

RESEARCH BRIEFS

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Special Theme: Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education

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Daicoff, S. Making Law Therapeutic For Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers. 811-848

The integration of therapeutic jurisprudence (TJ) with preventive law (PL) offers a uniquely satisfying and humanistic way of practicing law. The author uses the psychological data on the personality characteristics of lawyers to argue that TJ/PL is particularly well suited for lawyers with certain personality traits atypical of lawyers generally. These traits reflect altruistic, humanistic, or interpersonally oriented values; 2 of these atypical traits have been empirically linked to career dissatisfaction among lawyers. Because of the pervasiveness of the problem of lawyer job dissatisfaction, solutions are needed. TJ/PL is more than simply an alternative way of practicing law; it may actually hold the key to solving some of the problems currently besieging the legal profession.

Stempel, J.W. Theralaw and the Law-Business Paradigm Debate. 849-908

During the 1990s, both therapeutic jurisprudence and preventive law flourished as scholarly disciplines and have been increasingly viewed as complementary and connected, a fusion the author refers to as *theralaw*. The alternative dispute resolution (ADR) movement launched during the 1970s has also continued to grow. Simultaneously, debate in society has escalated regarding the proper organization and regulation of lawyers. Simply put, the debate is to a large degree over whether law practice is better modeled as a business or a profession. The author examines that emerging debate in the context of theralaw and ADR, assessing the potential implications of the respective models of lawyering for these growing fields of legal service.

Zacharias, F.C. Professional Responsibility, Therapeutic Jurisprudence, and Preventive Law. 909-920

In this essay, the author considers how therapeutic jurisprudence and preventive law might inform the field of professional responsibility. He suggests that many principles underlying professional responsibility standards are rooted in hidden psychological assumptions about the interaction between clients and lawyers. These principles often are ignored. Scientific research into the psychological assumptions

underlying professional responsibility norms could have numerous beneficial effects, including clarifying professional responsibility norms and teaching lawyers to deal with clients in a way that will help clients cope with the legal system and avoid tension with their lawyers.

Barton, T.D. Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection. 921-943

Combining the principles of therapeutic jurisprudence, preventive law, and creative problem solving reveals an overuse by legal professionals of “judging” problem solving style that emphasizes the problem solving tools of order, power, and normative expectation. It neglects – sometimes even suppresses – human emotion and interpersonal relationship, which are also important tools for solving problems. In contrast, psychologists often use an “accommodation” style of problem solving that emphasizes emotion and human connection. Legal professionals could be more effective and contribute importantly to community discourse were they to incorporate the accommodation style more frequently in legal problem solving. Doing so poses some threat to formal equality and due process, but therapeutic jurisprudence and preventive law scholarship offer promising examples for reconciling the accommodation style with traditional liberal values.

Rosen, R. E. And Tell Tchaikovsky the News: The Wedding of Therapeutic Jurisprudence and Preventive Lawyering. 944-950

Advocates for therapeutic jurisprudence (TJ) and preventive law (PL) presume that legal practice is normally unemotional and that expressing concern for the client is normally therapeutic. This response challenges both presumptions. The author argues that, as part of the service economy, legal practice involves a great deal of emotional labor. He emphasizes how psychological difficulties in being a lawyer may spring from the dilemmas of being a salesperson. He further questions linking certain emotional orientations to moral judgment by privileging compromising, expressing caring, or not being aggressive. He suggests that sometimes being affectively neutral toward clients is therapeutically indicated, and he considers how techniques and values are mixed in merging TJ and PL.

Brooks, S.L. Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach. 951-965

The field of child welfare law exemplifies opportunities and challenges facing the proponents of therapeutic jurisprudence (TJ) and preventive law (PL). The field has held itself out as promoting a therapeutic standard and goal for children, and it explicitly embraces a psychological PL theory. Nevertheless, it has failed to embrace contemporary mental health thinking about children and families (*family systems theory*) and reflects an outmoded, psychoanalytic, medical model that has contributed to an antitherapeutic child welfare system inconsistent with PL principles. Adopting a family systems approach

requires a paradigm shift toward respecting and empowering the family as a unit. This approach is consistent with TJ/PL principles and provides a better fit between the legal system and social reality.

Tesler, P.H. Collaborative Law: A New Paradigm for Divorce Lawyers.
967-1000

Collaborative law arose as a response to the harms of family law litigation and the limitations of family mediation. It consists of lawyers and clients working exclusively toward settlement. The lawyers and neutral experts are disqualified if the parties should litigate. Lawyers behave and think quite differently in collaborative law. To do it well requires new skills and knowledge not learned in conventional practice. Performed well, collaborative law can have a transformative effect on lawyers, clients, families, and communities. It has healing effects that distinguish it from adversarial practice and bring it within the compass of therapeutic jurisprudence.

Bryan, P.E. "Collaborative Divorce": Meaningful Reform or Another Quick
Fix? 1001-1017

Many of the negative consequences of divorce for women and children relate to poor substantive outcomes rather than to the process used to resolve the divorce dispute. Collaborative divorce focuses primarily on procedure, emotions, and relationship preservation almost to the exclusion of substantive concerns. Moreover, many of the factors that precipitate negative divorce results for women and children in traditional lawyer representation persist in collaborative divorce. Consequently, collaborative divorce likely does little to alleviate the postdivorce suffering of women and dependent children.

Tesler, P. H. The Believing Game, The Doubting Game, and Collaborative
Law: A reply to Penelope Bryan. 1018-1027

In her article in this issue, P. Bryan measured collaborative law by whether it improves the economic conditions of women after divorce, arguing that far broader reform of divorce laws is required to achieve that goal. Collaborative law aims at different goals. Bryan also argued that collaborative law resembles mediation, that mediation harms women and children, and that the same will happen in collaborative law. In fact, Bryan makes faulty analogies between mediation and collaborative law, misconstrues the literature on mediation, and criticizes collaborative law for human failings arising in any profession or dispute resolution modality. Fair-minded research questions would serve the evolution of this new model better than such ill-founded arguments in support of apparently preconceived conclusions.

Wexler, D. B. Relapse Prevention Planning Principles for Criminal Law
Practice. 1028-1033

Recent research in rehabilitation indicates the relative success of cognitive-behavioral modes geared to relapse prevention planning. Thus far, most of the successful programs involve persons who are already in prison or on probation. The basic approach to relapse prevention planning is to encourage the offender to analyze the chain of events and behaviors that lead to law-violating behavior and to come up with a plan both to avoid high-risk situations and to deal satisfactorily with such situations if they occur. The author proposes that criminal defense lawyers should become familiar with techniques of relapse prevention planning and use such techniques to work with a client and to propose a probationary plan with relevant, responsive, and workable conditions of probation. This enhances the chance for a probationary disposition, and the very process of attorney-client interaction may begin the rehabilitative process.

Winick, B. J. Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/ Preventive Law Model. 1034-1083

Promising new developments concerning offender rehabilitation and various provision of the Federal Sentencing Guidelines and their judicial construction make it appropriate to reconceptualize the role of the criminal defense lawyer at plea bargaining and sentencing. These new developments provide new opportunities for attorneys to counsel clients about rehabilitative options, to facilitate their rehabilitative efforts, and to seek probation or reduced sentences as a result. The author proposes a new broader role for counsel on the basis of principles of therapeutic jurisprudence and preventive law. The new approach is described, and author suggest how counsel can hold conversations with clients about these sensitive issues and play a therapeutic and preventive role in ways that increase client liberty and well-being.

Schneider, A. K. The Intersection of Therapeutic Jurisprudence, Preventive Law, and Alternative Dispute Resolution. 1084-1102

The author examines the intersection of alternative dispute resolution (ADR) with the theory of therapeutic jurisprudence (TJ) and the practical advice suggested by preventive law (PL). The 1st part of this article has a brief review of each of these approaches and notes similarities in their underlying concepts. In the 2nd part of the article, the use of TJ and PL in the practice and pedagogy of ADR is examined. A framework provided by the integration of TJ and PL can help lawyers counsel their clients in choosing between ADR methods and in designing dispute resolution systems. Finally, lessons and ideas that both TJ and PL could draw from ADR are examined. Empirical ADR research can support the premise of TJ. The implementation of ADR programs can also demonstrate the importance of balancing therapeutic factors with legal financial factors while providing lessons for other areas of the law seeking to implement TJ and PL ideas.

Waldman, E. Substituting Needs for Rights in Mediation: Therapeutic or Disabling? 1103-1122

In part I, the author assesses mediation's trade-off between rights and needs, focusing on the problematic nature of need satisfaction as a benchmark for successful mediation. Part II suggests that needs, unlike rights, are fundamentally subjective and that minorities and other traditionally marginalized peoples may define their needs more minimally than their White counterparts. It further summarizes data demonstrating that minorities experience greater satisfaction in mediation than Whites, even though they achieve objectively worse outcomes. Part III explores the validity of need satisfaction as the litmus test for proper or effective mediation, noting that individual need may be tainted by prejudice or colored by an improper interpretation of background legal norms and entitlements.

Goldman, P. & Cooney, L. L. Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventive Law into the Law School Curriculum. 1123-1146

Within the last decade, many law schools have broadened their educational missions to include lawyering skills programs that bridge the gap between practice and theory. At the same time, legal scholars have advocated training attorneys to integrate their planning and counseling roles to become "therapeutically oriented preventive lawyers." Skills and clinical programs in law schools are well suited for such training. The authors discuss the lawyering skills program they developed and direct. Using examples from classroom simulations, they illustrate how the integration of therapeutic jurisprudence and preventive law into the skills curriculum can sensitize students to the psychological aspects of the attorney-client relationship and prepare them to practice law as a humane profession.

Berkheiser, M. Frasier Meets Clea: Therapeutic Jurisprudence and Law School Clinics. 1147-1172

As other articles in this special theme issue demonstrate, preventive law has begun to bridge the gap between the theoretical nature of therapeutic jurisprudence and the actual practice of law. The author suggests that law school clinics can provide another avenue for integrating theory with practice. In law school clinics, students experience real, live client representation under faculty supervision. The questions posed by therapeutic jurisprudence can enhance that experience by focusing explicitly on nonlegal concerns that may affect the well-being of the client, clinic students, and faculty. However, incorporating the perspective of therapeutic jurisprudence into clinical teaching and practice presents challenges that law school clinicians need to address.

Silver, M.A. Emotional Intelligence and Legal Education. 1173-1203

The traditional knowledge-based law school curriculum is slowly giving way to one that increasingly exposes students to various lawyering skills. Nonetheless, legal educators are generally averse – or at best ill equipped – to support that training with the empathic and psychological skills good lawyering demands. The author discusses how emotional intelligence is essential to good lawyering and argues that it can and should be

cultivated in law school. The article draws upon three examples of popular culture to explore both the absence and possibilities of interpersonal intelligence in the practice of law. The author also describes her own law school's current project of re-imagining legal education and explains how the development of emotional skills might be incorporated into that vision.