

# Therapeutic Jurisprudence – an Introduction from a Swedish Perspective

Christian Diesen

<b>1 Introduction</b> .....	132
<b>2 What is TJ?</b> .....	133
<b>3 How can TJ be used?</b> .....	135
<b>4 What are the Implications of Therapeutic Jurisprudence for Justice Administration?</b> .....	138
<b>5 Therapeutic Jurisprudence in Court</b> .....	151
<b>6 Objections to TJ from the Swedish Point of View</b> .....	156
<b>7 Closing Remarks</b> .....	160

## 1 Introduction

Therapeutic jurisprudence (hereinafter TJ) is a new orientation in legal philosophy with relevance to legal practice. This new school of thought, which has its roots in American legal realism (especially as represented by Roscoe Pound's view of law as an organ of social engineering),<sup>1</sup> was founded by the American professors of law David Wexler and Bruce Winick at the end of the 1980s.<sup>2</sup> The therapeutic jurisprudence theory was first used in the field of mental health, and was based on the view that the constitutional grounds for the legislation in the field were aimed at protecting the human rights of the mentally ill. A careful analysis of legal practices in the field revealed, however, that this aim had been superseded by a desire to shield the public from the mentally ill. This led Wexler and Winick to the conclusion that it was necessary to change the view of the role of the law in this context, and perhaps even in relation to society as a whole. This new approach, labelled therapeutic jurisprudence, is based on the view that the practice of law involves resolution of conflicts between people, and that in order to fulfil his or her tasks a legal practitioner must fully understand the social and psychological consequences entailed by these conflicts to the parties concerned. If we realise that the practice of law involves resolution of conflicts, we will also understand that proposed solutions may be better or worse from the point of view of rehabilitative and restorative effects. Conflict resolution models which take into account these aspects can thus be regarded as therapeutic.

The above-described ideas quickly took root among legal scholars and practitioners in the USA, and TJ spread from one area to another, both geographically and in terms of legal practice. In the beginning the most important goal was to enforce social laws in a humane way, but soon these goals came to include family law, criminal law, correctional treatment, tort law, contract law, etc. By now several hundred authors have made contributions in the form of scientific articles on the subject<sup>3</sup>, primarily in the USA, but also in other parts of the world (such as Canada, England and Australia), and the movement, which has been organised in the International Network on Therapeutic Jurisprudence, has already had three international TJ conferences. Despite its short existence the movement has had a lot of influence on court activities and their organisation in the USA, especially as regards the creation of

---

1 P. Hora, W. Schma and J. Rosenthal *Therapeutic Jurisprudence and the Drug Treatment Court Movement*, Notre Dame Law Review, Vol. 74., 1999. Cf. also B. Winick in *Law in a Therapeutic Key*, p. 647 f.

2 The term 'therapeutic jurisprudence' was first used in 1987 in an enquiry into compulsory hospitalisation of mentally disturbed persons, performed by Wexler for the National Board of Health.

3 The most important collection of articles can be found in an anthology published by Wexler & Winick, *Law in a Therapeutic Key*, Carolina Academic Press (1997) – a 'brick' of over 1000 pages; in Stolle, Wexler & Winick, *Practicing Therapeutic Jurisprudence*, Carolina Academic Press (2000); and in Winick & Wexler, *Judging in a Therapeutic Key*, Carolina Academic Press 2003. Other articles can be obtained from the organisation's home page "[www.therapeuticjurisprudence.org](http://www.therapeuticjurisprudence.org)".

specialised, so-called problem-oriented courts. Drug Treatment Courts, which constitute a special form of problem-oriented courts are used when a suspect pleads guilty to a drug charge (and is prepared to enter a court-directed treatment and rehabilitation programme), but also other types of problem-oriented courts, such as those dealing with mentally disturbed offenders or family-related crime, have become popular in recent years. This trend which, in addition to a wider perspective concerning the question of how violations of law shall be punished, also entails that court members shall have a certain amount of special competence in their area of specialisation, can be ascribed to a large degree to the development of TJ. The success of this approach can be explained by the fact that it has become all too clear that the traditional forms of dispensation of justice do not always succeed as far as combating crime is concerned. Relapse into crime is very common, not least as regards ‘psycho-sociologically motivated crimes’, such as wife battering, sexual abuse of children and drug-related crimes.<sup>4</sup> But accelerating problems can be found even in civil disputes and family cases as a result of, among other things, long waiting times, rigid and formalistic problem resolution models, as well as high costs.

## 2 What is TJ?

TJ can be defined 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’<sup>5</sup> This definition gives an impression that TJ is more in the nature of a sociological jurisprudence activity, or, in any case, an instrument of empirical studies. Emphasis is laid, however, on judicial application even if the latter should indicate that the law needs to be changed in order to realise the objectives that TJ tries to achieve. This also means that TJ can be regarded as a *legal ideology*: upholding laws and administering justice in such a way that it makes the situation worse for all the parties involved once the process is over is a sign that the state has failed in its responsibility to maintain the rule of law.<sup>6</sup>

TJ studies the role of the law as a ‘therapeutic agent’.<sup>7</sup> This is based on the view that *members of the legal profession must use the theories and empirical results of social science which can improve the administration of justice*. TJ focuses especially on socio-psychological aspects, i.e. on the question of how laws and judicial practice affect people’s lives, especially as regards persons who become involved in legal proceedings. In a macro-perspective TJ can therefore be used to determine whether a certain law fulfils its intended function, or whether it is contraproductive. On a personal level the main figures of the court may try to minimise potential negative effects of a conflict by adopting a

---

4 B. Winick and D. Wexler in *Judging in a Therapeutic Key*, p. 5.

5 C. Slobogin *Therapeutic Jurisprudence; Five dilemmas to ponder*, in *Law in a Therapeutic Key*, p. 767.

6 TJ is also a part of a broader perspective in modern jurisprudence, sometimes called “proactive law”, see *Scandinavian Studies in law Vol.49*.

7 B. Winick in *Law in a Therapeutic Key*, p. 646.

more discerning approach. A court process should not be limited to the resolution of the conflict that has become the object of trial by the court, but it should also seek to solve the human and social problems which have led to the case landing up in court.<sup>8</sup> By analysing the underlying problems and trying to work out long-term solutions one might also be able to prevent the emergence of new conflicts and commission of new crimes.

What is at issue here is thus a view of law which is broader and deeper than the more instrumental conception of conflict resolution, and in which psychological and social factors serve as an important basis for decision-making. This does not mean, however, that adjudication influenced by TJ ideals implies that the judge shall act as a welfare officer, and that the court shall abandon its traditional adjudicative functions, offering instead panoply of rehabilitative services and social measures. TJ is thus intended to serve only as a *supplementary normative approach to conflict resolution*, and not as a replacement for legal norms, such as fair trial, burden of proof, penal value, financial compensation, need for protection, etc. Performing analysis based on a therapeutic approach, in general terms as regards a given case type, and individually as regards a particular dispute, may help the judges and counsel to uncover other values than those manifested directly in a decision or judgment. Likewise, utilising the insights gained from TJ is equally important when conflicting interests and interfering norms must be weighed against each other. Such analysis might help to formulate a well-balanced policy for different case types and to design a farsighted strategy for the solution of each individual case.

The focus placed by TJ on the social consequences of conflict resolution in the context of law distinguishes this school of thought from the majority of other orientations prevailing in the legal doctrine today, even though parallels can be drawn to both Swedish legal realists and modern decision-making theories. A closely related way of thinking is the approach referred to as 'restorative justice', which is a response to crime by legislation, justice administration and correctional care which focuses on restoring the losses caused by the criminal act and tries to actively counteract relapse into crime.<sup>9</sup> Restorative justice advocates propagate special arbitration and mediation institutes and other means of dispute resolution, different from traditional litigation processes, such as Alternative Dispute Resolution (ADR), seeking to balance the needs of the parties (such as victims and offenders, for example), striving to gain more insight into the issues surrounding the conflict, and trying to find long-term solutions. Restorative justice can thus be viewed as one side of TJ, namely the legal or legal-ideological side, whereas the other side forms a bridge that links it with psychology and other behavioural sciences.

What distinguishes TJ from other ideas prevalent in the jurisprudential doctrine is its close association with social scientific research. Decisions arrived at in a legal conflict must be based, according to TJ, on substantiated social science research findings. TJ is thus geared not only towards analysing legal rules and comparing intended effects with actual effects, but also towards

---

8 B. Winick and D. Wexler in *Judging in a Therapeutic Key*, p. 5.

9 See E. Weitekamp & H.-J. Kerner *Restorative Justice, Theoretical Foundations*, Devon 2002.

forcing the judge to familiarise himself with what other sciences have to say about this relationship (between intended effects and actual effects).<sup>10</sup> The fact that laws and judicial application deal with ethical norms, and therefore also with values, should not prevent judges and legal scientists from trying to understand what different decision alternatives (i.e. different values) may entail in the form of social and individual consequences.

### 3 How can TJ be used?

There are many examples, both current and from the past, which show that the approach adopted by TJ has been employed in various legal systems and areas, without having recourse to TJ or any other radical theory. Actually, TJ shares similarities with the older forms of dispute resolution applied by popular assemblies, or *ting*, in prehistoric Scandinavia, where the yeomen would gather together in order to discuss current problems and reach a collective decision that would be acceptable to both sides.<sup>11</sup> To avoid the escalation of conflict, or even a blood bath, the offender would normally have to pay a fine to the injured party (regarding both criminal acts and other disputes).<sup>12</sup>

The most impressive modern example of restorative justice is the Truth and Reconciliation Commission in South Africa, which was established in order to uncover the past and come to terms with the apartheid oppression, without necessarily punishing those responsible for it. As part of the national reconciliation process, or perhaps because of the necessity of political compromise, it was considered more important that the truth be revealed than that justice be done and the guilty punished. In accordance with the Commission's aims it was decided that those who made full disclosure of the relevant facts concerning their role in apartheid violations would be granted amnesty for the latter. Those who refused to give testimony or lied under oath could be punished on the other hand. The new government hoped to be able to make a new start for the country, so that everybody could go on with their lives, avoiding acts of vengeance or risking another civil war. The victims and their families would thus have to be satisfied with obtaining redress in the form of uncovering the truth about the past in return for the power which they would share, indirectly and collectively, in a new, democratic South Africa. This article's aim is not to discuss whether the aims have been achieved, or even whether the Commission has been successful in attaining its objectives, but only to note that the establishment of the Commission can be seen as an innovative attempt to dispense justice.<sup>13</sup> What this approach and TJ have in common is the

---

10 P. Hora, *et al*, p. 447.

11 The majority of communities have probably gone through this stage, where disputes would be resolved by means of negotiation (if not by a clash of arms) between the families. This system is still applied by the Aborigines of Australia and the Navajo Indians in the USA. See, T. Barton and J. Cooper 'Preventive Law and Creative Problem Solving', p. 14.

12 See Diesen, *Lekmän som domare* (Lay Judges), Stockholm 1996, p. 58f and 107ff.

13 See also V. Vindelöv *Försoning – alternativ till judiciell konfliktbehandling* in Retfaerd, no. 93.

fact that it is the *result* of the process, not the process itself, which is put into focus, and that the objective of the process is primarily restorative.

Another, more general example is constituted in the attempts and reforms taking place in different parts of the world with regard to mediation in criminal cases. Mediation can take different forms, being conducted at different stages of the process and having different objectives. Normally, mediation is used to decrease criminal case load by making the parties settle out of court (with the offender/wrongdoer paying a fine or damages) and giving the victim an alternative choice of confrontation with the perpetrator.<sup>14</sup> The indirect objective of mediation/confrontation is to make the perpetrator realise the extent of harm (physical or mental) caused by his criminal act to the victim. As long as the consequences of a criminal act remain abstract to the offender, being measured by the term of imprisonment or the amount of damages only, it is difficult for him to realise the amount of human suffering experienced by the victim. Realising this will in turn increase the chances of rehabilitation and reduce the risk of relapse into crime. Meeting the perpetrator may also help the victim to stop demonising the perpetrator as a result of the crime.

Mediation as an instrument to deal with petty crimes has been used in both Sweden and Finland since 1999. Mediation is thus a supplementary instrument to court involvement, and is viewed primarily as a means of decreasing the case load. What is new in this context is the fact that in some countries, such as, for example, New Zealand or Australia, confrontations are used even in connection with more serious crimes, and even (sometimes long) after the final judgment has been pronounced. The aim of the latter can be said to be therapeutic, since this procedure has nothing to do with improving the efficiency of the justice system, but with helping all the parties involved to learn to live with the consequences of the crime.<sup>15</sup>

Yet another example showing that TJ is a domain of topical interest is the American procedural reform stimulated by the Drug Treatment Court Movement. Instead of prosecuting drug addicts for crimes in ordinary courts and sentencing them to imprisonment for illegal drug possession or sale, their cases are taken up by special courts called Drug Treatment Courts (DTC), provided that this is in accordance with the defendants' wishes and that they meet the court's criteria.<sup>16</sup> The goal of the reform is obviously to help drug addicts (and alcoholics) towards recovery from chemical dependency. The reform is based on the view that a prison sentence almost invariably leads to relapse into drug abuse and drug-related crime. From a programmatic point of view the court reform entails that drug abuse is not seen primarily as a problem of criminal policy but as a public health issue.<sup>17</sup> What distinguishes DTC courts from other courts is

---

14 Lindell has pointed out that mediation is principally an uncertain tool to be used in criminal cases, since one of the parties, the victim, has nothing to give in the mediation process – he or she can only give up or renounce; see *Alternativ konfliktlösning*, p. 14, note 13.

15 The model (community conferences) has been shortly presented in Wexler in *Working with Offender-Victim Emotions in Judging in a Therapeutic Key*, p. 232 f.

16 The first DTC court was established in Miami, Florida, in 1989. At present there are over 300 drug courts in 48 states.

17 P. Hora *et al.*, p. 453.

that they bring the full weight of immediate intervention, the fact that the defendant's eligibility for the treatment programme is determined by the court (i.e. the court is responsible for the examination whether the eligibility criteria have been met)<sup>18</sup>, and the fact that it is the judge who designs a treatment plan with strict rules to be observed. Drug courts have been highly successful. The recidivism rate among drug court participants has decreased, producing significant, direct and indirect economic benefits to society.<sup>19</sup>

The reform in which prison sentences are replaced by compulsory treatment of those who seek this alternative did not have any visible connection with TJ until recent years, but is now used as a primary example in the USA of the effects that may arise from a new, more goal-oriented legal policy. TJ can also be used in civil proceedings, and is consequently viewed as an ideological supplement to the ADR Model (Alternative Dispute Resolution Model) developed in the USA in recent decades. The model, which has been presented to the Swedish public by Lindell,<sup>20</sup> consists in reducing the number of conventional trials by providing other forms of dispute resolution, which are cheaper and faster than court trials and arbitration proceedings. The main idea is to provide alternative forms of dispute resolution to the parties in conflict, so that they can choose the one which is most suitable for the resolution of the conflict in question.<sup>21</sup> In the USA different forms can be found in different states, but the most common ADR technique is a Summary Jury Trial, in which the main hearing consists of abbreviated case presentation and oral arguments submitted by attorneys for each party, but where no introduction of evidence takes place. The parties may decide that the jury's verdict shall be binding, but most often it is a non-binding, advisory trial in which the parties can try out their arguments, and where they have better chances of reaching a settlement than they had before the summary procedure was adopted.<sup>22</sup> Another alternative form of preliminary determination is Early Neutral Evaluation in which the contentious matter is evaluated by an objective expert or evaluator, or a Mini Trial in which the attorneys for each party make a brief presentation of the case – in both cases after a meeting with the parties when the facts of the case are presented.<sup>23</sup> Experiences from using ADR methods are essentially positive, even though there are some contenders claiming that ADR techniques are unfair to the weaker party, and that they adversely affect the courts' lawmaking function, since many disputes are cleared up quickly and quietly.<sup>24</sup> Since ADR has many other objectives than just promoting the parties' satisfaction with the outcome (or rather diminishing their dissatisfaction), such as reduced costs and

---

18 The burden of proof with respect to the fact that the suspect shall be labelled as addict, and that DTC shall therefore come into play, lies with the suspect himself.

19 P. Hora loc. cit., p. 526 ff.

20 B. Lindell *Alternativ tvistelösning*, Uppsala 2000.

21 Lindell, loc. cit., p. 10.

22 Lindell, loc. cit., p. 27.

23 See Lindell, loc. cit., 35 ff.

24 Winick, loc. cit., p. 240ff.

confidentiality, it cannot be linked directly to TJ. However, since ADR has been developed around the concept of mediation viewed as a way of taking responsibility for one's own actions, and the view that this approach will boost the parties' self-confidence, self-reliance as well as self-esteem<sup>25</sup>, it is easy to draw parallels between TJ and ADR: they both reflect current trends, and in therapeutic jurisprudence ADR is one of the most important instruments in civil dispute resolution<sup>26</sup>.

#### **4 What are the Implications of Therapeutic Jurisprudence for Justice Administration?**

The phenomena described thus far constitute examples of a new outlook, closely comports with the underlying principles of TJ, without being direct products thereof. Searching for examples of the implications of TJ for different conceptual and practical spheres one can examine, to start with, judicial application in the area of mental disturbance. The purpose of labelling someone as mentally disturbed, whether this is a question of a criminal case, compulsory treatment or guardianship, is to give that person a better chance of protecting his or her rights and/or receiving fair treatment. Those who cannot help the way they act, cannot be punished; those who do not understand that they must be hospitalised must undergo compulsory treatment; and those who cannot handle their financial affairs shall have a guardian or trustee appointed. By means of this special treatment the persons in question are considered to be given a fair compensation for their handicap. Bruce Winick and other proponents of TJ argue that in reality these adjudications of incompetence express a paternalistic, aristocratic and repressive approach towards a group of citizens who become stigmatized, and are regarded less worthy than others. Such stigmatization has serious legal and social consequences for the individual. When people are deprived of their civil rights, they lose some of their human dignity. Such persons will be adjudicated incompetent, and will therefore be stigmatized in the eyes of others. This means that their self-concept and self-esteem will be adversely affected, which may diminish in turn their sense of well-being and produce a form of clinical depression.<sup>27</sup> In addition, stigmatising individuals as mentally ill creates an attitude towards life which can produce a self-fulfilling prophecy.<sup>28</sup> It will be impossible for the mentally ill person to obtain and keep employment or his own place to live, since both the subject and the people

---

25 Winick, loc. cit., p. 250.

26 D. Wexler *Therapeutic Jurisprudence and the Culture of Critique*, in *The Journal of Contemporary Legal Issues*, University of San Diego, Vol. 10, p 277. Refer to Shuman below regarding the way in which proponents of TJ view disputes concerning claims for damages from a therapeutic point of view.

27 B. Winick *The Side Effects of Incompetency Labeling* in: *Law in a Therapeutic Key*, p. 19 f.

28 Winick loc. cit., p. 22.



around him view him as not only a deviant but also an incompetent person.<sup>29</sup> Psychological studies in the area show clearly a number of concrete adverse effects on those who have been labelled as ‘mentally disturbed’. Such persons ‘learn’ to be helpless, become depressed, and their general motivation decreases. In addition, their belief that they lack self-control may produce an actual loss of control.<sup>30</sup> Another consequence of labelling an individual as mentally disturbed is that the stigma attached to him may become irreversible – even if the person is later declared healthy, the label will stick to him, and he will remain an outsider to the community.

In view of all these negative consequences Winick and other proponents of TJ argue that one must be very careful and restrictive when labelling someone as mentally disturbed, especially as judicial determination of incompetence is often ambiguous and lacking in consistency. The legal concept of competence is based on a dichotomy in which people are regarded as either competent or incompetent.<sup>31</sup> In reality, mental disturbance or incompetence do not represent a complete ‘diagnosis’ – the majority of mental disturbances do not manifest themselves all the time, but pop up from time to time, and they do not affect all the psychological functions of an individual.<sup>32</sup> In most respects the majority of mentally disturbed persons can take responsibility for their actions and decisions. In addition, assessments concerning both the past (e.g. the presence of a mental disturbance at the moment of crime) and the future (e.g. how dangerous a person is) are in most cases very difficult to make, and experts often arrive at contradictory conclusions.

In reality, each judicial decision which entails that someone will be classified as mentally disturbed, must be seen as a decision which implies that the person in question will be deprived of his civil rights and liberties. According to the proponents of TJ depriving individuals of their right to enjoy or dispose of their property is an interference with both liberty and property, and imposing compulsory treatment means depriving individuals of authority over their bodily integrity, etc.<sup>33</sup> It is thus important to avoid labelling individuals as mentally disturbed for as long as possible, and one should always start from the presumption of mental competence according to Winick.<sup>34</sup> The fact that a person acts irrationally, or makes short-term decisions which do not appear particularly sensible, does not give the state the right to classify that person as a second-class

---

29 Some earlier works on such stigmatisation speak about the ‘halo’ or ‘demon’ effects. *See* Winick, loc. cit., p. 25.

30 Winick, loc. cit., 35 ff.

31 In Swedish criminal law one has tried to nuance this strict dichotomy by means of differentiation between mental disturbance prevailing at the moment of crime and its presence or absence at the time of judicial decision, but the task has not become easier for that, or decisions more just. *See* further S. Wennberg in JT (Swedish Journal of Law), 1999-2000, p. 612 ff.

32 B. Winick, loc. cit., p. 37.

33 Winick, loc. cit., p. 38 ff.

34 Winick, loc. cit., 48 ff.

citizen.<sup>35</sup> Those who need medical and/or social services shall be entitled to receive them on the basis of need, and not because of their being classified as deviants. Declaring a person to be legally incompetent shall not be the price that a person in need of society's help and support shall have to pay for the receipt of the aforementioned.<sup>36</sup> Winick also argues that the majority of problematic situations can be resolved without resorting to incompetence labelling: in criminal cases this can be done by offering the defendant appropriate psychiatric treatment; in cases of compulsory hospitalisation the person in question can be temporarily forbidden to discontinue a given course of treatment; and when management of one's resources is concerned, a temporary period of restricted guardianship can be arranged for<sup>37</sup>. The important thing in all these cases is that a given individual is not put outside the pale, and that the measures applied are seen as a temporary solution during the course of treatment and rehabilitation.<sup>38</sup> Furthermore, the measures applied shall be commensurate with the requirements in each individual case, and they shall be limited to the spheres where the intervention sought by the authorities is thought to be essential. Such individual solutions cannot be achieved by relegating people to the margins of society, and depriving them of the possibility of being regarded as 'normal'.

TJ has progressed from the field of mental health law, developing both theoretically and practically. Following the pattern established by DTCs, special domestic violence courts have emerged in a number of states to deal with family violence, and mental health courts have been established in connection with crimes committed by people with mental disturbance.<sup>39</sup> In a very short time a new movement (in conjunction with other similar trends) has thus exerted such great influence over the development of the law that it has led to changes in the organisation of the courts. This indicates that very important issues are at stake, but it also suggests that the administration of justice in the USA has been a source of great concern, and that reforms are absolutely necessary. Rising crime rates, overcrowded prisons and the frustratingly high rate of recidivism constitute powerful incentives for these changes.<sup>40</sup> The judicial reform promoted by TJ is not concerned in the first place with the organisation of the courts, their specialisation (as regards jurists), or differentiation (as regards clients); it should rather be viewed as a new perspective that shall inform the practice of law. Area after area is explored and results of behavioural sciences studied in order to

---

35 Winick, loc. cit., p. 43.

36 Winick, loc. cit., p. 52.

37 An example of the above is appointment of guardians with limited powers, such as, for example, the authority to veto major decisions. Loc. cit., p. 53.

38 Winick, loc. cit., p. 53.

39 Regarding these developments refer to *Judging in a Therapeutic Key*, p. 21-72. In 2003 there were over 200 such courts in the USA.

40 G. Berman & J. Feinblatt *Problem-Solving Courts: A Brief Primer* in: *Judging in a Therapeutic Key*, p. 73-77. Between 1984 and 1997 the number of domestic violence cases reported to the police increased by 77%, and it has been calculated that 3 out of 4 big city arrests concerned suspects influenced by drugs. Loc. cit., p. 76.

identify new ways in which to improve investigative work and conflict resolution methods in order to minimise future conflicts.

As regards *sexual offences* one has tried to broaden the context of both criminal inquiry and correctional treatment in order to make assessment of both criminal indictments and the risk of relapse into crime more reliable. The latter issue has been part of a debate on the possibility of being able to ‘cure’ sexual deviations manifested in criminal acts, such as, for example, sexual abuse of children. The idea of providing treatment to sexual offenders has been applied in several states in the USA, which have enacted laws according to which ‘sexual psychopaths’ are treated as a special category, being subject to procedures different from those normally followed in the criminal justice process, and where they can be released only after successful discharge proceedings.<sup>41</sup> The necessary condition for being able to be processed under sex offenders laws even in terms of determination of sanction is that the adjudicated sex offender must be regarded as treatable, which means that the prison sentence will include a rehabilitation programme. TJ has been applied here as a scientific approach in order to determine the variables controlling the effectiveness of such special procedures, e.g. the ways in which different methods (laws, treatments, control systems, etc.) affect the offender’s behaviour (e.g. his motivation for treatment), and consequently, the final therapeutic effect.<sup>42</sup>

As regards criminal investigation and prosecution of sexual offences proponents of TJ, including David Wexler, have studied the offender’s attitudes. One of the greatest obstacles to the investigation of such crimes, especially as regards child molesters, is normally the offender’s heavy denial of the criminal act, and statements such as that ‘nothing happened’. If the offender refuses to give any explanation to the ‘conflict’ between him, the child, those close to the child and others, it will also be difficult to determine the degree of reliability of the child’s story. The difficulty in admitting something is linked not only with the criminal act itself and with the fact that sexual abuse of children is regarded as particularly abominable, but also with the fact that denial of guilt is actually expected by the justice system. As long as police investigators persist in their attitude that it must be assumed that the defendant will deny his guilt, lie, or keep silent about it, one will fail to secure the most important source of information of what has really happened.<sup>43</sup>

In Wexler’s view one should therefore assume that the suspect suffers from ‘cognitive distortions’, which manifest themselves in denial and minimisation of guilt, and that these distortions are just as amenable to analysis as the sex

---

41 These statutes do not constitute federal law – different state legislatures have enacted their own ‘sexual offenders’ acts. Normally the offender is given a prison sentence, and can be committed to treatment only after he has served his full prison term, or in connection with release on probation.

42 J. Klotz *Sex Offenders and the Law: New Directions*, in: *Law in a Therapeutic Key*, p. 131ff.

43 The other party, the child, has often no understanding of the sexual implications of the act, and cannot therefore describe it in a legally adequate way, which is why the defendant’s admission of guilt is of primary importance from the investigatory point of view.

offending behaviour itself.<sup>44</sup> Instead of expecting denial one should assume that the suspect feels a great need to confess what has really happened, and try to encourage him to acknowledge his guilt. If this is not done, there is a great risk that denial reflexes will be reinforced and the defendant will continue to deny that there are any problems, which will make him more likely to reoffend<sup>45</sup>. To remedy the situation in the USA Wexler proposes that the possibilities of plea bargaining shall be restricted in sexual offender cases<sup>46</sup>. In any case, it is important to try to coax the suspect to admit his guilt, and tackle the problem at hand.<sup>47</sup>

TJ devotes a lot of attention to the *victims of crime* and their role in the (American) legal process. In this context one seeks to apply many of the measures already in long use in Sweden (without any knowledge of the Swedish legal procedure), such as, for example, the victim's own role in the proceedings (as a plaintiff, not just a witness), the right to be present during the entire proceedings, the right to legal counsel free of charge, the right to compensation even if the offender remains unknown (equivalent to the Swedish Crime Victim Compensation and Support Authority), etc.<sup>48</sup> In addition to these improvements greater use of victim-offender mediation (VOM) has been discussed as one of the ways of increasing the victim's influence over the outcome.<sup>49</sup> The historical origins of mediation go back to the times when dispensation of justice in criminal cases was a private matter, whereas its conceptual framework is based on the view that no victim of crime can be rehabilitated until he or she is able to make sense of what has happened. Research on the effects of mediation reveals that it improves the victim's chances of mental recovery and returning to the situation as it was before the crime, and that the feeling of hopelessness diminishes. One of the important conditions is that mediation is voluntary, and that the victim does not feel any kind of coercion, either direct or indirect, to meet the offender. It should also be noted that many authors claim that mediation should not be used in domestic violence cases or cases of extreme

---

44 D. Wexler *Therapeutic Jurisprudence and the Criminal Courts*, in *Law in a Therapeutic Key*, p. 159.

45 Denial is contraproductive for therapy. Most sex offender treatment programmes in the USA refuse to admit offenders who deny any sexual contact with the victim. S. Bibas in *Judging in a Therapeutic Key*, p. 170.

46 In these cases offenders can plead *nolo contendere*, which means that they can plead guilty without admitting their guilt; loc. cit., p. 159. The judges' experience, who refuse to accept *nolo contendere*, shows that the offenders are likely to admit the crime; W. Schma *Judging for the New Millennium*, in *Judging in a Therapeutic Key*, p. 89.

47 See also, S. Bibas, loc. cit., p. 169-175. In order to attain this goal it is important to use a non-authoritarian, emphatic style during questioning; see U. Holmberg *Police Interviews with victims and suspects of violent and sexual crimes*, Stockholm 2004 (this is the first academic volume in Sweden inspired by TJ).

48 R. Wiebe *The Mental Health Implications of Crime Victims' Rights*, in *Law in a Therapeutic Key*, p. 213 ff.

49 VOM is used in many American states instead of court proceedings as an alternative conflict resolution method in cases of petty crime.

violence.<sup>50</sup> In mediation it is extremely important that a distinct strategy is employed and clear goals and objectives are set for the mediation process. The latter include, in addition to material and symbolic reparation<sup>51</sup> for the suffering caused, reaching a point when the offender shows genuine shame and remorse over his actions, taking full responsibility for them. In order to realise this objective it is necessary that the victim (or the person who is on the victim's side) is given a fair chance of expressing his or her feelings about the crime, and that the offender is placed in a state of 'perfect defencelessness'. If, during the mediation meeting, the victim and the perpetrator express genuine emotions - even if only for a few seconds - this 'core sequence' constitutes the key to improved chances that the offender will not relapse into crime.<sup>52</sup>

As regards *wife battering and child abuse* TJ focuses on the fact that these acts normally involve recurring assaults. The majority of domestic violence cases are never reported, and when they finally come to the knowledge of the justice system there has usually been a long history of abuse. If a woman is abused, it can be expected that her children will also be subject to abuse. It is believed that approximately 80% of men who batter their wives also batter their children, and the worse the woman is abused, the worse the child is abused.<sup>53</sup> The legal system can be accused of having failed to respond effectively to domestic violence crime, both as regards penalisation in general, and coming to grips with the problem as such. Despite the recurring character of domestic abuse during a protracted period of time, and the fact that the victim risks being abused again and again, sanctions are almost always lower than in cases of similar, isolated assaults by a stranger. Even if the battered woman succeeds in leaving the relationship, there is no guarantee whatsoever that the abuse will cease, since statistical evidence demonstrates that the greatest risk of domestic violence is faced by separated women.<sup>54</sup>

Various studies on domestic violence show that batterers tend to neutralise their violent behaviour by blaming it on alcohol or provocation by the victim. Both the violence and the resulting harm are also underrated and played down. The victim is attributed with more involvement than is justified by the circumstances, and the offender may even try to depict himself as the real victim. In-depth studies of personality characteristics of batterers suggest that they have many psychological problems, which may be related to family

---

50 Wiebe, loc. cit., p. 230.

51 Material reparation consists in damages paid to the victim, whereas 'symbolic' reparation refers to other consequences of the crime that have to be borne by the offender, e.g. blame, criminal sanctions, community service, etc.

52 D. Wexler *Working with Offender-Victim Emotions*, in *Judging in a Therapeutic Key*, p. 235f and 244f. Wexler stresses the fact that the emotions exchanged between the two parties must be genuine. Expressions of self-righteous indignation and moral superiority by the victim, or pretended remorse by the perpetrator, do not fulfil their function, which is why mediators must be skilled in encouraging the expression of painful emotions (and in rechanneling of the aggressive ones, such as hatred, rage and anger), loc cit 237ff.

53 L. Simon *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, in *Law in a Therapeutic Key*, p. 245.

54 Simon, loc. cit., p. 245.

violence and lack of security in childhood, and which manifest themselves in the form of emotional instability and extreme fluctuations in mood, suicidal thoughts, substance abuse, extreme jealousy, social skills deficits and strong gender or sex role stereotypes. One cannot draw the conclusion, however, that due to the aforementioned defects, child and spouse abusers restrict themselves to domestic violence acts, and that they should receive special treatment from the legal system (by means, for example, of medical treatment). On the contrary, evidence suggests that the majority of these men are also violent outside the home, committing a variety of offences. Treating a domestic violence offender as a special kind of person, or a special category of offender, communicates to offenders and victims alike that domestic violence is more 'explainable' and therefore less serious.<sup>55</sup>

TJ's advocate Leonore Simon argues that cognitive therapies have proved very effective in combating domestic violence<sup>56</sup>, or to be more precise, domestic offenders' violent behaviour. The way in which TJ addresses domestic violence problems is by trying to alter the offenders' dysfunctional thoughts and maladaptive assumptions and beliefs, and providing new information processing skills, in which dysfunctional thoughts are countered by constructive responses. The legal system, as represented by investigators, legal counsel or judges, can help in altering offenders' tendencies to make up excuses and in this way try to neutralise their crimes. Simon points out that it is especially important that domestic violence calls be taken seriously, and that the use of plea bargains by prosecutors be restricted, whereas judges must ensure that domestic violence offences are adjudicated in the same way as offences committed against strangers.<sup>57</sup> Simultaneously, the victims of violence must be given better and more active support. Studies in the area clearly demonstrate that emotional and social stress is a constant companion of battered women and children, manifesting itself in many cases in the same way as post-traumatic stress disorder. Part of the problem is constituted in the fact that battering recurs more or less regularly, following a special cycle of abuse consisting of three phases: the first is tension building, which is followed by an explosion of battering, and which ends in loving contrition when the husband promises never to do it again – a promise wearing thin as the time for another round of abuse approaches. Another characteristic feature of an abusive relationship is that due to 'learned helplessness', 'traumatic bonding' and threats/fear of violence battered women have difficulty leaving battering relationships.<sup>58</sup> Despite all this there appears to be an absence of adequate treatment programmes for battered women, at least in the USA, which either means that women are considered to have only themselves to blame, or that no responsibility whatsoever can be assigned to them for the occurrences in question. There are important reasons, however, why

---

55 Simon, loc. cit., p. 254 ff.

56 Simon, loc. cit., p. 258 ff. See also D. Saunders & R. Hammill: *Violence against women: Synthesis on research on offender interventions*, National Institute of Justice (GB), 2003.

57 Simon, loc. cit., p. 261.

58 Simon, loc. cit., p. 262 f. See also the report of the Commission for Violence against Women: '*Kvinnofrid*' (Peace for Women) in SOU 1995:60.

battered women should also receive treatment, and that is in order to bring about changes in their dysfunctional attitudes. If no help is provided, there is a risk that the woman will perpetuate her relationship with the batterer, or enter into another violent relationship. Unfortunately, all too frequently the battered woman is likely to share the batterer's tendency to minimise the abuse and to blame herself for it. Many battered women also believe that abuse is the price that has to be paid for preserving a relationship or that there is no way out from an abusive relationship. Even in these cases it is important to break through the deep-rooted and faulty patterns of dysfunctional thinking. This can be done with the help of cognitive therapy, but the way leading there goes often via the legal system. It is then of greatest importance that the victims are met in a correct way, above all by treating each act of domestic violence as any other criminal act, rather than merely as a 'family matter'. It is also important that the woman is granted these forms of support and protection that are available under the circumstances, for example, appointment of legal counsel, granting of restraining order or protected identity.<sup>59</sup>

One of the important concerns as regards *children who show signs that they may have been subject to sexual abuse* is being able to correctly pinpoint the victims. Even though the symptoms shown by a child may not be sufficient to prove in terms of criminal law that sexual abuse has occurred, the symptoms indicate that the child in question needs support and help. It is important that the legal system does not let a child down in a situation when sexual abuse is suspected, but cannot be proven. If a child develops a range of behavioural disturbances, including such symptoms as 'secrecy, helplessness, accommodation, unconvincing and delayed disclosures', it can be an indication that the child is a victim of sexual abuse.<sup>60</sup> Lack of such symptoms must not be, however, automatically taken to mean that no abuse has taken place. In reality, meta-analysis of various research findings shows that children react in diverse ways to sexual abuse, depending on their age, the degree of violence involved, the time period over which it has been taking place, the relationship to the abuser, the abuser's ability to manipulate, the support from those close to the child, etc. A child's actual behaviour will thus depend on a number of variables, and the child may not reveal any signs of sexual abuse at the time. On the other hand a child can show the same psycho-sociological symptoms as those commonly resulting from sexual abuse, which may be due to other stress factors, such as, for example, parents' separation. All in all this means that a child's behaviour cannot be used as a reliable indicator of sexual abuse.<sup>61</sup> On the other hand behavioural aberrations are a clear sign that all is not well with the child, and that it needs help and support. Provision of the latter must not be dependent on the result of any preliminary investigation of possible crime; on the contrary, it should be completely independent of the legal process – neither the community nor the lawyers involved in the case must be allowed to abandon the

---

59 Simon, loc. cit., p. 265. Provision of legal counsel is the author's example.

60 D. Shuman, *The Duty of the State to Rescue the Vulnerable in the United States*, in *Law in a Therapeutic Key*, p. 308.

61 Shuman, loc. cit., p. 309.

child if the preliminary hearing results in the case being dismissed. Because of the difficulties involved in proving sexual abuse of small children, it may be better not to bother with the legal process in these cases, as it will probably lead nowhere, and will only aggravate the existing conflicts and tensions; it is better to invest the effort in the treatment of the child (and the child's family) instead. Should this become a general strategy, however, new problems may emerge. In the first place it may be difficult to draw a border line between cases where children are victimised by intimates and those in which they are victimised by strangers. In the second place sexual abuse may continue. Moreover, one must take into consideration that the effectiveness of the existing treatment programmes is limited – they reveal a decrease in abuse in only 40 percent of cases. At the same time there is a risk that responsibility for the abuse will be visited on non-abusing members of the family (usually not the man, but the child's mother).<sup>62</sup> On the other hand, one must be aware of the fact that the child's participation in the trial may entail yet another traumatic experience, and also that a trial seldom or never puts an end to all the problems of the persons involved. According to the proponent of TJ, Daniel Shuman, it is therefore extremely important that the social services agencies and the judicial system shall strive for the highest possible quality in all their work. Unsubstantiated suspicions and poorly researched circumstances may only make things worse. What is needed, is extensive and methodologically sound research on the identification and treatment of abuse, clear rules, as well as consistent and uniform practice that will enable the social services to identify cases that merit police investigation and prosecutors to identify cases that should be prosecuted.<sup>63</sup>

Practitioners of law involved in domestic violence proceedings – regardless of whether these refer to criminal cases, custody conflicts, or protective custody cases - must have special competence about the problem area, the psychological mechanisms governing the relationship as well as the reactions that can be triggered off when such conflicts reach the justice system. It is equally important that members of the court possess adequate psychological qualifications to handle the case, or, in particularly difficult situations, that they employ insights from behavioural sciences by consulting specialists in this area. Since an important part of the assessment, especially where children are involved, is prevention of future violence (towards the same individuals or others), the judge must act in practice as a 'risk manager'.<sup>64</sup>

In many cases, not just in domestic violence situations but also in other cases of violence and sexual offences in general, part of the sentencing task consists of being able to assess the risk of relapse into crime (and other negative effects of continued contacts between offenders and victims). The common approach traditionally used by judges, which involves an intuitive judgment based on whatever knowledge that may be available to the judge about the individual in

---

62 Shuman, loc. cit., p. 313.

63 Shuman, loc. cit., p. 322.

64 B. Winick *Domestic Court Judges as Risk Managers*, in *Judging in a Therapeutic Key*, p. 201-211.



question, is unfortunately not a reliable prediction tool. In the first place, such predictions are often based on incomplete information and are therefore inaccurate. Secondly, they may reflect the judge's own preconceptions and biases. And finally, judges making positive predictions about future non-violence of individuals receive highly negative feedback when a violent act actually takes place.<sup>65</sup> In certain contexts<sup>66</sup> various clinical prediction models are used in order to determine the probability of relapse into crime, but even these models are not very reliable.<sup>67</sup> Irrespective of whether prediction models based on clinical assessment or whether statistical calculations are used (or a combination of the two), risk assessment will always contain an element of statism: risk will be determined on the basis of how a given individual acted in the past (and on how he behaves at the time of the evaluation). Whether these factors are really relevant for the prediction of the offender's future conduct is difficult to determine with any accuracy, since it is often the actual circumstances and the environment which determine the course of action. The risks will thus vary depending on, for example, whether the subject lives with children and uses drugs, whether he lives alone and is drug-free, or whether a mentally ill patient takes prescribed medication or not, etc.

According to Winick it is important that risk assessment shall focus on that very issue, i.e. assessment of risk, rather than on dangerousness, and that the process shall be viewed as a continuum rather than a dichotomy (so that an individual is not treated as being either dangerous or not dangerous; dangerousness is thus not regarded here as the offender's characteristic feature, but rather as a result of his actions and the circumstances), the key issue being not so much assessing the risk, but trying to reduce the risk of violent behaviour.<sup>68</sup> This is why the risk management model should be supported by principles of therapeutic jurisprudence. If decision-making is based solely on the assessment of the level of risk, the individual has little incentive to alter his behaviour and minimise the level of risk ('I get dangerous when I am provoked'). The deterministic features of the risk assessment model must be supplemented by a dynamic approach to both the decision data and the individual. Criminal courts processing domestic violence cases tend to view a given case or issue as a still picture. Courts examine the event in question in isolation, and disregard the fact that the incident resulting in court proceedings represents just one frame of a film - a single episode in someone's life or relationship. In reality, domestic violence is not an event, but an ongoing process, which is exactly why the court needs to look at the whole picture if it is to fulfil its therapeutic function, ensuring that in the long run a change for the better will take place for all the involved. Winick argues that if the risk management function of the legal system is to be taken seriously, domestic

---

65 Winick, *loc. cit.*, p. 202.

66 In Sweden such models are used, for example, in discharge proceedings concerning persons sentenced to in-patient psychiatric care.

67 Winick claims that the accuracy of clinical predictions is about 50%. *Loc. cit.*, p. 203.

68 *Loc. cit.*, p. 205f.

violence cases should be investigated by specialists, and processed in special domestic violence courts.<sup>69</sup>

The approach presented above and illustrated by a number of practical examples is not limited to criminal cases (or social interventions against individuals), but can also be employed in civil disputes. For example, Daniel Shuman discusses therapeutic dimensions in cases concerning *damages in tort*.<sup>70</sup> What is interesting, according to Shuman, is a comparison of psychological consequences for injured parties who receive compensation as a result of legal proceedings as opposed to those who receive equivalent compensation from an insurance company without determination of fault. If legal proceedings delay or render the restorative process more difficult, it is hardly worth justifying court litigation, which is a costly and protracted process.

The current system is rooted in the legal system's search for a more civilised alternative to the blood feud, which was employed to resolve conflicts between members of society in the past. These origins indicate that there is a primal need of injured persons to seek vindication.<sup>71</sup> The view that an individual wrongdoer shall be punished, both morally and financially, has been superseded by a more collective system of punishment, in which compensation for the harm caused is almost always paid by someone else than the wrongdoer. In addition, the possibility to receive compensation under tort law is based on the premise that the wrongdoer's conduct must be regarded as negligent. If no negligence can be established, the injured party will not receive compensation for the harm suffered by him. The important thing in an action for damages is thus determination of negligence and causality, and not the satisfaction of the plaintiff's restorative needs.<sup>72</sup> The system is thus based on the premise that people are morally responsible for their conduct, and that tort sanctions, or rather a risk of tort sanctions, is an appropriate way of upholding the ethics and standards of daily life. Shuman claims that human behaviour research does not indicate that tort law exercises a clear action-shaping and therefore also deterrent function.<sup>73</sup> The important question to ask in this context should therefore be whether the injured party is adequately compensated by means of tort litigation, and the concomitant question: is revenge therapeutic?

There are divergent views regarding this question. Some researchers support the view that the injured party has a need of revenge which can be suitably channelled by tort litigation, whereas others claim that tort litigation is based on

---

69 Winick, loc. cit., p. 210. Many proponents of TJ believe that all cases concerning family matters (custody disputes, crimes against children, crimes committed by children, wife battering, custody of minors, etc.) should be handled by a unified family court; see, B. Babb, *A Unified Family Court*, in *Judging in a Therapeutic Key*, p. 294 ff.

70 D. Shuman *The Psychology of Compensation in Tort Law*, in *Law in a Therapeutic Key*, p. 433.

71 Shuman, loc. cit., p. 433f.

72 Shuman, loc. cit., p. 435f.

73 Shuman, loc. cit., p. 437. People's behaviour is governed by a complex constellation of physiological, cultural, social and psychological determinants, and the tort system is not an effective means of shaping desirable behaviour, loc. cit., p. 442.

a primitive and immature perception of morality: someone has transgressed an established norm of conduct and made me suffer - this gives me the right to strike back. That such reasoning violates the very same norm of conduct which has been transgressed, being permissible, however, under the guise of law, seems to be in fact forgotten.<sup>74</sup> Revenge consists in attaching blame to the guilty party, as well as in the excessive price that has to be paid by the defendant who loses the dispute in the form of damages for intangible injuries as well as legal costs.

If the need for revenge is accepted, one must also take into consideration possible consequences of endorsing such a view. Can an injured party be compensated at all for his or her suffering by means of financial remuneration? Does tort compensation encourage injured parties to play the role of victims, leading them to focus on maximisation of their financial compensation? Or does tort compensation help in transforming them from passive victims to proactive members of society?<sup>75</sup>

Human behaviour research in the area suggests that a wish for revenge and similar feelings play an important role in people's decisions to pursue tort litigation; their need for vindication, respect, dignity and 'justice' is so strong that these persons would pursue court litigation even if they could be guaranteed the same outcome by different procedure.<sup>76</sup> Generally speaking, there are good reasons for the claim that the outcome of the process is less important for the victim than is usually believed: the most important thing is the requirement that 'justice be done'. Another important aspect is that the litigation process provides the plaintiff with an opportunity to tell an important story in a culturally meaningful context, which shows that society supports them.<sup>77</sup>

One relevant body of theoretical research in tort law argues that high damage awards may have an adverse effect on the restoration of the injured: the more serious the injury the higher the level of compensation that can be expected, which is why 'reinforcing psychopathology' may seem to be profitable<sup>78</sup>. If this is the case the perpetuation of the role of the sufferer should cease when litigation is over. Some studies find a dramatic improvement of symptoms following the termination of litigation, whereas other studies do not show such effects.<sup>79</sup>

To sum up it can be said that current research cannot answer the question of whether tort litigation has predominantly therapeutic or anti-therapeutic effects. The question is probably too particular to be answered in general terms. In addition one must consider the special premises applying in the USA, such as,

---

74 Shuman, loc. cit., p. 437 with references to, inter alia, D. Owen *Punitive Damages in Product Liability Litigation* (1976) and A. Ehrenzweig, *A Psychoanalysis of Negligence* (1953).

75 Shuman, loc. cit., p. 442f.

76 Shuman, loc. cit., p. 445.

77 Shuman, loc. cit., p. 455.

78 Shuman, loc. cit., p. 444 (Shuman discusses here the studies examining the Secondary Gain Theory).

79 Shuman, loc. cit., p. 445f.

*inter alia*, the magnitude of damage awards. Nevertheless, there are good reasons to examine more closely the positive and negative consequences of tort litigation for all the parties involved. By means of new dispute resolution processes certain conflicts would probably be resolved faster and more effectively. Shuman holds that on many occasions protracted tort litigation can be avoided if a defendant makes a sincere apology to the injured plaintiff, and if he pays adequate compensation.<sup>80</sup> Another interesting example provided by the author is the claim that rape victims in the USA who choose to bring a civil suit against the offender, instead of reporting him to the police, regain self-confidence faster, because they refuse to assume the role of a victim.<sup>81</sup>

In family law, and especially in *child custody disputes*, there is an even more pronounced need for a therapeutic approach. Court battles only feed the conflict between the parents, benefiting neither the parents nor the children. TJ proponents hold that to be able to help the parents the attorneys involved in the process must clearly understand the way in which gender roles and relationships function in society.<sup>82</sup> In order to understand the dynamics of a separation process drawing on one's own experiences, or dispassionately rationalising the concept of justice is not sufficient – one must gather information about the history of the individual relationship from the pre-relationship stage right until the break-up. Once that has been done, one may hope to find correct answers to the following questions: 'What do you think would be fair?', and 'How does that make you feel?'<sup>83</sup> In order to be subsequently able to work out a strategy that would help the client, not making the situation more difficult for the children, the attorney must ensure that proper timing is maintained. Recommended solutions, not least regarding settlement arrangements, must be proposed at the right point in time, i.e. not when the client is filled with vengeance, wrath and desperation, but when he or she is more receptive, and will be able to understand the negative consequences (for the child) of an uncompromising attitude.<sup>84</sup> The ideal custody proceedings should be devised in such a way that the attorney himself would not hesitate to let his or her own child go through the process. As long as this is not the case, the main concern must be to try to make this painful process as smooth and painless as possible.<sup>85</sup>

---

80 Shuman, loc. cit., p. 458.

81 This is obviously connected with the fact that rape cases put a lot of pressure on the victim, not least due to the defence counsel's systematic attempts to attach blame to the woman and discredit her story. Loc. cit., p. 449 with references to Nora West: *Rape in the Criminal Law and the Victim's Tort Alternative*, Toronto Fac. Review 96, 114 (1996).

82 S. Anderer and D. Glass, *A Therapeutic Jurisprudence and Preventive Law Approach to Family Law*, in *Practicing Therapeutic Jurisprudence* (2000), p. 209ff.

83 Anderer and Glass, loc. cit., p. 208.

84 Anderer and Glass, loc. cit., p. 221.

85 Anderer and Glass, loc. cit., p. 234.

## 5 Therapeutic Jurisprudence in Court

The various applications of TJ reviewed in the foregoing show how legal scholars and practitioners employing a therapeutic jurisprudence approach take advantage of social and behavioural studies in order to examine and evaluate different judicial alternatives and their effects. This is not least relevant when thinking of the way in which legal procedures and their consequences affect people socially and emotionally, and that the law can be applied in a mechanical way if this dimension is lost in the process. TJ is not, however, just another form of legal psychology - legal psychology describes, explains and predicts human behaviour by reference to what is required by law and judicial practice, whereas TJ describes, explains and substantiates application of the law in specific instances, taking into account accumulated insights about human behaviour.<sup>86</sup> Neither can TJ be equated with the sociology of law, since TJ tries to find individual solutions to specific problems, which is why empirical study results in the field of legal sociology can only provide important points of reference. It is neither claimed that the psychological or therapeutic aspects are the only ones worthy of consideration, or even the most important ones in judicial application, but rather that modern approaches to law must be interdisciplinary, with a variety of disciplines providing their frame of reference. Law and application of the law do not only reflect and govern the economy, policies, environmental issues and moral concepts prevailing in a given society - they also reflect and influence the well-being of the people. This is why law's therapeutic and anti-therapeutic effects must be studied and considered if the former are to be enhanced, and the latter reduced.<sup>87</sup> In Winick's opinion TJ does not conflict with the legal-dogmatic method or other modern approaches to law, e.g. polycentrism or feminist jurisprudence. Quite the opposite is true - TJ should be viewed as a consequentialist approach to law: *since the law affects the well-being of people, that fact must be taken into account by members of the legal profession.*<sup>88</sup>

Practicing TJ implies applying a specific approach to conflict resolution and the legal system, based on the findings of the behavioural sciences. The social and psychological consequences of conflicts reaching the legal system must be considered and analysed in a concrete and scientific way in every field of law. It also means that the TJ method represents in many respects a departure from traditional methods of adjudication. The most important differences concern the perception of the necessary knowledge that must be possessed by a legal professional in order to be able to carry out his or her tasks and the functions of the legal process.

Traditionally, the scope of expertise of lawyers and judges necessary for the satisfactory performance of their working duties was supposed to include

---

86 M. Small, *Legal Psychology and Therapeutic Jurisprudence*, in *Law in a Therapeutic Key*, p. 611.

87 B. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in: *Law in a Therapeutic Key*, p. 648f.

88 Winick, loc. cit., p. 649. There are many instances, however, when therapeutic consequences must give way to other considerations and interests; loc. cit., p. 652.

knowledge of the law, general life experience and common sense. This is no longer sufficient in the view of TJ proponents, who claim that for the satisfactory and effective performance of their social functions the jurists need to be competent about the social consequences of judicial decisions at both the macro and micro levels of society. At the macro level, in addition to the awareness of the economic consequences of alternative decisions, the jurist also needs to be knowledgeable about the social consequences of the aforementioned, which is why competence in sociology, criminology and social psychology should be intimately connected with legal decision-making. At the micro level the jurist must realise that legal conflicts do not result solely from individuals' living conditions, personal history and choices they make, but also that the decisions made in the judicial process will often have a decisive influence on the rest of the life of the persons concerned. In order to understand the forces at play, the interplay of various factors and possible consequences, the legal actors must be well versed in psychology, and to some extent in psychiatry, and in the hope of finding more long-term, humane solutions to conflicts they must employ a therapeutic approach in the exercise of their profession.

This outlook implies that psychology and other behavioural sciences should constitute an important component of law study programmes, and courses in such subjects should form an important part of further education of every legal practitioner. Since it cannot be expected that every judge shall also be a qualified psychologist, behavioural sciences experts should be used to a greater extent in the judicial process than is the case now. It is not always necessary for such experts to make pronouncements concerning each individual case; their task may be restricted to a general description of factors relevant to the instant type of case, i.e. providing the court with a current scientific view of the problem area.

An even better solution might be to incorporate experts into the judicial process, for example by allowing psychologists to act as court members in certain cases or types of cases. Specialised, problem-oriented courts handling different types of cases, for example, domestic violence or drug-related crime, have therefore become common in the United States. The fact that all legal actors, investigators and members of the court are specialised in one type of case leads to higher qualifications, and enhances consequently the quality of legal inquiry and decision-making.

On the one hand TJ is concerned with the question of how to reconcile law with behavioural science, and on the other hand (in common with restorative justice) it promotes a novel view of the judicial process. Viewed in a traditional way, a court trial is a struggle - a duel between two parties, in which one must win and the other lose. This is a primitive, 'masculine' way of conflict resolution. In a modern society, with its great complexity of social phenomena, there should be more civilised and efficient ways of conflict resolution, especially knowing that defeat produces negative, self-depreciating feelings, thoughts, and attitudes, and may lead to regrettable actions and negative consequences. Active collaboration between the parties and the judge in order to find the most correct, reasonable and just solution to the conflict would probably produce many positive effects at both individual and societal levels. On the other hand the law might lose its vigour or 'steam' in the absence of argumentation between two parties and a judge - the method which relies on the view that a

search for truth and justice is best conducted through a dialectical process, in which two irreconcilable points of view are in direct opposition to each other. In any case, there are many reasons for an unbiased discussion of how court procedures should be formulated in order to be effective rather than destructive. Even though adversarial procedure is based on a thousands-year-old tradition, it is time to consider whether the traditional concept of this process fulfils its purposes and meets its objectives, and whether these are the objectives that we want the courts to achieve.

There are no theoretical obstacles to devising workable court procedures according to completely different principles, giving priority to values, methods and attitudes other than those used by the traditional conflict resolution model, i.e. the adversarial procedure. The possibility of practical application of this novel approach to the functions of the court process can be illustrated by the new courts of special jurisdiction that have been established in the USA.<sup>89</sup> For a more effective comparison between traditional and transformed court processes the ideals underlying these processes can be listed as opposites.<sup>90</sup>

### **Traditional process**

Vertical  
Dispute resolution  
Formal  
Adversarial  
Claim-oriented  
Rights-based  
Application and interpretation of law  
Judge as arbiter  
Backward looking  
Legal outcome

### **Transformed process**

Horizontal  
Problem-solving, dispute avoidance  
Informal  
Collaborative  
People-oriented  
Interest- or needs based  
Application of human behaviour research  
Judge as coach  
Forward looking  
Therapeutic outcome

Even though these almost diametrical differences of the transformed process will apply to courts of special jurisdiction only, which use treatment-oriented sanctions rather than punitive sanctions, the transformed court process and the role of the judge contain many innovative qualities. Whereas the traditional process is dispassionate, impersonal and formal, with the judge making decisions in splendid isolation, the transformed process is open and personal, being based on a team approach to investigation and decision-making.<sup>91</sup> It is

<sup>89</sup> This refers to DTCs, DVCs and other TJ-based courts. Wexler-Winick et al. refer to these reformed procedures as ‘transformed court procedures’; see *Judging in a Therapeutic Key*, p. 6.

<sup>90</sup> The table follows the pairs of opposites as presented in *Judging in a Therapeutic Key* (presentation by R. Warren), p. 6. Cf. S. Daicoff *The Comprehensive Law Movement*, in *Scandinavian Studies in Law* Vol. 49, p.15.

<sup>91</sup> J. Popovic cited in Wexler-Winick in *Judging in a Therapeutic Key*, p. 6.

quite indisputable that this new approach towards the judicial process can be used in civil disputes, at least as regards disputes between private parties, or in family cases. On the other hand it is rather doubtful whether the transformed model can be applied to ordinary criminal cases – and whether it would even be desirable to do so. There is no doubt that some of the components of this model, such as less formalism or more extensive use of human behaviour research findings, can improve criminal procedure. In cases of serious crime, however, there is a loser right from the start, i.e. the victim of the crime, in which case there is a great risk that his or her interests will be ignored if the process focuses too much on the defendant. It may be regarded more important in these cases to prevent new crimes than to ensure redress for the victim of the crime. Another risk is that the defendant's interests will be disregarded if the court focuses all too much on the future, and the question of guilt will be overshadowed by the question of adequate sanction. The important issue will then be not so much to decide whether the defendant has committed the criminal offence he is charged with, but to determine how he is to come to grips with his problems and rebuild his life. Even a slight influence of the transformed process might lead to the situation in which the principle stipulating that everybody is equal before the law will be curtailed. Defendants with a good prognosis will be rewarded, whereas the convicts who refuse to undergo treatment will be regarded as hopeless cases.

Despite the fact that it is not always easy, and perhaps even advisable, to apply a therapeutic jurisprudence approach to procedure law, especially in criminal cases, TJ has made it possible for us to take an unbiased look at the functions, aims and objectives of the court process (and at the chances of being able to attain these aims by the existing court processes). It has been shown that the vertical/hierarchical way of problem-solving in law is not the only one that can be used. It is not at all given that answers to legal questions must be sought in legal sources, following the principle that the higher up we move in the hierarchy of sources and court decisions the more well-founded and reliable the solution will be. The vertical approach implies actually distancing oneself from real life - the higher the level in the hierarchy of the legal system or the judiciary, the more abstract the problems and solutions.<sup>92</sup> In a prolonged trial process the battle aspect becomes more pronounced, with the attorneys becoming their client's champions, and the process becoming increasingly crippling to both parties, and devastating to the losing party, according to the principle stipulating that 'the winner takes it all'.<sup>93</sup> The focus placed on the past, on 'rewinding the tape', so to say, in order to prove what had happened, makes the present and the future fade into the background and lose their importance.<sup>94</sup> In certain cases there is perhaps little reason to bother about the anti-therapeutic effects of the process in relation to the losing party, but one must always keep in mind that these effects do not only concern individual losers (by creating, for example, a desire for revenge, or contributing to feelings of negativism), but that

---

92 Barton & Cooper, loc. cit., p. 2f.

93 Loc. cit., p. 10.

94 Loc. cit., p. 2, which shows that one should use the 'fast forward' function more often than the 'rewind function' on the symbolic video recorder.



in the long run they may have negative consequences for society as a whole (in the form of recidivism, for example). A process applying a therapeutic jurisprudence approach tries to minimise its long-term, harmful effects by creating favourable conciliatory conditions (i.e. in which reconciliation appears to be a reasonable solution), and by promoting active participation in the process of all the parties concerned. A trial must be seen as fair and the court's approach to dispute resolution as humane. The parties concerned must be able to make their voices heard, but they must also be allowed to take responsibility for the choices offered by the process (for example, conciliatory offers or possibility of treatment). Judicial processes employing a therapeutic jurisprudence approach should thus aim at inspiring respect and encouraging assumption of responsibility, rather than marginalising and humbling the 'culprit' into shamefulness.<sup>95</sup>

Thomas Barton, professor of procedural law, proposes that in order to investigate whether the traditional judicial process meets these conditions – as regards certain types of proceedings or in any specific case – the following questions should be asked:

1. Who *may* speak?
2. Who *can* speak?
3. What shall be regarded as a relevant argument?
4. What shall be regarded as a success or a failure – as regards litigation or outcome – in this process?
5. What are the designers of procedure afraid of?<sup>96</sup>

The first two questions concern the ways in which the parties can become participative in the relevant judicial context, and the support they need (curative, psychological and legal) in order to protect their interests. The third question concerns criteria for truth searching, or determination of risk, and the court's view of what is relevant in the case. It also concerns the issues of competence, deciding the extent to which law should be supplemented with insights provided by specialists other than members of the legal profession, and how far normative values (such as, for example, preventing something on moral or general grounds) can be accepted. The fourth question addresses the relationship between formal and substantive law, trying to identify the formal obstacles that can restrict trial proceedings (for example, the period of limitation, inadmissibility of evidence), and examines the legal and real consequences of a given verdict. In many cases various norms clash with each other, for example, individual rights versus requirements of public safety, in which case it is necessary to determine how these normative conflicts are tackled by the legal system. Furthermore, the consequences of each individual action may run counter to desired effects, with the judicial process producing many negative effects, which the legislator may

---

<sup>95</sup> Loc. cit, p. 28.

<sup>96</sup> T. Barton 'The Cultural and Procedural Assumptions of Procedures for Solving Problems', 2005. The term 'designers of procedure' refers to a group containing not only the legislator but also other practitioners of law (especially judges), and denotes 'those who have enunciated the rules and designed the procedure'.

have disregarded. A therapeutic jurisprudence approach helps us often to identify situations in which the justice system is too concerned with finding a scapegoat, and confirming the validity of statutory provisions, instead of trying to resolve the pertinent problems arising in connection with the matter at issue. This leads to a situation in which people demand validation of their reality by requesting that the court should pronounce one party to be right and the other party to be wrong, which often provides a one-dimensional picture of the conflict.<sup>97</sup> The last question concerning the fears of the designers of procedure is perhaps the most interesting one. Is one afraid of feelings? Is this the reason why courts so insist on formality and rationality? Is one afraid of making a mistake? Is it therefore the courts would rather acquit than convict? Is one afraid that the person is going to commit the same offence again? Is this the reason for long-term prison sentences?

Answering such simple, almost banal questions<sup>98</sup> can make understanding of the function and choice of procedure easier than long, legal-philosophical divagations, especially if one is keen on establishing the ways in which the litigants can protect their interests during the litigation process.

## 6 Objections to TJ from the Swedish Point of View

The question arises now whether this new approach is above all an American attempt to remedy the obvious shortcomings of the country's legal practice, or whether there are reasons for adopting this mode of reasoning even in Europe, and therefore also in Sweden.<sup>99</sup> In answer to this question it must be noted first of all that TJ must be assumed to be of greater importance to the USA than to Europe, when thinking of the application of the law in that country, whose consequences are much more drastic than in Europe: in the USA capital punishment is used, a person may be sentenced to 99 years in prison, the majority of criminal cases are settled through plea bargains, claimants may get hundreds of millions in damages (e.g. punitive damages may be imposed in medical malpractice cases), and winning the case depends to a large degree on how much money one has to pay the lawyer. It is thus clear that American laws and judicial administration may produce very powerful anti-therapeutic effects – it is almost absurd to speak of any therapeutic effects in this context.

In addition to the differences between the American and the Swedish legal systems and practice, one should also consider differences between the two countries' legal ideologies and law making. In Sweden, trying to predict the consequences of a new bill (normally by means of the Official Report Series of

---

97 Barton, loc. cit.

98 Note that my examples are only a few randomly chosen illustrations. In any individual case the questions can be much more concrete: Is one afraid of the media and the public opinion? Is one afraid that the witness will be affected by the audience in the courtroom? Is one afraid that the defendant will say too much? etc.

99 D. Carson and D. Wexler write about the importance of TJ for sociological jurisprudence in England in '*Law in a Therapeutic Key*', p. 633 ff.

the Legislative and Investigatory Commissions) constitutes an important part of all legislative work, and in the process many of the aspects emphasised by TJ proponents in the USA are taken into consideration. This also means that many of the concrete proposals for improvements in the law advanced by TJ proponents have already been introduced in Sweden.<sup>100</sup> At a distance it may seem that TJ represents only a belated attempt to implement ideas which have been part of the Swedish legal tradition for a long time now. It can thus be stated that in certain areas there is no need for reform following the line of approach as demonstrated by the American legal scholars. In certain other areas – especially those representing the chief concerns of the TJ movement – Sweden has abandoned to a large extent the ‘therapeutic ideas’ so strongly propagated in the 1970s. This applies especially to the ideology of treatment applied in criminal law, where criminal sanctions and correctional treatment were supposed to be adjusted in accordance with the forecast concerning the offender’s potential for reintegration into society. With a shift in political winds in the 1980s a dissenting point of view emerged, providing that the individualisation of sanctions was contrary to the general requirements of justice, the principle of foreseeability, and equality of all persons before the law. It was also regarded as injudicious that justice administration had been shifted from the courts to the healthcare authorities, so that it was now doctors, psychologists and welfare officers who were supposed to decide on the actual consequences of a crime.

Similar criticism has been levelled at TJ in the USA, where TJ has been accused of having the same paternalistic character as the traditional process, even if the assertion that ‘we know what is best for you’ is presented in a milder form than the old dictum ‘you must now take your medicine’. One speaks about well-being, when one means power. One speaks about treatment, when the real issue is punishment. One says that the ideal is to strengthen the individual’s motivation and help him to make his own choices, whereas at the same time one makes one’s own decisions about the motivational goals, with no room for any real choice (who does not want to avoid prison?). One decides who deserves to get a break, and when a person can be regarded as having been reintegrated into society.<sup>101</sup>

Winick admits that there is a risk of paternalism, and that a rehabilitative attitude can be perceived as a kind of an ultimatum, being therefore counterproductive. A TJ jurist must therefore develop his negotiation skills, so that motivation and persuasion replace coercion and other comparable techniques. An important part of the motivational technique is showing empathy, helping to

---

100 The most striking example of a therapeutic approach towards legislative work (at a macro level) is perhaps the introduction of the legal presumption of joint custody (and the possibility to adjudicate such custody against the will of one of the parents). The idea is that ‘children need both their parents’ and that both parents should take their parental responsibility seriously, which means, at least in theory, a higher quality of life for all the involved and therefore also a more stable social structure. The aforesaid presumption creates, however, a great deal of generality which may entail harmful effects in individual cases, where children are forced to spend time with unsuitable parents.

101 C. Slobogin *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, in *Law in a Therapeutic Key*, p. 736 ff. See also J. Petrila *Paternalism and the Unrealized Promise*, in loc. cit., p 685 ff.

develop the subject's self-reliance, and avoiding confrontations and argumentative attacks. Even if there is an element of persuasion in the negotiations, so called 'central route persuasion' tactics should be used. The person concerned must adopt his own stance on the alternatives presented to him and take responsibility for the choice he makes. The serious negative consequences (for example a prison sentence) that the process usually entails shall not be made appear as a threat but rather as a form of explanation to the defendant's questions.<sup>102</sup>

Another problem in TJ is that the therapeutic effect which is desired is difficult to produce, both in theory and practice. In the view of Christopher Slobogin, a critical sympathiser of the movement, if we speak of 'general well-being' as a goal, TJ becomes a form of a banal, proclamatory 'happy-go-lucky' discipline. In order to follow a more consistent line of approach one ought to make clear what is meant by a therapeutic approach: is it adaptation, re-integration or perhaps autonomy?<sup>103</sup> An additional difficulty lies in determining whether and how such therapeutic effects can be attained. Human behaviour research often yields contradictory results, and it is seldom possible to decide whether it is a certain legal measure, a certain form of treatment, or perhaps some other personal and/or casual factors which determine whether an individual develops a depression, relapses into crime or attains emotional well-being, etc.<sup>104</sup> Slobogin maintains that a typical TJ article today is thought-provoking, being supported, however, by empirical research of dubious value (since, as a rule, results indicating the opposite can be quoted), and that the most important thing is not to maintain the status-quo, but open the door to insights gained from the field of psychology.<sup>105</sup>

The fact that every judge needs some knowledge of psychology in order to make informed judgments about veracity and reliability is an obvious truism; *men who think that they can handle human conflicts without recourse to psychology simply make up a crude, uncritical psychology of their own.*<sup>106</sup> It should also be self-evident that in all legal situations entailing conflict resolution one tries to investigate and assess the psycho-sociological consequences entailed by different decision alternatives. In order to correctly assess these alternatives knowledge of relevant socio-scientific and human behaviour research findings in the field is therefore necessary.

As regards procedural law, a particularly interesting TJ orientation is the one in which TJ is viewed in terms of reconciliatory incentives in civil proceedings, and as an investigatory aid in criminal proceedings. The fact that the judicial

---

102 B. Winick *The Judge's Role in Encouraging Motivation for Change* in *Judging in a Therapeutic Key*, p. 181 ff.

103 Slobogin loc. cit., p. 775. Wexler argues that the definition cannot be made too general and that each legal scholar must be able to formulate a suitable definition for his or her own legal field. See *Reflections on the Scope of Therapeutic Jurisprudence* in *Law in a Therapeutic Key*, p. 813.

104 Slobogin, loc. cit., p. 776 ff.

105 Slobogin, loc. Cit., p. 782.

106 Slobogin, loc. cit., p. 792 f, quoting Edward S. Robinson (1935).

process and its outcome may become a life issue for many private parties, and that a risk for a 'breakdown of justice' is much higher than is generally imagined should encourage judges and lawyers to create favourable conditions for constructive reconciliatory settlements, where not just the amount of monetary compensation but also the need of 'justice' (which may be manifested in the form of assumption of responsibility, making an apology, etc) is taken into consideration.<sup>107</sup> As far as criminal law is concerned new investigative strategies will come within our reach once we stop looking at defendants as impossible sources of information, believing that they will lie through their teeth in order to be acquitted if they are guilty, and assume instead that in case of suspicion of a crime there is a social conflict, and that it is in everybody's interests to resolve it.

In contrast to the foregoing it is more difficult to make criminal proceedings as such more 'therapeutic'. In principle, it is desirable to introduce certain therapeutic components into criminal proceedings, especially with regard to victims of crime. Giving crime victims a voice, compensation and protection plays an important role in the process, since it gives them the possibility of vindication and rehabilitation. Failure to provide such support entails a risk of repeat victimisation, aggravation of trauma and reinforcement of a 'victim role'. It is especially important in rape trials that the woman be treated with respect, and not become an object of contempt or disdain.

As regards the defendant, TJ-oriented criminal law practice entails many dangers and risks. One of the risks, quite common in the USA, which leads to the mitigation of sentence or constitutes the condition to the right of treatment, is that admission of guilt is rewarded to such an extent that a suspect often pleads guilty on incorrect grounds. The defendant may plead guilty in order to get a shorter sentence, to be admitted to a treatment programme, or simply because he is expected to do that by all the parties involved in the process. If even the defence attorney acts as a therapist, there is obviously a risk that questions of evidence and issues of law will be pushed into the background, and the defendant's rights may be infringed.<sup>108</sup> *A more general risk is that the principles of fair trial, as well as burden and standard of proof will play a subordinate role in relation to a psychological examination of a person's propensity for crime and the risk of recidivism.* Wexler is well aware of these dangers, as well as of the fact that the American penal system, with its plea bargaining (but also other phenomena, such as, for example, release on bail, extended sentences for defendants who give testimony and perjure themselves) provides particularly powerful arguments for a TJ approach, but he has also pointed out in a newly published article that a defence counsel can act as a 'change agent', i.e. someone

---

107 See D. Wexler *The Development of Therapeutic Jurisprudence from Theory to Practice* in *Revista Juridica U.P.R.*, Vol. 68, 1999, p. 694 f and D. Wexler, D. Stolle, B. Winick and E. Dauer in *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, California Western Law Review, Vol. 34, 1997, p. 15 ff, regarding the relationship between TJ and 'preventive law'.

108 See Berman & Feinblatt, loc. cit., p. 83ff. An interesting illustration of the above-mentioned problems is Claes Borgström's defence of Thomas Qwick, a mentally disturbed serial killer who demanded to be convicted of several crimes, and in which case the evidence consisted almost exclusively of his admissions.

who is there to help the defendant to change his life.<sup>109</sup> A good defence lawyer should employ a client-oriented counselling approach called ‘motivational interviewing’ in order to establish the social and psychological circumstances surrounding the criminal event and understand the offender situation. He or she should be well aware of the options available to the client (e.g. community service or treatment programmes), and openly discuss the advantages and disadvantages of the foregoing. In addition, the defence attorney should try to motivate the defendant to leave his criminal past behind, or to work out ways of changing his negative behaviour patterns. If the defendant admits to having committed the criminal offence he is charged with, the attorney should also try to help him to accept his responsibility for it, both for the sake of the victim and for the sake of the defender’s rehabilitation.<sup>110</sup> In order to be able to perform these functions it is important that the defence attorney’s duties and responsibilities do not end with the verdict, but continue until, for example, a conditional discharge has been granted. Such performance of the defence attorney’s duties under his mandate is often natural in the USA, and paying for his or her work after the verdict would be a desirable reform to be introduced in Sweden.

As regards objections to TJ these should also be reiterated here. The increasingly popular view that specialised knowledge is necessary for many ‘intra-relational’ criminal cases, not least those concerning sexual offences, should encourage greater specialisation of the police, judges, prosecutors and attorneys, and tighter co-operation with behavioural scientists at all the stages of the process. There is probably a lot to be gained from setting up investigatory bodies based on teamwork of jurists, social workers, doctors and psychologists, as well as problem-oriented courts using experts in their proceedings. Another thing that could be worthwhile is that specialised courts handling domestic violence cases should also handle custody proceedings, including custody of minors. At the same time, if too much importance is attached to the therapeutic dimension of the process, domestic violence and similar abuse may be looked upon as symptoms of psychosocial abnormalities rather than as serious crime – which is both questionable and risky. It should therefore be emphasised once more that *TJ does not represent ‘the ideology of treatment’, and that it should rather be regarded as a supplement to the traditional judicial process.*

## 7 Closing Remarks

TJ is an incomplete, but nevertheless extremely interesting legal ideology, which is hardly new, but nevertheless innovative. This innovativeness consists primarily in a more interdisciplinary approach to law, which means that every practitioner of law must be willing to learn how to deal with the implications of current social and human behaviour research in order to better discharge his

---

109 Wexler *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defence Lawyer*, in *St. Thomas Law Review*, Vol. 17, p. 743-774. Refer especially to p. 747.

110 *Loc. cit.*, p. 751ff.

functions as a legislator, investigator, counsel and decision maker. Unfortunately, the approach has come to be called 'therapeutic', evoking wrong associations with psychoanalysis, treatment ideology, or even New Age.<sup>111</sup> Personally, I would prefer another label<sup>112</sup> for this school of jurisprudence, but in order to summarise its approach I would like to quote Bruce Winick's views on TJ and its possibilities:

"Therapeutic jurisprudence is a school of jurisprudence within the tradition of sociological jurisprudence and legal realism. Like psychology and law and social science in law, it is an interdisciplinary and empirical approach to the study of law. Unlike these schools, but like law and economics, critical legal studies, feminist jurisprudence and critical race theory, it is normative in orientation. It calls for the application of social science theory and research to enhance law's therapeutic impact. But it recognizes that, although psychological and physical health is a desirable aim of law, it is not the only aim. When therapeutic and other normative values conflict, its contribution is to sharpen the debate, but it cannot resolve it. On the other hand, when therapeutic and other normative values converge, therapeutic jurisprudence helps to identify the path of true law reform. By providing a new lens through which to examine law, it promises to produce new insights and newly invigorated interdisciplinary approach to law that will enrich legal policy analysis and improve law's functioning and its ability to increase well-being of our society."<sup>113</sup>

---

111 Wexler's underlying reasons for the adoption of the term 'therapeutic' jurisprudence can be studied in *loc. cit.*, p. 694.

112 "Restorative justice" is too focused on the past, "preventive law" too focused on the future, "proactive" or "holistic law" too wide, "relational lawyering" or "collaborative law" too narrow as a definition (see e.g. S.Daicoff in *loc. cit.* p. 113 about the nine "vectors" of the Comprehensive law movement.).

113 B. Winick, *loc. cit.*, p. 668.