally disordered offenders; it stresses the potential importance of psychosocial information when guiding the treatment of patients with mental health difficulties. Congruent with this viewpoint, recent research on prediction of recidivism by James Bonta and his colleagues<sup>16</sup> suggests that the reliance on the medical features of a mental disorder presentation is unfounded; demographic and criminal history variables prove to be better predictors. Furthermore, mental illness diagnoses were found to be unrelated to (indeed, negatively correlated with) recidivism. This would suggest that a psychologist's or a social worker's report could provide better evidence in helping the tribunal to make a decision. The comments of one tribunal member clearly indicated that the former type of evidence is under-valued:

The medical [evidence] is crucial, the medical evidence is decisive. I am not going to decide a case on a probation report or a social work report and you sometimes get social workers who step out of their role and become the advocate for the defendant and pronounce

13. J. Susman, *Resolving Hospital Conflicts: A Study on Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY* 907.

14. A. Greer, et al., *Therapeutic Jurisprudence and Patients' Perceptions of Procedural Due Process of Civil Commitment Hearings*, in *LAW IN A THERAPEUTIC KEY* 923. Patients reported feeling "angry, sad, displeased, and confused" and had a sense of being "coerced." *Id.* at 930.

15. See *supra* note 2.

16. J. Bonta, et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 No. 2 *PSYCHOLOGICAL BULLETIN* at 123-142 (1998); and see J. McGuire, *Commentary on the Efficacy and Effectiveness of Community Treatment Programs in Preventing Crime and Violence in Those with Severe Mental Illness in the Community* by Kirk Heilbrun and Lori Peters, *PREVENTION OF CRIME AND VIOLENCE BY MENTALLY DISORDERED OFFENDERS* (S. Hodgins and R. Muller-Isberner eds. 2000).

on psychiatric matters... we have to decide this case on criteria of dangerousness and I am not having this from a social worker as to whether somebody is safe.

Tribunal members appeared to be sensitive to the needs of patients. However, they demonstrated inconsistencies in their actions and described many different approaches for dealing with their difficulties. As with any public service, there needs to be some analysis of how the tribunal system operates as a whole. This analysis should focus on how the tribunal discharges its role. The tribunal system is an independent body that was designed to safeguard the rights of patients who had been detained. Disagreements between tribunal members and patients, therefore, require attention and patients' concerns need to be properly addressed. Analysis of the tribunal could take the form of an internal audit of procedures so that problems can be identified and solutions generated.

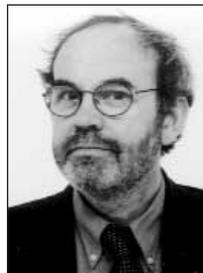
Members were willing to listen and were eager to receive feedback about their actions. It is recommended that patient follow-up statistics be tabulated and maintained so that members would receive information about their actions. Furthermore, this process could be incorporated into a wider training program that would support tribunal members and move towards identified goals that recognize the provision of good service. This would mean that good practice could be extended and that practice that fell below such standards could be eliminated.

Finally, further research is needed to continue the focus on the functioning of the Mental Health Review Tribunal. This should address both the difficulties for patients as well as tribunal members and could be extended to review of the entire tribunal procedure. Monitoring of any procedure is imperative so that individuals' rights can be safeguarded and necessary improvements made. If the process entails difficulties, then

these deserve attention within the provision and funding of mental health services. If they cannot be adequately addressed, then attention needs to focus on why, and whether the tribunal system in its current format can actually fulfill its designated functions.<sup>17</sup>



Nicola Ferencz is a clinical psychologist working in a medium security mental health unit in Stafford, England. She obtained her doctorate qualification in 1998 and completed the current research as part of her degree. The study has uncovered many important issues regarding the impact of the tribunal process upon patients' mental health. Her current aim is to continue to explore this area and to increase public and professional awareness of these issues.



James McGuire is director of studies of the doctorate in clinical psychology training program at the University of Liverpool in England. He is a chartered clinical and forensic psychologist and carries out assessment of offenders for criminal courts and Mental Health Review Tribunals. He has conducted research in prisons, probation services, adolescent units and secure hospitals on aspects of the effectiveness of treatment with offenders. He is the author or editor of eight books and more than 70 other publications. He is currently conducting a number of research projects on the development, implementation, and evaluation of cognitive skills training programs.

17. The last major review of law pertaining to mentally disordered offenders was that undertaken by the Butler Committee in 1975 (Home Office/Department of Health and Social Security, *Report of the Committee on Mentally Abnormal Offenders [The Butler Report]*) (1975)(Cmnd. 6244. London: Her Majesty's Stationery Office). There followed an eight-year gap before some of its proposals were enacted in the present Mental Health Act (1983). In comparative terms, by those standards, the pace of change at the present moment is little short of breathtaking. In July 1999, the government published a new set of proposals for the management of persons with severe personality disorders (Home Office/Department of Health, *Managing Dangerous People with Severe Personality Disorder: Proposal for Policy Development*

(1999)(London: Her Majesty's Stationery Office). Only four months later, in November 1999, a second consultation document was published, the product of a specially commissioned expert committee. (Department of Health, *Reform of the Mental Health Act 1983: Proposals for Consultation* (1999)(Cm. 4480. London: Her Majesty's Stationery Office). At the time of writing, responses have been invited to this consultation document, with a submission deadline of March 31, 2000. A centerpiece of the proposals is the establishment of a new kind of independent tribunal or decision-making body, the precise model for which has yet to be determined. This group would have powers regarding admission to hospital, the issue of orders for compulsory treatment, and review of detention.

# 2000 Annual Educational Conference

American Judges Association/American Judges Foundation

September 10-15, 2000 Kansas City, Missouri

## Tentative Schedule of Events

### Sunday, September 10, 2000

9:00 a.m. - Noon

Budget Committee and Executive Committee meetings

12:15 p.m.

Kansas City Royals game vs. Texas Rangers (optional)

6:00 - 7:00 p.m.

New Attendees Reception

7:00 - 8:00 p.m.

Opening Reception

### Monday, September 11, 2000

9:00 - 10:15 a.m.

Opening Remarks and Keynote Address: Roger Warren, president, National Center for State Courts - "Public Trust and Confidence in the Courts"

10:30 - 11:15 a.m.

Chief Justice Gerald VandeWalle, North Dakota Supreme Court - "Report on the 'Best Practices' Project"

11:15 a.m. - Noon

Address: William S. Sessions, former director of the FBI and former federal judge

Noon - 1:45 p.m.

Annual Awards Luncheon  
Speaker: Chief Justice William Ray Price, Missouri Supreme Court

1:45 - 3:15 p.m.

Pamela Casey, National Center for State Courts, and Judge Steve Leben, Johnson County, Kansas - "Trial Court Performance Standards"

3:30 - 5:00 p.m.

David Rottman, National Center for State Courts, and Alan Tomkins, director, University of Nebraska Public Policy Center - "What the Public Thinks of Us - Polls and Surveys on the Courts"

6:00 - 10:00 p.m.

Barbecue and music at Steamboat Arabia Museum



### Tuesday, September 12, 2000

7:30 - 9:00 a.m.

American Judges Foundation Trustees meeting

9:00 - 10:45 a.m.

Judge Brian McKenzie, Oakland County, Michigan - "Judicial Outreach"

11:00 a.m. - Noon

Judge Glen Norton, Ralls County, Missouri - "Judicial Ethics Update"

Noon - 1:30 p.m.

American Judges Foundation Luncheon Speaker: Dean Burnele Powell

1:30 - 2:30 p.m.

Judge Jeffrey Rozinek, Miami, Florida; Judge Pedro Hernandez, Billings, Montana; Judge James Faison, Camden, New Jersey - "Diversity and Ethnic Equality in the Courts"

2:30 - 3:30 p.m.

David Rottman, National Center for State Courts - "Community-Focused Courts"

3:45 - 4:45 p.m.

Judge Libby Hines, Ann Arbor, Michigan - "Domestic Violence Update"

6:00 - 10:00 p.m.

Cocktail Reception, Nelson-Atkins Museum of Art; Tour of the Country Club Plaza

### Wednesday, September 13, 2000

8:00 a.m. - 2:00 p.m.

Vendor Show

8:00 - 10:00 a.m.

AJA committee meetings

10:00 a.m. - Noon

AJA House of Delegates meeting

2:00 - 4:00 p.m.

Professor Charles Whitebread - "Recent Decisions of the U.S. Supreme Court"

7:30 - 10:00 p.m.

Tour of the 18th and Vine District, including the Negro Leagues Baseball Museum and the American Jazz Museum

### Thursday, September 14, 2000

8:00 - 10:00 a.m.

AJA General Assembly meeting

10:00 a.m. - Noon

Meeting of new AJA Board of Governors

7:00 - 8:00 p.m.

Champagne Reception

8:00 - 11:00 p.m.

Installation Banquet and Dancing

### Friday, September 15, 2000

8:00 - 10:00 a.m.

Meeting of new AJA Executive Committee

For registration materials, contact Shelley Rockwell at the National Center for State Courts, (757) 259-1841. Also watch for updates on the AJA Web site (<http://aja.ncsc.dni.us>) and on the special AJA Conference 2000 Web site (<http://www.law.umkc.edu/aja>).

# From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts

Nathalie Des Rosiers

In 1998, the Canadian federal government asked the Supreme Court to rule on the constitutionality of a unilateral Québec secession.<sup>1</sup> Asking the question at a time where there was no immediate plan for another referendum on the question of Québec's independence was risky.<sup>2</sup> It was a move designed to appease the "rest of Canada," not Québec.<sup>3</sup> In fact, it angered most Québécois: The Québec government refused to participate in the hearing, arguing that nine federally appointed people had no jurisdiction to decide on the right to self-determination of the Québec people. The Québec media presented the federal argument as an indicator that the constitution of Canada was a "prison" for Québec, an Alcatraz from which Québec could not escape. While the case was being heard, Québécois demonstrators picketed in front of the Supreme Court building, protesting the Court's jurisdiction over the right of self-determination of the Québec people.

On August 20, 1998, the Supreme Court of Canada issued its decision.<sup>4</sup> Québec did not have the right, under the current Canadian constitutional arrangement, to unilaterally secede, nor did it have that right at international law. However, the court went on to say that a "clear" majority vote in Quebec on a "clear" question in favor of secession would confer "democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize."<sup>5</sup> Both

sides, the Québec separatists and the spokespersons for the federal government alike, cheered.<sup>6</sup> Although the debate is far from over on the Québec-Canada relationship, and the implications of the decision continue to be debated,<sup>7</sup> there was nevertheless a certain sense of relief and peace that emerged after the decision. At a minimum, the predicted outcry and violence did not occur. This article is an attempt to explain why.

I argue that the approach of the Supreme Court of Canada as an appellate court was more "therapeutic" than the one it had used in the past to deal with Québec issues. In the first part, I develop the idea of the therapeutic role of an appellate court dealing with minority-majority disputes. I argue that courts should move from being magical "tellers of the truth" to becoming more process-oriented listeners, translators, educators and, if possible, facilitators. I expose what I see as two powerful insights from the therapeutic jurisprudence movement that could be applicable to the resolution of minority-majority disputes. In the second part, I try to apply this hypothesis of the process-oriented listener to the treatment of two Québec issues by the Supreme Court of Canada. I first situate briefly the decisions in the history of Québec-Canada conflicts, and then contrast them. I conclude with some observations on the potential uses of a "therapeutic" approach in minority-majority disputes.

## Footnotes

1. Under Canadian constitutional law, it is possible for the federal government to ask questions of the Supreme Court. See Supreme Court Act § 53, R.S.C. C.S.-26 (1985). The provincial governments have similar powers to refer questions to their respective Courts of Appeal. The limits of such reference power, as it is called, were hotly debated. See also *Ref. re Secession of Québec*, 2 S.C.R., 217 (1998). The "amicus curiae," who represented the Québec side, insisted that such a hypothetical question (although a separatist government is in power in Québec, it lost by a small margin its last referendum on the question) ought not to have been referred to the Supreme Court. The court decided to answer the question on the basis that it raised some interpretation question about the constitution of Canada. *Id.* at 234; see generally, *Id.* at 4-15. [The court distinguished the U.S. Supreme Court precedent of *Muskrat v. United States*, 219 U.S. 346 (1911).]
2. There have been two referenda on the question of Québec's sovereignty, which were both won by the "no" side, the side against the secession of Québec from Canada. However, while the 1980 referendum was won by the "no" side at 60%, in 1995, the "no" side gathered only 50.5% of the votes, prompting the hypothesis that a

third referendum would see a "yes" majority.

3. The "Rest of Canada" or (ROC) is an expression which describes the 9 provinces and 3 territories outside of Québec. It is preferred to the expression "English Canada," which ignores the fact that there are over 500,000 Francophones in Canada outside of Québec, and several other groups, Aboriginal and others, who speak neither French nor English.
4. See Reference Re Secession of Québec, *supra* note 1.
5. *Id.* par. 88.
6. See Robert Young, *A Most Politic Judgment*, 10 CONST. FORUM 14 (1998) for an explanation as to the reasons of such unanimity.
7. On December 10, 1999, the federal government introduced a bill in the House of Commons attempting to prescribe the conditions of "clarity" required for the obligation to negotiate to arise (*An Act to give effect to the requirements of clarity as set out in the opinion of the Supreme Court*). The Québec government replied by introducing its own bill proclaiming the right of the Québec people to decide alone, the "nature, scope and mode of exercise of its right to self-determination." See Bill 99, §3, [*An Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec state*] (December 15, 1999).

## PART I - THE ANALYTICAL FRAMEWORK: APPLYING THERAPEUTIC JURISPRUDENCE TO MINORITY-MAJORITY CONFLICTS

The therapeutic jurisprudence movement<sup>8</sup> posits, quite radically in the context of common-law systems,<sup>9</sup> that there is no reason why people should feel “worse” after dealing with the justice system. In fact, if at all possible, they should feel better. Therefore, the justice system should be concerned about the effects it has on people and their mental health.<sup>10</sup> It should try to minimize the damage that it does and aspire to help, not destroy, people who come in contact with it.

The movement has known a great deal of success in the context of private law,<sup>11</sup> criminal law<sup>12</sup> and mental health law.<sup>13</sup> What is less clear is whether the insights of the therapeutic analysis are applicable to group conflicts. This has been the focus of some of my research: to see whether some of the analytical framework developed with a therapeutic jurisprudence approach could help in the context of constitutional law.<sup>14</sup> The present part seeks first to define a model of a “therapeutic” approach. Second, it argues for its relevancy in the context of minority-majority conflicts.

### A. A Therapeutic Jurisprudence Approach<sup>15</sup>

One of the basic premises of the therapeutic movement has been to refocus the role of the court from a finality to a process. It seeks to examine the psychological effects of the process on the participants. The continuity of the relationship between the

parties, or the evolution of one of the participants<sup>16</sup> after the court process is often recognized and emphasized.<sup>17</sup> I explore two themes of the therapeutic jurisprudence literature that could help in the context of minority-majority relationships:

1. That the process of explanation of one’s position should be valued;
2. That the continuous relationship between the parties should also be valued.

### 1. THE EMPHASIS ON THE PROCESS

In general, the therapeutic jurisprudence movement, with its effort to unpack what are the psychological consequences for participants, could be said to put greater emphasis on the process of adjudication than on the result of it. The movement has valued the court process not as a rule imposition ritual, but rather as a process of explaining one’s position.<sup>18</sup> The telling of the story has been put at the center of the court process. This focus is said to allow one person to feel like a participant in a process that concerns him or her, and even to be empowered by such an experience, if possible.<sup>19</sup>

A number of consequences flow from this shift in emphasis: in order for this process of explanation to be therapeutic, it has

The telling of the story has been put at the center of the court process.

8. The therapeutic jurisprudence has been developed by David B. Wexler and Bruce J. Winick in *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. Miami L. Rev. 979 (1991). See also LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds. 1996).
9. In fact, the adversarial system could be said to have been predicated on the assumption that people should not want to resort to the legal system, that they should do so in last resort, and that they should find the experience unpleasant. This is a fundamental assumption of the system that has been, over the years, criticized under different guises: the system was financially inaccessible or unreceptive to concerns of “non-establishment” people, which could be said to be the basis of the feminist and race theory criticisms or class analysis.
10. David Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL. & L. 220, 225 (1995).
11. See Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409, 410 (1992); B. Feldthusen, *The Civil Action for Sexual Battery: Therapeutic Jurisprudence?*, 25 Ottawa L.R. 203 (1993); N. Des Rosiers, et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, PSYCHOL., PUB. POL. & L. 433 (1998); N. Des Rosiers & L. Langevin, *L'INDENNISATION DES VICTIMES DE VIOLENCE SEXUELLE ET CONJUGALE* (1998).
12. The therapeutic jurisprudence movement can be understood as a companion to all the new questions surrounding the re-thinking of the adversarial model and the emergence of a restorative justice, or transformative justice model. See Law Commission of Canada, *Discussion Paper on Restorative Justice* (1999), and David Carson, *Therapeutic Jurisprudence: An Alternative Approach to Issues Affecting the Criminal Justice System*, in DOES PUNISHMENT WORK?, 72 (James McGuire & Beverly Rowson eds., 1995); see also Alan Harland, *Towards a Restorative Justice Future*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, at 505-507 (Burt Galaway & Joe Hudson eds., 1996); Robert F. Schopp, *Integrating Restorative Justice and Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R., 665 (1998).
13. See THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990). See also B. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV., 1705, 1755-68 (1992); MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CASES AND MATERIALS* (1999); BRUCE D. SALES & DANIEL W. SHUMAN, *LAW, MENTAL HEALTH, AND MENTAL DISORDERS*, 163-166 (1996); and BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (1997).
14. For an earlier attempt published in French, see N. Des Rosiers, *La gérance de l'incertitude en droit constitutionnel*, in LES INCERTITUDES DU DROIT/UNCERTAINTY AND THE LAW (Ejan Mackaay ed., 1999).
15. The therapeutic jurisprudence approach is fairly young and I cannot claim that the description that I give is shared by all its proponents. For a variety of points of view regarding the insights that therapeutic jurisprudence can bring: see WEXLER & WINICK, *supra* note 8.
16. Allison R. Shiff & David B. Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, 32 CRIM. L. BULL. 342, 354 - 55 (1996).
17. For example, evidentiary rules that invite secrecy and silencing were denounced: see Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL., PUB. POL'Y & L., 142, 150-156 (1995).
18. Ellen A. Walman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MAR. L. REV., 155, 161 (1998).
19. Shiff & Wexler, *supra* note 16.

**For the losing party, being truly heard and respected is extremely important.**

to be listened to by the court, and it must be reflected in the court's decision.

### **(i) Listening**

One can find in the therapeutic jurisprudence literature several references to the need for the tribunal to listen fully to all the concerns of the participants,<sup>20</sup> and to recog-

nize the value of such expression.<sup>21</sup> In that context, there is a willingness to avoid blaming, which is seen as silencing the participants.<sup>22</sup> The process also must acknowledge the imbalance of power in the relationship<sup>23</sup> and seek to re-establish an equilibrium through it, always, with the view to giving a voice to the participants. One may even posit that reaching the right "result," without having given a party a chance to explain one's position *even if that party wins*, would not be as positive as taking the time to listen to the story.

This emphasis on the process is not to devalue the result: "winning" generates powerful emotions. However, if as one would expect, the point is not that only one party feels psychologically better but all participants feel marginally better, one would want to explore not only how the winner feels but also how the loser does. For the losing party, being truly heard and respected is extremely important.

Therefore, the role of the court as a listener as opposed to the "teller of the rules" is emphasized. This listening function cannot be eliminated for reasons of efficiency because the process then loses one of its great benefits for both parties, the one that tells the story and the one that listens to it. Modelling listening is an important educational function of the judge. It forces the other side also to listen carefully and hopefully to better understand the frailties of his or her own position. The process of accommodation starts by understanding the true nature of the other side's viewpoint.

In essence, the process of explanation to the judge and to the other party values the story and the participant. It may begin the process of teaching the parties to consider seriously the other side's viewpoint. Such teaching must continue in the language of the decision.

### **(ii) Reflecting**

The way in which the court reflects the parties in its decision matters to them, as well as to the rest of society. The decision could be said to be a "letter to the loser," designed to explain why he or she lost but also to help the acceptance of the reality and the recognition that a transition must occur.

A therapeutic analysis subjects the language used by the court to scrutiny,<sup>24</sup> not so much to discover the intricacies of a rule or principle, but rather to examine whether it truly reflects the positions of the parties and does not destroy them in the process.<sup>25</sup> This analysis of language will be carried out here. It should be completed by empirical research studying the impact on the participants over time. The idea of empirical research in the context of majority-minority disputes will require more studies. For the time being, the use of newspaper coverage and editorials may be useful to ascertain the impact of the language of a decision.<sup>26</sup>

A true reflection of the parties' position and concerns matters when one considers that there are some long-term consequences to a judicial battle: the parties' relationship does not end with the decision but instead evolves in light of it. This concern for the relationship between the parties is the second aspect that I want to discuss.

## **2. THE EMPHASIS ON THE RELATIONSHIP**

The therapeutic jurisprudence movement has valued the idea of looking at the relationship between the parties in its "continuous aspect" as opposed to breaking the relationship into a series of isolated court battles.<sup>27</sup> It could be seen as valuing the way in which the court can enhance the healthy aspects of the relationship between the parties.<sup>28</sup> In that context, it may want to avoid "destroying" one party. Such destruction kills the relationship: if there is only one person left, there is no relationship.

This approach is particularly helpful when people cannot simply ignore each other—for those who will meet again with other disputes to solve. Ideally, one would want the court process to teach the parties how to solve their own disputes in a manner that is non-abusive and respectful of the values embodied in the legal rules. This wish to enhance the parties' capacity to resolve their disputes themselves is where there is an overlap between the restorative justice movement and therapeutic jurisprudence.<sup>29</sup>

20. Des Rosiers, et al., *supra* note 11; Alexander Greer, et al., *Therapeutic Jurisprudence and Patients' Perceptions of Procedural Due Process of Civil Commitment Hearings*, in *LAW IN A THERAPEUTIC KEY* 923, 926 (1996). See also Lenore M. J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 *PSYCHOL., PUB. POL'Y & L.* 43, 75 (1995). See Michael A. Town, *Court as Convener and Provider of Therapeutic Justice*, 67 *REV. JUR. U.P.R.* 671 (1998), for a judge's perspective.

21. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 *SMU L. REV.*, 433 (1992).

22. Des Rosiers, et al., *supra* note 11; Simon, *supra* note 20.

23. Des Rosiers, et al., *supra* note 11, at 444.

24. *Id.* at 448.

25. Simon, *supra* note 20; See Marc W. Patry, et al., *Better Legal*

*Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 *CAL. W. L. REV.*, 439 (1998), for the implications for the role of the lawyer.

26. One of several studies currently under way attempts to monitor the way in which English-speaking Ontario papers deal with Québec questions. The study analyzes the language used by the editorials and news crews to describe Québec issues: how they assess the complexity of the issues, good faith of the actors, and acknowledgment of difference of opinions among francophone Québécois.

27. See K. E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on their Children*, 67 *REV. JUR. U.P.R.* 137 (1998)

28. Michael A. Town, *supra* note 20.

29. See Law Commission of Canada, *supra* note 12; R. Schopp, *supra* note 12.

I now move to explain why I think that these two major characteristics could help in the context of constitutional law.

## **B. The Application of a Therapeutic Jurisprudence Approach in the Context of the Resolution of Minority-Majority Conflicts.**

The resolution of minority-majority conflicts is particularly apt to be analyzed through the prism of therapeutic jurisprudence, because no case truly solves the conflict between the minority and the majority. A constitutional court is a forum, a place where public policy is analyzed slightly differently than on the political scene.<sup>30</sup> The emphasis on both the process and the relationship is helpful in this context.

### **1. THE EMPHASIS ON THE PROCESS**

Truly listening to the position of the parties in all its complexity should be an objective of constitutional decision-making since the reflection of such positions becomes part of the record of the relationship between the majority and minority. Future generations define themselves not only by reading speeches, political platforms, and articles, but also by reading court decisions. The language of the decision educates not only the parties, the lawyers, and law professors, but also the general public now and in the future. To deny the complexity of an argument makes for a facile resolution, but one that may miss the opportunity to translate the minority's concern for the majority and vice versa. The exercise can benefit current understandings and definitely future ones.

A language that destroys one participant serves to exacerbate his or her sense of having been exploited, of being misunderstood, and of having no hope of being respected. When one deals with groups, this creates a deep malaise and a further loss of a sense of belonging. It often feeds the fuel of the extremists within the group who had argued against the compromise, against participation in the court process. This rejection of justice as a value and avenue for resolution of conflicts is very dangerous: it foreshadows serious conflicts and arbitrariness within the group and with its dealings with the outside world.

We should value the constitutional court as a forum, where

actors debate issues of concern to them when they have not been heard elsewhere, or, at least, when they argue that they have not. It is a place where democracy is enhanced by the confrontation of reasons why one group should prevail

over another.<sup>31</sup> It is a place where the majority must justify its choices, where a minority is able to call on the majority to hear it in a relatively equal place (at least, physically, they are equal in front of the court: they have equal time to speak, an equal number of pages to write their arguments, and ought to be treated with equal respect). The process in the courtroom also serves to enhance public understanding and public discussions on the subject of the accommodation of the relationship.<sup>32</sup>

In reflecting the parties' positions, courts often create "tests" that make the resolution appear rational and incontrovertible. Creating tests that undermine the sense of identity in a minority group is damaging.<sup>33</sup> It fosters the suspicion that the law is foreign, designed by the majority to oppress it, to justify its continuing power and to be used as a tool of control.<sup>34</sup>

### **2. THE EMPHASIS ON THE RELATIONSHIP**

It is also important to value the continuity of relationships. For example, whether they are described as "a long series of visits to the dentists"<sup>35</sup> or not, Québec-Canada disputes will continue. Other conflicts in constitutional law also have high recurrence levels. The relationship between the provincial and federal governments with the Aboriginal people of Canada continues to be punctuated by court challenges. The conflict is never "solved" by the court battle. To assert a clear winner is always dangerous in the context of minority-majority relationships: we know from experience that assimilation or the crushing of minority discourses re-surface elsewhere. This is particularly true in Canadian history.

Relationships between minority and majority cannot only

**Creating tests that undermine the sense of identity in a minority group is damaging.**

30. See N. Des Rosiers, *Federalism and Judicial Review*, in M. Westmacott & H. Mellon, *CHALLENGES TO CANADIAN FEDERALISM* (H. Mellon & Westmacott eds., 1997). Others have described it as a "dialogue." See Peter Hogg, *The Charter Dialogue Between Courts and Legislatures*, L. TIMES, Jan. 29 - February 4, 1996, at 10. I am not arguing that the constitutional court process could not have other aims, e.g., articulating the values that citizens share (see Jean Leclair, *The Supreme Court, The Environment, and the Construction of a National Identity: R. v. Hydro-Québec*, 4 REV. CONST. STUD. 372 [1998]), or providing needed answers in a relatively quick way. What I am arguing is that it is better to recognize its potential as a forum than to deny this possibility and continue to clothe it with only the "teller" function.

31. See Des Rosiers, *supra* note 14, for a further exploration of such a role.

32. *Id.*

33. An example of when the courts have not used a "therapeutic" process in constitutional law will help explain the concept of listening to the voice of the parties. In the context of aboriginal

rights, in the case of *R. v. Vanderpeet*, 2 S.C.R. 507 (1996), the majority of the S.C.C. established the date of contact with the European culture as the date at which an aboriginal right must have existed to be constitutionally protected. The Aboriginal claimant must prove that at the time of contact with the European culture, there was in existence an aboriginal practice that was integral to the aboriginal culture. This is an example where the court does not "hear" the Aboriginal perspective. For the Aboriginals, to have their right defined by the date of contact with the European culture is symbolically unacceptable. See the dissent of Madam Justice MacLachlin, *id.* at 538. Why should they define themselves through the travels of the Europeans? Why should they have noticed at what time the European had entered into their lives? Why should they have recorded that fact?

34. See Michel Rosenfeld, *JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS*, ch. 7 (1998), for the importance of law that addresses the pluralism of interests.

35. A previous separatist premier from Québec has so described the process of Canada-Québec discussions.

**A process-driven answer should also allow the parties to continue their discussions outside of the courtroom . . . .**

be massaged in the courts. It is too costly and too sporadic an exercise. The two sides must learn to develop tools to accommodate their respective concerns. The court can play a helpful role in legitimizing the concerns, framing the dispute around a series of hopefully shared values, identifying the pitfalls of each position and

possibly articulating processes for resolving future disputes. It cannot pretend to have all the answers.

Tests developed by courts ought to enhance the recognition of the real questions between the parties as opposed to engaging in “definition wars.”<sup>36</sup> It should also help the parties argue their positions better and recognize the consequences of their positions for other groups in society. A process-driven answer should also allow the parties to continue their discussions outside of the courtroom to refine the resolution to the problem.<sup>37</sup> This possibility of fine-tuning the judicial pronouncement is very helpful: it makes for a more practical outcome, concretely linked with all the preoccupations of the parties.

I now move to analyze two decisions of the Supreme Court of Canada that dealt with symbolically charged issues for Québec in light of the proposed framework.

## **PART II - A CASE STUDY: THE SUPREME COURT ON QUÉBEC-CANADA CONFLICTS**

The question of the constitutional status of Québec in Canada has always been controversial. Is it a province—like the nine others—with a special history but no special constitutional consequences? Or is the nature of the historical attachment such as to create special constitutional responsibilities? Before looking at the two judicial pronouncements on this question, I briefly review the background to Québec-Canada relationships.

36. *Supra* note 13.

37. A positive example, in the Aboriginal context, is the requirement that governments “consult” with Aboriginal communities as part of their justification for a policy that otherwise infringes an aboriginal right. See *R. v. Sparrow*, 1 S.C.R. 1075 (1990). This is a process-based suggestion that deals with the true question, which is the way in which Aboriginal people were in the past excluded from decision making that affected them. It does not provide the answer, it invites the parties to find the solution by themselves.

38. What follows is an attempt to summarize a very complex history for an American reader. It certainly does not do justice to the richness of the context.

39. There are over 500,000 Francophones outside of Québec and a little less than 400,000 Anglophones in Québec. Some Aboriginal peoples have kept their native language, others use French or English. There are as well several other cultural minorities, which make out the cultural mosaic of Canada. This paper deals mostly with the French-English debate, and the particular position of

### **A. Background<sup>38</sup>**

Québec is the only province in Canada where Francophones composed the majority of the population.<sup>39</sup> Francophones are, for the most part, the descendants of the early French colonists in the sixteenth to eighteenth centuries. After the defeat of the French in North America, the British Crown has had ambivalent positions toward the French inhabitants of North America. It needed their support, particularly as U.S. independence threatened to limit the influence of Britain. It also needed the expertise acquired by the French in developing the land and dealing with the Aboriginal nations. However, over the years, as the usefulness of this help was perceived to decrease, it grew worried about the cultural cohesion that could lead to revolutionary movements. Some attempts to assimilate the French were undertaken, but ultimately failed.

In 1867, the federal structure that Canada continues to have today was adopted, and the province of Québec, with a definite French majority, was created. In the Québec conception of history, 1867 was the joining of “two founding partners,” the French and the English.<sup>40</sup> The provincial powers, given to Québec and the three other initial provinces, were designed to allow for the control of the development of the regional cultures. This article is not the appropriate place to give a full account of the history of Canadian federalism, but suffice it to say that what was then a French-English debate became, in a way, a Québec-Canada debate. Over time, Québécois claimed that with the addition of six provinces to the initial four, their power at the federal level had decreased. The lack of bilingualism at the federal level made it impossible for Québécois to really influence federal politics unless they spoke English. As Canada grew, the relative population base of Québec, and more so of its Francophone majority, decreased.<sup>41</sup> However, in Québec, the power of the English minority diminished as the Francophone population became better educated and economically stronger.

The independence movement in Québec began in the 1960s and the first referendum in 1980 had a 60% majority saying “no” to the proposal toward the sovereignty of Québec. However, during the referendum campaign, the federal Prime

the Aboriginals in that context.

40. This idea of the two founding peoples, which ignores the fundamental place of the Aboriginal Nations, is now recast as the union of “three peoples.”

41. Several incidents at the beginning of the twentieth century accentuated the gap between the French and the English. Some English-speaking provinces banned school teaching in French, attempting to assimilate their Francophone minorities. While a majority of Francophones were not in favor of conscription during the First World War, conscription went ahead anyway, and Québec soldiers were drafted. An advocate for Francophone and Métis rights in Manitoba, often portrayed as a hero, Louis Riel, was tried and hung in Western Canada. Each of these events is a highly complex and nuanced conflict that would require much greater explanation. The point is that in the way in which Québécois understand their history, these events are viewed as an indication that they are not understood by the English majority in Canada, and cannot trust the majority to always act in their interest.

Minister promised “constitutional change” to Québécois, in order to diffuse the rhetoric that voting “no” was voting for the constitutional *status quo*. And there was change. Federal proposals that would have British Parliament finally relinquish the power it had to make laws for Canada were drafted. They included a formula for the amendment of the constitution as well as a Charter of Rights. Although there was some protection for linguistic minorities in the proposals, the amending formula was seen as unsatisfactory for Québec. The process of adopting the federal proposals, initially opposed by several provinces, was restrained by the Supreme Court of Canada, which decided that a “substantial amount of provincial consent” was conventionally required for such sweeping amendments to be enacted.<sup>42</sup> After negotiations, modifications, and additions to the federal proposals, nine out of ten provinces agreed with the federal package. Only the province of Québec did not agree. Despite this opposition, the federal government proceeded and England passed the *Canada Act*, which became binding on the federal government and all provinces, including Québec.

The Québec government moved to challenge the enactment of the act, on the basis that there was a constitutional convention in Canada that required that Québec consent to any constitutional amendment that would affect its powers. “A substantial amount of provincial consent,” it argued, could not be indifferent to the special minority status of Francophones in Canada and the role of Québec to protect the French culture. The theory of the “two founding peoples” was referred to. In 1982, in the *Québec Veto Reference*,<sup>43</sup> the Supreme Court of Canada rejected Québec’s position: the province of Québec had no historical special status that would allow it to veto amendments to the constitution even if such amendments, as they were, affected its powers.<sup>44</sup>

I have chosen to analyze this decision because it has a great symbolic importance for Québécois and could be viewed as key to the “sense of rejection” that underlies the support for the nationalism movement in Québec.<sup>45</sup>

### B. The Decision in the *Québec Veto Reference*

An analysis of the language and the structure of the *Québec Veto* decision is interesting. First, the lawyers representing Québec are blamed for the loss. Second, the Court emphatically imposes the burden on Québec, and then states that Québec did not meet the burden. There is generally a denial of the complexity of the problem and an undermining of the value of Québec’s position. Finally, the focus of the decision is on the past, not the future. I review each of these aspects with examples and conclude, predictably, with how the decision scores on a therapeutic scale.

42. The *Patriation Reference*, 1 S.C.R. 753 (1981).

43. 2 S.C.R. 793 (1982).

44. Young, *supra* note 6.

45. Robert Young, *Québec Secession and the 1995 Referendum*, in *CHALLENGES TO CANADIAN FEDERALISM* (H. Mellon and Wetmacott eds., 1997).

### 1. BLAMING THE LAWYER

In the *Veto Reference*, the lawyers for the province of Québec are often blamed: they have presented an incoherent position,<sup>46</sup> they have read sentences out-of-context, they have over-simplified and presented an erroneous view of the test elaborated by the leading British constitutional expert, Jennings.

This exercise has a silencing impact on the minority. It is as though the court is saying: “I could not hear you because you had a bad lawyer. It is your own fault if you lose.” The examples in the *Veto Reference* are particularly virulent when the Court notes that the lawyers representing Québec quoted the federal Minister of Justice Guy Favreau out of context when he said:

... the [amending] procedure does not impose any legal constraint that thwarts the traditional forces of constitutional change; on the contrary, it mirrors these forces with utter realism. *In the past, Ottawa has never amended the Constitution on matters touching essential provincial rights (as defined in clause 2 of the formula) without the consent of all the provinces.* Given the current—and I think, fruitful—resurgence of provincial initiative, a change in this convention becomes inconceivable. However much some people may regret this convention, it remains an undeniable political reality. The formula does not invent that reality; it merely acknowledges it.

However, it takes the court several pages to explain how such a sentence does not mean what it says, and that contrary to what it seems to say, there had *never been* any recognition of a right by federal political actors of a convention not to amend the constitution without the consent of a province that was going to be affected by the change.

### 2. THE BURDEN ON QUÉBEC

The structure of the decision is quite traditional: the rules are exposed and then the court concludes that the evidence presented does not satisfy the burden. Again, the minority is blamed for not understanding the rules of the majority well enough, and for not securing the proper evidence.

One could argue that the process of establishing rules a *posteriori*, while making them look like they always existed, is a traditional legal reasoning approach. I am not debating the

**It is as though the court is saying: “I could not hear you because you had a bad lawyer.”**

46. “While both submissions [from Québec] seek the same answer to the constitutional question, they are alternative ones, as they have to be, for not only are they quite distinct from each other, they actually contradict one another.” 2 S.C.R. at 801.

[I]n the . . .  
**Québec Veto**  
Reference case,  
the court failed  
to adopt a  
“therapeutic”  
perspective

approach. I am reflecting on the allocation of the burden, its scope, and the blaming that goes on when the burden is not met. In the *Veto Reference*, the imposition of the burden on Québec is not obvious. The court had, in the past, concluded that there was uncertainty as to the rules surrounding constitutional amendment.<sup>47</sup> Why is it that the burden to con-

vince is imposed on the party attempting to maintain a traditional practice, i.e., securing approval of the province affected? Why isn't it on the party seeking to change this traditional practice?

### 3. THE DENIAL OF THE COMPLEXITY OR OF AMBIGUITY

In its decision, the Supreme Court concluded that the lawyers for Québec “failed *completely* to demonstrate compliance with the *most important* requirement for establishing a convention, that is acceptance or recognition by the actors in the precedents. . . . Neither in his factum nor in oral argument did counsel for the appellant quote a single statement made by any representative of the federal authorities recognizing . . . that Québec had a conventional power of veto.” (Emphasis added.)

There is clearly a desire to make vigorous pronouncements that without any doubt Québec had no veto right. Absolutely not. No ifs, ands, or buts. The matter was put to rest. The solution was found, and Québec had lost. The harshness of the tone and the lack of nuance is used not to placate Québec, but to silence it. One may make the hypothesis that the court did not want any doubt to be left as to the constitutional validity of what was to become the new Constitution of Canada, even if this clarity was to be achieved at the detriment of a nuanced presentation of the parties' positions. Interestingly, the destruction of the argument in court did not “solve” the problem, it just resurfaced in more emotional political speeches and a refusal later by the Québec government to recognize the legitimacy of the Supreme Court.<sup>48</sup>

### 4. THE EMPHASIS ON THE PAST AS OPPOSED TO THE FUTURE

In the *Veto Reference*, the emphasis on the past is particularly clear. Québec loses because no federal official has ever recognized the principle of the duality of Canada, despite the fact that numerous scholars and politicians had done so. Because of the past, it cannot assert its power. Because of others, it cannot get its veto. Its position depends only on the willingness of the others to agree. The decision does not suggest any tool that could enhance the process to ensure that the party could

be heard or understood. There is no hope given, no mechanism by which the loser can be made whole or can proceed outside of its loser status. The wisdom has come, the magic has played itself.

In conclusion under this part, one could argue that, in the decision from the *Québec Veto Reference* case, the court failed to adopt a “therapeutic” perspective. It did not acknowledge the uncertainty and the complexity of accommodating a minority's wishes within a majoritarian context. It did not always acknowledge Québec's voice, nor did it frame the debate in a helpful way. In fact, it could be said that it sought to “destroy” the position of Québec. It put itself in the position of the “know-it-all” magical teller of the rules.

In the next section, I explore how the court did better in the *Sécession Reference* and how it could, in the future, continue in this vein.

### C. The Québec Secession Reference

The case involved a reference from the federal government to the Supreme Court of Canada on three questions:

1. Under the Constitution of Canada, can the National Assembly, legislature, or government of Quebec affect the secession of Québec from Canada unilaterally?
2. Does international law give the National Assembly, legislature, or government of Québec the right to affect the secession of Québec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature, or government of Québec the right to affect the secession of Québec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Québec to affect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

In response, the Supreme Court decided that Québec did not have the right to unilaterally secede at constitutional law nor did it have that right at international law. The court developed the idea, however, that a “clear” majority vote in Quebec on a “clear” question in favor of secession would impose on the government of Canada an obligation to negotiate with the Québec people.

Several aspects of the language in the decision reflect a stark contrast to the approach used in the *Veto Reference*. It is helpful, however, before proceeding to the analysis of the decision to situate the context in which it was issued.

The *Québec Veto Reference* decision discussed above was symbolically highly problematic for federalists (the non-separatists) in Québec. They were elected to power in 1984 and sought to propose constitutional changes that would have had the effect of erasing this symbolic non-adherence of Québec to the new Canadian constitution. In 1988, the “Meech Lake Accord” was agreed to by the federal and the ten provincial governments. It included five proposals to accommodate

47. *Patriation Reference*, *supra* note 42.

48. The Québec government refused to participate in the hearing of

the *Secession Reference* case and the court had to appoint an *amicus curiae* to present Québec's position.

Québec. The accord was not approved by three provincial legislatures, and hence did not become part of the Canadian constitution in accordance with the rules established in the 1982 amending formula. This was perceived as a serious rejection by Québécois. A second attempt at changing the constitution to accommodate Québec and other groups was made in 1992.<sup>49</sup> The “Charlottetown Accord” was submitted to a referendum across Canada; it failed to gather enough support and did not become part of the Canadian constitution, either.

In 1995, with a separatist government elected in Québec, a second referendum on the issue of Québec’s sovereignty was called.<sup>50</sup> The arguments were that Canada neither understood nor wanted Québec, that the unharmonious Québec-Canada marriage had gone on long enough, and that an amicable divorce was appropriate. The federalists thought that they would win easily: the citizenry seemed to have tired of referenda and to be more interested in the economy or in social issues. However, in the middle of the referendum campaign, a popular figure, Lucien Bouchard, took the lead of the separatists forces. On referendum night, the federalist side barely won: the final results were 50.6% for the “no” side and 49.4% for the “yes” side. The “rest of Canada” was astonished: how could it have been so close? What would have happened if the “yes” side had won? There was a sense that no planning for the “after referendum day” had really been done and that the federal government had been too passive in its approach on the issue.

The federal government then developed a strategy designed to deal with the Québec question. It would attempt to continue on the road to accommodation (Plan A), while creating some pressures in the public opinion about the risks of separation (Plan B). Part of Plan B was to ensure that Québécois knew the real costs of separation. The true economic costs have been debated for decades, the federal government wanted to pursue the idea that the Québec sovereignty project could not be done “legally” and hence appeal to the Québec public’s insecurities of such illegality. Plan B had some symbolic costs as well, such as the Québécois who were “scared” into voting for a status quo that did not respect them.

Nevertheless, the federal government pursued the idea of asking the Supreme Court of Canada to rule on the constitutionality of a unilateral Québec Secession. The Québec govern-

ment refused to participate in the hearing. Eventually the court had to appoint an *amicus curiae* to present Québec’s side. Me André Jolicoeur, a separatist lawyer, first argued that the court had no jurisdiction to hear the case and, in the alternative, that the democratic principle ought to be recognized as giving the Québec people the right to secede if it so decided.<sup>51</sup> The federal government was arguing that the principle of the rule of law<sup>52</sup> prevented a unilateral secession.<sup>53</sup>

[T]he Court starts by acknowledging the complexity of the issues . . . .

Although there were some criticisms that the “obligation to negotiate”<sup>54</sup> in case of a clear vote on secession was unwarranted judicial interventionism,<sup>55</sup> the decision was generally applauded.<sup>56</sup> I now propose to analyze the decision from a “therapeutic viewpoint” as defined earlier.

First, the Court starts by acknowledging the complexity of the issues: “the present [case] combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity.”<sup>57</sup> The Court then goes through a historical analysis to conclude that the principle of federalism prevents unilateral secession. However, the tone of the narration is sympathetic to Québec’s sensitivities: a famous Québec proponent of confederation, Georges-Étienne Cartier, is quoted at length<sup>58</sup> and Québec is described as a “distinct culture.”<sup>59</sup> Its distinctiveness is heralded as the reason for federalism. One may want to explore further the role of using the minority’s own narratives and histories, or to at least acknowledge their existence.<sup>60</sup>

Interestingly, for my purposes, is the “duty to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change.” The Court suggests that other parties would have to negotiate if Québécois expressed their desire for independence after a referendum on a “clear” question approved by a “clear” majority of citizens.<sup>61</sup> It then goes on to say that the process of negotiation should deal with the protection of minority interests, which would be affected by independence, and the Aboriginal interests, among others.

49. The most understandable criticism against the Meech Lake Accord had been that it only dealt with Québec’s constitutional problem and failed to provide a solution to other equally pressing problems; the Aboriginal issues, for example.

50. I use here “nationalist” or “separatist” to identify the Québécois who generally support the idea that Québec should become a separate country from Canada.

51. See B. Ryder, *A Court in Need and a Friend Indeed: An Analysis of the Arguments of the Amicus Curiae in the Quebec Secession Reference*, 10 CONST. F. 9, 9-13 (1998), for a critical analysis of the submissions of the *amicus curiae*.

52. J. Leclair, *Impoverishment of the Law by the Law: A Critique of the Attorney General’s Vision of the Rule of Law and the Federal Principle*, 10 CONST. F. 1, 1-8 (1998).

53. This argument was designed to “scare” Québécois who are lukewarm toward the secession: they may not want to participate in an illegal movement. See Young, *supra* note 6, at 14.

54. Alan C. Cairns, *The Quebec Secession Reference: The Constitutional Obligation to Negotiate*, 10 CONST. F. 26 (1998).

55. Rob Martin, *Treating the Constitution like a Toy*, OTTAWA CITIZEN, Aug. 22, 1998, at B3.

56. See David Mullan, *It Will Stand the Test of Time*, PUB. L. (1998). See also N. Des Rosiers, *The Court as the Real Winner*, (unpublished conference paper on file with author) (Oct. 1998).

57. See *Ref Re Secession of Québec*, 2 S.C.R. at 227.

58. See 2 S.C.R. at 244.

59. See *id.*

60. See Robert Fulford, *THE TRIUMPH OF THE NARRATIVE—STORYTELLING IN THE AGE OF MASS CULTURE* 33 (1999) (“Children grow into adults by learning stories, and so do nations and communities”).

61. See D. Greshner, *The Québec Secession Reference: Goodbye to Part V?*, 10 CONST. F. 19, 19-25 (1998) and Cairns, *supra* note 54, for a commentary on the scope of such obligation.

**[The Court] preserved its legitimacy, and the approach it took has some merit, “therapeutically.”**

The reconciliation between the different minorities in Québec is hence placed at the center of the debate. The decision, in fact, calls on all the participants to acknowledge their power and their ability to destroy other groups. It frames the discourse in a way that addresses squarely the potential for change and the impact on

the ones who would be affected by the secession. After all, the treatment of minorities, Aboriginal and ethnic, under a new sovereign Québec is the question that holds the most potential for violence.

The decision of the Court seeks to foster a public debate on the issue of the treatment of minorities. It also imposes a duty of participants in a democracy to acknowledge the desire for change of the other partners. I view this not as giving the solution but as helping the participants to come to grips with the frailties of their positions. It educates the public on the issues of principles involved and it educates the parties of the weaknesses of their positions, but it gives them a chance to move beyond such difficulties. In fact, it enhances the discussion process among the players.

Therefore, the “duty to negotiate” can be seen as a brilliant, process-oriented response to the quandary. Not that it solves anything. Nothing could. But it allows for the debate to continue without shutting up one participant. Québec’s wishes may require constitutional accommodation, and the rest of Canada would have, at least, the obligation to listen and respond.

The court did not define what would be a “clear” question nor what is a “clear” majority, which may at first glance appear skittish on the part of the court. However, this nebulous message on clarity is also helpful. It is now at the center of public debate: the two sides attempting to control the meaning of the word. Nevertheless, the value of clarity has been stated and the debate is now engaged on the form that such “clarity” should take. Giving the solution would have been dis-empowering. Stating the value is much more powerful.

It is true that it is easier for a court to be “therapeutic” when the case presented is “hypothetical,” as the *Secession Reference* was. However, there is still a lesson to be learned in the approach adopted by the Supreme Court. Its attention to the language it used in order not to create a problem of legitimacy for itself in Québec has been fruitful. Particularly welcome is the process-driven solution it offered, which called for respect for other minorities and defined the values which had to be taken into account.

It could be that an inventory of process-driven solutions ought to be offered to courts. The imposition of an obligation to negotiate, as was done here, is one example. The creation

of duties to consult, as was done in the Aboriginal context, may also be of value. Several mechanisms that exist in other fields, the obligation to negotiate in good faith in labor law or the obligation to inform in tort law, for example, could be explored. More must be done in this area. It could also be that lawyering will have to be done differently: if the process is to have the therapeutic benefits argued for, it requires that the “true” story be told, that the groups’ narratives be heard. It may require that lawyers relinquish control of the story told by the group-client. Again, the implications for lawyers of a judicial therapeutic approach will have to be examined further.<sup>62</sup>

In conclusion, I have argued, as have others,<sup>63</sup> that the Supreme Court was the real winner in the *Secession Reference*. It preserved its legitimacy, and the approach it took has some merit, “therapeutically.” Contrary to the *Veto Reference* case, it sought neither to destroy nor to undermine the position of the minority, but instead to respond with care and empathy. Maybe that is all that one can ask from the court on these questions—to do as little damage as possible. It could be that this is a way of judging that could be used again in other minority-majority conflicts, where it is not enough just to tell, one must also listen.



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62. See Wexler, et al., *supra* note 25.

63. Young, *supra* note 6.

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# Therapeutic Jurisprudence on Appeal

Amy D. Ronner

The novelist, Marge Piercy, writing about the French Revolution, gave Georges-Jacques Danton a therapeutic jurisprudence epiphany that his voice and the tribunal's willingness to hear it are crucial components of justice:

Yet he was not as helpless as they thought. He was in possession of his finest weapon, his voice, his rhetoric, his ability to move crowds. He would take over the fake trial, the quick march toward death.<sup>1</sup>

Professor Bruce J. Winick, a founder of therapeutic jurisprudence, has given the movement the expansive definition it deserves by explaining that the law can “function as a kind of therapist or therapeutic agent” and that “legal procedures . . . constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences.”<sup>2</sup> There is, however, a tendency to unduly confine therapeutic jurisprudence to just situations in which the law literally grapples with a mental health problem.<sup>3</sup> Also, much therapeutic jurisprudence analysis focuses on the trial context because an individual's involvement with the legal system typically entails direct contact with lower tribunals.<sup>4</sup>

Surprisingly very little has been written about therapeutic jurisprudence in appeals. Professor Nathalie Des Rosier, who has discussed appellate therapeutic jurisprudence, points out that “there is no reason why people should feel ‘worse’ after dealing with the justice system” and that “[the system] should try to minimize the damage that it does and aspire to help, not destroy, people who come in contact with it.”<sup>5</sup> Because appellate courts are final decision makers that not infrequently share their reasoning, they are able to “minimize damage” and engender therapeutic consequences.<sup>6</sup>

As Danton implicitly believed, two main components of appellate therapeutic jurisprudence are fairness and listening. In a predominantly narrative format, I will elaborate on these and show how an appellate court served as a therapist for a client represented by a law school in-house appellate litigation clinic.

## AN IN-HOUSE APPELLATE CLINIC AND THEIR INCARCERATED CLIENT

As a full-time law professor, I run an in-house appellate clinic, which has 10 to 14 third-year law students. Under the student practice rules, the Florida Supreme Court certifies these students as legal interns, which authorizes them to appear in any Florida court on behalf of an indigent party.<sup>7</sup> In the 1999 Spring semester, the appellate clinic accepted a case from the public defender's office in which a Douglas Pellicane had been charged with felony driving under the influence.<sup>8</sup>

The charge was a felony because Pellicane allegedly had, at the time of his arrest, three prior DUI convictions.<sup>9</sup> After the jury found our client guilty of DUI, the judge conducted a separate proceeding in which the onus was on the prosecution to satisfy the requisite element of felony DUI by proving the three prior convictions.<sup>10</sup>

The state, however, had a problem establishing the alleged third prior conviction: it introduced an electronic docket showing a DUI conviction for a person with the same name as our client along with a certified copy of the driving record.<sup>11</sup> While the state had offered fingerprint standards from court records in order to prove the other two priors, it did not have fingerprints for the third.<sup>12</sup> In the trial court, defense counsel argued that the state's omission of fingerprint standards meant that it fatal-

### Footnotes

1. MARGE PIERCY, *CITY OF DARKNESS, CITY OF LIGHT* 426 (1996).
2. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 *PUB. POL'Y & LAW* 184, 185 (1977). See also Dennis P. Stolle et al., *Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 *CAL. W. L. REV.* 15, 17 (1997) (“Therapeutic jurisprudence . . . builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects”).
3. See, e.g., BRUCE J. WINICK, *THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT* (1997). See also *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds. 1996) (several articles deal with mental health issues).
4. See generally *LAW IN A THERAPEUTIC KEY*, *supra* note 3 (many articles in that collection deal with trial court issues).
5. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority/Majority Conflicts*, *COURT REVIEW*, Spring 2000 at 54, 55.
6. *Id.*
7. See generally Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 *AM. U. L. REV.* 859 (1996) (describing the in-house appellate clinic).
8. *State v. Pellicane*, 729 So.2d 534 (Fla. Dist. Ct. App. 1999).
9. *Id.* at 535. See generally Fla. Stat. § 316.193(2)(b)(1999) (“Any person who is convicted of a fourth or subsequent violation of this section is guilty of a felony of the third degree”).
10. See *State v. Rodriguez*, 575 So. 2d 1262 (Fla. 1991) (for felony DUI, the judge must hold a separate non-jury proceeding).
11. *Pellicane*, 729 So. 2d at 535.
12. *Id.*

ly failed to link our client with that conviction. The judge, agreeing with the defense, acquitted Pellicane of the felony charge.<sup>13</sup>

The state appealed, arguing that a preponderance of the evidence standard applied to the felony proceeding and that the driving record alone was enough to prove the third prior conviction.<sup>14</sup> On appeal, the appellate clinic argued, among other things, that the state must prove the priors beyond a reasonable doubt and that the driving record did not meet that heightened standard.<sup>15</sup> The appellate court found for Pellicane.<sup>16</sup>

#### THERAPEUTIC JURISPRUDENCE: LISTENING AND FAIRNESS

Fairness and listening are two main threads of therapeutic jurisprudence and they are crucial on appeal as well. The Pellicane appeal illustrates the therapeutic effect that an appellate court can deliver.

Some therapeutic jurisprudence scholars point out that when individuals participate in a judicial process, the actual outcome of their experiences is not what principally affects them. What influences them most is their assessment of the fairness of the process itself. As Professor Tyler explains:

Studies suggest that if the socializing influence of experience is the issue of concern (*i.e.*, the impact of participating in a judicial hearing on a person's respect for the law and legal authorities), then the primary influence is the person's evaluation of the fairness of the judicial procedure itself, not their evaluations of the outcome. Such respect is important because it has been found to influence everyday behavior toward the law. When people believe that legal authorities are less legitimate, they are less likely to be law-abiding citizens in everyday lives.<sup>17</sup>

Similarly, Professor Gould, examining studies of people involved in felony cases, concludes that those "who have experienced a legal procedure that they judged to be unfair had less

respect for the law and legal authorities and are less likely to accept judicial decisions."<sup>18</sup> This can in turn "lead to a 'gradual erosion of obedience to the law.'"<sup>19</sup>

Intertwined with fairness is what Professor Des Rosiers has isolated as "the need for the tribunal to listen fully to all the concerns of the participants and to recognize the value of such expression."<sup>20</sup> That is, the court must make the parties know that they have a voice, one that it is not being silenced.

When Pellicane first contacted the appellate clinic, his message was essentially twofold: the system is unfair and I have no voice. In the opening paragraph of his long letter to the clinic, Pellicane, writing from a work camp, said that he had "given up hope in lawyers and the judicial system" and asked us to make sure "that the procedures and laws of the judicial system are followed and obeyed."<sup>21</sup> He also, expressing dismay at the fact that the judge that had tried his case was up on charges before the Judicial Qualifications Committee, feared that the state's appeal was part of a "crusade" against a liberal judge and that the appellate court would not really hear his arguments, but would reverse just to endorse the judge's unfitness.<sup>22</sup> Further, Pellicane's letter contained a litany of injustices that he felt the system had heaped on him.<sup>23</sup>

Without commenting on the legitimacy of his grievances, what stood out most about our client's letter was his perception of himself as a silenced, abandoned victim of a lawless system. What was noticeably absent from that letter was any real acknowledgment of his alcohol problem or acceptance of responsibility for anything that had transpired. He also did not mention the future or convey any feeling that he had power to change his own life. In short, Mr. Pellicane seemed mute and helpless.<sup>24</sup>

Pellicane's letter, the one written after the appellate court

**[T]he court must make the parties know that they have a voice . . . .**

13. *Id.* The judge sentenced Pellicane to a year's probation with the special condition that he serve 364 days in county jail. The court also ordered, among other things, that Pellicane be placed in an inpatient alcohol treatment center for at least 28 days and that he only be held in jail until a bed in such a facility became available. An adjudication of guilt for felony DUI, however, could have exposed Pellicane to steeper penalties and a five-year term of imprisonment. See generally Fla. Stat. §§ 775.082 and 775.083 (1999) (describing punishment for felony of the third degree).

14. *Pellicane*, 729 So. 2d at 535.

15. *Id.*

16. *Id.* at 535-56.

17. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 437 (1992). See also Amy D. Ronner, *Punishment Meted out for Acquittals: An Antitherapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459, 472-77 (1999).

18. Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 865 (1993)

19. *Id.* (quoting Daniel W. Shuman & Jean A. Hamilton, *Jury*

*Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 SMU L. REV. 449, 451 (1992)).

20. Des Rosiers, *supra* note 5.

21. Letter from Douglas Pellicane (January 22, 1999) (on file with the author).

22. *Id.*

23. His numerous complaints included the following: court unfairly failed to notify him that his case had been transferred to the felony division; the blood alcohol level tests were unfair; jury selection had been unfair because it eliminated anyone who knew the public defender or the state attorney; the court unfairly allowed an officer who wasn't present during his arrest or blood alcohol test to be a witness; the prosecution witness unfairly talked to two jurors in the parking lot, which resulted in a mistrial but not in a dismissal; he had to endure the whole ordeal again, which unfairly gave the state time to "choreograph [its] testimony and change [its] approach"; it was unfair that his counsel and the state attorney were "very good friends"; and the state purposely lost him in the system. *Id.*

24. See Ronner, *supra* note 17 at 476-80 (discussing how the legal system can spawn a sense of helplessness).

decision, was markedly different from the first. In expressing his appreciation to the appellate clinic, what emerged was a rejuvenated faith in the legal system:

I believe God allowed all of you the ability and the inner urge to fight to get into the court room to stand up for due process of the laws this land is governed by. And also the determination to see to it that people's rights to Justice, Liberty and Freedom are honored and respected as the Constitution of the United States of America requires.<sup>25</sup>

Something else came across in that letter, however: our client saw that he had a future and power to direct it. For example, he expressed a desire for treatment and explained that he had been doing "a little work on [his] own to get [himself] to a Work Release Center and [had] prevailed."<sup>26</sup> Significantly, Pellicane assumed responsibility for his own predicament, stating, "I'm not a hard core criminal. The people I have hurt are my family, friends and my self respect."<sup>27</sup>

## CONCLUSION

In the course of the appellate process, Pellicane had changed and it was not just because he won. While the clinic took pains to answer Pellicane's letters, the appellate court also heard his voice. The court did not merely recite "per curiam affirm," but

instead authored a short, but fairly substantial decision that acknowledged and responded to Pellicane's position.

The court also did not ignore precedent, but applied it honestly, explaining why Pellicane was entitled to the heightened, reasonable doubt rule. For Pellicane, the court helped him by listening and being fair. It gave him the assurance that Danton so much desired, that the proceeding was neither "fake" nor a "quick march toward death."<sup>28</sup> In short, the court became a kind of therapist, releasing our client from his bastille of voiceless, self-perceived helplessness.



Amy D. Ronner is a professor of law at St. Thomas University School of Law in Miami. She earned her J.D. in 1985 from the University of Miami; her Ph.D. in 1980 from the University of Michigan; her M.A. from the University of Michigan in 1976; and her B.A. from Beloit College in 1975. She would like to dedicate this article to Arthur J. England, former Chief Justice of the Florida Supreme Court, because he is fair and such a good listener.

25. Letter from Douglas Pellicane (April 21, 1999) (on file with author).

26. *Id.* A therapeutic approach for an attorney representing a client like Pellicane would of course emphasize that he or she has a substantial prior record of DUIs and that further arrest can result in

conviction as a felony and suggest treatment options. It is, of course, basic that a client's acknowledgment of a problem and the need for treatment is a beginning for potential recovery.

27. *Id.* (emphasis added).

28. Piercy, *supra* note 1.

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# The Resource Page on Therapeutic Jurisprudence



## BOOKS & ARTICLES OF NOTE

LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, David B. Wexler & Bruce J. Winick, editors. Carolina Academic Press, 1996. 1,012 pp. \$65.

The most comprehensive collection of TJ articles by multiple authors around, this book is reviewed by Judge Tom Merrigan at page 8.

ESSAYS IN THERAPEUTIC JURISPRUDENCE, DAVID B. WEXLER & BRUCE J. WINICK. CAROLINA ACADEMIC PRESS, 1991. 320 PP. \$34.95.

This book contains the best early work of Wexler and Winick. The essays collected here deal with topics such as therapeutic issues in mental health law, consent to treatment and hospitalization, training in law and behavioral science, and the design of research projects in the therapeutic jurisprudence area.

The journal BEHAVIORAL SCIENCES & THE LAW is publishing two special issues on TJ. The first, containing eight articles and essays, was just published in the journal's final issue of 1999 (Vol. 17, No. 5); the second, containing several more TJ-related articles, is scheduled for later this year (Vol. 18, No. 4).

Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997).

Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998).

Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Court Treatment Movement: Revolutionizing the Criminal*

*Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

David B. Rottman & Pamela Casey, *A New Role for Courts?*, NATL. INST. JUST. J., July 1999, at 12.

David B. Rottman & Pamela Casey, *A Response to Scheff: Don't Write Off the Courts*, 67 REV. JUR. U. P.R. 653 (1998).

Dennis P. Saccuzzo, *How Should the Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest*, 39 SANTA CLARA L. REV. 765 (1999).

Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCH., PUB. POL. & LAW 193 (1995).

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 CAL. W. L. REV. 15 (1997).

Michael A. Town, *Court as Convener and Provider of Therapeutic Justice*, 67 REV. JUR. U. P.R. 671 (1998).

Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000).

David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U. P.R. 691 (1999).

Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37 (1999).

Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCH., PUB. POL. & LAW 184 (1997).

Michael D. Zimmerman, *A New Approach to Court Reform*, 82 JUDICATURE 108 (1998).

## UPCOMING TJ CONFERENCE

The Second International Conference on Therapeutic Jurisprudence will be held May 3-5, 2001 at the Kingsgate Conference Center at the University of Cincinnati. A call for papers, travel and accommodation details, and other conference information will be made available in the coming months at the conference Web site—<http://www.law.uc.edu/tj2001>. To be added to a mailing list for the conference, send your name, address, and e-mail address to [univconf@email.uc.edu](mailto:univconf@email.uc.edu). The conference is sponsored by The Fetzer Institute, Kalamazoo, Michigan; the Glenn M. Weaver Institute of Law and Psychiatry, University of Cincinnati College of Law; the International Network on Therapeutic Jurisprudence, University of Puerto Rico School of Law; and the National Center for State Courts, Williamsburg, Virginia.



## WEB SITES OF INTEREST

### International Network on Therapeutic Jurisprudence

<http://www.law.arizona.edu/upr-intj/>

This Web site will keep you up-to-date on TJ developments. Updated by David Wexler, it contains a comprehensive bibliography of books and articles, information about coming events, and links to other Web sites of interest.

### Center for Restorative Justice and Peacemaking

<http://www.ssw.che.umn.edu/rjp>

Run by the School of Social Welfare at the University of Minnesota, this Center and its Web site are devoted to the concepts of restorative justice. As explained on the site, they are committed to empower victims in their search for closure; to impress upon offenders the real human impact of their behavior; and to promote restitution to victims and communities.



# The Resource Page



## NEW BOOKS

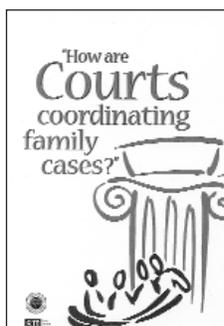
CAROL R. FLANGO, VICTOR E. FLANGO & H. TED RUBIN, *HOW ARE COURTS COORDINATING FAMILY CASES?* National Center for State Courts, 1999. 141 pp. (\$5.00 P&H).

It's unusual to give a book a title that's a question. In this case, we suspect the authors wanted to emphasize that, while they explore the question in some detail, they do not reach a final, definitive conclusion about how a court should best be organized to handle family cases.

Written by two members of the National Center for State Courts research staff and a former juvenile court judge, this book provides an overview of the need for coordination among courts and social service entities when handling family cases. It also catalogs various approaches in use around the country that attempt to meet the needs of these cases.

As the authors note, courts today often become the service coordinators of last resort for dysfunctional families, matching the needs of the family involved with the services available in the community. They explore the ways in which courts and service providers can share information and coordinate their help for a family. As they do in other areas of the book, they describe the methods currently in use in several courts around the country—here including Jackson County, Oregon; Jefferson County (Louisville), Kentucky; Deschutes County, Oregon; Denver, Colorado; and the Delaware family courts.

Another section of the book discusses courts that have employed variations on the one-judge, one-family approach to judicial staffing of family cases. They note, however, that at



least one study has indicated that families may find continuity of social service workers, probation officers, and other collateral court professionals more important than assignment to a single judge. Once again, the differing procedures used in several jurisdictions are reviewed. Among them is Deschutes County, Oregon, where the one-family, one-judge approach has been implemented without specialized dockets. There, all the members of the general jurisdiction court simply have family cases as a part of their caseload. An attempt is made to assign related divorce cases, criminal filings, and domestic violence cases to a single judge. Other courts with specialized dockets are also reviewed.

A 1992 task force appointed by the Maryland governor aptly summarized the different role of a family court: "The goal of a court dealing with family disputes should be more than simply resolving the particular issues before them. Rather, such resolution should leave the family with the skills and access to support services necessary to enable them to resolve subsequent disputes constructively with a minimum need for legal intervention."

For those who are interested in improving a family's experience with the court system, this book—with its review of court systems that have coordination mechanisms for family cases in place—is a good starting point.

To order, send \$5 to cover postage and handling to Valerie Hansford, National Center for State Courts, P.O. Box 8798, Williamsburg, Virginia 23187-8798, or contact her by e-mail at [vhansford@ncsc.dni.us](mailto:vhansford@ncsc.dni.us).



## USEFUL INTERNET SITES

### Law Library Resource Exchange (LLRX)

<http://161.58.34.171/index.htm>

<http://161.58.34.171/features/strategy.htm>

Designed with the interests of law librarians in mind, this site offers a fairly comprehensive and up-to-date summary of the legal information available on the Web. The first URL address listed above is the LLRS home page; the second takes you to an excellent article about online legal research written by Diana Botluk, a reference librarian at the law library of Catholic University in Washington, D.C. Especially valuable, if you go to the end of the article, is her list of links to the major Web sites, along with her commentary about what makes each site useful.

### My Virtual Reference Desk

<http://www.refdesk.com/>

Whatever you're looking for, you can probably find it here. Plus everything is easy to find, with a greeting page chock full of links to information. Want to set your watch to the U.S. Naval Observatory's atomic clock? The link is at the top of the page. You can go to the American Heritage Dictionary to look up a word, or to an online medical dictionary. The link to a legal dictionary takes you to one for pro se use set up by Nolo; while it might not help you, it might be helpful to some of those pro se litigants coming to the courthouse. Other links cover all of the major news media, including broadcast and print outlets; ZIP Code look-up; and access to more than 260 Web search engines categorized by subject matter.

## FOCUS ON THERAPEUTIC JURISPRUDENCE

The Resource Page focuses on resources relating to therapeutic jurisprudence on page 67.