



Future Trends in State Courts 1999 - 2000



Therapeutic Jurisprudence

The Honorable William Schma, Circuit Court Judge, Kalamazoo, Michigan

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The notion of Therapeutic Jurisprudence (TJ) has been discussed and developed by legal scholars for over a decade. It concentrates attention on the psychological and emotional impact of law, legal procedures, and legal actors. Recently it has increasingly informed state court practices.

What is TJ?

One author describes TJ as “the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.”^[1] It is the study of the role of law as a healing agent. As such it is an interdisciplinary science, offering fresh insights into the role of law in society to those who practice law. TJ can be thought of as a “lens” through which we view regulations and laws as well as the roles and behavior of legislators, lawyers, judges, administrators, and educators. It may be used to identify the potential effects of proposed legal arrangements. It is useful to inform and shape policies and procedures in the law. It posits that, when appropriate, the law apply an “ethic of care” to those it affects.

TJ does not override important societal values such as due process and freedoms of speech and press. It suggests, rather, that mental and physical health aspects of law should be examined to inform us of its potential for beneficial or detrimental consequences. In so doing, TJ promotes better insight and more effective legal results. Such considerations enter into the balance when considering a law, a legal decision, or course of legal action. It is important to practice TJ because—like it or not—the law does have therapeutic and anti-therapeutic consequences. This is empirical fact. Consider the following situations; they are familiar to most legal practitioners, and they are examples of the application of TJ principles.

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Examples of Therapeutic Moments

In busy dockets, it is common for judges to accept “no contest” or nolo contendere pleas in sex offense cases in lieu of a guilty plea. TJ will not dictate whether a judge should do this. It will, rather, ask the judge to consider the therapeutic effects that may follow as a consequence of such a plea. They may

be considerable because, in the case of sex offenders, a nolo plea may reinforce a process of denial which will frustrate the offender's rehabilitation. If the offender does not have to admit the crime to the judge, he or she may more easily deny it later to a probation officer or sex abuse counselor. The anti-therapeutic consequence may be the frustration of rehabilitation and return to abusive behavior. This result would have been, ironically, begun by the judge—the very person society expects to promote the rule of law.

The same may be said of criminal cases involving addiction to alcohol or other drugs. The biggest hurdle that an addict or alcoholic must usually overcome is denial. It is difficult to admit affliction with an uncontrollable disease, especially one to which society has attached moral overtones. Nevertheless, those experienced with recovery know this admission is critical. If, for whatever reason, a judge agrees to accept a nolo plea and does not require the defendant to confront his or her addiction openly, the judge misses a critical “therapeutic moment”. Moreover, as in the case with sex offenders, the judge may have set in motion a course of denial that will virtually guarantee the failure of subsequent rehabilitation efforts and the return of the offender to the system.

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

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The TJ Process

TJ first identifies anti-therapeutic elements which might otherwise go unexplored. Next, it asks whether an action could be taken to avoid them without “trumping” the established legal principles involved. TJ proposes action and methods to evaluate the action. TJ is, therefore, not merely a speculative exercise, but action-oriented. It seeks tangible results. These are not radical concepts; they are mainstream. They give a fresh perspective on honored principles of the legal profession. Abraham Lincoln advised lawyers: “Discourage litigation. Persuade your neighbor to compromise wherever you can. As a peacemaker, the lawyer has a superior opportunity of being a good” person. At a presentation to the Annual Meeting of the National Association for Court Management (NACM) in 1996, the need to become “more therapeutic” was described as one of the top ten issues facing the courts in the future. In 1996, in a cover story in the American Bar Association Journal entitled “The Lawyer Turns Peacemaker,” the author noted public dissatisfaction with the justice system and argued for the need to apply a therapeutic approach to litigation so parties’ feelings of anger, resentment or rejection could give way to healing.

In the July 1999 National Institute of Justice Journal, David Rottman and Pamela Casey, staff members of the National Center for State Courts and frequent authors on this topic, observed that courts are moving toward a “problem-solving” orientation to their responsibilities and forming problem-solving partnerships to address the complex social evils that have come to dominate their dockets in recent years. The Trial Court Performance Standards raise the level of court consciousness on these matters. Standard 3.5 is: “The trial court takes appropriate responsibility for the enforcement of its orders. No court should be unaware of or unresponsive to realities that cause its orders to be ignored.” Standard 4.5 states:

The trial court anticipates new conditions and emergent events and adjusts its operations as necessary. Effective trial courts are responsive to emergent public issues such as drug abuse, child and spousal abuse, AIDS, drunken driving, child support enforcement, crime and public safety, consumer rights, gender bias, and the more efficient use of fewer resources. A trial court that moves deliberately in response to emergent issues is a stabilizing force in society and acts consistently with its role of maintaining the rule of law.

Judith S. Kaye, Chief Judge of the state of New York wrote recently about the emergence of what she terms “hands-on courts.” She makes these useful observations:

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

In *Judicature* magazine in 1998, Michael D. Zimmerman, Utah Supreme Court Justice and former Chief Justice called for “involved judging” in which “judges and courts assume a stronger administrative, protective, or rehabilitative role toward those appearing before them, that they become more involved in what some have termed ‘therapeutic jurisprudence.’”

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

[1] Christopher Slobogin, “Therapeutic Jurisprudence: Five Dilemmas to Ponder,” *Law in a Therapeutic Key* (Carolina Academic Press, 1996).

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