Much Ado About Nothing? A Critical Examination of Therapeutic Jurisprudence

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I. INTRODUCTION

In the decades since the 1970s[1] there have been several movements designed to impact or alter the workings of the

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[1] It is Krumholz's theory, and the subject of ongoing research, that following the political and social activism on college campuses, most notably of the 1960s and early 1970s, many of these activists viewed the practice of law as a viable path toward social transformation. For a variety of reasons, including the discovery that the legal system is rather intractable, radical goals were often modified or abandoned.

legal system. [2] The most lasting and widespread of these movements has been the development and systemic incorporation of mediation or Alternative Dispute Resolution,[3] especially in the arena of family law[4] but also impacting community disagreements,[5] a variety of commercial disputes,[6] and civil cases in general.[7] However mediation did not significantly impact the practice of criminal law. Rapid growth in the number of individuals being processed through the criminal courts during the 1980s and 1990s shifted the focus to the criminal courts and made reforms to the processing of crime more than desirable. Several models for reforming the law[8] to include a response

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[2] On a personal note (from author Susan T. Krumholz) having attended law school in the 1970s, and having witnessed many friends from that time (myself included) abandon the legal practice for other pursuits, I am profoundly interested in the ways that the legal system has, and has not, evolved.

[3] Alternative Dispute Resolutions are any "non-judicial means of settling disagreements" Partrice M. Mareschal, *Introduction: New Frontiers in Alternative Dispute Resolution*, 25 INT'L J. PUB. ADMIN. 1255 (2002); *See also* Caroline Harris Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768 (Dec 2001).

[4] Linda Roberson, *Negotiation Strategies: Civility and Cooperation without Compromising Advocacy*, 20 AM. J. FAM. L. 7 (2006).

[5] Rosemary O'Leary & Maja Husar, *Public Managers, Attorneys, and Alternative Dispute Resolution of Environmental and Natural Resources Conflicts: Results and Implications of a National Survey*, 25 INT'L J. PUB. ADMIN. 1267 (2002).

[6] *See* Victoria L. Herring, *Creative Advocacy in Voluntary Alternative Dispute Resolution: Resolving employment disputes without going to trial can serve your client well*, 40 TRIAL 40 (2004); Roberta Jacobs-Meadway, *Alternatives to Litigating IP Disputes*, N. J. L. J. (July 18, 2005); Wyatt McDowell & Lyle Sussman, *Alternative Dispute Resolution: How Small Businesses can Avoid the Courts in Resolving Disputes*, 69 SAM ADVANCED MGMT. J. 38 (2004).

[7] Deborah R. Hensler, *Alternative Courts? Litigation-Induced Claims Resolution Facilities*, 57 STAN. L. REV. 1429 (2005).

[8] Other movements were introduced at the same time, these primarily aimed at altering the experience of the lawyer rather than that of the client (recognizing that one necessarily impacts the other). *See* James K.L. Lawrence, *Collaborative Lawyering: A New Development in Dispute*

to criminal transgressions emerged, among them Restorative Justice,[9] Problem Solving Courts,[10] and Therapeutic Jurisprudence. Of the three, only Therapeutic Jurisprudence was not initially conceived as a response to crime.

THERAPEUTIC JURISPRUDENCE: MUCH ADO

Therapeutic Jurisprudence ["TJ"] emerged in the early 1990s as a promising approach to addressing issues of civil commitment and other aspects of mental health law.[11] Once rooted in mental health law, TJ has extended its reach to an ever-increasing number of legal arenas.[12] Slobogin has

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Resolution, 17 OHIO ST. J. ON DISP. RESOL. 431 (2001-2002); Stephen Younger, *Spirituality and Lawyering: A Practitioner's Perspective*, 28 FORDHAM URB. L.J. 1069 (2001); Deborah Miller, *Empowering Staff in the Holistic Practice of Law*, http://www.iahl.org/articles/23_Staff_Empowerment.htm (last visited August 16, 2006). *See also* Elaine McArdle, *From Ballistic to Holistic*, http://www.boston.com/news/globe/magazine/articles/2004/01/11/from_ballistic_to_holistic/ (last visited August 16, 2006).

[9] "Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders." Restorative Justice Online, http://www.restorativejustice.org/intro (last visited August 11, 2006).

[10] "Problem-solving courts are designed to treat offenders while, at the same time, considering the harm to victims and the community. These courts work with other criminal justice institutions, and across disciplines - such as health and social services and - to address underlying issues that contribute to criminal behavior and to design appropriate interventions." Problem-Solving Courts, http://www.ojp.usdoj.gov/courts/problem_solving.htm (last visited August 11, 2006).

[11] *See* BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (Carolina Academic Press) (2005); Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1 (2006).

[12] *See* DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler ed., Carolina Academic Press) (1996); BRUCE J. WINICK & DAVID B. WEXLER, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC

defined 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."[13]

According to Daicoff[14] and Wexler,[15] therapeutic jurisprudence has significant implications for understanding the nature and scope of the impact of legal rules, processes, and practices on the well-being, both physically and psychologically, of all persons involved in the legal system of our society. "Therapeutic jurisprudence recognizes that legal rules, procedures, and actors are social forces that intentionally or unintentionally often produce therapeutic or anti-therapeutic consequences."[16] The proliferation and expansion of TJ has resulted in profound changes in the way in which legal scholars, practitioners, social scientists, and even lawmakers and judges have attempted to understand broad topics primarily, but not exclusively, within the field of criminal justice. This interest has spawned a great deal of theoretical discussion and empirical examination of both the original and extended claims of TJ. [17] TJ has also evolved into a number of specific areas of practical application such as problem-solving courts, therapeutic lawyering and judging, restorative justice, and others. Thus, we have moved from a theoretically based premise with suggestions for empirical study to extensive practical application. How did we get

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JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B, Wexler eds., Carolina Academic Press) (2003).

[13] Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 196 (1995).

[14] Susan Daicoff is Professor of Law at the Florida Coastal Law School and writes frequently regarding the "Comprehensive Law Movement."

[15] David B. Wexler, with Bruce Winick, is considered to be a co-founder of the school of social enquiry called therapeutic jurisprudence. He is a Professor of Law at John D. Lyons and Professor of Psychology at the University of Arizona.

[16] Susan Daicoff & David B. Wexler, *Therapeutic Jurisprudence, in* 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 561, 561 (Alan M.Goldstein ed., John Wiley & Sons, Inc.) (2003).

[17] Daicoff, *supra* note 11.

there so quickly and why? It is easy to propose that one reason was the significant dissatisfaction with the legal system *in general* and the criminal justice system in particular, by many legal, economic, social science and other scholars.[18] We can suggest, perhaps, that the overall dissatisfaction of the public at large[19] contributed to what Daicoff refers to as the "vectoring" or moving forward of the disciplines.[20]

We contend that therapeutic jurisprudence, as a "school of social enquiry" must establish specific and precise conceptual and theoretical constructs prior to the application of its principles to "therapeutic" movements in the criminal justice and overall legal systems. One cannot ascertain the benefits of problem-solving courts or therapeutic lawyering techniques if one has not established the validity of therapeutic jurisprudence as a theoretical construct. Our discussion begins with an examination of the theory of TJ, because we believe that without a return to the beginning that is the conceptual, theoretical, empirical, and ideological basis for the claims made, we cannot answer the question: is this much ado about nothing?

II. CONCEPTUAL AND DEFINITIONAL ISSUES

The concept of Therapeutic Jurisprudence is built upon the assumption that the law, in its application, can be

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[18] *See* RICHARD QUINNEY, THE SOCIAL REALITY OF CRIME (Little, Brown and Company) (1970); RICHARD QUINNEY, CRITIQUE OF THE LEGAL ORDER: CRIME CONTROL IN CAPITALIST SOCIETY (Little, Brown and Company) (1974). *See also* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (Oxford University Press) (2000).

[19] *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (University of Chicago Press) (2001) for an extensive discussion of how public dissatisfaction with the system as well as other historical, penological, and sociological factors contributed to a change in focus for the criminal justice system toward a more social control orientation.

[20] Daicoff, *supra* note 11, at 3.

therapeutic or anti-therapeutic, and that consciously practicing and adjudicating in a manner that is therapeutic will produce "healthier" outcomes.[21] Some have suggested that TJ should be defined generally, and even vaguely, so that it can lead to the development of extensive empirical investigation, "...thus allowing individualized definitions to develop."[22] The confusion here stems from whether these proponents believe that by loosely defining TJ it will encourage empirical investigations, or simply result in the proliferation of problem-solving courts, therapeutic lawyering, and other non-traditional modifications to the system.[23] This confusion prompted our concerns with conceptual, theoretical, and empirical issues such as: can the law be therapeutic, how do we determine what is therapeutic and antitherapeutic, who defines therapeutic/antitherapeutic, and how does one empirically test these constructs?

An initial problem centers on the conceptual issue of what constitutes "therapeutic." Arrigo has pointed out that proponents have identified the "normative stance" of TJ as being "...that law can function therapeutically."[24] The implication is that one might be able to determine through TJ, how to make the law, legal processes, and legal actors therapeutic. A further problem with this relates to the definitional issues of therapeutic and anti-therapeutic. Who decides what is therapeutic or anti-therapeutic? Should we leave this to social scientists, judges, lawyers, or legislators? Furthermore, how do we decide the therapeutic or anti-

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[21] Although proponents of TJ do not necessarily use the term healthier (they use therapeutic or physical and psychological well-being), we find it appropriate here with regard to the assumed goals of TJ. *See* Daicoff, *supra* note 11, at 6; Daicoff & Wexler, *supra* note 16.

[22] Daicoff & Wexler, *supra* note 16, at 572.

[23] Sound social science empirical research requires precise operational definitions of theoretical constructs., *See* LIQUN CAO, MAJOR CRIMINOLOGICAL THEORIES: CONCEPTS AND MEASUREMENTS (Wadsworth Group) (2004).

[24] Bruce A. Arrigo, *The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime*, 11 PSYCHIATRY PSYCHOL. & L. 23, 26 (2004).

therapeutic outcomes of legal issues? The answer is significantly tied to what we define as therapeutic and anti-therapeutic and proponents of TJ have not specifically proposed these definitions. It should be noted that defining TJ loosely so that it can lead to much empirical study may be tautological. We should not assume that TJ, as the study of how law, legal processes, and legal actors can have therapeutic or anti-therapeutic effects, allows us to jump to the statement that the law can function therapeutically. Are we defining TJ by the very thing it is hypothesized to explain? Gerring has emphasized that the manner in which we define social science concepts is far more critical than merely defining them (loosely, as TJ would have it). He further emphasizes that social science concepts should not be assumed to be the same as the concepts that the general public has. [25] Thus, what TJ and therapeutic/anti-therapeutic mean to psycho-legal experts may be different than what they mean to clients and other legal actors.

Further difficulties arise when TJ assumes that the law, legal processes, and legal actors can actually have therapeutic or anti-therapeutic outcomes. How do we know whether they can in actuality be therapeutic or anti-therapeutic? If we assume that TJ follows modernist principles,[26] then TJ implies that there are objective realities that exist and can be known by psycho-legal experts: that is, what is therapeutic and anti-therapeutic can be discovered and observed. Additionally it is implied that the role of law, legal processes,

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[25] John Gerring, *What Makes a Concept Good? A Critical Framework for Understanding Concept Formation in the Social Sciences*, 31 POLITY 357 (1999).

[26] Modernism is a philosophical doctrine that arose during the period of the Enlightenment (similar to positivism in science) that emphasizes the importance of understanding and utilizing abstract, universal principles to improve problems faced by humans. This is accomplished through the implementation of objective observation. *See* James T. Hansen, *Thoughts on Knowing: Epistemic Implications of Counseling Practice*, 82 J. COUNSELING & DEV. 131, 131-138 (2004). *See also* B.R. HERGENHAHN, AN INTRODUCTION TO THE HISTORY OF PSYCHOLOGY (Wadsworth) (5th ed. 2005).

and legal actors in therapeutic outcomes can also be discovered and observed.[27] However, the postmodern movement has taken exception to modernistic assumptions in psychotherapeutic processes. Specifically, no therapeutic approach has been empirically established as being more efficacious than another.[28] The essential point is that from a postmodernist perspective, law, legal processes, and legal actors cannot be inherently therapeutic or anti-therapeutic. It should be noted that proposing that the law should function to have therapeutic outcomes does not have an inherent basis. We should not assume that there is an independent reality but it should be understood that the premise of TJ and the notion of what defines therapeutic and anti-therapeutic are essentially socially constructed by TJ's proponents. Additionally, it is important to recognize that what constitutes therapeutic and anti-therapeutic for clients, lawyers, judges, and other legal actors might be quite different from a social constructive perspective of postmodern thought. What defines therapeutic and anti-therapeutic then may be similar to what Hansen has suggested is associated with different therapeutic models: "Counseling orientations simply represent competing value systems regarding the type of personal epistemic changes that cause psychological healing to occur."[29]

Slobogin notes that "At its broadest, therapeutic could simply mean beneficial, whereas [counter] or [anti-therapeutic] could mean harmful." [30] He further points out

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[27] For example, mock jurors attribute more blame for being raped to women who were considered more respectable than they did to divorced women, which is consistent with the belief in a just world notion that "good" individuals must have done something wrong to bring about their fate. Cathaleene Jones & Elliot Aronson, *Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim*, 2 J. PERS. & SOC. PSYCHOL. 415, 415-419 (1973).

[28] *See* ROBERT T. FANCHER, CULTURES OF HEALING: CORRECTING THE IMAGE OF AMERICAN MENTAL HEALTH CARE (W.H. Freeman & Company) (1995); Hansen, *supra* note 26.

[29] Hansen, *supra* note 26, at 138.

[30] Slobogin, *supra* note 13, at 196.

that defining these terms so simply does not differentiate TJ from other types of reformist efforts within the legal system. From this perspective, TJ is not novel when we consider other efforts that have been made to mitigate harms that may be caused by the legal process.[31] If we are to keep the broad and vague definitions of TJ, therapeutic, and anti-therapeutic, in order to stimulate empirical studies, then these definitions are essentially ideologically and not conceptually or theoretically based, further exacerbating the methodological issues involved in operationalizing theoretical concepts necessary to adequately conduct empirical studies. That is, one cannot directly study (observe and measure) constructs, or abstract concepts suggested by theories. One must decide on directly observable and measurable referents (indicators) of the abstract concepts (operationalize the concepts) and use them to generate testable hypotheses to empirically examine the theory.[32] Although Wexler cautions us to shun a precise definition of therapeutic because it would cause the research community to either circumvent the study of TJ or "...might prematurely eclipse the issues that may be subject to research," his suggestion is empirically unsound.[33] It is our contention that without specifically and precisely defining and conceptualizing therapeutic jurisprudence, social scientists can not study the validity (accuracy) and reliability (consistency) of its theoretical constructs.

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[31] The introduction of victim impact statements and the Rape Shield Laws created to prevent the introduction of prior sexual behaviors in rape trials are just two such examples. *See* WILLIAM DOERNER & STEVEN LAB, VICTIMOLOGY (Matthew Bender & Company, Inc.) (4th ed. 2005); HARVEY WALLACE, VICTIMOLOGY: LEGAL, PSYCHOLOGICAL, AND SOCIAL PERSPECTIVES (Karen Hanson ed., Allyn & Bacon) (1998). *See also* KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 407 (Little, Brown and Company) (1993); The National Center for Victims of Crime, http://www.ncvc.org/ncvc/main.aspx?dbID=DB_FAQ:RapeShieldLaws927 (last visited August 16, 2006).

[32] CAO, *supra* note 23, at 20.

[33] David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 220, 221 (1995).

If TJ is the study of how legal processes, laws, and legal actors can have therapeutic or anti-therapeutic effects, then the importance of conceptually formulating the construct of TJ is critical. And if we are to proliferate the empirical study of TJ, then we need to be as precise as possible in operationally defining TJ and, more specifically what we mean by therapeutic and anti-therapeutic. Again, the normative premise of TJ is that the law can be therapeutic.[34] Thus, empirical studies should focus on determining how the law can be therapeutic (or anti-therapeutic) once we have operationally defined the concept. Gerring emphasizes that concepts provide us with terminology, characteristics, etc., of what is to be defined and that operational definitions provide us with the indicators to observe them.[35] Miller, Schreck, and Tewskbury note that "Operational definitions, then, enable empirical examination of cause-and-effect relationships by specifying measurable indicators for variables."[36]

If proponents of TJ suggest that law can be therapeutic, then there is a cause-and-effect suggestion here: that law will have (has?) therapeutic outcomes (or anti-therapeutic). If we follow this cause-and-effect suggestion, then there is an inherent assumption of determinism[37] in the doctrine of TJ. Determinism would then assume that the outcome of law as therapeutic (or anti-therapeutic) has a finite number of causes, and that if identified (at least some), could predict when the law would in fact be therapeutic (or anti-therapeutic). Thus, empirical research should focus on determining whether there is an actual cause-and-effect relationship between law (legal processes, and actors as well)

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[34] Arrigo, *supra* note 24, at 25-26.

[35] Gerring, *supra* note 25.

[36] J. MITCHELL MILLER, CHRISTOPHER J. SCHRECK & RICHARD TEWKSBURY, CRIMINOLOGICAL THEORY: A BRIEF INTRODUCTION 7 (Jennifer Jacobson ed., Pearson Education, Inc.) (2006).

[37] By determinism we refer to the philosophical doctrine that all human behavior and experiences have both known and unknown causes. *See* WAYNE VINEY & D. BRETT KING, A HISTORY OF PSYCHOLOGY: IDEAS AND CONTEXT 28 (Pearson Education, Inc.) (3rd ed. 2003).

and therapeutic outcome. By not specifically defining TJ, proponents have not operationalized the construct that is necessary to empirically support the theoretical principles of TJ. More succinctly, "After the operationalization process, the theory has been transferred into a statistical model that can be tested through data analysis."[38] Consequently, in order to provide adequate operational definitions, a conceptual framework of the theoretical construct must be established initially. It appears that TJ has difficulties with both. Therefore, to evaluate the efficacy of problem solving courts, etc., is not empirically supporting the theoretical tenets of TJ, but of the policy decisions that implement them.

III. THEORETICAL ISSUES

Legal issues such as policies, procedures, and the role of legal actors have attracted a significant amount of multidisciplinary attention.[39] These phenomena require a multidisciplinary approach; however, herein lays a major problem. There has been a significant lack of theoretical integration of multidisciplinary findings with regard to legal systems overall, and for our purposes, the criminal justice system in particular. A vital example is the lack of theoretical integration in criminological theory.[40] Theories need to provide us with descriptive and predictive [and explanatory] statements of the correlation between events, but not statements of "what ought to be."[41] Additionally, theories are not to be confused with the ideology of deciding what kinds of systems we should have or implement in the future

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[38] CAO, *supra* note 23, at 20.

[39] Daicoff, *supra* note11; Daicoff & Wexler, *supra* note 16.

[40] *See* DIANA FISHBEIN, BIOBEHAVIORAL PERSPECTIVES IN CRIMINOLOGY (Sabrahorne ed., Wadsworth) (2001); SUSAN GUARINO-GHEZZI & A. JAVIER TREVINO, UNDERSTANDING CRIME: A MULTIDISCIPLINARY APPROACH (Matthew Bender & Company, Inc.) (2005).

[41] RONALD L. AKERS & CHRISTINE S. SELLERS, CRIMINOLOGICAL THEORIES: INTRODUCTION, EVALUATION, AND APPLICATION (4th ed. 2004).

(e.g., problem solving courts, therapeutic lawyering, etc.). For example, "theories do not tell us what are the correct, proper, and desirable values that should be exemplified in the system." [42]

Theory "...grounds several styles of inquiry in a logic of systematic analysis."[43] Also, theory development promotes a relationship between theory, empirical study, and policy (practical application). If TJ is to be tested via empirical study, and also propose changes in the law, legal processes, and the behaviors of legal actors, TJ needs to do a much better job of developing its theoretical principles. Outcome studies of problem-solving courts, therapeutic lawyering, etc., may provide significant data. However, social science research really has as its task the relating of empirical data to unifying themes—that is theory development—not the mere accumulation of facts. According to Bartol and Bartol, "The development of scientific theory represents the greatest challenge to psychologists studying the legal system today."[44] Others have also delineated the difficulties in using social science theory and research to understand issues in law and the legal process, mostly because social science research does not have significantly integrated theoretical underpinnings.[45] Although its proponents encourage prolific empirical study, Slobogin reminds us that "...the typical TJ article seems to be based on thought-provoking but speculative theories that are likely to be only partially supported by any good research that is carried out."[46] Again, the adequacy and benefit of the empirical work and policy changes that could result from TJ work is significantly tied to its conceptual and theoretical quality. And the quality of a theory is only as good as its

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[42] *Id.* at 13.

[43] MILLER, SCHRECK & TEWKSBURY, *supra* note 36, at 11.

[44] CURT R. BARTOL & ANNE M. BARTOL, PSYCHOLOGY AND LAW: THEORY, RESEARCH, AND APPLICATION (Michele Sordi ed., Wadsworth) (3rd ed. 2004).

[45] *See* Dennis R. Fox, *Psychological Jurisprudence and Radical Social Change*, 48 AM. PSYCHOL. 234, 234-241 (1993); Arrigo, *supra* note 24; Slobogin, *supra* note 13.

[46] Slobogin, *supra* note 13, at 209.

empirical validity and accuracy. One does not occur without the other.

As noted above, a theoretical premise of therapeutic jurisprudence is that law can have therapeutic effects.[47] TJ emphasizes that law may have therapeutic or anti-therapeutic outcomes. The significant issue being addressed here is whether empirical study should pursue determining when, where, how, and under what circumstances law can be therapeutic and anti-therapeutic. Gathering outcome data on a number of problem-solving court initiatives will not help answer this theoretically driven question. To suggest that there is an inherent quality in law that can promote true benefit in terms of physical and psychological well-being appears significantly problematic. In fact, some have questioned whether one should even consider whether law has "therapeutic" or positive benefits with regard to human issues and problems.[48] "Although certainly well-intentioned, this logic is as troubling as it is dangerous...can it ever be asserted that reliance on it produces fundamentally therapeutic effects? I think not."[49] Proponents of TJ have failed to clearly and precisely conceptualize and articulate what they definitively mean by emotional and physical well-being.

From an ideological perspective, TJ's notion that the law may be, and even that the law should be, therapeutic is understandable. However, because the theoretical constructs have not been well-conceptualized, and more importantly, not well-operationalized, the current state of affairs makes an empirical examination of the theoretical premises difficult, if not impossible. The functions of a theory are to describe, explain, and predict phenomena, and one must question how well TJ's theoretical premise meets these functional criteria. In saying that the law, legal processes, and legal actors may have therapeutic or anti-therapeutic outcomes does not

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[47] *See* Daicoff, *supra* note 11; Daicoff & Wexler, *supra* note 16; Wexler, *supra* note 33; WINICK, *supra* note 11.

[48] *See* Arrigo, *supra* note 24; Fox, *supra* note 45.

[49] Arrigo, *supra* note 24, at 28.

precisely establish what is to be described, explained, and more importantly, what is to be predicted. This precision is important in order to apply the hypothetico-deductive model in evaluating theories.[50] This method allows us to empirically discover data that will either support or not support the theoretical premise. TJ has not clearly delineated how its theoretical premises will explain and predict the empirical outcome data of, for example, problem-solving courts. To determine whether drug courts reduce the likelihood of drug offenders recidivating does not support the theoretical notions of TJ; it perhaps supports the efficacy of drug courts.

The quality of the inferential claims of cause-and-effect or covariate relationships that a particular theory makes is critical in evaluating the quality of TJ as a social science theory.[51] "When observations are inconsistent with the basic premises of a theory, it is falsified."[52] Popper's falsifiability principle[53] states that a theory must be developed and presented in a manner that allows it to be refuted; it is appropriate and relevant to the discussion of TJ's theoretical quality. Popper believed that the falsifiability principle was the demarcation criterion for differentiating between non-scientific and scientific theories.[54] To say that the law may be therapeutic or anti-therapeutic does not render TJ consistent with the falsifiability criterion, because its premise is not presented in a manner that allows it to be refuted; that

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[50] *See* CAO, *supra* note 23, at 19-20 (hypothetico-deductive refers to the process of developing specific hypotheses from the general theory through deductive reasoning and operationalization . . . once the hypotheses have been tested, specific data findings are then used to inductively support the more general theory).

[51] Covariate refers to how one phenomenon or variable changes in relationship to the changes of another phenomenon or variable. *See* PAUL C. COZBY, METHODS IN BEHAVIORAL RESEARCH (McGraw-Hill) (8th ed. 2001); MILLER, SCHRECK & TEWKSBURY, *supra* note 36.

[52] MILLER, SCHRECK & TEWKSBURY, *supra* note 36, at 8.

[53] KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE (Routledge Classics) (1963).

[54] *Id.*; B.R. HERGENHAHN, *supra* note 26, at 8.

is, " . . . because those theories are so vague that no matter what happens their verification can be claimed."[55] This is not to say that there is no value to theories that do not meet the falsifiability criterion—they can still be of limited use.[56]

A. JURISPRUDENCE

Central to the definitional and theoretical basis of TJ is the issue of jurisprudence. Friedrichs defines jurisprudence as referring to the general intellectual approach to examining issues regarding law, and "It may refer to legal philosophy or to a science of law."[57] The principles that relate to specific aspects of law, such as, criminal law and property law, are the arenas for the jurisprudent science of law. Friedrichs suggests that there is little argument that jurisprudence is philosophical inquiry, and it is generally acknowledged that jurisprudential theory is based in ideology and therefore is not amenable to scientific testing.[58] Jurisprudence, as a philosophy, can focus on legal principles -- the practice of law -- and on what law ought to be. A theory, at least from the perspective of social science, should address what something is and may even predict what something will be, but should never determine what it ought to be. Perhaps then, TJ is a jurisprudential philosophy and as such it can proclaim what ought to be. If, however, it is a theory that can be subject to empirical testing, should it also present an opinion on how the law ought to function? Social science would say "no."[59]

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[55] B.R. HERGENHAHN, *supra* note 26, at 8.

[56] POPPER, *supra* note 53.

[57] DAVID O. FRIEDRICHS, LAW IN OUR LIVES: AN INTRODUCTION 90 (Roxbury Publishing Co.) (2nd ed. 2006).

[58] *Id.* at 77 -78.

[59] AKERS AND SELLERS, *supra* note 41, present this rather traditional view of social science inquiry. Such inquiry is informed by positivism which says that knowledge can only be gained when observed by an impartial observer and subject to scientific testing. Positivism has been the predominant ideology for more than two centuries. Critical theorists

IV. EMPIRICAL ISSUES

Numerous empirical studies have been conducted of applications related to TJ. However, they do not focus on testing any theoretical validity, but focus on studying the efficacy of the practical application of these issues: namely, outcome studies of drug courts,[60] therapeutic lawyering,[61] and mental health commitment processes.[62] The empirical study of the efficacy of the theoretical model regarding therapeutic jurisprudence itself is needed. One critical issue, noted above, is the challenge of empirically studying a theory that has not been adequately and specifically defined. Social scientists are aware of the necessity of developing operationally established definitions of theoretical constructs for their empirical studies. This lack of specific methodological focus can result in inadequate study design, inconsistent results among researchers, and an ultimate inability to support the original theoretical premise.[63] The question for TJ proponents to answer is whether the empirical data supports the theoretical notion that legal rules, processes, and actors can have therapeutic or anti-therapeutic effects.

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have long questioned the notion of an impartial observer, suggesting instead outcomes are predetermined by one's own philosophy.

[60] *See* Steven Belenko, *Research on Drug Courts: A Critical Review*, NAT'L CENTER ON ADDICTION & SUBSTANCE ABUSE (1998); John Goldkamp & Doris Weiland, *Assessing the Impact of Dade County's Felony Drug Court*, NAT'L INST. JUSTICE (1993).

[61] *See* M.A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al eds., 1999); Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycho-Legal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901 (1998); Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105 (2000).

[62] Henry Steadman, Susan Davidson & Collie Brown, *Mental Health Courts: Their Promise and Unanswered Questions*, 52 PSYCHIATRIC SERVICES 330 (2001).

[63] *See* CAO, *supra* note 23; Gerring, *supra* note 25; MILLER, SCHRECK & TEWKSBURY, *supra* note 36.

The appropriate and consistent process of operationally defining what is therapeutic and anti-therapeutic poses a significant challenge. For example, while one could argue that outcome studies have supported the use of problem solving courts,[64] which are essentially non-traditional legal processes utilizing actors (judges, attorneys, and social service workers) that have "chosen" to work in non-traditional settings, not a great deal of evidence is available to show how traditional legal rules, processes, and actors can be beneficial or harmful. This is not to disagree with the notion that the traditional legal system, or at least the current implementation of same, is terribly flawed.[65] It is to point out that we have rapidly jumped from a theoretical model that needs careful and empirical study to an extensive proliferation of practical application. The coordination of data and theory is crucial to the process. Science involves the pursuit of data, and relating this data to theoretical principles of explanation, which includes the modification of the theoretical principles where warranted. "Science is the interaction of data and theory."[66]

Bolles illustrates this by describing clinical treatment programs in mental health. Many of the clinical methods, modalities and techniques practiced by well-trained and well-meaning clinicians have little basis in sound clinical theoretical models and clinical research. Clinical technologists ostensibly develop clinical technologies in order to produce quick solutions. Has TJ made this jump as well? The issue may be that TJ's proponents need to return to the essential epistemological questions. It is important to emphasize that Winick has made significant steps in exploring the theoretical issues of TJ, especially as it applies to issues of civil commitment, psycho-legal conceptions of

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[64] *See* Belenko, *supra* note 60; CAO, *supra* note 23; Gerring, *supra* note 25; Goldkamp & Weiland, *supra* note 60; MILLER, SCHRECK & TEWKSBURY, *supra* note 36; Silver, *supra* note 61.

[65] *See* GARLAND, *supra* note 19; QUINNEY, *supra* note 18.

[66] ROBERT C. BOLLES, THE STORY OF PSYCHOLOGY: A THEMATIC HISTORY 3 (Gay Meixel ed., Brooks/Cole Publishing Co.) (1993).

coercion, and other issues in mental health law. How does one decide what is therapeutic even in the arena of mental health commitment? Who makes that decision? Slobogin suggests giving mental health clients choices so that they are empowered to make decisions regarding their treatment options may not be as therapeutic as one would assume. As he so aptly states, " . . . giving people multiple options may cause anxiety and perhaps even be debilitating."[67] Perhaps then, if we apply TJ's principles to the issues of civil commitment in order to avoid coercion, we may actually be implementing anti-therapeutic outcomes. The clinical suggestions of mental health workers are essentially socially and morally based, not scientifically derived, and are acculturated into value-laden practices. That is, clinical professionals too often make the decisions as to "what should be beneficial" because their "culture of healing" has convinced them that what is beneficial has been empirically derived, when in fact, it has not.[68]

A related issue concerns who should be the recipients of therapeutic legal rules, processes, and behaviors of legal actors. Wexler suggests that there is no real limit as to who could benefit from TJ applications. Do we then limit consideration of therapeutic outcomes to clients? Do we include attorneys? Victims? The community at large? Only when these questions are addressed can the theory be adequately tested.

This brings us back to the controversy noted above, one that is characteristic of general social service or human service efforts: if clients are to be the recipients of therapeutic outcomes and the recipients of efforts to ensure that anti-therapeutic outcomes do not befall them, should we not consider what they deem as therapeutic and anti-therapeutic? Slobogin cautions against defining what is therapeutic without considering consumer choices and "preferences." Additionally, we should consider the possibility that in many

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[67] Slobogin, *supra* note 13, at 202.

[68] FANCHER, *supra* note 28.

ways, legal rules, procedures, and behaviors by all legal actors, will benefit some and harm others. Slobogin also suggests that legal rules and processes "will probably turn out to be neither wholly therapeutic nor antitherapeutic."[69] Daicoff and Wexler believe that clinical and empirical research will help to delineate what is therapeutic, which certainly is at the basis of the TJ notion that multidisciplinary empirical and clinical studies can and will eventually support the theoretical basis of TJ.[70] As we have illustrated, this may be much more difficult than it sounds.

It could be that Winick's attempts to apply the phenomenon of TJ to the understanding of coercion in mental health commitment and other aspects of mental health law are significant efforts in the area of jurisprudence and theory development.[71] However, the rapid transition from theoretical jurisprudence to implementation of a broader agenda is cause for concern. Proponents of TJ have stated that the movement will lead to an examination and understanding of the therapeutic and non-therapeutic aspects of the legal system.[72] Can TJ adequately and appropriately accomplish this? Winick has emphasized that the parameters of TJ are vast, thus enabling a broad and extensive application of TJ to many issues.[73] While this may be ideologically welcome, the evolved broad nature and scope of TJ may not lend itself to easy empirical investigation within the realm of social science. Issues of human behavior do not lend themselves easily to social science research because of the way these issues have been inconsistently defined within a largely confusing and un-integrated theoretical framework.

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[69] Slobogin, *supra* note 13, at 208.

[70] Daicoff & Wexler, *supra* note 16.

[71] WINICK, *supra* note 11.

[72] *See* Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184 (1997); Daicoff, *supra* note 11; Daicoff & Wexler, *supra* note 16; WINICK, *supra* note 11.

[73] WINICK, *supra* note 11.

"Although important social problems do raise empirical questions, at their core these problems are nonempirical."[74]

Ultimately this inquiry returns to the consideration of whether Therapeutic Jurisprudence is an ideology or a theoretical model. We suggest that in order for this movement to sustain its momentum, and to make some marked impact on the legal system, some consideration be given to the dilemma posed.

V. CONCLUSIONS - ABOUT NOTHING?

As we hope we have illustrated throughout this paper, TJ's proponents are making claims that TJ is a theory that can, and should, be subject to empirical testing to establish its validity. We have identified what we believe to be numerous concerns regarding these claims. At the same time we believe that TJ might have its greatest potential as a philosophy.

The implementation of TJ into the legal system has created a double bypass. First, problem solving courts and other applications, for example, are attempts at achieving therapeutic outcomes without addressing the fundamental problems and issues related to the existing system, which we strongly believe is inherently antitherapeutic. It seems important that if real change is to be made, the focus should be on amending the existing system directly, and not on an effort that circumvents the system. Second, if TJ is to be considered theory, it must be subject to empirical studies to examine the theoretical validity of the construct. That would require initially providing a scientific definition that would operationalize therapeutic and antitherapeutic, and subject to empirical review the issue of whether therapeutic outcomes are actually impacted by law, legal processes and legal actors. At present, the testing is limited to practical considerations, most often, for example, examining a program's rate of

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[74] Dennis R. Fox, *Social Science's Limited Role in Resolving Psycholegal Social Problems*, 17 J. OFFENDER REHABILITATION 159, 159 (1991). *See also* Slobogin, *supra* note 13.

recidivism. This leads to a fundamental concern with TJ as theory, which is that one may not be able to establish what is therapeutic or antitherapeutic. Social science research and theory development can certainly be successful in areas in which specific and precisely operationally defined constructs are examined. Practical empirical issues such as jury selection,[75] repressed memory,[76] accuracy of eyewitness testimony,[77] and others have been extensively studied with profound results.

TJ and its progeny generate such broadly imagined inquiries making it difficult to draw conclusions based on current research outcomes. Can TJ effectively and clearly integrate the more specific empirical and theoretical questions with the more general (and value-laden) social issues facing our legal system in general and the criminal justice system in particular? That is, while TJ may have accomplished some of its goals at a micro-level, such as beneficial outcomes for mental health clients, can it have a major impact on these larger macro-level issues? Daicoff and Wexler have emphasized that TJ should not by-pass or trump

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[75] *See* Gordon Bermant & J. Shapard, *The Voir Dire Examination, Juror Challenges, and Adversary Advocacy*, *in* PERSPECTIVES IN LAW AND PSYCHOLOGY: VOL. 2, THE TRIAL PROCESS (Bruce D. Sales ed., 1981); DAVID NEUBAUER, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM (2002); Phoebe Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788 (2000).

[76] *See* ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE (1996); Scott Lilienfeld & Elizabeth Loftus, *Repressed Memories and World War II: Some Cautionary Notes*, 29 PROF. PSYCHOL. RES. & PRAC. 471 (1998).

[77] *See* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); Gary Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy Psychology*, 1 PUB. POL'Y & L. 726 (1995). *See also* Gary Wells, John Turtle & C.A. Elizabeth Luus, *The Perceived Credibility of Child Witnesses: What Happens When They Use Their Own Words?*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY (Stephen J. Ceci et al eds., 1989).

concerns of justice or due process.[78] Society today is confronted with countless issues of justice, and perhaps more importantly, injustice. Should we bypass these issues, or do we need to launch a major effort to examine, challenge, and perhaps address the underlying systemic problems? "The logic of a systemic view is that the resolution of social problems requires radical solutions rather than reformist ones."[79] In Daicoff's discussion of TJ and other "comprehensive law movements," she suggests that we should view law "...as a healing profession..."[80] If she is in fact correct that the profession of law should be a mechanism of healing, then diverting select groups from the legal system into alternative settings may not be the path. To make the law a healer the current system requires drastic, perhaps revolutionary, change.

Therapeutic Jurisprudence could significantly challenge the status quo. As a philosophy, its advocates could engage in value-laden debate. At present, however, it fails to do that. Instead it has resulted in movements that bypass that system for the chosen few, leaving the rest to maneuver within the existing structures. Social science theory development and empirical study is focused on specific issues, factors, and phenomena, rather than major systemic issues and problems. Fox notes that "...even systemic, holistic research explicitly designed to challenge the status quo can have only modest impact because it inevitably confronts the third limiting factor: Most social problems result not from lack of knowledge but from conflicting value priorities and competing societal interests."[81] He proposes that many of the major social issues and problems that face our society are so plagued with ethical, moral, and other values, they cannot be understood adequately, and more importantly, resolved, through the application of social science theory and empirical results, which have as their ultimate goals, issues of fact, not

[78] Daicoff & Wexler, *supra* note 16
[79] Fox, *supra* note 74, at 160.
[80] Daicoff, *supra* note 11.
[81] Fox, *supra* note 74, at 161.

values. The advocates of TJ are currently pursuing a reformist agenda. It may be that for any real change to occur, and for the legal system to have a "therapeutic" impact, we should instead be looking for a radical reordering of the current system. Removing a few especially contentious problems from the larger system is rather like bringing a cup of water to a fire.

We realize that we may have raised more questions than we have answered. This is then our challenge for the future: if Therapeutic Jurisprudence is going to make a real impact on the legal order, its proponents need to decide whether it is a theory or an ideology and proceed accordingly. Once this is accomplished, TJ could truly be much ado about something.