

1997

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### Recommended Citation

Stolle, Dennis P.; Wexler, David B.; Winick, Bruce J.; and Dauer, Edward A. (1997) "Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering," *California Western Law Review*. Vol. 34 : No. 1 , Article 3.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol34/iss1/3>

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# INTEGRATING PREVENTIVE LAW AND THERAPEUTIC JURISPRUDENCE: A LAW AND PSYCHOLOGY BASED APPROACH TO LAWYERING\*

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## I. INTRODUCTION

This article grows out of a panel presentation and discussion held at the 1997 Annual Meeting of the Law & Society Association.<sup>1</sup> The presentation brought together proponents of both preventive law and therapeutic jurisprudence ("TJ") to consider the potential for an integration of these two fields. At the time of the presentation, two of the authors (Stolle & Wexler) had recently published a series of initial efforts at introducing an integrated TJ/preventive perspective on lawyering,<sup>2</sup> which served loosely as a spring-

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\* The authors thank Dennis Lynch and Rob Rosen for their thoughtful comments and suggestions at the 1997 Annual Meeting of the Law and Society Association. This article was prepared while the first author was in receipt of the Orinda M. Johnson Fellowship, administered through the University of Nebraska-Lincoln. The financial support of the University of Nebraska is gratefully acknowledged.

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1. Preventive Law and Therapeutic Jurisprudence: A Psychology and Law Based Approach to Everyday Lawyering, Address Before the Annual Meeting of the Law and Society Association (May 30, 1997).

2. Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25 (1997) [hereinafter *Therapeutic Jurisprudence*]; Dennis P. Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*, 14 BEHAV. SCI. & L. (1996) [hereinafter *Professional Responsibility*]; Dennis P. Stolle & David B. Wexler,

board for the remarks of the panelists. The present article provides introductions to preventive law, therapeutic jurisprudence, and the integrated TJ Preventive Law perspective. Several examples of TJ preventive lawyering are provided, followed by a detailed discussion of future directions and novel issues explored by us at the session or in its aftermath.

### A. Preventive Law

Preventive law has been defined as “a branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties.”<sup>3</sup> Preventive law provides a framework in which the practicing lawyer may conduct professional activities in a manner that both minimizes his or her clients’ potential legal liability and enhances their legal opportunities. In essence, preventive law is a proactive approach to lawyering.<sup>4</sup> It emphasizes the lawyer’s role as a planner<sup>5</sup> and proposes the careful private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities.<sup>6</sup>

An analogy is often drawn between preventive law and preventive medicine.<sup>7</sup> Just as preventive medicine works from the premise that keeping people healthy constitutes a better allocation of resources than treating people who become sick, preventive law works from the premise that preventing legal disputes is less costly than litigation.<sup>8</sup> Furthermore, preventive law promotes a client-centered approach, just as preventive medicine promotes a patient-centered approach.<sup>9</sup> In preventive law, the lawyer and client engage in a joint decision making process regarding legal strategies. The decision making is not limited to a particular dispute, but rather the decision making contemplates the client’s long term goals and interests and how best to achieve them while minimizing exposure to the risk of legal difficulties. “By receiving updates on a client’s life events (not limited to disputes), the lawyer can then assist the client to improve decision making and planning to

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*Preventive Law and Therapeutic Jurisprudence: A Symbiotic Relationship*, 16 PREVENTIVE L. REP. 4 (1997) [hereinafter *Preventive Law*].

3. Honorable Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 692 (1995) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1798 (1961)). This definition provides a starting point for understanding preventive law. However, like most definitions of preventive law to date, this definition falls short of an accurate description of both the breadth and detail of the preventive law enterprise. See discussion *infra* part III.

4. See ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS (1997).

5. See generally *id.*; LOUIS M. BROWN & EDWARD A. DAUER, PERSPECTIVES ON THE LAWYER AS PLANNER (1978).

6. See HARDAWAY, *supra* note 4, at xxxvii-xli.

7. See HARDAWAY, *supra* note 4, at xxxvii.

8. See HARDAWAY, *supra* note 4, at xxxvii.

9. See BROWN & DAUER, *supra* note 5, at xix.

prevent problems, reduce conflict, and increase life opportunities.”<sup>10</sup> Such “legal check-ups”<sup>11</sup> are in many ways analogous to a medical check-up with a primary care physician.<sup>12</sup>

Preventive law has generated considerable interest, scholarly and practice-oriented legal publications, and a dedicated corps of preventive law practitioners.<sup>13</sup> Yet the movement has its critics, and it has failed to convert large numbers of lawyers.<sup>14</sup> A frequently heard (but ironically contradictory) criticism among lawyers is that the practice of preventive law is “impossible, . . . and I already do it anyway.” Furthermore, some lawyers worry that their clients will complain if they seek legal advice for one subject, and wind up paying a preventive lawyer more than was anticipated to deal with problems that they didn’t know they had.<sup>15</sup> It has also been suggested that the proactive orientation of preventive law may come dangerously close to improper solicitations of legal business.<sup>16</sup> Thus, although some preventive law ideas have caught on, many lawyers remain resistant.

### B. Therapeutic Jurisprudence

Therapeutic jurisprudence is an interdisciplinary approach to law that 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. Therapeutic jurisprudence suggests that these positive and negative consequences be studied with the tools of the behavioral sciences, and that, consistent with considerations of justice and other relevant normative values, law be reformed to minimize anti-therapeutic

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10. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L. Q. 421, 440 (1994).

11. HARDAWAY, *supra* note 4, at 180-222; *See* Mosten *supra* note 10, at 445.

12. *See* Mosten *supra* note 10, at 447.

13. The interest in preventive law is exemplified by the success of the National Center for Preventive Law, the recent publication of HARDAWAY, *supra* note 4, and the continued success of the PREVENTIVE LAW REPORTER.

14. Interestingly, many good lawyers practice preventive law instinctively; however, far fewer explicitly refer to their work as involving preventive law. *See* HARDAWAY, *supra* note 4, at xxxvii; *See also* Scott E. Isaacson, *Preventive Law: A Personal Essay*, 9 UTAH B.J., Oct. 1996, at 14, 16 (discussing potential reasons why preventive law is not more often explicitly recognized and advocated).

15. *See infra* note 79 and accompanying text.

16. This argument is most often incorrect. Preventive law, practiced as it was intended by its founders to be practiced, creates no potential for improper solicitations of business. *See* Louis M. Brown, *The Law Office-A Preventive Law Laboratory*, 104 U. PA. L. REV. 940, 948 (1956); Louis M. Brown, *The Scheme: Maximize Opportunities, Minimize Future Legal Trouble*, 6 PREVENTIVE L. REP. 17, 19 (1987) [hereinafter *The Scheme*] (noting that “the law of professional responsibility has always permitted lawyers to initiate legal discussions with existing clients. That process is not a process of solicitation in the traditional definition of that word. Solicitation that was not permitted was solicitation to obtain a client.”); *see generally* HARDAWAY, *supra* note 4.

consequences and to facilitate achievement of therapeutic ones.<sup>17</sup>

Although the approach originated in the area of mental health law, it has quickly expanded beyond that context, and has become a mental health law approach to law generally. As Wexler and Winick's 1996 book *Law in a Therapeutic Key*<sup>18</sup> illustrates, the therapeutic jurisprudence perspective has recently been applied in the contexts of criminal law, family law, juvenile law, disability law, discrimination law, health law, evidence law, tort law, contracts and commercial law, labor arbitration, workers' compensation law, probate law, and legal profession. The approach has provoked an entire field of original interdisciplinary work by law professors, psychologists, sociologists, criminologists, philosophers, lawyers, and judges.<sup>19</sup> And, most recently, there is growing interest in a dimension of therapeutic jurisprudence that takes the law as given and explores ways in which existing law might be most therapeutically applied.<sup>20</sup>

However, like preventive law, therapeutic jurisprudence is not without its critics. Therapeutic jurisprudence has been accused of being paternalistic, in some respects as a result of a confusion provoked by the title itself, which for some sounds like a call for a return to the therapeutic state. Its proponents have been careful to point out that although the law's therapeutic consequences should be studied, law often serves other normative values that often will dictate the existence of a rule of law or a legal practice even if anti-therapeutic.<sup>21</sup> Therapeutic jurisprudence serves to sharpen the public policy debate about law and law reform, but does not purport to resolve it when therapeutic considerations conflict with other normative values. Therapeutic jurisprudence, like preventive law, also has been subjected to the ironic critique that law's therapeutic consequences ought not be considered, or that they are too difficult to ascertain, but also that they are already taken into account.

### C. Integrating Preventive Law and Therapeutic Jurisprudence

One of us (Stolle) has recently attempted a synthesis of preventive law

17. See generally David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* 3 (1990) [hereinafter *THERAPEUTIC AGENT*].

18. DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (1996) [hereinafter *THERAPEUTIC KEY*]; See also DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991) [hereinafter *ESSAYS*]; Wexler, *supra* note 17; BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (1997) [hereinafter *MENTAL HEALTH*].

19. See generally WEXLER & WINICK, *THERAPEUTIC KEY*, *supra* note 18.

20. See generally David B. Wexler, *Applying the Law Therapeutically*, 5 *APPLIED & PREVENTIVE PSYCHOL.* 179 (1996); Stolle, *Professional Responsibility*, *supra* note 2; David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, 20 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 243 (1994); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 *PSYCHOL. PUB. POL'Y. & L.* 184, 201-03 (1997).

21. See generally Wexler, *supra* note 17.

and therapeutic jurisprudence.<sup>22</sup> Writing in the context of elder law, Stolle suggests that a preventive lawyer should be sensitive to the therapeutic and psychological consequences of attorney-client interactions. Stolle argues that TJ has much to offer preventive law and that it can help to reconceptualize and broaden the approach to encompass an important but frequently overlooked dimension of legal practice.<sup>23</sup> Likewise, recent scholarship by Stolle & Wexler has suggested that “preventive law, and the legal check-up in particular, at least when used by a lawyer keenly attuned to how the law may affect a client’s psychological well-being, can provide the very legal context or mechanism needed for lawyers to work with clients to apply the law therapeutically.”<sup>24</sup>

The integration of these two approaches can greatly enhance the potential of each to achieve its objectives. Therapeutic jurisprudence alone lacks the practical procedures for law office application. Preventive law alone lacks an analytical framework for justifying emotional well-being as one priority in legal planning. Bringing the two fields together can remedy these difficulties. Through a synthesis of preventive law and therapeutic jurisprudence, preventive law can “provide a framework for the practice of therapeutic jurisprudence. And therapeutic jurisprudence, in turn, can provide a rich and rewarding ‘human aspect’ and interdisciplinary orientation for a preventive lawyer to use in everyday law practice.”<sup>25</sup>

This integrated framework, like preventive law and therapeutic jurisprudence in general, is not substantively restricted to any particular field of law. Of course, application of the integrated framework may be more sensible in some legal contexts than in others.<sup>26</sup> Furthermore, the combined framework is likely to be of most immediate interest to lawyers providing pre-paid legal services, legal-aid lawyers, lawyers and students in law school legal clinics, or lawyers working with special populations such as children, the elderly, or the disabled.<sup>27</sup> Indeed, many such lawyers already blend elements of preventive law with concerns for a client’s emotional well-being.<sup>28</sup> The integrated framework merely seeks to explicate the point

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22. See Stolle, *Professional Responsibility*, *supra* note 2.

23. See Stolle, *Professional Responsibility*, *supra* note 2.

24. Stolle & Wexler, *Therapeutic Jurisprudence*, *supra* note 2, at 27.

25. *Id.* at 28.

26. See discussion *infra* Part IV, particularly the Venn diagram; Stolle & Wexler, *Therapeutic Jurisprudence*, *supra* note 2, at 28.

27. See Stolle & Wexler, *Therapeutic Jurisprudence*, *supra* note 2, at 28 (“After all, such lawyers can be involved in a client-centered practice that seeks to negotiate the legal arena with maximum attention to the psychological well-being of clients. Such practitioners—in essence, primary care counselors-at-law—are truly helping professionals . . .”).

28. See Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *FORDHAM L. REV.* 1073 (1994); Mosten, *supra* note 10; Gerald R. Williams, *Negotiation as a Healing Process*, 1996 *J. DISP. RESOL.* 1 (1996); Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty law: In Search of Access, Connection, and Voice*, 63 *GEO. WASH. L. REV.* 1071 (1995).

and perhaps sharpen the focus. The combined framework is intended to generate thinking that otherwise would not occur and to create a community of lawyers sharing the same perspective and systematically and expressly applying the principles of both therapeutic jurisprudence and preventive law in their daily practice.<sup>29</sup>

The potential offered by an integration of these two approaches is perhaps best illustrated through examples. This Article therefore presents several examples of TJ preventive lawyering, which serve as catalysts for further discussion of the integration. Part II offers examples of the integrated framework drawn from the contexts of elder law, HIV/AIDS law, family law, and business planning law. Part III provides a critical examination of the potential utility of the integration from the established analytic perspectives of preventive law and therapeutic jurisprudence. Part IV then discusses appropriate channels for future research and scholarship on the combined framework. Finally, Part V concludes with a call for a transformation of legal practice in a direction consistent with the principles of TJ Preventive Law.

## II. EXAMPLES OF THE INTEGRATION IN PRACTICE

### A. Elder Law<sup>30</sup>

The TJ Preventive Law framework may lend itself particularly well to working with older clients. In a recent article appearing in *Behavioral Sciences and the Law*, Stolle applied a TJ Preventive Law perspective in analyzing an elder law example adapted from Frolik & Brown's treatise on elder law.<sup>31</sup> Imagine Frank and Eleanor Burke, both age sixty-five and married for forty years, who enter a lawyer's office wishing to "have a simple will drafted." Neither Frank nor Eleanor has ever consulted with a lawyer before. It might appear that such a client consultation would likely be relatively straightforward, mostly involving well established legal principles related to estate planning. Indeed, in many law offices, the Burkes would walk in with this agenda and would walk out with a simple will and nothing more.

However, Stolle suggested that a lawyer working with elderly clients ought to stay abreast of social science literature relevant to older clients, as well as legal developments relevant to the elderly.<sup>32</sup> Such information could

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29. See Stolle & Wexler, *Therapeutic Jurisprudence*, supra note 2; See also Stolle & Wexler, *Preventive Law*, supra note 2.

30. This example has been adapted from Stolle, *Professional Responsibility*, supra note 2.

31. LAWRENCE A. FROLIK & MELISSA C. BROWN, *ADVISING THE ELDERLY OR DISABLED CLIENT: LEGAL, HEALTH CARE, FINANCIAL, AND ESTATE PLANNING* (1992).

32. For example, a subscription to one or more of the following journals may go a long way toward keeping a lawyer on top of the social scientific literature relevant to older clients: *JOURNAL OF GERONTOLOGY*, *PSYCHOLOGY AND AGING*, *DEVELOPMENTAL PSYCHOLOGY*,

then be applied during client consultations to achieve a sophisticated preventive/therapeutic approach to elder law. In Stolle's framework, the first step for a TJ preventive lawyer confronted with clients such as the Burkes is to determine whether emotional or psychological well-being will be in any way relevant in this client consultation.

The Burkes have entered the lawyer's office with narrow economic concerns in mind—the drafting of a simple will. However, the preventive lawyer should be able to use client counseling skills to quickly bring out information regarding the Burkes' age, health conditions, family structure, vocations, and avocations, all of which may prove to be critical information in drafting a document to distribute their assets in accord with their intent. Furthermore, this information can be used to alert the preventive lawyer to any potential therapeutic concerns.

An initial conversation might reveal that the Burkes have recently become concerned with setting their affairs in order as they approach their later years of life. The Burkes have three children, two of whom are married and each have children of their own. The Burkes' third child, Tom, now age twenty-eight, has been divorced twice. Unfortunately, over the last few years Tom has also been through a series of drug and alcohol abuse treatment centers. Of particular concern for the Burkes is treating their children fairly and avoiding future dependency on their children. The Burkes appear to be in good physical and mental health; however, Frank did take an early retirement because of recurring problems with arthritis. Frank spends his free time with woodworking projects when his arthritis is in remission. He sells some of his projects for a profit and donates the remainder to his church for sale at auctions and craft shows. For the past thirty years Eleanor has been a homemaker. Frank's parents both passed away a number of years ago. Eleanor's father also died several years ago. Her mother is eighty-six and in poor health. She is suffering from Alzheimer's disease, and has been living in a nearby nursing home for the past several months. The primary sources of the Burkes' income are Social Security, Frank's fixed pension, dividends from a number of investments, and a small amount from the sale of Frank's carvings.

Upon considering this information, a TJ preventive lawyer should recognize that, beyond the economic and legal concerns normally associated with drafting a will, many therapeutic concerns may also confront the Burkes in the future.

First, the Burkes' age should serve as an indicator that therapeutic goals may become important. Reaching age sixty-five often has psychological implications beyond the readily apparent legal and economic benefits. In addition to meeting or approaching the threshold age requirements for

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ABSTRACTS IN SOCIAL GERONTOLOGY, AGE AND AGEING, AGEING AND SOCIETY, AGING AND MENTAL HEALTH, JOURNAL OF AGING AND HEALTH, JOURNAL OF AGING AND SOCIAL POLICY, JOURNAL OF APPLIED GERONTOLOGY, RESEARCH ON AGING.

Medicare, private pensions, Social Security, and private benefits such as retail and service discounts, approaching age sixty-five may also bring the label of "elderly."<sup>33</sup> The therapeutically insightful lawyer should be cognizant that being labeled elderly may have adverse consequences on an individual's self-image.<sup>34</sup> However, the lawyer should also not overlook the reality that, as a matter of actuarial science, growing older is associated with an increasing potential for mental and physical health problems.<sup>35</sup> Therefore, although the Burkes currently appear to be in relatively good mental and physical health, health maintenance might properly become a priority in their life.

Second, the Burkes' concern about directing the distribution of their assets might itself raise therapeutic concerns. As evidenced by the Burkes' very presence in the lawyer's office, the Burkes have been contemplating the future, including the possibility of their own death or incapacity. Such concerns are common among older persons;<sup>36</sup> however, the topic of one's own death remains sensitive, and may often be accompanied by feelings of anxiety, uncertainty, or depression. The fact that the Burkes have never before consulted with a lawyer may also contribute to feelings of anxiety in discussing these private and emotionally charged issues.

Third, the fact that Eleanor's mother is suffering from Alzheimer's disease should raise serious therapeutic concerns. Because Eleanor's mother is eighty-six years old and suffering from a severe neurological disease, she may have a very limited life expectancy. This raises the issue of the impact on Eleanor and Frank of witnessing Eleanor's mother's mental deterioration and coping with her eventual death. In addition to the difficult emotional and psychological circumstances the Burkes are facing, the continuation of adequate care for Eleanor's mother may have the potential to place an additional financial burden on the Burkes. Indeed, struggling with financing Eleanor's mother's care may place yet another psychological stressor on the Burkes. Finally, some evidence suggests that Alzheimer's disease may have a hereditary component.<sup>37</sup> Eleanor's mother's condition thus ought to serve as a warning sign that Eleanor too may be at increased risk of developing

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33. See Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L. J. 683, 684-87 (1991) (discussing "who really is elderly?").

34. See generally *id.*

35. At the same time, it is critical that a lawyer not buy into stereotypes of the aged and avoid the "temptation to substitute decisions made by him or her for decisions that should properly be made by the client." JOAN M. KRAUSKOPF, *ADVOCACY FOR THE AGING* 24 (1983).

36. See Judith W. McCue et al., *Disability Planning for the Senior Citizen*, C126 ALI-ABA 339, 343 (1995) ("Increasingly, clients are concerned about the possibility of their own incapacity and wish to take steps to assure, should they become disabled in the future, that their assets will be protected and that health care decisions will be made on their behalf without court intervention or other delays.")

37. See generally Ge Li et al., *Age at Onset and Familial Risk in Alzheimer's Disease*, 152 AM. J. PSYCHIATRY 424 (1995). This is especially true of early onset Alzheimer's disease. *Id.*

Alzheimer's disease in later life.<sup>38</sup>

Fourth, Frank's arthritis should raise therapeutic concerns in the mind of the preventive lawyer. Arthritis is a chronic disease that often contributes to future disability among older persons<sup>39</sup> and is a characteristic impairment of "consistently high users" of medical services.<sup>40</sup> Furthermore, the severity of an arthritic condition is related to a decline on some measures of psychological well-being.<sup>41</sup> In Frank's case, an increase in the severity of his arthritic condition may infringe on his woodworking hobby and, consequently, have a particularly detrimental impact on his psychological well-being.

Stolle suggested that, by keeping abreast of social scientific literature on geriatric issues, a preventive lawyer, as a first step, can identify therapeutic concerns such as those listed above.<sup>42</sup> The presence of such therapeutic issues should suggest to the TJ preventive lawyer that planning for the possibility of future incapacity or disability should be important in working with the Burkes. Thus, the lawyer should discuss therapeutic goals openly with the Burkes as one potential consideration in their planning. This conversation must, of course, be conducted in a sensitive and respectful manner. However, the client should be involved from the beginning in the identification of therapeutic concerns.

On one hand, the lawyer should encourage the Burkes to consider the real possibility of future incapacity. A detailed client interview and a discussion of the clients' plans can provide an opportunity for the Burkes to take a realistic look at their own health and the possibility of declining health in upcoming years. On the other hand, the lawyer should also encourage the Burkes to value their current healthy condition, and might even use this opportunity to encourage the Burkes to make health maintenance a priority.

Here, the lawyer is clearly stepping outside of his role of legal counselor, and should make that absolutely clear to the client.<sup>43</sup> The lawyer

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38. See generally *id.*

39. See generally Susan L. Hughes et al., *Impact of Joint Impairment on Longitudinal Disability in Elderly Persons*, 49 J. GERONTOLOGY S291 (1994).

40. Donald K. Freeborn et al., *Consistently High Users of Medical Care Among the Elderly*, 28 MED. CARE 527 (1990).

41. See Barbara L. Downe-Wamboldt & Patricia M. Melanson, *Emotions, Coping, and Psychological Well-Being in Elderly People with Arthritis*, 17 W. J. NURSING RES. 250 (1995); Baqar A. Husaini & Stephen T. Moore, *Arthritis Disability, Depression, and Life Satisfaction Among Black Elderly People*, 15 HEALTH & SOC. WORK 253 (1990).

42. See Stolle, *Professional Responsibility*, *supra* note 2.

43. This point represents a refinement of the analysis presented in Stolle, *Professional Responsibility*, *supra* note 2. Although TJ preventive lawyering involves an expansion of the role of the lawyer as counselor, the TJ preventive lawyer's expertise has clear limits. When the lawyer chooses to give advice or suggestions falling outside of that area of expertise, the lawyer must make clear that his role in giving that advice is as a friend or acquaintance, not an expert. Furthermore, any such advice should be restricted to general and innocuous statements.

might say, "Look, I'm not a doctor, but I see a lot of older clients. I always say to them that I hope the documents that I draft won't be used for a long, long time; and, I mean that. But, over the years, I can really see the difference between my clients who make an effort to take care of themselves, and those who don't. So keep checking in with your doctor and living a healthy life-style. You guys are in great shape and I want you to stay that way. After all, I would like to be your lawyer for a long time." Thus, by using the law office as a forum for encouraging the Burkes to both plan for the worst and attempt to maintain their health so that the worst never comes about, the lawyer can maximize the probability of therapeutic outcomes and minimize the probability of anti-therapeutic outcomes.

The lawyer's task is, however, primarily legal. Given this, the lawyer must use the appropriate legal tools to ensure that the Burkes' intent is achieved, or if their intent cannot be achieved, inform the Burkes of this and discuss alternative strategies. However, if more than one legal tool is available to achieve the Burkes' intent, the role of the integrated framework is to choose the most therapeutic, or, at minimum, the least anti-therapeutic alternative, all other things being equal, or nearly so. Even where only one legal solution is available, that solution may, in some cases, be tailored to enhance its therapeutic effect without jeopardizing its legal enforceability.

In the present situation, the lawyer might first consider the Burkes' relationship to one another. The Burkes have had a long and successful marriage and appear to care deeply for one another. In such circumstances, the death of one spouse may have a substantial negative psychological impact on the surviving spouse, rendering the surviving spouse temporarily unable to manage his or her own affairs. Consequently, a complementary set of revocable trusts may be appropriate. Such a set of mirror-image documents would prevent financial disaster if the surviving spouse is unable to make financial decisions, yet retains a level of autonomy that may be critical to a person's self-esteem.<sup>44</sup>

The preventive lawyer should also carefully consider the nature of the Burkes' relationship with their children. The Burkes appear to want to leave most of their assets to their children. However, the Burkes' comments should suggest that they may expect that their two happily married children will spend any inheritance more wisely than their third child, who apparently has a serious drug and alcohol problem. Although the Burkes said that they want to treat their children fairly, they may have reservations about leaving assets to a child who currently has a serious substance abuse problem. If further discussion reveals that this is the case, the lawyer might suggest alternative legal solutions, such as leaving their third child's inheritance to him in trust.

In many law offices, the lawyer may suggest leaving Tom's inheritance

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44. See generally FROLIK & BROWN, *supra* note 31, for an introduction to revocable trusts.

in a trust, the Burkes would agree, and there would be no further discussion of the matter. However, the goal of the TJ Preventive Law enterprise is to take the legal consultation a step further by considering not only the legal or economic ramifications of implementing a particular legal tool, but to also consider the psychological or emotional ramifications. A decision to leave an inheritance in a trust for one child and not for the other children could provoke family quarrels, or alienate Tom from other family members.<sup>45</sup> Thus, before drafting such documents, the TJ preventive lawyer should discuss openly with the Burkes the potential psychological impact of their decisions. The lawyer might also ask for the Burkes' views on whether they would like to discuss the matter with Tom or with the other children before finalizing the document. The decisions, of course, remain the Burkes' to make, but only after a discussion of both the legal and psychological effects of leaving Tom's inheritance in a trust can the Burkes make a truly informed decision regarding which legal strategies to elect.

The lawyer might also suggest that the Burkes consider advance directives regarding health care.<sup>46</sup> The lawyer should emphasize that having such legal directives might have the benefit of providing the Burkes with additional psychological comfort and security regarding their future. Furthermore, if either Frank or Eleanor became incapacitated, such documents can reduce the stress on family members who otherwise might be faced with difficult surrogate health care decisions.<sup>47</sup> Similarly, the lawyer should inquire as to whether the Burkes have adequate long-term care insurance and whether the insurance plan adequately covers special care needed in cases of mental illness.<sup>48</sup> Given that the Burkes are involved in organized religion, the lawyer might also suggest that the Burkes consider the advance directive options for health care in relation to their religious beliefs, or perhaps even suggest consulting with one of their church leaders before the document is drafted.

Ultimately, a TJ preventive lawyer can ensure therapeutic outcomes through the careful use of preventive law tools. By considering not only economic and legal priorities, but also personal goals, values, and relationships, a lawyer can create a superior package of preventive legal documents that may include a complementary set of wills or revocable trusts, and a complementary set of living wills or health care proxies. In doing so, a lawyer can both reduce the potential for anti-therapeutic outcomes down the road and maximize the older client's present sense of security and auton-

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45. Furthermore, the selection of a trustee might create family tension, if not chosen wisely.

46. It is important to note that such suggestions are not improper solicitations of business. See Brown, *The Scheme*, *supra* note 16.

47. See generally THOMAS L. HAFEMEISTER & PAULA L. HANNAFORD, RESOLVING DISPUTES OVER LIFE-SUSTAINING TREATMENT 10, 16-20 (1996).

48. This may become of particular importance for Eleanor given the possibly hereditary nature of Alzheimer's disease. See *supra* note 37.

omy.

A final and critical step for a TJ preventive lawyer confronted with the Burkes' situation is the establishment of a legal check-up system.<sup>49</sup> The preventive lawyer should explain to the client that the legal documents he or she has drafted on their behalf may be amended, and that such amendments may be desirable in the face of any major life changes or any statutory changes. The lawyer should encourage the client to provide him or her with information any time a major illness, crisis, conflict, or change of financial circumstances arises. Likewise, the lawyer should agree to keep the client informed of any legal developments affecting the client's documents. Additionally, the lawyer should encourage the client to periodically return to the office for a short legal check-up, perhaps once a year. At the legal check-up the lawyer and client can discuss both negative events such as conflicts or illnesses, as well as positive goals or opportunities that may have arisen in the client's life.

When the Burkes return in a year, the topics of conversation might include any important financial changes, Tom's addiction recovery progress, Eleanor's mother's condition, or any other significant life events that may have arisen during the year. This meeting will give the lawyer and the Burkes an opportunity to evaluate whether the Burkes' goals have changed and whether their current advance directives and any other legal instruments remain adequate.

Such a legal check-up itself can serve a therapeutic function. The legal check-up is a structured opportunity for the client to reevaluate his or her current life situation relative to his or her goals, and to think about and plan for the immediate and distant future. The check-up also serves as an opportunity for the client to ask the lawyer questions about issues that the client might be reluctant to schedule a separate appointment to discuss. For example, many older individuals have anxiety about and questions regarding medical and insurance paperwork that is sent to their homes.<sup>50</sup> Therefore, a lawyer's reminder letter, sent out shortly before the check-up, might also remind clients to keep a list of questions they may have and perhaps to

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49. Legal check-ups have been within the preventive law armamentarium for some time. One of us (Dauer) has been conducting field trials of a periodic legal check-up particularly for the elderly, thus far with useful results. Samples of the check-up materials are on file at the National Center for Preventive Law in Denver and available to qualified individuals and groups.

50. See Wayne Moore, *Improving the Delivery of Legal Services for the Elderly: A Comprehensive Approach*, 41 EMORY L. J. 805, 810 & 811 n.44 (1992) (citing The Spangenberg Group, Wisconsin Elder Legal Needs Study, 1 The Final Report of the ABA Commission on Legal Problems of the Elderly 42 (Apr. 1991)) (on file with the Emory Law Journal), which found that one area of quasi-legal nature of great concern to older people was finding assistance with medical paper work related to Medicare and Medigap reimbursement; See also Thomas D. Overcast, *The Development and Evaluation of Handbooks Providing Law Related Information for the Elderly* (1980) (unpublished Ph.D. dissertation, University of Nebraska) (on file with the University of Nebraska-Lincoln library) (empirically exploring the impact of providing legal information packets to elderly individuals).

bring along any related correspondence, confusing documents that have come in the mail, et cetera. In this way, the legal check-up can provide a chance for older clients to discuss such matters with a knowledgeable and trustworthy professional.

Thus, a regularly scheduled legal check-up conducted by a therapeutically insightful preventive lawyer may provide the client with an increased sense of security. Indeed, the legal check-up can perhaps ultimately become a therapeutic part of the client's experience of growing older.

### B. HIV/AIDS Law

Elder law, therefore, provides fertile ground for the development of the TJ Preventive Law framework. The framework is not, however, restricted to working with elderly clients. Consider also the example of HIV/AIDS law. Although a new sense of optimism has arisen from recent successes with protease inhibitors and "cocktail" treatments,<sup>51</sup> a person who learns that he or she is HIV-positive continues to face not only the overwhelming health care issues related to living with AIDS, but also a myriad of legal and social issues. These issues can include, for example, concerns over estate planning, employment discrimination, child custody, health care costs, disability insurance, life insurance, and government aid.<sup>52</sup> Given the number and complexity of the legal issues associated with AIDS, most HIV-positive persons will need some specialized legal planning.<sup>53</sup> Furthermore, many of the legal issues that an HIV-positive client will potentially face, such as child custody disputes, employment disputes, and health care decision

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51. The term "cocktail" refers to a mixture of several drugs. Such mixtures have shown better results than monotherapies in fighting HIV. See Joan Stephenson, *New Anti-HIV Drugs and Treatment Strategies Buoy AIDS Researchers*, 275 JAMA 579 (1996); See also Lawrence Corey & King K. Homes, *Therapy for Human Immunodeficiency Virus Infection—What Have We Learned?*, 335 NEW ENG. J. MED. 1143 (1996).

52. See, e.g., James Monroe Smith, *Legal Issues Confronting Families Affected by HIV*, 24 J. MARSHALL L. REV. 543 (1991); MARK S. SENAK, *HIV, AIDS AND THE LAW: A GUIDE TO OUR RIGHTS AND CHALLENGES* (1996); Emily Berendt & Laura Lynn Michaels, *Your HIV Positive Client: Easing the Burden on the Family Through Estate Planning*, 24 J. MARSHALL L. REV. 509 (1991); W.E. Scott Hoot, *Introduction to Symposium, Estate Planning for Artists: Will Your Art Survive?*, 21 COLUM-VLA J.L. & ARTS 15 (1996); Charles J. Groppe & Eileen E. Hudson, *Estate Planning for the Client with AIDS*, 64 N.Y. ST. B.J. 20 (1992); Georgiana K. Roussos, *Protections Against HIV-Based Employment Discrimination in the United States and Australia*, 13 HASTINGS INT'L & COMP. L. REV. 609 (1990). John Douglas, Note, *HIV Disease and Disparate Impact Under the Americans With Disabilities Act: A Federal Prohibition of Discrimination on the Basis of Sexual Orientation?* 16 BERKELEY J. EMP. & LAB. L. 288 (1995); Tracy Jackson Smith, Comment, *AIDS and the Law: Protecting the HIV-Infected Employee from Discrimination*, 57 TENN. L. REV. 539 (1990); Jody B. Gabel, *Release from Terminal Suffering? The Impact of Aids on Medically Assisted Suicide Legislation*, 22 FLA. ST. U. L. REV. 369 (1994); Sana Loue, *Living Wills, Durable Powers of Attorney for Health Care, and HIV Infection: The Need for Statutory Reform*, 16 J. LEGAL MED. 461 (1995).

53. See SENAK, *supra* note 52 (discussing the need for advance legal planning for HIV-positive persons).

making, are issues of both legal and psychological significance.<sup>54</sup>

Consider health care decision making. There is a growing consensus among lawyers and medical professionals that HIV-positive persons should execute some type of advance directive instrument. Furthermore, much recent commentary has suggested that such advance directive instruments may be a good idea from a legal and medical standpoint, as well as from a psychological or emotional standpoint.<sup>55</sup> Planning for death and exerting some level of control over the process, it is hypothesized, may have inherent therapeutic value.<sup>56</sup>

A TJ preventive lawyer, especially one experienced in working with HIV-positive clients, should recognize that some HIV-positive clients are likely to be alienated from their families as a result of past or present behaviors that their family condemns.<sup>57</sup> This raises the issue of who the client ought to name as a surrogate decision-maker. In some cases the client may prefer that a domestic partner be named as the decision-maker. However, if this partner is also HIV-positive, the partner may be grieving and may himself be gravely ill at the time of critical decision-making. As a result, a secondary and even tertiary surrogate decision-maker should be named.<sup>58</sup>

In some cases, this dilemma may provide an opportunity for the client to have some reconciliation with alienated family members and to eventually name a parent or sibling as a secondary or tertiary decision-maker. This reconciliation may also have significant therapeutic effects on the client and the client's family. In other cases, there may be no hope of reconciliation. The client-centered approach of TJ preventive lawyering allows for the lawyer and client, who best knows his family situation, to jointly engage in decision-making regarding whether approaching family members would be useful.

Just as the establishment of a legal check-up system was a critical component of ongoing success in the elder law example above, so too in the context of HIV/AIDS law. The TJ legal check-up would allow for the ongoing development of the advance directive documents. Indeed, the therapeutic value need not end when the document is signed. At an annual legal check-up, the HIV-positive client could update the lawyer concerning de-

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54. See generally SENAK, *supra* note 52.

55. See Bruce J. Winick, *Advance Directive Instruments for those with Mental Illness*, 51 U. MIAMI L. REV. 57, 83 (1996) (suggesting in the context of advance directive instruments for those with mental illness that "having the opportunity to engage in advance planning concerning hospitalization and treatment may have significant therapeutic benefits. The ability to be self-determining—to plan for the future, to envision future contingencies and bring about those that are desired and avoid those that are undesired, to set goals and see them achieved—is an important aspect of mental health and self-esteem").

56. See generally SENAK, *supra* note 52.

57. See generally SENAK, *supra* note 52.

58. See Stolle & Wexler, *Therapeutic Jurisprudence*, *supra* note 2, at 31; See also *Uniform Health-Care Decisions Act*, 9 U.L.A. 239, § 4 (1993) (explaining the Act's optional form provides a signature line for a primary, secondary, and tertiary decision-maker).

velopments in family relationships and friendships that may influence who ought to be named as a surrogate decision-maker.

A dedicated TJ preventive lawyer, who often works with HIV-positive clients, ought to keep up with current AIDS literature, both literature directly pertaining to legal implications and literature dealing with social or medical aspects of AIDS.<sup>59</sup> Under those circumstances, the lawyer and client could also discuss any recent advancements in medical technology or therapy that may influence the client's election or rejection of certain medicines or treatments. Furthermore, the legal check-up would provide the lawyer with an opportunity to update the client on any recent legal developments that may affect the client's advance directives or any other issues that the client may be facing.<sup>60</sup>

We have now presented two examples of client counseling situations in which the approach of TJ Preventive Law seems particularly useful. Each example involved working with a special population of clients, defined more by physical or social characteristics than by legal relationships or legal status. However, the TJ Preventive Law framework, as will be illustrated by the following two examples drawn from family law and business planning law, is not limited to such contexts.

### C. Family Law

The TJ Preventive Law framework also lends itself particularly well to family law, which, perhaps, is an area likely to be encountered by more lawyers at some point in their legal career than elder law or HIV/AIDS law. In a recent article, Kathryn Maxwell examines preventive and therapeutic strategies that lawyers might implement in an attempt to minimize the anti-therapeutic effects of divorce on their clients' children.<sup>61</sup>

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59. Such literature need not always be journal articles or technical books and reports, which might consume much of a lawyer's free-time. Rather, as Stolle & Wexler have suggested, much information regarding questions that clients may be reluctant to ask or the emotional difficulties underlying legal problems that clients may hesitate to discuss can be gleaned from consumer oriented law books. See Stolle & Wexler, *Therapeutic Jurisprudence*, *supra* note 2, at 30-31.

60. Again, it is important to note that this type of legal consultation with an existing client does not amount to improper solicitation of business. See Brown, *The Scheme*, *supra* note 16. The difficulty with proactive legal planning, however, is getting the individual who is in need of legal planning to seek out a lawyer's advice in the first instance. In the case of populations such as HIV-positive persons, who are widely recognized as being in need of general legal counsel, HIV clinics or support groups might compile listings of local lawyers who emphasize AIDS related issues in their legal practice and make those listings available to HIV-positive persons.

61. Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Client's Divorces on Their Children*, 66 REVISTA JURIDICA U.P.R. (forthcoming 1997). The focus on the interest of the client's child or children rather than the interests of the client raises the issue of whose psychological well-being ought to be the focus of the TJ preventive lawyer's focus. For more on the issue of "therapeutic for whom?", see David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, in WEXLER & WINICK,

Maxwell suggests that in many law offices matrimonial lawyers are unlikely to give significant consideration to the psychological and emotional effects that their clients' divorces will have on the children involved.<sup>62</sup> Furthermore, some lawyers may even unnecessarily heighten the negative psychological effects of divorce on children by magnifying the acrimony between the divorcing parents, and by implicitly or even explicitly using the children as bargaining chips in the divorce negotiations.<sup>63</sup> In contrast, Maxwell proposes that divorce lawyers adopt a preventive/therapeutic approach, giving explicit consideration to the emotional or psychological well-being of the children as one important factor in divorce proceedings.<sup>64</sup>

Maxwell provides practical lawyering strategies for mitigating the negative effects of divorce on children. Lawyers concerned with the effects of divorce on children might, as a first step, choose like-minded clients. Maxwell suggests that these lawyers simply refuse to represent clients who, in an initial client interview, display some propensity toward disregarding the best interests of the children in order to achieve financial gain or some sort of vindication against their spouse.<sup>65</sup> Such lawyers might even advertise a "preference for child-friendly divorce, in order to attract like-minded clients and avoid future conflicts with contrary clients."<sup>66</sup>

Maxwell further suggests that once the lawyer has agreed to represent the client, the lawyer should educate the client regarding the potential detrimental effects of divorce on children, and plan a specific preventive/therapeutic strategy to mitigate any such negative effects in this client's case.<sup>67</sup> Maxwell provides, as an addendum to her article, a sample packet of materials that might be used in educating the client and developing the preventive/therapeutic plan.<sup>68</sup> The materials include a TJ Preventive Law checklist for the divorce agreement and an information packet for divorcing parents.<sup>69</sup>

Maxwell's article thus provides an example of another context to which the TJ preventive lawyering approach lends itself well. Indeed, the approach of TJ Preventive Law seems to fit nicely within the context of family law as a whole, not simply divorce law.<sup>70</sup> A TJ Preventive Law approach may also be appropriate for lawyers serving as a guardian ad litem for a

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THERAPEUTIC KEY, *supra* note 18, at 811.

62. *See* Maxwell, *supra* note 61.

63. *See id.*

64. *See id.*

65. *See id.*

66. *Id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See generally* Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 *IND. L.J.* 775, 802 (1997) (providing an interesting application of the TJ framework within the context of family law, although not an explicitly TJ Preventive Law approach).

troubled youth, lawyers involved in paternity actions, adoption cases, or cases of abuse and neglect, and even lawyers drafting prenuptial agreements.<sup>71</sup>

#### *D. Corporate and Business Planning Law*

Consider next the close corporation. A closely held corporation typically involves a small, tightly knit group of shareholders. Often many of the shareholders are family members or close friends. Many, though perhaps not all, shareholders may depend upon the corporation for their livelihood, either through a salary or through dividends. Furthermore, the initial capital contribution of individual shareholders often varies dramatically.

Imagine Bob and Jane, a husband and wife who enter a lawyer's office and explain that they are "interested in opening a small, family run cafe." They are consulting a lawyer because they would like the cafe to be incorporated. They have heard that incorporation is a good method of limiting business liabilities. From their explanation, it appears that the cafe would have four potential shareholders.

Two of the potential shareholders are Bob and Jane. They have only \$5000 in initial capital to contribute, but both have experience in the restaurant business and plan to manage the day-to-day operations. Both Bob and Jane would be dependent upon the success of the cafe for their livelihood. Jack, Bob's brother, is a third potential shareholder. Jack wants nothing to do with the day-to-day operations, but is a wealthy investor. Jack is willing to contribute \$30,000 in initial capital, believing the cafe will be a highly profitable investment. Jack is, however, very concerned about limiting his liability to only his \$30,000 investment. Sally is the fourth potential shareholder. Sally is Jane's best friend. Sally is willing to contribute \$5000 in initial capital and she plans to be a full-time hostess and waitress at the cafe.

An enterprise such as this cafe, in which there exist differing expectations and differing levels of capital contribution against the backdrop of family and social relationships, provides a classic example of a situation in which advance legal planning will be critical to the continued success of the business. By taking the approach of TJ preventive lawyering seriously in a context like this, the lawyer may be able, through skillful client counseling, to elicit information about the relationships and expectations of the parties that might not otherwise be revealed. This information can be used, through the client-centered approach of TJ preventive lawyering, to develop a structure of corporate control and internal dispute resolution that satisfies the needs and expectations of each of the shareholders.

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71. See generally Melvin Aron Eisenberg, *The Limits of Cognition and Limits of Contract*, 47 STAN. L. REV. 211, 254-58 (1995) (discussing the application of social cognitive psychology in the context of prenuptial agreements as a way to understand both why parties might choose to enter into certain agreements and why courts might choose to enforce or not enforce those same agreements).

Again, the establishment of a legal check-up system will be a critical component of the TJ Preventive Law approach. One cannot expect that the relationships in such a business will remain static, nor will the business itself. As relationships change and the business grows and prospers, changes in the corporate structure may become appropriate.<sup>72</sup> Likewise, changes in the legal regulatory environment may necessitate some change in corporate structure or operations. Absent some continuing dialogue between the attorney and the corporate client, developments giving rise to the need for an adjustment of legal relationships may go unnoticed. However, by engaging in regular legal check-ups, not confined solely to legal information, the TJ-oriented preventive lawyer may anticipate necessary changes, thereby smoothing the bumps on what otherwise might be a jolting entrepreneurial ride.

Ultimately, a well drafted corporate agreement that takes into consideration not only the financial investment of the shareholders, but also their social and emotional investment, could avoid future disputes, which have the potential to tear apart the corporation, friendships, and family relationships. Furthermore, the certainty created by working through expectations and contingencies with the shareholders in advance might reduce the stress that will inevitably accompany any attempt to start a new business. Thus, just as psychological or emotional well-being ought to be one priority in legal planning for the elderly, for HIV-positive clients, or divorcing parents with children, emotional well-being ought to be one priority in some aspects of corporate law.<sup>73</sup>

### III. LOOKING ACROSS THE AISLE: HOW EACH DISCIPLINE VIEWS THE OTHER

Although hypothetical scenarios such as those described above allow the luxury of creating ideal circumstances that may not always exist under the situational constraints of actual practice, the hypotheticals provide an important starting point for exploring the potential integration of preventive law and therapeutic jurisprudence. That potential can be viewed both from the perspective of a preventive lawyer evaluating the contribution of therapeutic jurisprudence, and from the perspective of a proponent of therapeutic jurisprudence evaluating the contribution of preventive law.

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72. See discussion *infra* Part III for another example of changing personal relationships and their potential impact on corporate structure.

73. See LOUIS M. BROWN & EDWARD A. DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS* 564-65 (1977) (describing a business organization as a "small society").

### *A. The View from the Preventive Law Side of the Aisle*

The literature of therapeutic jurisprudence can be thought of as describing a four-fold program. One substantial half of the enterprise is addressed to law reform, in the sense of advocating attention to the substance and the process of law itself with the objective that law should advance, and in any event not retard, the therapeutic or psychological well-being of those whom it affects. The complementary half of the therapeutic jurisprudence program lies in the realm of private counseling. Here it focuses on the ways in which consultations with members of the legal profession can similarly affect a client's mental health or psychological well-being.

Each of these two halves may then be divided again into what might be called the "weak" sense and the "strong" sense of the therapeutic jurisprudence claim. Here, the words weak and strong are meant not as comparative or evaluative terms, but as ways of describing the reach or the ambition of the subject.

As it applies to counseling by private attorneys, therapeutic jurisprudence in its strong sense seeks to alert lawyers to the need to recognize clinically identifiable psychological implications of their counseling and other lawyering activities. Therapeutic jurisprudence is in this regard most closely related to mental health law: and to what was known, some decades ago, as "law and psychiatry." If there is a claim that TJ makes here, it is that lawyers both can and ought to conduct their lawyering in this way.

What might be termed the weaker claim suggests that a significant aspect of lawyering is client well-being—broadly defined as meaning a condition of acceptable or enhanced personal satisfaction and the absence of untoward psychological disturbance.

Between the strong and weak senses there is a continuum, which may be observed from the perspective of preventive law. At the weak end of that continuum, therapeutic jurisprudence appears to be virtually identical with the counseling ambitions of preventive law. At the outer margin of the strong end of the continuum, however, the TJ program appears to be beyond what can be achieved by most preventive lawyers practicing under most everyday circumstances. The question is where on the continuum should legal education aim and where should we place our expectations of practicing lawyers.

Consider the observation that the weak therapeutic jurisprudence claim is not just compatible with preventive law, but is integral to it and possibly inevitable within it. There is no single definition of preventive law that satisfies all preventive law scholars and preventive lawyers. We can for this purpose, however, summarize it by suggesting that the objective of the lawyer practicing preventive law on behalf of a client is to work with that client in arranging his or her affairs, through the use of legal techniques and documents, in such a way as to maximize the probability of achieving the client's objectives and, in doing so, to minimize legal risks and costs associ-

ated with those objectives.

Consider this concrete case, which returns us to the context of a close corporation. A client whom a lawyer has seen once or twice before enters the law office and puts this question: "Is it possible for my small, closely-held corporation to have a class of common stock that carries with it the right to participate in the corporation's financial successes, but that does not carry with it the right to vote or otherwise participate in control of the company?"

At the most basic level that is a question about the law to which there is an answer. In most jurisdictions the answer is yes and the techniques by which such a class of stock can be created are easily within the reach of even the least experienced lawyer. To respond to that client's stated request is therefore a relatively simple matter.

If we take the matter to level two, we can visualize a lawyer saying, "Why would you like to do this?" And we can envision the client responding, "Because I want to reward an employee for the fruits of his efforts by giving him a stake in the company." Now we are one layer deeper and the opportunities for helping the client have expanded considerably. There are many routes by which employees can be provided with incentives that match their income with the success of the organization—stock options plans, profit-linked bonuses, and a variety of other things that are equally not terribly arcane.

Now the third level: The lawyer asks, "Any particular employee?" To which the client responds, "My son." Ah. Things are becoming interesting. It would still be possible to provide a purely technical answer to the client's question, but the lawyer might probe further: "Tell me about the relationship of your son to your corporation and your business?"

The client then delivers a long story about a son who has gone down a lifestyle route of which the father does not approve—living in Boulder or Madison or Berkeley and eating but sprouts and tofu. The father, in any case, thinks that all of these problems can be straightened out if the son simply comes into the business with the appropriate incentives in place, and that in no time at all their relationship will be humming and the son's direction will be the right one. At this fourth level the options widen even more broadly. And creating a class of non-voting shares is hardly the best of them.

One of us (Dauer) has used this illustration in teaching preventive law to both law students and to young lawyers, because it creates the opportunity to derive a number of important observations. First, there is in legal counseling a strictly analytical dimension. Clients come to lawyers not with questions, but very often with answers. What it is fascinating to note is how the solution possibilities broaden as the consultation goes deeper into underlying layers of the client's "purpose." Taking the client's request at face value may leave only one or two options. Digging a bit into what the client is really trying to accomplish typically opens up many more, and so even

the most basic good lawyering requires good counseling.

The second point is a bit of modesty about the importance of legal solutions to clients' problems. One often hears lawyers or law students say things such as, "The best test of a good contract is its ability to withstand challenges in litigation." Nonsense. Clients don't care about winning lawsuits, just as they really don't care about classes of stock. What they do care about is achieving their objectives.<sup>74</sup> All the rest of it is simply instrumental. The best test of a good contract is whether it leads to those kinds of arrangements that achieve a client's objective with the minimum of cost and risk. Thus preventive law requires that lawyers help people achieve their objectives, not that they simply create technically perfect legal documents. Students, and lawyers, often simply fail to understand this point.

The third point is an expansion of the second. Abraham Maslow once said, "If the only thing you have is a hammer, then everything looks like a nail." Sometimes legal solutions are counter-productive. Occasionally clients' problems call for a kind of ministrations that has nothing to do with those things that are generally handled by law, lawyers, or any other part of the legal apparatus. As lawyers, we need to know when we are the wrong person. Or at a minimum, we need to know when to associate the case with someone who is the right person. But, the objector will say, the client has decided that a lawyer is what he or she wants.

Again, nonsense. That argument requires that we accept the client's diagnosis to the complete exclusion of our own. It is as if a physician were to allow a patient to enter the examining room and direct the course of the examination by saying, "Palpate my pancreas and do nothing else. I know that the problem lies there." No self-respecting physician would do such a thing. Clients come to lawyers after having engaged in self-diagnosis that is in many if not most cases uninformed by the kind of knowledge about the potential of the law that we hold. While we must respect client autonomy, we must also not abandon the opportunity to offer professional guidance even when it might lead the client out of our office. Indeed, that may well be our duty.

Finally, and this is related to the preceding points as well, incipient legal problems—as opposed to existing litigation—are very often non-symptomatic. Litigation is like a broken arm. By contrast, a legal risk that a client does not recognize is like high blood pressure. It is our job to help clients identify the symptoms of legal risks in time to deal with them. Because clients come to us when they feel they should come to us, part of the

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74. See Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (providing empirical evidence that, in entering into contractual relations, most businessmen are more concerned with the objective of relationship building and creating good-will than with legal enforceability or anticipating litigation); Stewart Macaulay, *Organic Transactions: Contract, Frank Lloyd Wright and the Johnson Building*, 1996 WIS. L. REV. 75 (1996) (providing a case study illustrating the dominance of important personal/business relationships over legal concerns, even in high-dollar transactions).

preventive law program is the challenge of delivery of legal services to those people who may need it but who have not manifested any demand for it. This, in fact, is very likely the largest single challenge the preventive law program faces—how to help people recognize the occasions for the appropriate use of professional legal help.

To return to the point of departure, this example illustrates why therapeutic jurisprudence taken in its weak sense is an indispensable component of preventive law, taken at its most fundamental level. Because we are concerned in practicing preventive law with achieving our client's objectives and therefore with maximizing our client's individual welfare, we should not be satisfied with measuring the outcomes of our activities simply by testing their legal sufficiency. Our test must ultimately be the impact of what we do on the client's total welfare. The word "welfare" overlaps with well-being and includes psychological well-being, in its non-clinical sense. It would therefore be difficult if not impossible to practice preventive law well without heeding the lessons and concerns of therapeutic jurisprudence.

### *B. The View from the Therapeutic Jurisprudence Side of the Aisle*

At the outset, the integration reveals certain limits in the way the two approaches have traditionally been conceptualized. Preventive law traditionally has focused on estate and business planning,<sup>75</sup> yet the recognition that attorney-client interactions have inevitable therapeutic consequences extends beyond these contexts to encompass as well attorneys performing traditional litigation roles. For example, a motion to exclude the public from a civil commitment hearing when embarrassing information is about to be presented may serve a TJ-preventive function by reducing the chances of further undermining the client's self-image.<sup>76</sup> Likewise, though perhaps at the weaker end of the TJ continuum, lawyers defending clients against tort suits or other civil litigation may, through their conduct, help to reduce the risk of exposure to future litigation. This can avoid both future legal risk and psychological difficulties, thereby plainly serving an important TJ preventive function.

Therapeutic jurisprudence thus has the potential to expand considerably the preventive law paradigm. This expansion may even come in areas in which the lawyer's intervention is primarily psychological in its effects, but incidentally also may produce legal advantages or prevent legal disadvantages. For example, Winick has suggested that, in view of the negative psychological effects of incompetency labeling, criminal attorneys representing

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75. However, preventive law, like therapeutic jurisprudence, has expanded its scope in recent years, extending to such areas "as environmental law, sex discrimination, and computer law. In addition new applications have been found in the more traditional areas of estate planning, corporate compliance, business planning, and property transactions." HARDAWAY, *supra* note 4, at xxv.

76. See WEXLER, THERAPEUTIC AGENT, *supra* note 17, at 18.

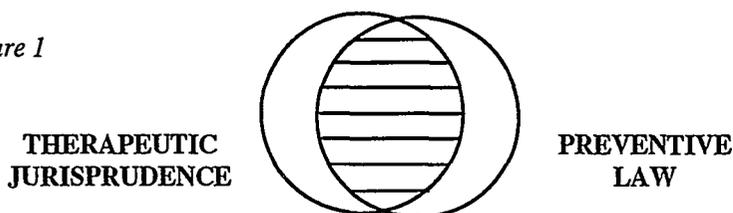
defendants in the incompetency to stand trial context who are found incompetent can help the client to interpret that legal label in a way that minimizes the risk of adverse psychological consequences.<sup>77</sup> Thus, the lawyer can tell his or her client that the incompetency determination is merely an opportunity for the client to secure needed treatment and a delay in the proceedings that will enable the client to function more effectively in the attorney-client relationship when the criminal proceedings are resumed.<sup>78</sup>

By helping the client to reframe the legal label as a form of treatment continuance, the attorney thus can help the client to avoid what might otherwise be negative self-attributional effects triggered by application of the incompetency label. If successful, attorney efforts in this regard can help to improve the client's legal situation. As a result, these efforts can properly be understood to be a form of preventive law.

The preventive law paradigm can also help attorneys in their everyday practice of law to better realize the full potential of therapeutic jurisprudence. Although much of the early therapeutic jurisprudence scholarship centered on the impact of legal rules or procedures on the mental health and psychological functioning of those affected, more recent work has suggested that the way various legal actors—judges, lawyers, police officers and sometimes state-employed clinicians—*apply* the law also can have important therapeutic effects.<sup>79</sup> Preventive law provides a concrete context in which the therapeutic impact of attorney conduct can be identified and studied.

While preventive law and therapeutic jurisprudence may sometimes be mutually exclusive categories, there is undeniably an area in which the two overlap. Figure 1 illustrates this point.

Figure 1



Some legal advice might prevent future legal dilemmas but have only slight if any consequences on the mental health or psychological functioning of the client. Some legal advice might be related to positive therapeutic consequences, but largely unrelated to avoiding future legal problems. One

77. See WINICK, *MENTAL HEALTH*, *supra* note 18, at 63-65.

78. *Id.*

79. See Wexler, *supra* note 17.

rather clear example of therapeutic jurisprudence that is not preventive law is the use of therapeutic jurisprudence arguments in test case litigation designed to change a rule of law.<sup>80</sup> An example of preventive law that is not obviously therapeutic jurisprudence is helping a client copyright an innovation in computer software. In the area of intersection, however, legal actions can have both preventive law and therapeutic consequences.

The above examples—from the areas of elder law, HIV/AIDS law, matrimonial law, and business planning—are illustrative of contexts in which preventive law and therapeutic jurisprudence may have a substantial overlap. In these areas of overlap, sensitizing the preventive lawyer to the potential psychological impact of various problems and methods of dealing with them can both enhance the preventive law mission and also minimize psychological difficulties or even mental health problems. Lawyers performing a preventive law check-up who have developed a sensitivity to psychological issues will be better equipped to conduct the attorney-client interview and to provide effective counseling. This psychological sensitivity will allow the attorney to put the client at ease, to engender trust and confidence, to obtain information from the client more effectively, and to better understand the client's needs, desires, and capacities.<sup>81</sup> Such an attorney will be better able to deal with the emotional dimensions of particular problems, to help the client understand such situations more clearly and to design and implement preventive law solutions more effectively.<sup>82</sup>

Having this psychological orientation can allow the attorney more effectively to perform the preventive law function. In addition, a therapeutically-oriented preventive lawyer can also encounter many opportunities to avoid and relieve psychological stress in clients, to avoid law-created psychological dysfunctional effects, and otherwise to act in ways that will increase the client's psychological well-being. The practice of preventive law thus provides many therapeutic jurisprudence opportunities. And, an integration of these two fields can provide considerably expanded opportunities for both.<sup>83</sup>

#### IV. PROMISE, PROSPECTS, & PROPOSED PATHS

The proposition that therapeutic jurisprudence and preventive law are interrelated and overlapping is clearly a welcome one from both the preventive law and therapeutic jurisprudence sides of the aisle. To put it perhaps more crisply than might be justified, it has been suggested that therapeutic

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80. See Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, in WEXLER & WINICK, *THERAPEUTIC KEY*, *supra* note 18, at 739.

81. See generally Linda G. Mills, *Affective Lawyering: The Emotional Structure of the Lawyer-Client Relation* (forthcoming 1997).

82. See *id.*

83. See Stolle & Wexler, *Preventive Law*, *supra* note 2.

jurisprudence (in its private counseling sense) is a body of substance in need of a method of application.<sup>84</sup> If that is so, then preventive law has been a method of application with an incomplete body of substance. The advantages of coordination between the two schools of thought and of the interaction between them are therefore obvious.

Inasmuch as there is agreement concerning the advantages of an integration of the two fields, the question becomes, "What's next?" The areas that may demand our attention are: (a) In practice, how far on the continuum from the weak claim to the strong claim should we strive to go? (b) What should the research and scholarship component of TJ Preventive Law look like?<sup>85</sup> and (c) how might the educational or teaching component of TJ Preventive Law proceed?

### A. Practice

Attorney-client counseling will often reveal circumstances in which the client's psychological well-being may be directly affected by the situation under discussion. The examples drawn from the context of elder law and matrimonial law, as well as the HIV/AIDS and business planning examples discussed above, are illustrative. Some lawyers will have an intuitive sensitivity to the psychological dilemmas presented and may have developed sensible strategies for communicating to clients about these dilemmas and alternative strategies for dealing with them. Many attorneys, however, will not. Many will simply lack a knowledge base concerning psychology and how to identify and deal with the psychological issues that may arise in practice contexts, and will feel uncomfortable offering counseling on these matters as a result.

Some lawyers will say, "I'm not a psychologist. If the client feels the need for psychological counseling, he or she can seek the services of a counselor." But, is it psychology when you discuss with a terminally ill parent the importance of talking to the kids about a standby guardian,<sup>86</sup> or with an HIV-positive client the desirability of talking to his partner about being named—or not being named—executor?<sup>87</sup> These illustrations show

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84. Therapeutic jurisprudence is actually not so much a body of substance as it is an approach (through careful analysis and empirical research) to creating a body of substance. To date, therapeutic jurisprudence has been required to draw on social science literature that is related to law but often not explicitly an investigation of law-related psychological distress. The body of explicit therapeutic jurisprudence substance is growing; however, much more empirical research is needed.

85. As will become evident in the discussion that follows, these inquiries are intimately related. The more our research and educational components prosper, the easier it is to move, in practice, from the weaker to the stronger side of the continuum.

86. See Stolle & Wexler, *Therapeutic Jurisprudence*, *supra* note 2; see also discussion *supra* Part II.

87. See generally Stolle & Wexler, *Therapeutic Jurisprudence*, *supra* note 2; see also discussion *supra* Part II.

just how *interdisciplinary* the enterprise is, for if a *psychologist* were to advise such steps, wouldn't he or she similarly be subject to the turf-related accusation of practicing *law*? And wouldn't a psychologist likely be even more in the dark about standby guardians and executors than would a lawyer about psychologically-sensitive points relating to legal situations?

Many with the view that they are strictly a lawyer and not a counselor may ignore the psychological dimensions of a client's problem and become insensitive to them. This approach is problematic. Clients may resent their lawyers if they display such an emotional insensitivity and may feel misunderstood. A sense that a lawyer lacks empathy may diminish client trust and confidence, with possibly negative effects on the attorney-client relationship and its ability to achieve positive client outcomes.<sup>88</sup> Lawyers with a preventive law orientation in particular should reject this attitude and adopt the posture of sensitivity and openness to their client's psychological responses. They should understand that in their relationships with clients, they are inevitably psychological and even therapeutic agents. They should, in short, embrace the teachings and insights of therapeutic jurisprudence.<sup>89</sup>

However, in embracing a TJ Preventive Law approach to legal practice, it is important to bear in mind that, individually, therapeutic jurisprudence and preventive law each have their own baggage, and the integration of the two means that each perspective will now inherit the baggage of its new partner. For example, preventive law is sometimes (improperly) accused of promoting solicitation,<sup>90</sup> and clients or prospective clients sometimes fear that a lawyer is creating work that is not truly needed.<sup>91</sup> When the preventive work also takes on a TJ dimension—alerting the client to foreseeable psychological/emotional fallout of certain courses of legal action—there is the additional potential concern among lawyers that, unless skillfully communicated, this additional advice may unnerve the client and kill the deal.<sup>92</sup>

88. See generally Mills, *supra* note 81 (providing an insightful discussion of the importance of attorney/client rapport).

89. The approach of TJ Preventive Law may also have the potential to enhance the well-being of the lawyer. Indeed, one lawyer recently described the practice of preventive law as "life-affirming." See Isaacson, *supra* note 14, at 33; see also Robert B. Hughes, *If Anybody Should be Immune from Lawyer-Bashing, It's Us!*, 1990 PREVENTIVE L. REP. 14 (1990) (suggesting that "if there is any real justification for lawyer bashing, I think we can state unequivocally that the segment of our legal profession (possibly a small segment) which is working actively toward preventive law certainly does not fit into that mold").

90. See discussion and accompanying footnotes *supra* note 16.

91. This supports the notion that it is best initially to encourage the use of the perspective in legal services offices, prepaid legal plans, and law school clinics—contexts where this concern should surely not be an issue. See *supra* note 16; see generally Mosten *supra* note 10, at 443 (addressing the issue of client's perceiving preventive lawyering as "financially motivated"). But cf. Isaacson, *supra* note 14 (suggesting that "[t]here is simply not as much money in counseling and advising clients on how to avoid legal problems as there is in litigating disputes"); see also David S. Rowley, *Preventive Law Can Be—And Is—A Solo Practitioner's Career*, 1989 PREVENTIVE L. REP. 13 (March 1989) (arguing that "[p]reventive law is not a mechanical profit center").

92. For example, some lawyers may worry that pointing out all of the potential quarrels

In a related way, some lawyers have raised objections to preventive law checklists on the grounds that checklists, once promulgated, will potentially set a new—and higher—standard of care in legal malpractice matters. Therapeutic jurisprudence has confronted a similar issue regarding the reluctance of organizations of mental health professionals to promulgate crystallized standards for professional practice, fearing that they will be creating “duties that their members are then held liable for transgressing.”<sup>93</sup> With the addition of therapeutic jurisprudence, the preventive law malpractice concerns may be magnified.<sup>94</sup>

Who are lawyers, it may be asked, to anticipate and advise clients on avoiding psychological pressures, stresses, reactions—even if those psychological states are intricately related to legal advice and proposed legal courses of action? And what sort of standard of care (and malpractice coverage) should be used if this advice backfires? What if a lawyer recommends a marital or family discussion about an especially sensitive situation, and that discussion results in a permanently breached familial relationship or even in violence? Of course, with a touch of preventive law, the legal exposure of the TJ preventive lawyer can perhaps be minimized by the lawyer behaving in a non-directive fashion and simply presenting the client with an array of options.<sup>95</sup>

Such questions regarding the proper parameters of the TJ Preventive Law enterprise, and questions regarding its relationship to issues of professional responsibility, will inevitably arise. These questions should not be avoided, nor should they quell hopes for the full development of the integrated framework in practice contexts. Rather, such questions can become topics addressed by a new brand of psycholegal scholarship that focuses efforts on both understanding the therapeutic and anti-therapeutic impact of everyday lawyering, and developing practical methods for maximizing preventive and therapeutic outcomes. As answers to these and other questions materialize, TJ Preventive Law will settle into a comfortable position on the continuum between the weak and the strong TJ claim.

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that could arise in opening a business with friends and family, such as the cafe described in our Corporate and Business Planning Law discussion, might discourage the client and cause the client to abandon the whole idea. See discussion *supra* Part II.D.

93. Robert F. Schopp & David B. Wexler, *Shooting Yourself in the Foot with Due Care: Psychotherapists and Crystallized Standards of Tort Liability*, in WEXLER & WINICK, *ESSAYS*, *supra* note 18, at 179 (proposing some ways of dealing with the matter).

94. See generally Mosten, *supra* note 10, at 430 (discussing malpractice exposure within the context of “unbundled” legal services).

95. Therapeutic jurisprudence has seen this issue in the context of the Ramona repressed memory lawsuit, where a therapist was sued by the father of a patient who was encouraged by the therapist to confront the father regarding new memories of childhood sexual abuse; therapists have been advised to avoid possible Ramona liability by behaving in a far less directive manner than apparently occurred in Ramona. See David B. Wexler, *Therapeutic Jurisprudence in Clinical Practice*, 153 AM. J. PSYCHIATRY 453 (1996).

### B. Research and Scholarship

A major difficulty with the TJ Preventive Law approach to lawyering lies in the fact that lawyers have almost no empirical base on which to proceed. It is one thing to teach a young lawyer that the act of executing a durable power of attorney has an important psychological effect on many older clients. It may even be that we have some sense of what that effect is. But if there are three or four legal routes to the same personal objective, there typically exists no literature that suggests empirically any link between each of those routes and the relevant features of its psychological outcomes or side effects.

While physicians share experiential information derived from specific cases in their literature, lawyers tend not to do so. Whether for reasons of confidentiality, competitiveness, or whatever, the fact is that there is virtually no empirical base on which we can say with any confidence that the therapeutic implications of one kind of document, in specified circumstances, are superior to the therapeutic implications of another. The available data about the uses of these documents comes almost exclusively from case reports, and cases never mention the kinds of psychological implications in which the therapeutic jurisprudence and preventive law enterprise would be interested.

Of course, comprehensive encyclopedias need not exist for some gains to be achieved in this area. Rather, it would suffice if there were a manageable number of general propositions that could be conveyed, tested, and validated in the field. This would provide, at least, a substantial improvement over the ignorance (or judgment or intuition) with which many lawyers now operate. Lawyers' current knowledge base of things psychological can and should be increased through additional TJ Preventive Law research and scholarship. The focus of this new breed of legal psychology should be (1) identifying "psycholegal soft spots"; (2) identifying or developing several preventive legal strategies relevant to those psycholegal soft spots; and (3) evaluating the therapeutic or anti-therapeutic effects of the available strategies.

### C. Identifying Psycholegal Soft Spots

The "psycholegal soft spot" is a TJ Preventive Law concept which grows out of the preventive law concept of the "legal soft spot" advanced by Louis Brown.<sup>96</sup> Whereas the concept of legal soft spots refers to factors in a client's affairs that may give rise to future legal trouble, the concept of psycholegal soft spots might include the identification of social relationships or

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96. Louis Brown, *Manual for Periodic Check-up*, CLS (1974), excerpted in HARDAWAY, *supra* note 4, at 191-92; see also Mosten, *supra* note 10, at 446 (providing examples of legal soft spots and corresponding client actions that might be considered and pointing out that "[s]ome legal soft spots may be 'pure' legal issues- most are not").

emotional issues that ought to be considered in order to avoid conflict or stress when contemplating the use of a particular legal instrument.

For example, the relationships among children might be considered before leaving an inheritance in trust for one child and outright for another, as in the elder law example above.<sup>97</sup> Or, the relationships between an HIV-positive client and his or her family might be considered before making decisions about naming a proxy health care decision maker.<sup>98</sup> In addition, the impact on the welfare of children of divorce might be considered in the determination of custody arrangements and even the mode of resolving divorce and property settlement disputes between divorcing spouses.<sup>99</sup> Many additional examples likely exist across numerous areas of practice. Furthermore, the psycholegal soft spot concept need not be restricted to social relations. A psycholegal soft spot may simply be recognition that a particular type of legal proceeding, such as a request to modify a child custody arrangement, often places clients under severe psychological or emotional distress.

How might lawyers or scholars actually go about identifying and cataloguing such recurring psycholegal soft spots? For starters, attorneys encountering the psycholegal soft spots that arise in their preventive law practices can become sensitive to these situations and can share information with one another, either formally or informally.<sup>100</sup> Many good lawyers will already possess a degree of wisdom and insight concerning these matters. But as lawyers, we should periodically question our insights and compare notes with our colleagues, as we would on other matters—ethical dilemmas, for example, or new or newly changed areas of practice. These psychological dilemmas should become the subject of professional dialogue—in legal newspapers, bar meetings, and continuing education programs.<sup>101</sup>

Furthermore, TJ Preventive Law case studies that identify psycholegal soft spots could be written up in the manner in which bio-ethics case studies appear in the *Hastings Center Report*. That publication frequently contains case studies drawn from medical practice or research, accompanied by commentary by various experts. Legal case studies with accompanying commentary by attorneys and/or psychologists could perhaps become a recurring feature in the *Preventive Law Reporter*, in the newly-established Therapeutic Jurisprudence Forum of the University of Puerto Rico's law journal,<sup>102</sup> or in a peer-reviewed interdisciplinary journal.

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97. See *supra* Part II.

98. See *supra* Part II.

99. See Maxwell, *supra* note 61.

100. One informal method might be through an automated e-mail list-serve. See Stolle & Wexler, *Preventive Law*, *supra* note 2.

101. See Stolle & Wexler, *Preventive Law*, *supra* note 2.

102. A regular Therapeutic Jurisprudence Forum of REVISTA JURIDICA U.P.R., dedicated to the publication of TJ articles and essays, is one important component of the University of Puerto Rico's newly-created International Network on Therapeutic Jurisprudence, which will serve as a clearinghouse and resource center for developments in therapeutic jurisprudence.

Another potential type of research is the performance by teams of academic lawyers, social scientists, and their students of surveys of lawyers practicing in various areas of specialization to ascertain recurring pressure points and emotional dilemmas arising in lawyer/client counseling contexts.<sup>103</sup> Such a survey instrument perhaps could be administered to all *Preventive Law Reporter* subscribers, or other practitioner oriented publication subscribers.

#### D. Identifying and Developing Preventive Legal Strategies

Once psycholegal soft spots have been identified and catalogued, legal scholars and practitioners can publish work that identifies and discusses various legal strategies relevant to a particular psycholegal soft spot. Such scholarship might include analyses of the appropriateness of the potential legal strategies from perspectives such as the enforceability, the cost effectiveness, the level of difficulty, and the professional responsibility implications of engaging in one legal strategy over another. In those cases in which only one legal strategy appears obviously to be available, the scholarship might involve the theoretical development of new and alternative legal strategies. This may include the creative use of lawyering skills, the creative interpretation or application of existing law, or proposals for law reform.

In addition to these theoretical and analytical approaches, empirical approaches to identifying alternative legal strategies may be developed as well. For example, an empirical approach might involve the preparation of standardized case studies raising psychological trouble points in lawyer/client counseling contexts, and the submission of such case studies to samples of lawyers practicing in the relevant area. Data could be collected concerning how these attorneys would react in the situation portrayed. It could then be ascertained whether there was consensus among attorneys in certain areas of practice concerning how to handle various psychological dilemmas arising in practice. Indeed, tabulations of this data might inspire further theoretical and analytical scholarship. Areas revealing a lack of consensus could become the subjects of debate by law professors, psychologists, and attorneys in scholarly and practitioner journals. They could also become the subject of professional meetings of bar association practice area groups or of such organizations as the Inns of Court. The publication of such data and the commentary it could generate could go a long way to increasing our knowledge base concerning the psychological implications of various legal practice situations and how best to minimize or avoid psychological dilemmas.

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103. Additionally, such interdisciplinary research could include the systematic collection of the experiences of law students and of their supervising attorneys in legal clinics sensitized to the TJ preventive approach. See discussion *infra*.

*E. Evaluating the Therapeutic or Antitherapeutic Effects of the Available Strategies*

Most of the psycholegal soft spots that are identified will lack a developed psychological literature with appropriate guideposts. In such circumstances, therapeutic jurisprudence scholars can discuss psychological doctrine in analogous areas in an effort to speculate about likely therapeutic and anti-therapeutic consequences of various alternatives. This is, in fact, the conventional mode of therapeutic jurisprudence scholarship illustrated by Wexler's use of health care compliance principles to make reform proposals for the insanity acquittee release process,<sup>104</sup> and Winick's use of the literature on the psychology of choice to speculate about the likely therapeutic consequences of recognizing a right to refuse mental health treatment.<sup>105</sup> By drawing on existing areas of psychological research, therapeutic jurisprudence scholars can frame hypotheses about likely therapeutic and anti-therapeutic outcomes in lawyer/client counseling contexts.<sup>106</sup>

In addition, the identification of psycholegal soft spots can serve as the basis for generating empirical research on both the likely outcomes and the therapeutic value of alternative solutions. Social scientists could frame and test hypotheses concerning outcomes and alternative solutions through the use of various experimental and quasi-experimental research designs. Although such research may be difficult, it is not impossible to perform.<sup>107</sup> Even though social science research methods may not always be sufficient to provide clear answers, they can produce considerable additional information that can be quite helpful. The identification of recurring psychological trouble points in preventive law counseling and the subsequent evaluation of preventive/therapeutic strategies for dealing with those trouble points could provide fascinating empirical social science research opportunities. And, the results of such research would be enormously useful to preventive lawyers in their counseling efforts.

Among the possible empirical strategies, a sample of attorneys surveyed could be interviewed telephonically for further details or perhaps at periodic intervals to determine whether an anticipated psychological prob-

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104. See WEXLER & WINICK, *ESSAYS*, *supra* note 18.

105. See WINICK, *MENTAL HEALTH*, *supra* note 18, at 67-91; BRUCE J. WINICK, *RIGHT TO REFUSE MENTAL HEALTH TREATMENT* 327-44 (1997).

106. The areas of relevant psychological research need not be limited to clinical issues. Indeed, much social-cognitive psychology—especially the areas of cognitive heuristics, stereotypes, cognitive schemas, and judgment under uncertainty—is likely to be relevant to understanding patterns of client decision-making. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439 (1993). For an introduction to social cognition, see FISKE & TAYLOR, *SOCIAL COGNITION* (1991).

107. See generally WEXLER & WINICK, *THERAPEUTIC KEY*, *supra* note 18, at 845-994 (providing numerous examples of creative empirical research related to therapeutic jurisprudence).

lem materialized or whether a particular solution worked or failed. Felstiner and Sarat performed research that is somewhat related when they recorded conversations of attorneys and their clients involving divorce.<sup>108</sup> The research suggested here could go considerably further, in that it might begin with qualitative or survey methods but then move to quasi-experimental methods, and even true experiments. Thus, the research would move beyond being largely descriptive and would begin to actually test novel approaches and enable researchers to draw causal conclusions. By no means are we suggesting that such research would be easy to conduct. Rather, such research is likely to pose interesting, though not insurmountable, methodological issues. Indeed, analysis of methodological problems arising in the conduct of research of this kind can itself be the subject of interesting and significant scholarship. Ultimately, however, we believe that research using accepted methodologies to collect and evaluate this type of psycholegal data can be developed and will result in a new and highly useful form of empirical legal psychology.

In this way, the attorney-client relationship can become the subject of a new body of interdisciplinary research that can then impact the way in which the law develops in this area as well as how lawyers apply the law and conduct their counseling function. Several analogies exist. For example, prior to the 1970's, much of antitrust law was developed based largely upon judicial intuitions about the anti-competitive impact of various business practices. In the years since then, a significant body of law and economics scholarship has examined these issues through economic modeling and, in some cases, empirical investigation.<sup>109</sup> This law and economic scholarship has proved to be of enormous use to courts and to antitrust lawyers. Moreover, the law and economics approach has spilled over to affect many other areas of the law.

A second example arises from medical practice. Physicians frequently face a variety of ethical dilemmas in dealing with patient treatment and research involving human subjects. While some physicians may have developed intuitive approaches to dealing with these dilemmas, many lacked a sufficient knowledge base in this area. This vacuum created an entire field that has come to be known as "bio-ethics." Philosophers applied ethical theory to deal with these emerging treatment and research issues, and this new body of interdisciplinary work has been of enormous use to practicing physicians and to institutional review boards that now exist in virtually all hospitals and health care facilities.

A similar body of theoretical and empirical work can, we hope, be de-

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108. See William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992) [hereinafter *Enactments of Power*]; Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989) [hereinafter *Lawyers and Legal Consciousness*].

109. See *id.*

veloped to address the various psychological dilemmas that are recurring in lawyer/client preventive law contexts. The fruits of this new work could help considerably to expand the knowledge base of preventive lawyers who seek to apply a TJ-oriented approach in their lawyering. This work may be unlikely to result in fixed algorithms that attorneys can apply in every context. The people and circumstances involved in legal counseling situations are perhaps too varied and lawyers are perhaps too often presented with novel situations for the methods of actuarial decision making to supplant the traditional legal methods of clinical decision making anytime in the foreseeable future.<sup>110</sup> Indeed, a healthy measure of professional discretion may be both inevitable and desirable in the attorney counseling context. However, that discretion can be informed considerably by the kind of probabilistic information that careful empirical research can provide.<sup>111</sup> We hope that this discussion and future discussions like it will continue to inspire such empirical psycholegal research.

### F. Teaching<sup>112</sup>

Once this body of empirical knowledge regarding the therapeutic impact of various lawyer/client interactions begins to emerge, the information must be disseminated to a relevant audience. Law school education is the obvious starting point. Law school seminars are already being separately taught on the topics of preventive law and therapeutic jurisprudence.<sup>113</sup>

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110. For an introduction to the distinction between actuarial and clinical decision making in the context of psychology, see Marc C. Marchese, *Clinical Versus Actuarial Prediction: A Review of the Literature*, 75 PERCEPTUAL & MOTOR SKILLS 583 (1992); see also John Monahan, *Clinical and Actuarial Predictions of Violence*, in 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 300 (D. Faigman et al. eds., 1997). For further discussion of the issue of standardization in legal checklists, see HARDAWAY, *supra* note 4, at 496.

111. This information is perhaps best utilized in practice in the form of preventive/therapeutic checklists. Preventive law has long touted the use of checklists. The integrated preventive/therapeutic framework provides an opportunity to develop checklists that move a step beyond the traditional preventive checklist by contemplating both legal and psychological or social concerns. Furthermore, such checklists could be based not merely upon intuition, or poorly documented experience. Rather, the checklists could be based upon sound empirical research that identifies those factors that contribute significantly to outcomes of interest and those that do not.

112. Portions of this section were adapted from Stolle & Wexler, *Preventive Law*, *supra* note 2.

113. For example, seminars on preventive law have been offered at the University of Denver School of Law and at the University of Southern California School of Law, and a preventive law oriented course on transactional lawyering is offered at Whittier Law School. Likewise, courses on therapeutic jurisprudence have been offered at the following law schools or joint law/psychology programs: University of Arizona, the University of Puerto Rico, the University of Miami, New York Law School, the University of Nebraska, Capital University, Widener University, and Osgoode Hall Law School of York University. See David B. Wexler, *Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence*, 35 REVISTA DE DERECHO PUERTORRIQUENO 273, 273 n.2 (1996).

Seminars devoted jointly to preventive law and therapeutic jurisprudence could also be developed. Students could read interdisciplinary scholarship, including empirical psycholegal studies and theoretical therapeutic jurisprudence scholarship, and discuss how the ideas presented might be put into practice with a preventive orientation. Such a seminar would have a strong emphasis on the importance of client counseling and might even be integrated into a standing course on client counseling or negotiation.

Such a seminar could employ the usual features of legal education—reading and discussing appellate case reports with some form of Socratic questioning led by the professor—as well as less traditional classroom activities. For example, students could be presented with concrete examples and required to role-play the probable lawyer/client interactions in the classroom.<sup>114</sup> The role-play exercises could involve law students either playing the part of the lawyer or of the client, or, at some universities, could involve undergraduate students from a law and psychology course or a sociology of law course to play the parts of the clients. Following the lawyer/client role-play, students could then attempt to draft documents that resolve the legal trouble area without undermining the client's extra-legal interests, which were brought out during the role-play.<sup>115</sup>

Students might also be required to research preventive legal resources outside of the classroom materials, and to draft checklists for client counseling. Such a checklist could focus on any substantive area of law in which the student has an interest in practicing in the future. Ideally, students would research relevant legal precedent as well as relevant social science literature, in an attempt to develop checklists that incorporate both legal concerns as well as psychological concerns, each grounded in information gathered from appropriate sources of authority. A well-drafted checklist of this type may be one of the few written assignments completed during law school that a student will actually retain and utilize during his or her practice.<sup>116</sup> Likewise students might be required to choose an area of law of in-

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114. See HARDAWAY, *supra* note 4, at xlv (discussing role playing as a technique for teaching preventive law). An excellent book on counseling skills is DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991). The work urges lawyers to anticipate and consider the “nonlegal” consequences—including psychological ones—that invariably accompany legal measures, but note that “nonlegal consequences are often difficult to predict.” *Id.* at 12. We hope that the research we propose on identifying psycholegal soft spots and strategies will enable us explicitly and systematically to focus on the law-related psychological dimension in legal counseling—and that it will make this sort of nonlegal consequence less difficult to predict.

115. See HARDAWAY, *supra* note 4, at xlv (discussing document drafting as a technique for teaching preventive law).

116. Some such projects might be of publishable quality. Even those that may fall short of publishable quality could be retained as unpublished manuscripts, forming the foundation for a library of TJ preventive materials. See generally Louis M. Brown, *Decisions in the Law Office, Like Those in Appellate Courts, Should be Available*, 1990 PREVENTIVE L. REP. 17 (1990); Louis M. Brown, *Lawyer Decisions: New Materials for Law Libraries to Collect*, 87 LAW LIBR. J. 7 (1995).

interest to them, to read treatises and consumer oriented books on the chosen area, interview several lawyers working in the area,<sup>117</sup> and finally prepare and present a paper on some important psycholegal soft spots and strategies for dealing with them.<sup>118</sup>

At some law schools, materials on TJ Preventive Law could also be integrated into the first year course on legal process or lawyering skills.<sup>119</sup> This section of the first year course, consuming perhaps only a small portion of the total semester, could be entitled "counseling and prevention" or simply "preventive law," and may pique students' interest in later taking an upper level seminar devoted exclusively to the topic. At law schools that do not require a first year course on legal process, lawyering skills, or some analogous course, some introduction to the integrated framework somewhere in the first year, perhaps in property or contracts, might set the tone for the remainder of a law student's career, legitimizing the concepts of counseling and prevention.

Ideally, some TJ Preventive Law principles might also seep into the clinically-oriented upper level courses.<sup>120</sup> Many upper-level courses will naturally lend themselves to a TJ Preventive Law approach, such as client counseling, wills and trusts, family law, estate planning, and negotiations. Furthermore, criminal and civil clinics might take on a preventive orientation, emphasizing psychological well-being as one important consideration in legal planning.<sup>121</sup> Law school clinics operated with a TJ Preventive Law orientation might benefit both the students, by preparing them to be thoughtful and careful practitioners, and the public, by providing needy citizens with psychologically sophisticated preventive legal counsel.<sup>122</sup>

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117. The interviewing component of the assignment has the potential to make the project come to life for the students. Furthermore, the interviews will likely expose students to the wide range of approaches to lawyering and to the extent to which lawyers intuitively take a preventive, or even TJ preventive, approach to working with clients.

118. Again, some of these papers will likely rise to the level of publishable quality, and even those that do not could still make a significant contribution to an ongoing collection of TJ preventive lawyering materials. See, e.g., *Felstiner & Sarat, Enactments of Power*, supra note 108; *Sarat & Felstiner, Lawyers and Legal Consciousness*, supra note 108.

119. For example, at the University of Missouri-Kansas City Law School, preventive law is being introduced in the first year course on Torts taught by Edward Richards, as well as in his upper level courses on Health Law and Products Liability. Likewise, Richard Gruner includes a preventive law component in his Corporations course at Whittier Law School.

120. See generally Louis M. Brown, *Experimental Preventive Law Courses*, 18 J. LEGAL EDUC. 212 (1965) (describing the plan for a course intended to teach preventive lawyering techniques to third-year law students).

121. In fact, under the direction of Professor Mariluz Jimenez, the legal clinic at the University of Puerto Rico (a law school clinic in which all third-year students are required to participate) is in the process of undertaking just such an orientation to supervised law practice.

122. In order to take on a comprehensive TJ Preventive Law orientation, legal clinics should consider offering preventive legal services and legal checkups to certain groups of prospective clients, and should even consider creating outreach programs to make such services known and available. Cf. Melanie B. Abbott, *Seeking Shelter Under a Deconstructed*

## V. CONCLUSION

Lawyers once described themselves as “counselors and attorneys-at-law.” But the role of lawyer as counselor has seemed to diminish markedly in recent years. The proposed integration of therapeutic jurisprudence and preventive law seeks to reclaim this lost ground and to reshape the everyday practice of law in ways that emphasize this counseling function and that give this counseling function real structure and substance, rather than merely paying it lip-service or describing it in amorphous and often unhelpful ways.

In recent years, the consumers of legal services have experienced what seems to be a growing dissatisfaction with lawyers. Lawyers more frequently are seen as unethical professionals whose interest in their clients’ welfare is subordinated to their own pecuniary interests. The prevalence of lawyer jokes in the popular media and the portrayal of lawyers as objects of ridicule evidences just how far the reputation of lawyers has fallen in recent years. Moreover, many lawyers seem increasingly dissatisfied with the practice of law, and lawyers as a professional group experience a higher incidence of mental illness and substance abuse than other professions.<sup>123</sup>

Reshaping the role of lawyer in the way proposed here can do much to change both public attitudes concerning lawyers and the personal and professional satisfaction of practitioners in the field. Rather than merely dealing with people’s problems, and with the perhaps inevitable perception that they are part of those problems, lawyers should become problem-avoiders, counseling their clients in ways that can anticipate and prevent future difficulties. While this is the basic mission of preventive law, the sensitivity to the psychological dimensions of law practice that the integration of therapeutic jurisprudence and preventive law can bring about will permit the preventive law approach to be applied more effectively, with greater client and lawyer satisfaction. Bringing therapeutic jurisprudence and preventive law together can broaden the counseling mission, and can convert the practice of law into a helping and healing profession in ways that may make it a much more humanitarian tool.

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*Roof: Homelessness and Critical Lawyering*, 64 TENN. L. REV. 269, 289 (1997) (analyzing the relationship between jurisprudence and social action within the context of the problem of homelessness). Abbott also notes that the impact of therapeutic jurisprudence “has so far been limited to the academic realm.” *Id.* at 289. We hope, however, that the integration of TJ with preventive law will take TJ into the realm of the practicing lawyer. Likewise, TJ is beginning to attract the interest of the judiciary. For example, TJ was the theme of the Annual Conference of Women Judges, held in September 1997, Salt Lake City, Utah. *See also* William Schma, *Book Review*, 36 JUDGES JOURNAL 81 (1997) (reviewing WEXLER & WINICK, THERAPEUTIC KEY, *supra* note 18) (suggesting that TJ has much to offer the judiciary in its day to day business).

123. *See generally* Amiram Elwork & G. Andrew H. Benjamin, *Lawyers in Distress*, in WEXLER & WINICK, THERAPEUTIC KEY, *supra* note 18, at 569; Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U.L. REV. (forthcoming 1997).

As broadened and redefined by the integration suggested here, the practice of law can bring enormous personal satisfaction and can become a force that will enhance the mental health and psychological well-being of the client. Integrating these two fields will surely enhance the potential of each. In the process, the practice of law can be transformed into an instrument for helping people, ultimately revitalizing the professional life of the lawyer by making law practice more enriched and fulfilling.

