The Mythical Power of Myth? A Response to Professor Dauer

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Professor Dauer makes two very interesting points about why endorsing a therapeutic jurisprudence (TJ) approach rocks fundamental assumptions about the common law legal system. First, he argues that demonstrating impartiality more than empathy is a practice so entrenched in the system that it cannot be dislodged. Second, he argues that the TJ approach that I advocate in my discussion of the Québec Secession Reference is more "mediation" than adjudication. I would like to respond to both points and conclude with another example as to how a TJ approach may prove attractive in times of criticism about judicial activism in constitutional law.

1. The Mythical Power of Myth?

The traditional legal method has not been very successful in protecting the legitimacy of decision-makers. Whether or not there is a crisis of interpretation,[1] postmodern criticism has certainly shaken the belief that impartiality can exist. The legitimacy of decision-makers or of traditional legal reasoning is now often openly challenged.[2] My proposition is that a therapeutic jurisprudence approach could be a partial solution to this legitimacy crisis.

When issues are particularly complex, legally or socially, the legal rules often appear to be narrow, inadequate, arbitrary, and an exercise of raw power. The presence of competing moral orders and the

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1. MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 13 (1998) (observing that "[i]n America, for a generation the practice of legal interpretation has been mired in a deep and persistent crisis.").

2. This legitimacy certainly was challenged in the Québec secession case. Ref. re. Secession of Québec [1998] 2 S.C.R. 217. The Québec government asked how nine federally appointed judges could decide the Québec nation's right to separate. *Id.* In my view, it is this concern for its own legitimacy that prompted the Court to adopt what I see as a therapeutic approach in attempting to recognize the interests of both sides.

lack of a uniform set of beliefs suggests that the old, traditional way of judicial decision-making no longer commands the same respect.

The healthcare example used by Professor Dauer in his text illustrates well the narrowness of current legal thinking. Here is a complex, difficult social issue translated into "simplistic"[3] legal rules: does the statute apply? What is the statutory definition of plan administrators? Are precedents compelling on the issue of fiduciary duty? In the eyes of traditional legal reasoning, patients' worries about their treatment are not "relevant." The discomfort of physicians with divided loyalties is not either. After all, law is about defining relevance: the patients' worries about not being properly taken care of are completely "irrelevant" to the question of whether physicians are plan administrators, which is the only "legal" question. The beauty of the therapeutic jurisprudence approach, in my view, is the way in which it challenges the notion that only "legally" relevant information needs to be heard. TJ expands notions of relevance in order to make feelings, interests, understandings, emotions, and stories relevant. This is a very important challenge.

It is, however, an important challenge that fits well with our current understanding that context matters in the decision-making process. Isolating pieces of evidence, statutory rules, or precedents from the context in which they arose always seems arbitrary. It generally feels like a very impoverished way of comprehending reality.

Solutions to post-modern criticism have sometimes advocated a recognition of a pluralism of interests.[4] The TJ approach is not unlike this position because it opens up the process to a wide array of issues of concern to the clients so that they might feel better heard and understood. Such a process may enhance the clients' sense of belonging to institutions, restoring their faith in them.

Further, it must be remembered that a TJ approach does not necessarily replace traditional reasoning, it adds to it. It could be that judges are taught that "equal application" is more important than empathy and that demonstrating impartiality matters more than demonstrating a concern for the parties. One does not, however, exclude the other. The traditional concern for equal application can become one piece of the puzzle as opposed to the entire image. It could even be that we could prove that demonstrating empathy is "better" in a complex society than demonstrating only impartiality.

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3. I use "simplistic" here, not to minimize the degree to which choosing between the statutory answer and the common law fiduciary duties could be interesting and legally convoluted, but simply to illustrate how it makes a perfect case to illustrate the paucity of the legal discourse on such an important issue.

4. MICHEL ROSENFELD, *supra* note 1, at 199 *et seq.*

My interest in developing a therapeutic approach is to highlight and value the process of explanation that speaks to the real issues for the parties; a process of explanation that identifies principles around which parties can continue to articulate their views. It is not my intention to invite courts to develop structured intervention. Rather, I suggest that giving an answer may not be always very helpful. What matters is to develop a process-driven approach that recognizes the ability of the parties to better solve their problem in a way that speaks to their interests.

The healthcare example is again very stimulating in this regard. Is it possible to imagine a process-driven answer to the problem posed by Professor Dauer? Courts have, in the past, imagined process-driven answers that could be helpful in this context: the duty to warn, the obligation to disclose conflicts of interests, and the necessity to have independent reviews. However, it could also be that any process-driven answer does not help and that the problem must be solved by legislative intervention. Nevertheless, talking about the real issues in front of a court is still arguably better than masking the problem by referring to the canons of statutory interpretation. The public interest in the issue may be heightened because it is no longer an obscure legal battle, but rather a story of people caught in a web of conflicting duties.

In summary, I suggest that a TJ approach may offer real potential for a legal system that suffers from a legitimacy crisis, because it expands traditional notions of relevance and better recognizes a wide range of interests. In that sense, it could be that a TJ approach is not unlike mediation.

2. Mediation vs. Adjudication or Mediated Adjudication

Professor Dauer suggests that the TJ approach looks more like mediation than adjudication. I agree. Maybe I am advocating a form of "mediated adjudication."

First, I am not sure that the opposition between mediation and adjudication is necessary, except that it was once needed to explain mediation. In an effort to convince people of its benefits, proponents of mediation have stressed how different mediation is from traditional adjudication. However, if adjudication can be informed by mediation techniques, it does not seem wise to ignore them.

Second, it is interesting to reflect on the changed role of the courts that the TJ approach could be said to advocate. In a traditional adjudication model, the lawyer manages the client's emotions, her fear, her desire for revenge, or her ambivalence. The lawyer converts

all those emotions into a neat legal issue for the judge. Prior to getting to the judge, there often will have been numerous attempts to "mediate" the case with the other party.

What is interesting about the traditional model is that the "messiness of the client" is supposed to be hidden from the judge, only hinted at during the trial, often in cross-examination. Nevertheless, the model presumes the validity of converting/transforming/masking the client's private feelings in favor of a publicly advocated, clean legal position.

The TJ model allows for greater disclosure of the stories of clients and a greater role for judges in managing a wider range of issues and interests. There may be several reasons why one might now move toward a TJ model. First, lawyers are no longer trusted to manage everything and hold such a position of power relative to the client. Second, there is a desire for a democratization of decision-making: it can no longer be obscure, it must be in the open and the citizen or client must have some control over it. Finally, we should reflect on the fact that this is a world where intermediaries are being eliminated. For example, Internet access now provides direct access to information. In that context, direct access to the source of power, i.e. the judge, sounds appealing. It could be said that a therapeutic approach provides such unimpeded access, in a way, because it allows a wider range of emotions and issues to be put forward during the adjudicative process and because it speaks to the parties' real issues.

On that note, I would like to refer to another Canadian example that might help explain the role of "mediated adjudication" in constitutional law.

In the Canadian context, criticisms about judicial activism abound. They focus mainly on the interpretation of Section 1 of the Canadian Charter of Rights and Freedoms, which provides that rights, such as the freedom of expression, are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[5] The vagueness of the expression has prompted the Supreme Court of Canada to elaborate a test that imposes on a government the obligation to explain why it seeks to infringe a certain right or freedom. The methodology developed by the Court asks questions such as "what are the objectives of government in infringing the freedom?" "what are the alternatives that were available to achieve the same objectives?" and "why were these alternatives not chosen?" Some lawyers have criticized this test as "not law related, as courts

5. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

doing policy," or as courts engaged in social sciences assessment for which they are incompetent. I think these questions present a positive step because they ask the questions that really matter and that help Canadians understand social problems better. For example, it may be better to ask "what is the objective of prohibiting obscenity?" and "if the objective is the protection of the women and children used in the industry, what are the alternatives to moving toward this objective?" than to ask "is obscenity speech or not?" The Section 1 methodology does not engage in definition wars, i.e., tests that define concepts in order to fit them into legal categories. Rather, a wider range of questions is asked. The test diffuses the attacks on the legitimacy of decision-makers (why are nine men deciding that obscenity must be tolerated in order to protect freedom of speech?), by moving the debate to focus on issues such as the alternatives to eradicating violence against women or whether criminalizing obscenity is necessary. By opening up the debate, the process may not only be more helpful, but also more therapeutic.

In conclusion, I view the therapeutic jurisprudence approach as a breath of fresh air in the context of the fight over the legitimacy of decision-making and the generalized complaints about alienation from the traditional adversary system and the narrowness of legal reasoning. More may need to be done to convince judges and courts to embrace the approach. However, I continue to be optimistic about such an evolution. Furthermore, I wholeheartedly agree with Professor Dauer's proposal that model decisions be drafted in order to help judges adapt to the transition.