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Current Issues in Therapeutic Jurisprudence

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GUEST EDITORIAL: CURRENT ISSUES IN THERAPEUTIC JURISPRUDENCE

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On behalf of the guest editors of this special issue, leading scholars and practitioners in the therapeutic jurisprudence ('TJ') field in Australia, Europe, and the US, we congratulate QUT and the authors for a valuable contribution to the increasingly influential presence of TJ on the international stage.

TJ had its genesis in the early 1990s as a new interdisciplinary approach to mental health law in the US, but has expanded remarkably in scope, reach and influence since then. TJ sees law as a social force which inevitably gives rise to unintended consequences, which may be either beneficial or harmful (what we have come to identify as therapeutic or anti-therapeutic consequences). These consequences flow from the operation of substantive rules, legal procedures, or from the behaviour of legal actors (such as lawyers and judges). It is in this sense that we conceive of the role of the law as a 'therapeutic agent'. TJ researchers and practitioners typically make use of social science methods and data to study the extent to which a legal rule or practice affects the psychological well-being of the people it affects, and then explore ways in which anti-therapeutic consequences can be reduced, and therapeutic consequences enhanced, without breaching due process requirements. The jurisdiction with which TJ was most often associated in its earlier days tended to the that of the drug courts (in which the drug court team assists drug addicted offenders to break out of their cycle of offending by facilitating and supervising treatment programs as part of the court process itself) and the other so-called problem solving courts (more commonly referred to as 'solution focussed courts' in Australia).

But there is a growing and increasing focus on mainstreaming TJ principles and practices into all those legal institutions and jurisdictions where it can make a difference. A natural complement to this mainstreaming agenda has been the significant internationalisation of the TJ movement, as evidenced by the many international conferences dedicated to TJ themes

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and most recently, by the launching at the Arizona Summit School of Law in Phoenix, of the *International Journal of Therapeutic Jurisprudence.*[1]

In July 2017, the editors of this special issue, along with many other international TJ scholars will be convening in Prague to launch another major initiative – the *International Society of Therapeutic Jurisprudence*. This society will provide a formal, legal structure to what for three decades has been a growing, stimulating, but highly informal and amorphous movement. Among other things, the Society will seek to consolidate and assist with the coordination of the increasing number of TJ projects and endeavours worldwide. We hope it will provide some advisors and contributors to the international journal, for example, and that it will disseminate information through the recently established 'TJ in the Mainstream Blog' – a practice focussed blog edited by Victorian magistrate Pauline Spencer and boasting an 18-nation advisory group.[2]

In order for the mainstreaming process to succeed, we need to examine the governing 'legal landscapes' (legal rules and legal procedures) in mainstream courts and institutions to determine how 'TJ ready' or 'TJ friendly' they are. To that end, we began to conceptualise the principles of TJ judging in particular as a kind of 'liquid' and the operative legal structures into which we might introduce them as 'bottles'. By analysing the nature and malleability of the relevant legal landscape (the bottles) we can then make judgements about how much TJ 'liquid' can credibly and realistically be poured into them. Much work is now being done both within the US and international jurisdictions in relation to creating processes of best practice for maximising the use of TJ judging principles.

An essential future challenge will be to increase the coordination with important TJ activities occurring beyond the English-speaking world. There is, for example, a highly important and active Iberoamerican TJ association busily working in Spain, Portugal and Latin America. In fact, original TJ scholarship is now being conducted in 14 different languages.

In this special issue, we commend to you, scholarship across a diverse range of TJ related topics. Melbourne barrister and TJ scholar *Ian Freckelton* has previously conducted research into coronial processes from the perspectives of both therapeutic jurisprudence and restorative justice to identify the potential for maximising the therapeutic and public health benefits of the investigative functions of coroners' courts and minimising their counter-therapeutic potential. In his contribution to this special issue, he notes that the need to address potential counter-therapeutic deficits in the experiences of parties other than family members as and what may be done to recognise and minimise any such deficit.

Lorana Bartels from the University of Canberra, reports on research she recently conducted in relation to Hawaii's *Opportunity with Probation Enforcement* ('HOPE') program, through the lens of therapeutic jurisprudence. HOPE is a community supervision program for drug addicted offenders currently subject to community based probation orders, whose chronic history of drug abuse and offending place them at high risk of recidivism.

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[1] Arizona Summit Law School, *International Journal of Therapeutic Jurisprudence* (2015) Arizona Summit Law Review <https://www.azsummitlaw.edu/sites/default/files/tjasls_files/Brochure%20for%20IJTJ.pdf>.

[2] Pauline Spencer, 'Home' on *Therapeutic Jurisprudence in the Mainstream* (2016) <https://mainstreamtj.wordpress.com/>.

Suzanna Fay-Ramirez from the University of Queensland reports on the results of an 18-month study of a Washington State Family Treatment Court, one of a growing number of problem solving courts utilising principles of therapeutic jurisprudence and restorative justice, which cater for parents with current child protection cases and co-occurring addiction to drugs and/or alcohol. Her study examines how the court manages the potentially harmful stigma of clients being labelled as 'bad parent', 'addict' and 'offender', in interactions between the courtroom treatment team and court clients. She suggests that lessons learned from Family Treatment Court provide important consideration for mainstreaming therapeutic practice into the courtroom and the examination of interactions between court clients and courtroom personnel demonstrate how to translate stigma management from theory into practice.

Robert F Schopp, currently the Robert J Kutak Professor of Law at the University of Nebraska, points out that legal rules and procedures generally affect a variety of individual and societal interests and values. In exploring the most justified approach to defining and pursuing individual and public well-being, he suggests human dignity as one value relevant to the most justified application of police power and parens patriae interventions to individuals with mental illness.

Charlotte Glab from Milner Lawyers surveys some successful therapy-based initiatives for treating child sex offenders in Australia and internationally and considers what may constitute a best practice model based on therapeutic jurisprudence principles. She suggests a lack of understanding of the rehabilitative potential of current programs has led to an over-emphasis on punishment and denunciation as a sentencing purpose in Queensland to the detriment of rehabilitation. Her paper examines the more widespread success of initiatives in jurisdictions such as Canada, Germany and also considers then relevance of definitional and practical distinctions between those offenders who are opportunistic or remorseless (and for whom treatment is unlikely to be effective) and those who experience significant distress at their actions, wo self-identify as paedophiles but who are often unable to access effective preventative assistance due to stigma in the wider community.

Michael Perlin Professor Emeritus from New York Law School, draws on his experiences of years in trial courts and appellate courts as well as from decades of teaching and of writing books and articles about the relationship between mental disability and the criminal trial process, to offer a fascinating overview of his scholarship on the negative impact which society's views on mental disability have had on the criminal justice system. In this paper he explores how 'sanism' and 'pretextuality' have influenced the behaviour of actors within the system (including judges, jurors, prosecutors, witnesses, and defence lawyers) to create an environment of significant therapeutic deficit for defendants with a mental disability. He also proposes a potential remedy, based on a pre-requisite requirement that lawyers representing criminal defendants with mental disabilities understand the meanings and contexts of *sanism* and *pretextuality.*

Shelley Kolstad from the Queensland University of Technology reviews the book 'Sexuality, Disability, And the Law: Beyond the Last Frontier?' by Michael L Perlin and Alison J Lynch. The book includes a discussion of the alignment between the advocacy of the sexual rights of those with mental disabilities and central principles of therapeutic jurisprudence book – namely, 'dignity, voice, validation and voluntariness.'