Therapeutic Jurisprudence in the Appellate Arena—A Louisiana Jurist's Response

*Sol Gothard**

Therapeutic jurisprudence is concerned with the law's impact on emotional life and psychological well-being; it is interested not only in law reform, but also in how existing law may be most therapeutically applied.[1] Although the study of the law as a therapeutic agent may be a relatively new field,[2] the combination of common and civilian traditions of Louisiana law incorporates the concepts of therapeutic jurisprudence. In his article, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*,[3] Professor Kenneth Murchison recognizes that the Louisiana judiciary is an American creation, however, its method of interpreting law derives from the civilian tradition of Western Europe, which recognizes that decisions rendered by the judiciary have an impact on society.[4] In this Article, I will show how Louisiana jurisprudence incorporates the concepts of therapeutic jurisprudence.

In his law review article, Professor Murchison[5] reviews the theoretical framework of Louisiana jurisprudence as described by Justices Mack Barham and Albert Tate, both of whom served on the Louisiana Supreme Court during the 1970s.[6]

As summarized by Professor Murchison, Justice Barham described Louisiana civil law and jurisprudence as "a heritage" that is

---

* JD, MSW, ACSW; Fifth Circuit Court of Appeal for the State of Louisiana.

1. Marc W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439 (1998).

2. Bruce Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL., PUB. POL'Y, & L. 184 (1997). In this article, Mr. Winick notes that "Therapeutic jurisprudence has grown considerably since its inception in the early 1990s."

3. Kenneth M. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 LA. L. REV. 1 (1988).

4. *Id.* at 3.

5. At the time of the writing of the article, Mr. Murchison was a professor of law at the Louisiana State University School of Law.

6. Murchison, *supra* note 3, at 5.

"essentially a matter of technique rather than substance."[7] The main component of this technique is a rejection of the common law doctrine of stare decisis, which frees civilian judges from past decisions that do not serve present social needs.[8] While Justice Barham recognized that legislation is the primary source of law, he also recognized the legitimacy of other sources, including customs, and he argued that judicial decisions should be evaluated by their potential for producing socially desirable results.[9]

Louisiana jurisprudence, as described by Justice Tate, views the judge as the legislator's colleague, whose job it is to translate abstract legislation into solutions for specific problems.[10] The judge is to apply a functional approach that relies not on "logic alone," but also on "policy considerations of what rule is best for the community as a whole and of what rule provides the fairest solution of the present controversy."[11] To that end, while preexisting doctrine governs the vast majority of cases, the judge's role includes that of "lawmaker" in three particular settings: when the legislature fails to provide a rule; when a new legislative rule needs to be fitted into the existing legal framework; and when a "substantial change in social conditions" makes application of the "literal wording" of the legislative rule inappropriate.[12] In the civilian tradition, the judge has a duty to consider the policy implications of a decision and to render a decision that "justly resolves the particular dispute."[13] The judge's lawmaking function is necessary to keep the law "alive and current and responsive to the changing needs of society."[14]

Therapeutic jurisprudence calls for the systematic study of the therapeutic or antitherapeutic effects of the law.[15] Other things being equal, positive therapeutic effects are desired and should be a proper aim of law, and antitherapeutic effects are undesired and should be avoided or minimized.[16] In our Louisiana tradition, the effects of the law are also a factor. In a judicial consideration of the applicable law to a particular proceeding, the judge is not to decide cases "simply on the basis of the individual equities of the parties" but rather, the

---

7. *Id.* at 6.
8. *Id.*
9. *Id.* at 7.
10. *Id.*
11. *Id.* at 9.
12. *Id.*
13. *Id.* at 10.
14. *Id.*
15. Winick, *supra* note 2, at 185.
16. *Id.* at 188. Mr. Winick recognized that "other things" may rarely be equal, and there may be justification for a legal rule or practice found to produce antitherapeutic consequences.

judge's function is to select or to create a rule "of general application to other interests to be similarly situated in the future."[17] Surely, this consideration encompasses the ideals of considering the therapeutic effects of the decisions rendered.

Having recognized that there can be both therapeutic and anti-therapeutic effects of judicial decisions, I would like to offer this consideration concerning the use of therapeutic jurisprudence in the appellate courts. In his Article, *Therapeutic Jurisprudence in the Appellate Arena*, David Wexler asks, "Does the ability to issue advisory opinions enhance a court's ability to create 'therapeutic' doctrines?"[18] As a general rule, courts are not allowed to issue advisory opinions and there are strong reasons for such a prohibition.

First, we must be mindful that the framers of the Constitution built into the tripartite federal government a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.[19] It has long been held that Congress may not execute the laws or exercise judicial power to revise final judgments rendered by the courts.[20] The judicial power to decide cases and controversies does not include a provision for purely advisory opinions and it does not permit the federal courts to resolve nonjusticiable questions.[21] These restrictions on judicial activities are necessary "to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches."[22]

From this tradition the requirement of a "justiciable controversy" has evolved. A justiciable controversy connotes, in the present sense, an existing, actual, and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute that involves the legal relations of parties who have real adverse interests upon which the judgment of the court may effectively operate through a decree of a conclusive character.[23] It is a real and substantial controversy to which the law provides specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be given a hypothetical set of facts.[24]

---

17. Murchison, *supra* note 3, at 10.

18. David B. Wexler, *Therapeutic Jurisprudence in the Appellate Arena*, 24 SEATTLE U. L. REV. 217 (2000).

19. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

20. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Bowsher v. Synar, 478 U.S. 714 (1986).

21. *See* Clinton v. Jones, 520 U.S. 681 (1997).

22. Morrison v. Olson, 487 U.S. 654, 677 (1988) (quoting *Buckley*, 424 U.S. at 123).

23. Abbott v. Parker, 249 So. 2d 908 (La. 1971).

24. Couvillion v. James Pest Control, Inc., 729 So. 2d 172 (La. 1999).

This concept prevents the courts from rendering advisory opinions. In federal law, the restriction is rooted in the "cases and controversies" requirement in Article III of the United States Constitution. In Louisiana law, it arises from the Louisiana Code of Civil Procedure and our jurisprudence.[25]

Therapeutic Jurisprudence has been accused of being paternalistic,[26] possibly because it promotes the judicial powers beyond those envisioned by the framers of the Constitution. While most jurists would agree that the practice of rendering decisions with a positive effect on society is desirable, we must be mindful that these decisions be rendered in the context of real-time controversies. The grant of power to the judiciary does not, and should not, include the ability to influence social trends before those trends occur. It is the job of the judiciary to respond to social change within the perimeters of the law as it exists at that time, not to initiate or prevent social change. Thus, the ban on advisory opinions provides a necessary check on the judiciary, preventing the concept of therapeutic jurisprudence from evolving into a paternalistic force in violation of the Constitution.

25. Cat's Meow, Inc. v. City of New Orleans, 720 So. 2d 1186, 1195 n.15 (La. 1998).

26. Dennis P. Stolle et al., *Integrating Preventative Law and Therapeutic Jurisprudence*, 34 CAL. W. L. REV. 15 (1991).