



The Case for Measuring Legal Actor Contributions in Court Proceedings

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The importance of legal actor contributions has been highlighted in recent international guidelines proposed for the evaluation of court programs and is evident when reviewing the literature on good research design. However, attempts to measure legal actor contributions from an **objective** and **therapeutic** perspective as part of the ongoing therapeutic jurisprudence movement are scarce in the literature. To date, no court evaluation programs have included an objective measurement of legal actor contributions as a feature of their research design. However, several programs have attempted to measure this variable via self-report or the perceptions of other legal actors. This article highlights the necessity and usefulness for both the mainstreaming therapeutic jurisprudence movement and problem-solving courts to find a way to measure legal actor contributions effectively and objectively when evaluating court processes, impacts and outcomes. The proposed measurement tool could also function as a respectful mechanism to give feedback for magistrates wishing to embed therapeutic jurisprudence practices into their work in mainstream courts and could potentially be used in judicial training.

Key words: court evaluation; judge contribution; law; legal actor contribution; mainstreaming TJ; psychology; research design; therapeutic court program; therapeutic jurisprudence.

Introduction

Therapeutic Jurisprudence (TJ) is the interdisciplinary study of the use of law as a therapeutic agent and social force.¹ Since the inception of the TJ movement in the 1990s, TJ specialist court programs proliferated, but many were unable to stay the distance, often due to a perceived poor performance on program evaluations, and/or lack of support or funding.² The more recent mainstreaming TJ movement has advocated strongly for the implementation of TJ principles in mainstream courts, in line with the original conceptualisation of how TJ could function.³

This article deals with the evaluation of legal actor contributions from a therapeutic

perspective across the spectrum of courts, including problem-solving courts, mainstream courts and mainstreaming TJ approaches.⁴

The term ‘legal actor contribution’ refers to the contribution of the actors in a legal setting to the experience of the defendant (or client) of that court. For the purposes of this discussion, this means the contribution of the judge and the lawyers to the defendant’s experience of the court process.

This review will explore the therapeutic potential of the judge’s role, review the attempts so far at measuring these contributions, identify potential issues with the measurement of legal actors and also the potential benefits that could stem from measuring these.

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Therapeutic Potential of Legal Actor Contributions: The Court as a Site of Intervention and Systemic Entry Point

The potential therapeutic input of legal actors in mainstream courts has been discussed in depth both in the early⁵ and more recent therapeutic jurisprudence literature.⁶ However, recognising the full scope of the court as an intervention site means recognising the extent that legal actors can impact on a client both by what they say (content) and how they say it and interact (process). There is an argument to be made that the most reliable and powerful point of intervention in the life narrative of a person in contact with the justice system is what, and how, the judge speaks to them in public court.

Within the cast of characters and the narrative of an offender-client's life, the unique attributes of a judge arguably makes them very well placed to be an agent for change.⁷ Judges are usually highly motivated, have high intelligence and are able to acquire new skills rapidly. They are also in a position of power and trust and could be conceptualised as the mouthpieces of 'society' speaking to those who are disenfranchised. They have the resources, the intellect and the opportunity to self-reflect and develop what they bring to this interaction from a process point of view.

From a judgement *content* perspective, it is important for a skilled and motivated judiciary to use the effective tools that are available when dealing with defendant clients, based on the evolving intervention evidence base, through appropriate use of referrals and the sentencing regimes and the court processes (eg judicial review) and programs open to them. The evidence as to what works, for whom, and in what form, will necessarily keep evolving with new evidence-based treatments.

This review focusses on the argument for measuring what judges (and lawyers) do, from an objective, *process* perspective.⁸

If the court is conceptualised as a point of intervention in the lives of offenders (and

their families, social networks and communities),⁹ and an entry point into intervention for those who may not receive therapeutic intervention otherwise, then the logical question is, what can a judge (and other legal actors) contribute that will make the best use of that interaction to maximise therapeutic intervention for the defendant?

As Cannon points out, TJ had been practiced by many magistrates for quite some time before the descriptive label of 'therapeutic jurisprudence' came along.¹⁰ As noted by Clark, general relationship factors such as empathy, warmth and acceptance are amongst the most effective predictors of a therapeutic impact for a client in a therapeutic relationship.¹¹ This concept has been developed throughout the literature on psychological research into therapeutic outcomes as 'therapeutic alliance', which is the common underlying denominator that correlates highest with client therapeutic outcome.¹²

As identified by several authors, using techniques from therapy in the courtroom (or good 'court craft'¹³), including encouraging self-determination,¹⁴ can increase client compliance with court orders and sentences,¹⁵ an observation which has been echoed by the procedural justice literature. The presence of these factors, for example, in a judicial-client interaction could create a 'shared respect process' that would contribute to a therapeutic impact on offender behaviour.¹⁶

Certainly, when viewed through the lenses of various systems of therapy, the argument for measuring legal actor contributions goes beyond the relationship factors already noted, and beyond even whether there could be said to be a therapeutic relationship occurring between the defendant-client and the judge during their court experience. For example, many types of therapy (and TJ)¹⁷ conceptualise crisis points as points that are perfect for intervention,¹⁸ as the client is likely to be at their highest motivation point for change.

Review of Efforts so Far to Evaluate Legal Actor Contributions

Some researchers in the TJ field have raised concerns about the inconclusiveness of empirical research (at times), and the risk of TJ ‘resting on shaky grounds’ if it is based on the social sciences and research evidence.¹⁹ However, there are significant funding narratives which demand an evidence-based approach to the implementation of TJ programs.²⁰

Roberts and Indermaur, writing in 2007, suggested guidelines for evaluating TJ initiatives,²¹ but unfortunately these did not include any evaluation of the contributing court factors, namely the legal actors and their contributions, aside from identification of the question of how to assess and account for the ‘impact of contextual factors’ (for example a change in judge).²² More recently in 2016, Richardson, Spencer and Wexler formulated comprehensive criteria for evaluating court practices, which included measurement of legal actor contributions, but did not go as far as to operationalise how this could be achieved.²³

The problem-solving court approach to TJ casts the judge in the role of judge, case manager, therapist and treatment auditor; the role of the judge is central to a TJ approach. Although there remain important distinctions between the role of the judge and the role of the therapist, in the use of therapeutic jurisprudence, a judge is expected to utilise therapeutic principles and techniques, in addition to judicial sanctions (and additionally for problem-solving courts) referral to practical support services, to achieve a therapeutic outcome. When reviewing the literature on therapeutic interventions, the quality of the relationship with the therapist, and especially what the therapist contributes to this, is a crucial factor in outcome.²⁴ Generally speaking, when asked to rate the interaction, the ratings of the client or an objective observer have been found to be most accurately correlated with the outcome of the interaction.²⁵ The literature consistently indicates that the way in which legal actors are

evaluated is fundamental to effective measurement of their contributions and the predictive validity of these measurements for the outcome of the court intervention.

Unfortunately, of the literature reviewed, very few studies were identified that attempted to measure a judge’s contribution within a courtroom from a therapeutic perspective. It is unclear as to why this crucial element of a TJ intervention has not been developed further in court evaluation research design.

Herzog-Evans, writing in 2016, measured the therapeutic input of lawyers, but this has been from the defendant’s perspective, rather than from an objective viewpoint of what would be therapeutically desirable during the court interaction.²⁶

Additionally, Perlman’s 2008²⁷ review of the correlation between judicial and lawyer attitudes towards each other’s practice of what was essentially therapeutic jurisprudence utilised the perspective of members of each profession to evaluate what they appreciated most from the other in a courtroom interaction. The survey also clearly indicated a strong interdependence between the professions when utilising therapeutic jurisprudence interventions.²⁸ However, this study did not include an independent measurement of legal actor contributions.

It is highly problematic that no research designs in the field of therapeutic jurisprudence have included an **independent** observational measurement of legal actor contributions, when read together with the literature base related to therapeutic change, therapeutic alliance and effective ways of measuring this. It renders existing research into ‘what works’ in courtrooms, and evaluations of TJ programs, difficult to interpret and even potentially invalid. From a research design perspective, the observed outcomes of all programs have been complicated by an important confounding variable, a variable which is likely to have a potentially determinative impact on the outcomes when read together with research on the impact of

therapeutic alliance on outcomes from the psychological research literature.²⁹

The research design literature emphasises the need to control, or measure, all variables in an evaluation which could affect the outcome being measured.³⁰ In the case of evaluating the effectiveness of a problem-solving court for a client of that court, the impact of the judge and their contribution to the client's experience and outcome is highly significant.

Attempts to measure the legal actor contributions from the perspective of the judicial officers and lawyers are to be commended for their ingenuity, but are also unfortunately likely to be inaccurate in measuring the interaction due to the reasons stated above.³¹

As previously discussed, when reviewing the literature on therapeutic interventions, the quality of the relationship with the therapist is a crucial factor in therapy outcome. This leads to the question from a TJ perspective, how can the court experience, including judges, create the best therapeutic effect for clients of the court?

Therapeutic Jurisprudence Research Design Issues

After their substantial literature review in 2007, Roberts and Indermaur reluctantly observed that the problem-solving courts appeared to have moved ahead of the research demonstrating their effectiveness.³² They also noted that the 'imperative of accountability' and the 'demand for more effective tools' for justice and rehabilitation³³ created the risk of 'wearing out the welcome' if the empirical evidence for a TJ intervention was not also readily available alongside the rhetoric.³⁴

Developing empirical evidence for the effectiveness of a TJ approach, both in a problem-solving court or in a mainstream court, is not straightforward. As noted throughout the TJ literature, there is a difficulty in the evaluation and formal measurement of outcomes proving that the TJ approach 'works'. This is because the definition of 'what works' is a multidimensional construct and difficult to define, and even

harder to measure.³⁵ Roberts and Indermaur used the terms 'micro-analytic' and 'macro-analytic' to conceptualise this in terms of constructs related to the individual and to the context in which the TJ initiative is taking place.³⁶ However, they conclude their review citing methodological flaws in the evaluation of TJ programs³⁷ including the difficulty of finding an appropriate control group and insufficient follow-up times.

Roberts and Indermaur highlighted some of the key challenges facing those researchers trying to build the evidence base for therapeutic jurisprudence interventions:³⁸

- The dilemma of how to define success;
- The difficulty in finding suitable comparison and control groups, how to avoid selection bias of a comparison group;
- Assessing the impact of contextual factors – these include changes in judicial staff, variability in the input or treatment that the client receives;³⁹
- Timing of evaluation and follow up;
- The best way to measure recidivism and treatment outcomes;
- Conducting cost-benefit analysis;
- Writing evaluations that are accessible to practitioners;
- Research design when evaluating therapeutic jurisprudence programs;
- Lack of guidance as to best practice in TJ program evaluations;
- The need to identify active components of the process that contribute to success for participants;⁴⁰ and
- The range of interventions ('eclectic approaches'⁴¹) on offer between and within programs, resulting in a treatment 'black box'.⁴²

Possible models for better court evaluation procedures have been put forward by Wiener et al (2010)⁴³ which included legitimacy of justice and offenders' reactions whilst progressing through the court process, however this did not include a measurement of legal actor contributions. Their model highlights

the need for a well-developed research model so as to avoid faulty research design which does not allow for generalisation to other programs or initiatives.⁴⁴

Additionally, Pawson and Tilley's realistic evaluation model⁴⁵ recommends defining and testing context-mechanism-outcome patterns so as to see what type of intervention works for what type of court participant.⁴⁶ This model allows space to measure the contribution of legal actors within the theoretical framework of the proposed evaluation model, but it does not mention measuring them explicitly. There is a strong argument that basic research design for therapeutic or mainstream court program evaluation should include the measurement of legal actor contributions. This measurement process could be incorporated into existing research models already discussed in the TJ literature for future evaluation projects.

Benefits of Better Evaluation Procedures

The potential benefits put forward are:

- Better research design and clearer interpretation of outcomes when evaluating therapeutic jurisprudence programs;
- Better support for TJ problem-solving programs due to 'evidence-based practice';
- Improving performance when attempting to mainstream TJ practices into regular courts;
- Improved therapeutic input for magistrates to the court process and individuals who might not otherwise receive therapeutic input; and
- A tool that could be useful for professional development and training for judicial officers.

Evidence-Based Practice and Perceptions of Therapeutic Jurisprudence

The Centre for Justice Innovation recommended evidence-led innovation for problem-solving courts,⁴⁷ following a well-developed discourse in the TJ review

literature. As noted by most authors writing in the field,⁴⁸ there is a strong need for critical evaluation of problem-solving courts, including a transparent and critical analysis of problem-solving court processes. This position also applies, in the author's opinion, to the evaluation of the impact of mainstream court procedures from a therapeutic jurisprudence perspective, including an incorporation of a theoretical foundation from the social sciences into the evaluative process. In 2017 Lanier and De Vall⁴⁹ reviewed attempts to evaluate and explain the functioning of problem-solving drug courts and noted that they were only able to find eight studies that attempted to incorporate social science theories into the evaluation.⁵⁰ It is difficult to understand why existing theories of therapeutic change from the literature on therapeutic intervention are not being measured in a quantifiable way nor included systematically in research design as a measurable variable when evaluating problem solving court programs.

As encountered by the earliest problem-solving court recorded, Judge Kross' early Wayward Minor's Court for Girls,⁵¹ public opinion and data to support the efficacy of the court intervention are crucial.⁵² One of the difficulties in gaining political and funding support for TJ initiatives has been to 'prove' that TJ legal practices result in 'better' outcomes for individuals in contact with the legal system. There is a wealth of diversity of opinion in terms of how something can be 'proven', and although most people in the field would agree that TJ focusses on improving the lives of court clients, and hopefully reducing their future negative impact on their community, as already discussed, it can be difficult to operationalise and measure in an effective way what a 'good' or 'better' outcome for a court client looks like, so as to fully capture the impact of TJ practices on the populations in which they are being utilised, which can be some of the most difficult health populations to treat and intervene with.

As can be seen in the history of TJ initiatives worldwide, 'evidence-based practice'

and ‘cost-effectiveness’, and the misguided dialectic of ‘tough on crime’ vs ‘soft on crime’ are strong narratives determining public perception and support and subsequently political support and funding for these initiatives.⁵³ Additionally, at times there is a political temptation to reinforce and make use of the popular construction of courts as sites of judgement and punishment only, while ignoring the rehabilitative aspect of the legal system and the great power it can hold as a positive intervention in the lives of those passing through. All of these factors can create a context in which it is difficult for TJ, and the imperative of a culture of rehabilitation, to thrive.

As can be seen, for TJ to be effective (and to be funded), effective and comprehensive evaluation needs to be developed, including the necessary tools to evaluate aspects of court functioning.

Magistrate Training and Self-Development for Mainstreaming Initiatives

The act of observing something changes it. Once it is possible to measure an aspect of legal actor contribution from a therapeutic perspective, these observations could have many potential implications. They could be utilised by judges themselves for their own self-development, and they could also be incorporated into training packages for judges and lawyers.

Cannon (along with most schools of psychology training) asserts that it is possible to teach someone how to be ‘therapeutic in their interactions with others’.⁵⁴ From this perspective, TJ is a process that can be taught and mainstreamed for legal actors.⁵⁵ The Centre for Justice Innovation has highlighted a practice development need,⁵⁶ and, aside from the humanist considerations, from a cost-effectiveness standpoint, it is evident that basic training in therapeutic interaction skills should be ‘an essential part’ of training for specialist courts,⁵⁷ and it would be reasonably straightforward to include basic

therapeutic interactional skills in lawyer and judge training for mainstream courts.

The need to create scalable and replicable models of service delivery has been highlighted by the Centre for Justice Innovation,⁵⁸ and intervening via the training and evaluation of legal actors offers a potent and cost-effective way to do so. It also offers an entry point for discussion and efforts to ‘mainstream’ TJ practices within existing legal structures and staffing, while sidestepping objections regarding costs and the ‘soft on crime’ debate. If a regular magistrate continued to function as usual in sentencing, but employed therapeutic intervention skills while doing so, this would not cost the state any extra and would not result in ‘criminals’ being ‘let off the hook’ either.⁵⁹ The potential improvements in terms of recidivism outcomes, and perceptions of procedural justice and compliance with orders, would be very interesting to measure.

Conclusion

This article has examined the current state of TJ research with reference to the evaluation of legal actor contributions across mainstream and specialist courts and examined overarching problems with TJ research design referenced in the literature. The potential usefulness of measuring these contributions has been discussed, as well as the potential for the development of legal actor contributions to greatly contribute to the therapeutic impact of mainstream and specialist courts.

The potential benefits from measuring legal actors include better research design, clearer TJ research outcomes, better support for TJ programs, improved mainstreaming efforts, contribution to judge and lawyer training, and subsequently, improved therapeutic input from magistrates to the court process and use of the opportunity to intervene for individuals who might not otherwise receive therapeutic input. Further potential knock-on effects of therapeutic input for

offender-clients include better justice outcomes, less recidivism, better perceptions of procedural justice, and potentially, lower costs in ancillary systems involved with defendants progressing through courts (for example the child protection system, the health system, costs of medications, cost of maintaining incarceration).

Given these factors, it is imperative to develop and systematise ways of objectively measuring legal actor contributions from a therapeutic perspective, utilising the existing knowledge base of the therapeutic and psychometric literature.

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Declaration of Conflicts of Interest

Rhondda Waterworth has declared no conflicts of interest.

Ethical Approval

This article does not contain any studies with human participants or animals performed by any of the authors.

Notes

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 58. Centre for Justice Innovation (n 7) 8. <<http://justiceinnovation.org/portfolio/problem-solving-courts-delivery-plan/>>
 59. As the TJ debate is so often depicted, please see n 53 for multiple sources.

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