

THERAPEUTIC JURISPRUDENCE: IT'S NOT JUST FOR PROBLEM-SOLVING COURTS AND CALENDARS ANYMORE

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Four years ago, in an important joint resolution, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) endorsed the notion of “problem-solving” courts and their use of the principles of therapeutic jurisprudence. According to the resolution, these principles include “integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and government organizations.”¹

The resolution noted that well-functioning drug treatment courts are the best example of problem-solving courts. Now, four years later, drug courts not only have continued to proliferate, but, as a recent publication notes, have become increasingly institutionalized—or “mainstreamed”—within the American court structure.² In fact, they are gaining international attention. For example, there is now an International Association of Drug Court Professionals listserv, coordinated by Justice Paul Bentley of the Toronto Drug Treatment Court.³ A recent issue of the National Center for State Courts’ *Problem-Solving Reporter* discusses some of the international activity and, in fact, categorizes problem-solving courts as a growing American “export.”⁴

At the same time, there is a related trend with international dimensions that constitutes the focus of the present essay: the use of therapeutic jurisprudence principles in courts generally, outside the context of problem-solving courts and calendars.

Therapeutic Jurisprudence and Problem-Solving Courts

Therapeutic jurisprudence (TJ) and problem-solving courts were basically born at the same time, and have always been closely connected, but they are actually close cousins rather than identical twins. Drug treatment courts originated with the efforts of practical, creative, and intuitive judges and court personnel, grappling to find an alternative to revolving door justice, especially as dispensed

to drug-addicted defendants.⁵ TJ, by contrast, developed as an interdisciplinary perspective interested in how the law and the legal system produce therapeutic and antitherapeutic consequences.⁶ Drawing on insights from psychology, criminology, social work, and like disciplines, TJ studies different legal arrangements and their therapeutic outcomes.

The growing body of therapeutic jurisprudence thinking regarding courts includes principles noted in the CCJ/COSCA resolution, such as ongoing judicial monitoring, as well as many other strategies, such as how to help an offender develop problem-solving skills, how to spark motivation to change, how to enhance compliance with probation conditions, how to reinforce desistance from crime, and much more.⁷ It is only natural that these two close cousins would have much interaction: TJ, being interested in “what works” and “why,” has much to learn from well-functioning problem-solving courts. And problem-solving courts can improve their mission by invoking insights developed in the TJ literature.

Therapeutic Jurisprudence in a General Judicial Context

In our recent edited book, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*, Bruce Winick and I note how this interaction has worked to bring TJ into more general judicial contexts:

The new problem solving courts have served to raise the consciousness of many judges concerning their therapeutic role, and many former problem solving court judges, upon being transferred back to courts of general jurisdiction, have taken with them the tools and sensitivities they have acquired in those newer courts. Indeed, the proliferation of different problem solving courts, and the development of various “hybrid” models [e.g., juvenile drug courts, dependency drug courts, domestic violence-mental health courts], suggests to us that the problem solving court movement may actually be a transitional stage in the creation of an overall judicial system attuned to problem solving, to therapeutic jurisprudence, and to judging with an ethic of care.⁸

The use of TJ principles in the more general judicial contexts will also be useful if budgetary constraints hamper the future development of concrete problem-solving courts. As Judge William Dressel (ret.), president of the National Judicial College, has put it, “the principles of therapeutic jurisprudence can be applied by judges whenever they engage in addressing societal problems, no matter how framed on a docket.”⁹

Thus, Judge William Schma, formerly a drug treatment court judge in Kalamazoo, has returned to the general bench with a TJ approach to judging, which he believes should constitute “judging for the new millennium.”¹⁰ Judge Michael Town of Hawaii, long an advocate for unified family court, has now put TJ principles to work in felony trials in Honolulu.¹¹ The use of TJ generally, and especially in the criminal and juvenile context, is fully consistent with another emerging trend: a bit of a pendulum swing away from mandatory minimums and toward alternatives to incarceration, toward increased correctional rehabilitation, and toward more effective prisoner reentry, matters recently underscored in the ABA Justice Kennedy Commission Report.¹²

International Developments

The international activity relating to therapeutic jurisprudence in general settings has been fascinating. Sensitive and creative judges are applying basic principles of therapeutic jurisprudence not only in urban areas, such as Melbourne, Australia,¹³ but also in remote geographical areas and in jurisdictions with rather meager resources. For example, Magistrate Michael King, from Western Australia, has instituted interesting approaches and is writing prolifically about applying therapeutic jurisprudence “in the bush.”¹⁴ He and Magistrate Stephen Wilson are instituting creative sentencing schemes and are incorporating aboriginal dispute resolution elements into their day-to-day work as magistrates.¹⁵

Indeed, regions with dispersed populations are taking the lead in thinking about applying therapeutic jurisprudence in general settings. In July 2004, I had the privilege of participating in a New Zealand judicial workshop titled “Therapeutic Interventions.” In that country of four million people, there is only a single specific problem-solving court—a youth drug court, created in Christchurch by Judge John Walker. That court is now presided over by Judge Jane McMeeken, Judge Walker having returned to the “general” bench in the capital city of Wellington. Judge Walker, however, is now trying to carry TJ principles with him and to expose his colleagues to the approach.¹⁶ The written “aims” of the “Therapeutic Interventions” workshop put the matter clearly:

Many recent developments in therapeutic jurisprudence have focused on the establishment of specialist courts, e.g. drug, domestic violence. This seminar aims to increase your capacity to identify and use therapeutic interventions in general court work. Day one will focus on understanding therapeutic jurisprudence and the options that it provides. Day two will focus on the

practice of engaging with those appearing in courts and opportunities to make therapeutic interventions.

Closer to home is an ambitious project sponsored by the National Judicial Institute (NJI) in Canada, which has a handful of specialized problem-solving courts (drug treatment courts, mental health courts, etc.), especially in Toronto. But the concern of NJI is nationwide, and much of the country has a dispersed population, often in areas with a predominantly aboriginal population.

NJI is accordingly drafting a handbook, tentatively titled “Beyond Problem-Solving Courts: Taking a Therapeutic Approach into Canadian Courtrooms.” It is specifically designed to provide some practical suggestions and guidelines for Canadian judges in nonspecialized courtrooms on how to incorporate TJ principles in their work. The manual will likely deal with matters such as a proactive problem-solving orientation, judicial demeanor and direct interaction with the defendant, judicial supervision, rewards and sanctions, and referrals to treatment.¹⁷

Conclusion

The developments in Australia, New Zealand, and Canada seem to me to reinforce the speculation offered earlier that the development of problem-solving courts reflects a general dissatisfaction with the “ordinary” judicial system—that the problem-solving court movement may be merely transitional, serving as a stepping-stone to an eventual broad-based reform in the judicial profession as a whole. In essence, much of what seems to be happening in these other countries is that they are cutting to the chase of judging with an ethic of care, sometimes skipping altogether the creation of problem-solving courts.

Of course, the U.S. thinking and writing about problem-solving courts has been extraordinary, and much of those ideas are exceptionally worthy of continued export. But what Australia, New Zealand, and Canada are engaged in will be of interest and use to each of those jurisdictions—and, indeed, should be of enormous interest and use to the United States as well. Their thinking, writing, manuals, and programs about the use of therapeutic jurisprudence in general judicial settings deserve the status of a major U.S. import.¹⁸

Online at www.ncsconline.org/WC/Publications/KIS_SpePro_Trends04.pdf

ENDNOTES

¹ Conference of Chief Justices, CCJ Resolution 22, and Conference of State Court Administrators, COSCA Resolution 4, “In Support of Problem-Solving Courts,” approved August 3, 2000. Available through the Web site of the International Network on Therapeutic Jurisprudence, <http://www.therapeuticjurisprudence.org> (under “Cases, Briefs, Statutes and Other Documents of Interest” >> “Other Documents”).

² Aubrey Fox and Robert Victor Wolf, *The Future of Drug Courts: How States Are Mainstreaming the Drug Court Model* (New York: Center for Court Innovation, 2004), available online at <http://www.courtinnovation.org/publications.html#future>.

³ See <http://www.nadcp.org/iadtc/>.

⁴ James Cooper, “Problem-Solving Courts: A Growing U.S. Export,” *Problem-Solving Reporter* 1, no. 2 (Summer 2004), available online from the National Center for State Courts at http://www.ncsconline.org/Projects_Initiatives/ProbSolving/vol1No2.htm#Cooper.

⁵ Bruce J. Winick and David B. Wexler, eds., *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham: Carolina Academic Press, 2003). See <http://www.cap-press.com>.

⁶ For an orientation to therapeutic jurisprudence, a comprehensive bibliography, links to a TJ listserv, announcements, and a list of upcoming activities, see the Web site of the International Network on Therapeutic Jurisprudence, <http://www.therapeuticjurisprudence.org>.

⁷ Winick and Wexler, *Judging in a Therapeutic Key*.

⁸ *Id.*, at 87.

⁹ Dressel, foreword to *Judging in a Therapeutic Key*, ed. Winick and Wexler.

¹⁰ Judge William Schma, “Judging for the New Millennium,” *Court Review* 37, no. 1 (Spring 2000): 4. Reprinted in Winick and Wexler, *Judging in a Therapeutic Key*, 87.

¹¹ Winick and Wexler, *Judging in a Therapeutic Key*, 92.

¹² Terry Carter, “End Mandatory Minimums, ABA Commission Urges,” *ABA Journal eReport* 3, no. 25 (June 2004), available online at <http://www.abanet.org/journal/ereport/jn25death.html>.

¹³ Jelena Popovic, “Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary,” *Law in Context* 20, no. 2 (2002): 121. (Law journal of LaTrobe Law School, Vic., Australia. Correspondence to O. Mendelsohn@latrobe.edu.au.)

¹⁴ Michael S. King, “Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush,” *Criminal Law Journal* 26 (2002): 260; “Applying Therapeutic Jurisprudence in Regional Areas: The Western Australia Experience”, *E Law—Murdoch Univ. Electronic Journal of Law* 10, no. 2, (June 2003), <http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html>; “Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities,” *Alternative Law Journal* 28, no. 4 (2003): 172; “Roads to Healing: Therapeutic Jurisprudence, Domestic Violence and Restraining Order Applications,” *Brief* 30, no. 7 (2003): 14 (published by the Law Society of Western Australia); “Innovation in Court Practice: Using Therapeutic Jurisprudence in a Multi-jurisdictional Regional Magistrates’ Court,” *Contemporary Issues in Law* (in press) (U.K. journal); and Michael S. King and Stephen Wilson, “Magistrates as Innovators,” *Brief* 29 (2002): 7.

¹⁵ Interestingly, both therapeutic jurisprudence and western-style problem-solving courts bear substantial similarity to concepts such as restorative justice, family group conferencing, and circle sentencing—concepts that originated in tribal justice systems of Australia, New Zealand, and North America.

¹⁶ Judge Walker is pleased to share his unpublished remarks on the matter with interested persons. He may be contacted at walkerj@courts.govt.nz.

¹⁷ I serve as a member of an NJI working group charged with reviewing the manual. For more on NJI, go to <http://www.nji.ca>. For further information on the manual, interested persons may contact Justice Paul Bentley at paul.bentley@just.gov.on.ca.

¹⁸ Those interested in pursuing this area can keep abreast of TJ developments through the Web site of the International Network on Therapeutic Jurisprudence, <http://www.therapeuticjurisprudence.org>, and the TJ listserv, linked to on the Web site, which has many judicial (and other) members worldwide. Bruce Winick and I are currently consulting with social work professor Carrie Petrucci who, as principal investigator, is conducting an international study of judges engaged in therapeutic jurisprudence work. The first step of the study surveys involved judges and tries to glean from them the “how” of TJ. For example, they are asked to answer a question, such as “I practice therapeutic jurisprudence by...” Some representative answers, which surely can and do apply in general judicial settings, include “speaking directly to the defendant in language and tone of voice that I think he or she will understand”; “finding something positive to say about the defendant”; “learning as much as I can about each defendant so they feel I know them and care about them”; and “explaining my decision to all parties.” When the study is complete, information about it will be posted to the TJ Web site and listserv.