

“The Synergy Between Therapeutic Jurisprudence and Drug Treatment Courts”

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Therapeutic jurisprudence (TJ to its adherents) has been called “[T]he most prolific vector [of the Comprehensive Law Movement], at least in academic and judicial circles. It has rapidly spread to all areas of the law and has been enthusiastically adopted by American judges in the form of ‘problem-solving’ courts.”¹

The task of TJ is to identify and ultimately examine empirically relationships between legal arrangements and therapeutic outcomes.² It has a law reform agenda geared to minimize antitherapeutic consequences and facilitate achievement of therapeutic ones.³ TJ theory insures people re helped in ways that obey, complement, and further the goals of the law and is designed to ensure the law does things to help people.⁴ TJ proposes to see the law as a healing profession.

The Comprehensive Law Movement, as it is termed by Prof. Susan Daicoff, seeks to maximize emotional, psychological and relational wellbeing of those involved with legal matters. Its focus is beyond strict legal rights, responsibilities, duties and obligations.⁵ Using a TJ lens, the court system can be viewed as an interdisciplinary, problem-solving, community institution.⁶

TJ asks the question: “Can we enhance the likelihood of desired outcomes and compliance with judicial orders b y applying what we know about behavior to the way we do business in court?” And TJ’s other question is: “Can we reduce the anti-therapeutic consequences and enhance the therapeutic ones without subordinating due process and other justice values?”⁷

Problem-solving courts, as drug treatment and other outcome-focused, collaborative courts have come to be known, focus on the underlying chronic behaviors of criminal defendants and other court users and recognize that the public is looking to the courts to address complex social issues. They began in the U.S. in 1989 in direct response to jail overcrowding, courts becoming plea bargaining mills and the fact that people with addictions, mental illness and status offenders were clogging the courts with high recidivism rates. It was discovered that three areas particularly lent themselves to a problem-solving, collaborative approach – domestic violence, mental health disorders and substance abuse. Each area offers an opportunity for changed behavior through treatment, intervention or therapy and each lend themselves to conditions imposed by a judge. Each allows the court to address the underlying issues that brought the person to court.

The Center for Court Innovation⁸ has developed “Six Shared Principles that Distinguish Problem-Solving Courts from the Conventional Approach to Case Processing and Case Outcomes in State Courts.”

1. Case Outcomes: P-S courts seek to achieve tangible outcomes for victims, offenders and society including reduced recidivism, reduced stays in foster care for children under the court’s protection, increased sobriety for substance users and healthier communities.
2. Judicial Monitoring: P-S courts rely on judicial authority to solve problems and change behavior of litigants. Judges stay involved with each case throughout the post-adjudication process. Frequent progress reports are expected from collaborating entities.
3. Informed Decision-Making: P-S courts improve the quality and quantity of information available in the courtroom. Judges can respond quickly and effectively to performance and hold court users and partner agencies to a high level of accountability.
4. Collaboration: P-S courts employ a collaborative approach and rely on government and non-profit partners to achieve their goals.
5. Non-Traditional Roles: Some P-S courts, such as drug treatment courts, alter the dynamics of the adversarial process and employ a team approach to the participants’ treatment and recovery. The team works together to craft incentives and sanctions for participants. The judicial role may include being a convener or broker between participating entities.
6. System Change: P-S courts promote reform outside of the courthouse and work more visibly with the executive and legislative branches. Outside agencies may be encouraged to adopt new staffing patterns such as attending court sessions and improve case management practices because of reporting expectations.

Problem-solving courts further require a new role for the judge who is expected to be more proactive. TJ judges believe they can and should play a role in the problem-solving process and they believe that outcomes – not just case processing – matter.⁹ Collaborative courts recognize the therapeutic potential of the court’s coercive powers and find “judicial leverage” to be an appropriate tool.

There are many types of problem-solving courts. At least 18 countries have courts using problem-solving approaches and TJ techniques¹⁰ and as of December, 2004, there were 2,558 problem-solving courts in the United States alone.¹¹ They consist of:

- 811 adult drug treatment courts
- 357 juvenile drug treatment courts
- 153 family treatment courts
- 176 driving-while-impaired (DWI) courts
- 68 re-entry drug courts
- 16 other re-entry courts
- 23 community courts
- 111 mental health courts
- 393 teen/peer courts

- 141 domestic violence courts
- 1 campus drug treatment court
- 937 other problem-solving courts
- 54 tribal healing-to-wellness courts
- 1 urban Native American DWI court

California has a Community Justice Project dedicated to building restorative justice principles in the community. Its goals are to enhance awareness and understanding of community justice practices and principles; facilitate information sharing between existing community justice programs and start-up programs; and, to facilitate the development of local practices consistent with community justice principles.¹²

The Conference of Chief Justices (CCJ) is a body made up of the top administrative judge in each state's court of highest jurisdiction. The Conference of State Court Administrators (COSCA) has a membership of the top administrative employee of the court of each state. In August of 2000¹³ the CCJ and COSCA voted unanimously to support problem-solving courts and further agreed to develop best practices. It also recognized the need for collaboration and interdisciplinary training. This commitment was reaffirmed in 2004 and in 2006 it voted unanimously again to support the Judges' Criminal Justice/Mental Health Leadership Initiative (JLI)¹⁴ which grew out of working in mental health courts.¹⁵ These actions by the top leadership of the courts gives legitimacy to problem-solving courts in the United States and allows judges who are interested in working therapeutically to do so without fear of reprisal.

CCJ/COSCA agreed to:

1. Encourage the broad integration over the next decade of the principles and methods employed in the problem-solving courts.
2. Support national and local education and training on the principles and methods.
3. Advocate for the resources necessary to advance and apply the principles and methods.

COSCA said, "The human and political success of therapeutic justice programs is too great to ignore."

In support of the JLI resolution, CCJ committed to join the organization and urged state supreme court justices to "take a leadership role to address the impact of mental illness on the court system through a collaborative effort involving stakeholders from all three branches of government."¹⁶

The synergy between TJ and problem-solving courts is best displayed by a review of the operating principles of such courts. Defining Drug Courts: The Key Components¹⁷, Essential Elements of a Mental Health Court¹⁸, and the United Nations' Twelve Principles for Court-Directed Treatment and Rehabilitation Programs¹⁹ all envision a collaborative, treatment-oriented alternative to traditional case processing using TJ principles.

The National Center for State Courts issues a trends report periodically and in 2005 stated that judicial educators need to teach problem-solving methods and TJ to more judges; encouraged law schools to refocus their efforts and take a more problem-solving approach; and, predicted bar exams incorporating TJ as they have family law, tribal law and ADR.²⁰

Twenty years ago when TJ was a mere twinkle in the eyes of Prof. David Wexler and Prof. Bruce Winick and the judges who started the first drug treatment courts were starting to feel their frustration with the recycling of the same alcohol and drug users throughout the system, none of us would have ever believed things would have developed to the extent they have, not in our wildest dreams.

¹ Daicoff, Susan, "Law as a Healing Profession: The 'Comprehensive Law Movement'," 6 Pepp. Disp. Resol. L.J. 1 (2006)

² Drogin, Eric, Y. "Jurisprudent Therapy and Competency," 28 L. & Psychol. Rev. 41, (2004).

³ *Id.*

⁴ *Id.*

⁵ Daicoff, *supra*.

⁶ Barach, Alvan, M.D. as quoted by Bill Moyers in *Healing and the Mind* (1993)

⁷ Slobogin, Christopher, "Therapeutic Jurisprudence: Five Dilemmas to Ponder," 1 Psych. Pub. Pol. & L 193 (1995)

⁸ See: http://www.problem-solvingcourts.org/ps_char.html last visited 26 June 2006

⁹ Adapted from Judge Judith S. Kaye, Chief Judge, New York

¹⁰ Australia, Canada, Scotland, England, Ireland, New Zealand, Brazil, Israel, Tobago, Chile, Jamaica, Cayman Islands, Trinidad, Barbados, Bermuda, Macedonia, Norway and Italy

¹¹ Huddleston, West, *et al.*, "Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States," Nat'l Drug Ct. Inst., (May 2005)

¹² See: <http://www.courtinfo.ca.gov/programs/ccjp> last visited 26 June 2006

¹³ See: <http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf>

¹⁴ JLI is coordinated by the Council of State Governments Criminal Justice/Mental Health Consensus Project(See: <http://consensusproject.org/>?) and the GAINS/TAPA Center for Jail Diversion (See: <http://gainscenter.samhsa.gov/html/>)

¹⁵ See:

<http://ccj.ncsc.dni.us/CriminalAdultResolutions/resol11JudicialCriminalJusticeMentalHealthInitiative.html>

¹⁶ *Id.*

¹⁷ See: <http://www.nadcp.org/whatis/> last visited 26 June 2006

¹⁸ See: <http://consensusproject.org/mhcp/essential.elements> last visited 26 June 2006

¹⁹ See: http://www.unodc.org/pdf/lap_report_ewg_casework.pdf last visited 26 June 2006

²⁰ See: http://www.ncsconline.org/WC/Publications/KIS_CtFutu_Trends05.pdf