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Introduction

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INTRODUCTION

Attorneys as collaborators and counselors. Judges who promote resolution of conflict. Law as a healing agent and court proceedings that minimize rather than exacerbate harm. Problem-solving courts. Restorative justice. Collaborative law.

You may have noticed a subtle, though clearly discernible, change of climate in the American legal system in recent years. An invigorating breeze has been blowing, and has now gathered sufficient force to reshape the roles of judges, lawyers, and legal educators, and through them the legal system as a whole. From my vantage point on the bench of the supreme court of our nation's fourth largest state, I see the fruits of this new perspective in unified family courts that emphasize an integrated approach to proceedings that involve children or families, in drug courts that promote treatment over incarceration, in alternative dispute resolution that is an essential element of the mediation programs in all of our trial courts, and in the more holistic approach being taken in clinical programs provided in some of our law schools. I see further evidence of profound change in attorneys who include in their criminal law practice a focus on client rehabilitation, and in attorneys who understand the harm caused to children by a high-conflict divorce and so encourage practices in family law such as collaborative divorce.

This movement has a name—Therapeutic Jurisprudence—coined more than a decade ago by one of its pioneers, Professor David Wexler, whose essay on therapeutic justice and the role of the criminal defense lawyer appears in these pages. Through the efforts of Professor Wexler and his “original co-conspirator and intellectual partner in crime,” Professor Bruce Winick, as well as the work of many others, what began as a lonely voice of dissent has gained adherents in our courts, our profession, and our law schools. As this issue of the *St. Thomas Law Review* demonstrates, this movement has even developed a literature of its own.

Therapeutic Jurisprudence has the potential to transform our perspective on how law can affect human behavior. Its focus extends far beyond decisional law and legal rules, and pierces into the very essence of judging and lawyering. While the name itself may conjure up notions of “touchy-feely” jurisprudence, the results are concrete. By approaching legal problems in a problem-solving, holistic and conflict resolution mode, this approach works to resolve conflicts more humanely, to minimize harm to the litigants and to prevent recidivism.

In our own state, there are eighty-three operational drug courts that emphasize treatment over incarceration, with more on the way. This type of problem-solving court, pioneered in our state by a group of visionary judges in Miami who were determined to stop the revolving door of crimes driven by substance abuse, is a hallmark of Therapeutic Jurisprudence. Having attended many drug court graduation ceremonies, I can personally attest to the therapeutic effects for everyone involved. I recall shaking my head in despair as the intermediate appellate court on which I served upheld the termination of parental rights for a fifth time of a mother who gave birth to yet another crack cocaine-addicted baby. The drug court graduations I have attended nurture the hope that serves as a tonic helping to alleviate that kind of despair. And the drug court approach is not only tough on crime, but smart on crime as well: drug court graduates have lower recidivism rates than eligible offenders who have not participated in or graduated from drug court.

To date, much of the work in Therapeutic Jurisprudence has gone into the area of greatest need, family law. Family cases in Florida account for the largest percentage of the courts' filings and post-judgment litigation. In cases involving children and families, our traditional adversary system escalates conflict. Although my practice before becoming a judge was primarily a civil trial practice, when I did become involved in family law cases, I never felt quite comfortable with my role as an adversary or with the perception that litigants thought the best family lawyers were those who were the most aggressive litigators. I realize that I am not the only lawyer to have had those feelings. In our legal and judicial education, and in our criteria for board certification in family law, we must emphasize that the best family lawyer is the problem solver who assists his or her client in achieving long-lasting solutions.

To its credit, the Family Law Section of The Florida Bar has committed itself to this goal through its 2004 publication of the "Bounds of Advocacy," establishing laudable standards and goals of professionalism for family lawyers within this State. The Family Law Section recognizes the basic principles of Therapeutic Jurisprudence in its Introduction to the "Bounds of Advocacy:"

Public opinion increasingly supports other models of practice and methods of conflict resolution.

A counseling, problem-solving approach for people in need of help in resolving difficult issues and conflict within the family is another model. This is sometimes referred to as "constructive advocacy." "Constructive advocacy" must be the goal of all

family law attorneys. This approach must include a consideration of all available means of settling disputes. Family lawyers should recognize the effect that their words and actions have on their clients' attitudes about the justice system, not just on the "legal outcome" of their cases. As a counselor, the lawyer encourages problem solving by the client.

Further, the Florida Legislature, recognizing that we must minimize harm in divorce cases by assisting in the peaceful resolution of conflict, has incorporated therapeutic goals into this often acrimonious arena. In its statement of purposes for the statutes governing dissolution of marriage, child support, and child custody, the Legislature has stated that the purposes of legal dissolution proceedings are to "safeguard meaningful family relationships," "promote the amicable settlement of disputes," and "mitigate the potential harm to the spouses and children caused by the process of legal dissolution of marriage."¹

In addition, since 1991, the Florida Supreme Court, where I now serve, has consistently emphasized the importance of a unified family court, where issues arising from divorce, domestic violence, juvenile dependency, and juvenile delinquency are addressed in a collaborative and comprehensive manner. In 2001, we reiterated that "our goal continues to be the creation of a fully integrated, comprehensive approach to handling all cases involving children and families, while at the same time resolving family disputes in a fair, timely, efficient and cost-effective manner."² In the same year, we expressly applied the principles of therapeutic jurisprudence when we adopted a rule requiring the court to consider the child's views before ordering him or her into residential treatment.³

More evidence of the Therapeutic Jurisprudence movement in Florida can be found in the anti-violence initiative undertaken by Miami-Dade Public Defender Bennett Brummer, which emphasizes "the public health model because of its holistic, constructive, research-based prevention and treatment methods." In addition, there is Team Child, which pairs indigent children in the justice system with social workers who help solve civil legal problems that may contribute to delinquency or affect the outcome of a case. These and other examples, too numerous to mention, demonstrate the surge in reaching beyond the study of "law and therapy" to use the law *as*

1. Fla. Stat. § 61.001(2)(a)-(c) (2004).

2. In re Report of the Family Court Steering Committee, 794 So. 2d 518, 519-20 (Fla. 2001) (citations and quotation marks omitted).

3. See Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 804 So.2d 1206, 1210-11 (Fla. 2001).

therapy. Although we cannot expect judges and attorneys to assume the responsibilities of social workers, we can encourage them to be problem solvers rather than solely advocates and arbiters of disputes.

This symposium represents another important step in the Therapeutic Jurisprudence movement. Whatever your role in our justice system or interest in this subject, the articles that follow will help show you how attorneys and legal educators are revising our traditional notions of lawyering. To what end? An offender whose attorney has succeeded in structuring individualized terms of probation may achieve rehabilitation rather than prison. An immigrant or elderly client may receive the social services needed to thrive independently. A family may be kept together, rather than have the parent-child bond severed. And in the process, an attorney—perhaps more than one—will find that she is actually achieving the goals that led her to the practice of law in the first place. I am sure that the contributors to this issue, myself included, would hope for no greater reward.

The Honorable Chief Justice Barbara J. Pariente

FLORIDA SUPREME COURT