



Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts

By David Rottman and Pamela Casey

Individual judges, trial courts, and entire State court systems are adopting a new, problem-solving orientation to their work, one well removed from the traditional model of the “dispassionate, disinterested magistrate.”¹ In doing so, courts, in many but not all respects, are taking a path previously cut by other components of the criminal justice system, where a problem-solving orientation first emerged as a reaction to the “management-dominated” concept of police reform of the 1970’s and 1980’s. In the new model, “problem” is defined expansively to include “a wide range of behavioral and social problems that arise in a community.”² A series of executive sessions convened by the Kennedy School of Government refined this orientation into a community strategy of policing based on the “establishment of effective problem-solving partnerships with the communities they police.”³ Community policing, in turn, helped to shape the strategies of community prosecution, probation, and corrections.

Courts also are establishing problem-solving partnerships, but, thus far, lack a coherent strategy comparable to community policing. Various approaches are being tested across the country following a variety of principles, including those of therapeutic jurisprudence, which explore the role of the law in fostering therapeutic or antitherapeutic outcomes. Therapeutic jurisprudence attempts to combine a “rights” perspective—focusing on justice, rights, and equality issues—with an “ethic of care” perspective—focusing on care, interdependence, and response to need.⁴

Restorative justice and community justice are related approaches to problem solving that offer the field of therapeutic jurisprudence potential strategies for achieving therapeutic outcomes. In addition, court

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Achieving Court and Community Collaboration

The following describes how courts can achieve a collaborative relationship with the community:

- Collaboration can be achieved by working with community organizations and the public to identify critical community problems and implement problem-solving strategies. The community can contribute in a variety of ways—for example, by providing paid and volunteer staff, assessment and sentencing options, and advice and support to the court.
- Court and community collaborations can problem-solve at both the community and the individual-case level. Such collaborations can address community wide problems in the aggregate, for example by engaging the court and community in programs designed to reduce the frequency of domestic violence, drug use, or juvenile delinquency.
- Collaboration means that the court is engaged with a cross-section of the community in an ongoing dialog that is expansive in scope.

Source: Rottman, D., H.S. Efkenman, and P. Casey, *A Guide to Court and Community Collaboration*, National Center for State Courts, 1998.

and community collaboration is a vehicle for implementing therapeutic jurisprudence. (See “Achieving Court and Community Collaboration.”) These emerging partnerships are a response to forces pushing and pulling courts toward a more problem-solving and community-focused orientation.

The Road to Therapeutic Jurisprudence

The main push for this change came from the societal changes that placed courts in the frontline of responses to substance abuse, family breakdown, and mental illness. Courts cannot restrict the flow of such problems into the courtroom, and often such problems stand in the way of effective adjudication of cases.⁵ Consequently, courts are struggling to create appropriate dispositional outcomes, including securing treatment and social services.

The push provided by rising case-loads coincided with demands from the public and individual communities for a more responsive and involved judiciary. In recent decades, the courts of most urban and many rural areas have become distant from the public, both physically and psychologically. The public lacks a sense of connection to the court system and views courts as irrelevant to solving the problems of greatest concern to most citizens—the breakdown of social and family support networks. Public opinion surveys indicate considerable dissatisfaction with the accessibility and relevance of the courts and low levels of trust and confidence in the judiciary.

Judges and courts also were pulled rather than pushed toward a problem-solving, proactive orientation. One pull came from a new model for judging that reshapes the nature of the judicial process across the board. (See “A Comparison of Traditional and Transformed Court Processes.”) The Commission on

A Comparison of Transformed and Traditional Court Processes

Traditional Process

- Dispute resolution
- Legal outcome
- Adversarial process
- Claim- or case-oriented
- Rights-based
- Emphasis placed on adjudication
- Interpretation and application of law
- Judge as arbiter
- Backward looking
- Precedent-based
- Few participants and stakeholders
- Individualistic
- Legalistic
- Formal
- Efficient

Transformed Process

- Problem-solving dispute avoidance
- Therapeutic outcome
- Collaborative process
- People-oriented
- Interest- or needs-based
- Emphasis placed on postadjudication and alternative dispute resolution
- Interpretation and application of social science
- Judge as coach
- Forward looking
- Planning-based
- Wide range of participants and stakeholders
- Interdependent
- Common-sensical
- Informal
- Effective

Source: Warren, Roger K., "Reengineering the Court Process," Madison, WI, Presentation to Great Lakes Court Summit, September 24–25, 1998.

Trial Court Performance Standards developed and published in 1990 a set of standards, several of which are relevant to this discussion. First, one standard recognizes an obligation on the part of courts to anticipate and adjust their operations to meet new conditions. Second, three standards hold courts responsible for their standing with the public. These standards acknowledge that objectively measured high performance is not enough if the public fails to perceive that high performance.⁶

Therapeutic Jurisprudence and Its Application

Therapeutic jurisprudence is one source of guidance as the judiciary thinks through the philosophical and practical issues associated with

these changes in their role and public expectations. Formally, therapeutic jurisprudence is a relatively new and rapidly growing area of academic inquiry. In essence, it "proposes the exploration of ways in which, consistent with principles of justice, the knowledge, theories, and insights of the mental health and related disciplines can help shape the law."⁷ The fundamental principle underlying therapeutic jurisprudence is the selection of a therapeutic option—an option that promotes health and does not conflict with other normative values of the legal system.

Therapeutic jurisprudence claims that attending to the individuals as well as the issues involved in a case leads to more effective dispositions.⁸

Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute

social forces that, like it or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence proposes that we be sensitive to those consequences, and that we ask whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values.⁹

Thus, the orientation underlying therapeutic jurisprudence directs the judge's attention beyond the specific dispute before the court and toward the needs and circumstances of the individuals involved in the dispute.

Within these broad parameters, therapeutic jurisprudence can be implemented on a continuum. First, therapeutic jurisprudence can be practiced by judges when interacting with the individuals involved in a particular case. Second, therapeutic jurisprudence may be practiced at the organizational level of the court by devising new procedures, information systems, and sentencing options and by establishing links to social service providers to promote therapeutic outcomes. Third, for some areas of law and court policy, the practice of therapeutic jurisprudence principles requires changes to State statutes or to court rules, policies, or procedures that apply across courts. The following real-life examples help to clarify the role of therapeutic jurisprudence at all three levels.

At the Individual Case Level.

At the individual case level, therapeutic jurisprudence proposes that judges look for "psychojudicial soft spots"—areas in which judicial system actions could lead to antitherapeutic consequences—when interacting with individuals in the courtroom. In some cases, these "therapeutic moments," or opportunities to promote a more therapeutic out-

come, are discovered simply by being attentive to the emotional dynamics of the courtroom. Consider a therapeutic moment described by Justice John Kelley of Australia at the London Conference on Criminal Law Reform.

It happened in a rape case in which Justice Kelley reports that he:

... made a special effort to ensure that the victim felt vindicated. He had just sentenced the defendant to prison, but before calling the next case he asked the victim to approach the bench. Justice Kelley had watched the complainant throughout the proceedings, and it was clear that she was very distraught, even after the offender's conviction and sentencing. The justice spoke with her briefly and concluded with these words: "You understand that what I have done here demonstrates conclusively that what happened was not your fault." The young woman began to weep as she left the courtroom. When Justice Kelley called the family several days later, he learned that his words had marked the beginning of psychological healing for the victim. Her tears had been tears of healing.¹⁰

Most of the examples of therapeutic jurisprudence that have been discussed in the literature, however, reflect a systematic approach to identifying psychojudicial soft spots, which can be applied to more than one individual or case at a time, rather than ad hoc comments. Typically, the examples relate to decisions that the judge must make in a particular category of cases but has discretion in how she or he decides (e.g., accept a no contest plea). For example, research indicates that individuals who commit acts of domestic violence or sexual molestation frequently deny responsibility for or distort the seriousness

of their acts.¹¹ Because such cognitive distortions are likely to lead to recidivistic behavior, attempts to restructure these individuals' cognitive distortions may prove beneficial for the effective disposition of their cases.

One approach for incorporating cognitive restructuring into the court process is to require defendants who enter guilty pleas to provide details about their offenses. After receiving a defendant's guilty plea, for example, one metropolitan court "requires the defendant to take the stand, under oath, and state that he did commit the crime and exactly how he committed it."¹² The defendant's acknowledgment and description of the offense may be helpful in convincing the defendant to participate willingly in treatment. In addition, the detailed description of the offense subsequently may be helpful during treatment if the offender relapses into denying participation in the offense. A related approach is to respond to offenders' denial and minimization of acts of domestic violence by explicitly sentencing them in the same way as offenders who attack strangers.¹³

Concepts associated with behavioral contracting can be adapted by courts to increase compliance with orders in a treatment setting. Behavioral contracting is used in some treatment settings to increase adherence to a treatment plan. In a court setting, it would be used to seek an offender's agreement to comply with the conditions of an order. Agreement is fostered by court efforts to involve the offender in the development of the conditions of the order.¹⁴

At the Court Level. In some jurisdictions, the therapeutic jurisprudence approach has been adopted at the organizational level in the form of special court programs or specialized courts. Drug treatment courts are the best known

example of a court for which therapeutic jurisprudence arguably provides the underlying legal theory.¹⁵ Such courts have five essential elements: (1) immediate intervention; (2) nonadversarial adjudication; (3) hands-on judicial involvement; (4) treatment programs with clear rules and structured goals; and (5) a team approach that brings together the judge, prosecutor, defense counsel, treatment provider, and correctional staff.¹⁶ The therapeutic potential of the courtroom can be exploited in a drug treatment court through simple changes to procedures such as the court calendar. Scheduling new defendants to appear last allows them to observe the court in action, and thus learn what is expected and understand that participating in the program will take considerable effort but can succeed in turning their lives around.¹⁷

Although other specialized courts are not specifically founded on therapeutic jurisprudence principles, they reflect the same school of thought. For example, consider the following statement from the mission of the Jefferson County Family Court in Louisville, Kentucky:

Cognizant of the fact that traditional legal approaches may create new barriers to relationships and exacerbate problems within families, the court encourages alternative dispute resolution, and, as appropriate, recommends or orders counseling, self-help, and other available, suitable governmental and community services.¹⁸

The court's advisory committee has established a subcommittee on the family court as social services delivery system to improve practice on all family court dockets and coordinate social services for all family cases.

A handgun intervention program was established in 1993 by a judge in the 36th district court in Detroit,

Michigan, working with a group of volunteers, including court employees (probation officers, clerks, and translators); law enforcement officers; members of the clergy; and other community leaders. The program represents the potential of a special court to work collaboratively with a community to foster therapeutic outcomes for individuals, families, and the entire community.

The program requires that adults charged with felony firearm offenses attend a special 4-hour presentation on the dangers and consequences of gun violence before they are considered eligible for bail release. Juvenile defendants attend on referral. Other participants attend voluntarily, typically on referral from teachers, clergy members, social workers, parents, and past participants. The program, which is held weekly in a courtroom on Saturday mornings, features police officers, probation officers, and a judge who present a focused, fine-tuned message aimed at raising awareness. All of the presentations reinforce the basic message of the program: the need to make positive life choices and to take responsibility for one's own life and the life of one's community. The message is balanced by the availability of practical advice, as well as educational and employment resources.

It should be noted that although specialized courts may be optimal for practicing therapeutic jurisprudence for some categories of cases and defendants, the potential limitations associated with the establishment of specialized courts in general may prove them less optimal. For example, defining the subject matter of the specialized court can be a problem. If the specialization is too broad, it is diluted; if it is too narrow, the volume of cases may be too low to warrant a specialized court. And if the court shares jurisdiction of a particular subject matter, the

court system becomes more complex for the user.

Another potential limitation is that specialized courts usually require some amount of judicial specialization. Although such specialization can result in improved precision and accuracy and more creative responses to complex problems, it can result in judicial stress and burnout. Specialized courts also are likely to afford fewer opportunities for judicial career advancement, and because specialized courts generally are viewed as less prestigious among members of the judiciary, it may be more difficult to attract high-quality judges to serve in these courts.

At the Policy Level. Although some therapeutic outcomes can be achieved at either the individual case level or at the court organizational level, some must be addressed at the policy level. For example, a judge may be able to reduce a sexual offender's minimization of an offense by using some of the cognitive restructuring and behavioral contracting ideas mentioned above. However, if the system routinely allows defendants to plead to a lesser offense or enter a *nolo contendere* or *Alford* plea, cognitive restructuring to overcome offense denial will be more difficult to achieve.¹⁹ Therapeutic jurisprudence, then, would call into question the benefits of the plea bargaining policy, at least for certain offenses.

Examining the consequences of labeling individuals incompetent provides another example of using the therapeutic lens at the policy level. Labeling individuals "as incompetent and thereby depriving them of the opportunity for self-determining behavior induces feelings of helplessness, hopelessness, depression, and low self-esteem."²⁰ These antitherapeutic consequences suggest revisiting the definition of

competency for the purpose of clarifying the concept and narrowing its application.

Another therapeutic issue for courts to consider at the policy level is the coordination of cases involving members of the same family. A family in crisis may come to the court(s) through a civil case (protection order), adult criminal case (assault), juvenile criminal case (delinquency), dependency case (child abuse or neglect), and/or domestic relations case (custody). Notwithstanding these complexities, coordination can be crucial for the physical and psychological well-being of a family. Without information about the family's legal history, such as former and pending cases involving intrafamilial matters, a judge could unknowingly add to the tragedy of a family crisis situation by, for example, awarding unsupervised visitation to a parent who has a juvenile court history of abusing the child. Also, the judge is unlikely to know what services, if any, have already been provided to family members and the impact of those services on the family. Thus, the development and evaluation of mechanisms to track these cases is a policy issue with considerable therapeutic consequences for courts to address.

Alternative Approaches for Implementing Therapeutic Jurisprudence

As noted, the practice of therapeutic jurisprudence principles can occur at any point on a continuum that ranges from one judge in one case to an entire State court system. Although individual judges and court staff may view the application of therapeutic jurisprudence principles as beneficial, they also may see



Drug treatment courts are the best known example of a court for which therapeutic jurisprudence provides the underlying legal theory. In this court in Richmond, California, graduate Johnny Martinez speaks to one of the several police officers who routinely attend drug court graduation ceremonies to celebrate the accomplishments of offenders who complete the program and have their drug charges dropped. Photo: Scott Bhla, West County Times.

it as resource- and time-intensive. Even modest efforts by an individual judge can be time-consuming as the judge begins the process of identifying problem areas and possible therapeutic strategies. Some support for experimenting with therapeutic jurisprudence principles may provide the incentive for individual judges to make the extra effort. For example:

- **Recognize the importance of therapeutic jurisprudence at the State level.** This will let judges know that their efforts in this area are welcomed and considered consistent with State judicial goals. This may be particularly important for judges who work in relative isolation or whose colleagues do not view therapeutic jurisprudence as a worthwhile endeavor.
- **Provide funding for therapeutic jurisprudence pilot projects.** Modest funding might be need-

ed, for example, to support the administration of and incidental costs associated with a small working group of judges and court staff seeking to identify therapeutic strategies to address a specific problem, accessing relevant resources in the jurisdiction, or implementing a specific therapeutic jurisprudence project.

- **Offer training and information on therapeutic jurisprudence.** Educational programs may offer judges an effective and efficient forum for exploring the concept of therapeutic jurisprudence. A clearinghouse at the State level also could facilitate the transfer of therapeutic jurisprudence knowledge and experience from one jurisdiction to another and provide relevant materials and references to assist judges who are just learning about the concept.

- **Recognize innovative therapeutic jurisprudence programs.** The identification of therapeutic jurisprudence practices that work will showcase particular jurisdictions and facilitate the transfer of effective programs.
- **Provide opportunities for judges to share their experiences and ideas.** Judicial interaction can be accomplished at annual conferences and incorporated into judicial education programs, but it also can take place in more informal settings on a local level, such as the therapeutic jurisprudence discussion group in Kalamazoo, Michigan.²¹ By continually describing and discussing the application of therapeutic jurisprudence, practitioners will increase their awareness of and sensitivity to therapeutic problems and potential strategies.²²

- **Revise the code of judicial ethics.** The wording of State codes of judicial ethics may appear to discourage or place little value on problem-solving and court and community collaboration.

The California Judicial Council, working with the American Judicature Society, recently revised its code of judicial ethics to make involvement in problem-solving with the community an expectation. In California, "The question for judicial officers is not 'How to avoid community involvement to ensure compliance with the canons of ethics?' Rather, the question is 'How can judges most effectively balance their community leadership responsibilities within the appropriate limitations?'"²³

Notes

1. Zimmerman, Michael D., "A New Approach to Court Reform," *Judicature* 82(3) (November–December 1998). Justice Zimmerman offers a concise and coherent view of changes now occurring in the State courts in response to changes in societal conditions and public expectations of the courts.
2. Goldstein, Herman, "Improving Policing: A Problem-Oriented Approach," *Crime and Delinquency* 25(2) (April 1979):242. Goldstein's definition of a law enforcement problem is notable: "By problems I mean the incredibly broad range of troublesome situations that prompt citizens to turn to the police, such as street robberies, speeding cars, runaway children, accidents, acts of terrorism, even fear."
3. Kelling, George L., and Mark H. Moore, "The Evolving Strategy of Policing," *Perspectives on Policing* 4 (November 1988):1.
4. Janoff, S., "The Influence of Legal Education on Moral Reasoning," *Minnesota Law Review* 76 (1991):194–95.
5. Domestic relations cases in the United States grew by 77 percent and juvenile cases grew by 68 percent between 1984 and 1997. By contrast, the State courts' criminal caseloads grew by 45 percent, their civil caseloads by 34 percent, and the national population by 13 percent during the same time period. See Brian Ostrom and Neal Kauder, eds., *Examining the Work of State Courts, 1997: A National Perspective From the Court Statistics Project*, Williamsburg, Va.: National Center for State Courts, 1998.
6. Standard 4.5 Response to Change: The trial court anticipates new conditions and emerging trends and adjusts its operations as necessary. Commentary: "Effective trial courts are responsive to emergent public issues such as drug abuse, child and spousal abuse, AIDS, drunken driving, child support enforcement . . ." Public trust and confidence is the fifth court performance area with standards such as "The public has trust and confidence that basic trial court functions are conducted expeditiously and fairly, and that court decisions have integrity." See Commission on Trial Court Performance Standards, *Trial Court Performance Standards With Commentary*, Washington, D.C.: U.S. Department of Justice, Bureau of Justice Assistance, 1997:20. The standards were approved by the Commission and first published in 1990.
7. Wexler, D.B., and B.J. Winick, eds., *Law in a Therapeutic Key*, Durham, N.C.: Carolina Academic Press, 1996:xvii.
8. Janoff, "The Influence of Legal Education on Moral Reasoning," 194–95.
9. Wexler and Winick, *Law in a Therapeutic Key*, xvii.
10. Van Ness, D.W., "New Wine and Old Wineskins: Four Challenges of Restorative Justice," *Criminal Law Forum* 4(252) (1993).
11. Simon, L.M.J., "A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases," and Wexler, D.B., "Reflections on the Scope of Therapeutic Jurisprudence," in D.B. Wexler and B.J. Winick, eds., *Law in a Therapeutic Key*, Durham, N.C.: Carolina Academic Press, 1996:243–85 and 811–29.
12. The court's practice was included in a study by Donald Newman that is cited in Wexler, "Reflections on the Scope of Therapeutic Jurisprudence," 161.
13. Simon, "A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases," 261–62.
14. Wexler, "Reflections on the Scope of Therapeutic Jurisprudence," 168.
15. Hora, Peggy Fulton, William G. Schma, and John T.A. Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," *Notre Dame Law Review* 74(2) (January 1999):453.
16. *Ibid.*, 453.
17. *Ibid.*, 474.
18. *Kentucky Rules of Court, State*, St. Paul, Minn.: West Publishing, 1997:429.
19. Wexler, "Reflections on the Scope of Therapeutic Jurisprudence," 159–60.
20. Winick, B.J., "The Side Effects of Incompetency Labeling and the Implications for Mental Health Law," in D.B. Wexler and B.J. Winick, eds., *Law in a Therapeutic Key*, 37.

21. Patry, M.W., D.B. Wexler, D.P. Stolle, and A.J. Tomkins, "Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies," *California Western Law Review* 34 (1998).
22. Wexler, D.B., "Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies," *Revista Juridica* 67, (1998):336-42.
23. Judicial Council of California, *Courts Reaching Out to Their Communities: A Handbook for Creating and Enhancing Court and Community Collaboration*, San Francisco: California Judicial Council, 6.1 (1999).

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