Getting and Giving: What Therapeutic Jurisprudence and Get From and Give to Positive Criminology

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GETTING AND GIVING: WHAT THERAPEUTIC JURISPRUDENCE CAN GET FROM AND GIVE TO POSITIVE CRIMINOLOGY

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I. INTRODUCTION

Therapeutic jurisprudence (“TJ”) is a field of inquiry that studies the law’s impact on one’s psychological well-being. TJ is an interdisciplinary approach, often described as “optimistic,”¹ that seeks to employ insights from the behavioral sciences—most notably from psychology, criminology, and social work—to humanize the law and its administration. TJ originated in the area of mental health law, but it has since been applied to virtually all areas of the law—ranging from criminal law to trusts and estates.² The area where TJ is most active, however, is in criminal law and procedure.³ This Article focuses on TJ’s intersection with the criminal law.

When TJ speaks of “the law” and its potential therapeutic or anti-therapeutic impact, TJ’s interest is in the law in action, not simply in the written law, and TJ examines both the legal landscape (the pertinent legal rules, like statutes, and the pertinent legal processes, like hearings) as well as the practices

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and techniques (the roles and behaviors) of legal actors working in a legal setting (like judges, lawyers, and others such as therapists and criminologists). In recent TJ work, the legal landscape is sometimes referred to as the legal structure or the “bottles,” and the practices and techniques are referred to as the “liquid.” Especially with the development of recommended TJ practices and techniques—with the “liquid”—TJ scholarship looks to the behavioral sciences, and notably to criminology, for guidance. Moreover, the literature and scholarship that TJ scholars reference turns out to be remarkably (but not at all surprisingly) consistent with the new school of “Positive Criminology.” “Positive Criminology is oriented to human strengths, resilience, and positive encounters that can assist individuals in abstaining from crime and deviant behaviors.”

The TJ literature, for example, eschews coercion and paternalism and, when referring to drug treatment courts or mental health courts or the like, prefers the term “solution-focused” courts rather than “problem-solving” courts. This preference underscores the central role played by the client (facilitated by the court) in tackling the underlying issue; it is the client through his or her active participation, and not the court, that is in charge of “solving” the problem. In such courts and in other settings, lawyers versed in TJ might counsel a client about possible ways to convert a current crisis (e.g., an arrest and legal charge) into a life changing opportunity. Such lawyers can help clients garner hope—an important ingredient in positive change and also something that can indicate the lawyer’s “belief” in the client and the client’s progress. The relevant literature similarly focuses on the importance of courts noting an offender’s strengths, praising an offender’s law-abiding behav-

4 Rehabilitating Lawyers, supra note 3, at 11-20.
7 Id.
9 Id.
10 Rehabilitating Lawyers, supra note 3, at 21-22 (discussing approach of lawyer John McShane).
11 Id. at 24 (discussing work of social worker Michael Clark).
12 Id. at 181-83 (discussing pleading filed by defense attorney Joel Parris).
ior, condemning an offender’s acts but not the offender himself,\textsuperscript{13} and engaging in judicial behavior meant to increase an incarcerated offender’s “readiness for rehabilitation.”\textsuperscript{14}

Teen Courts—where fellow teenage peers judge teenage offenders facing minor charges—demonstrate how courts perform many positive, rehabilitative, and preventive functions. For instance, a sentence in Teen Court typically requires the teenage offender to serve as a juror in at least one future case; this serves as a type of reintegration ceremony.\textsuperscript{15} As a juror, the teenager will be mingling with other jurors who are volunteers.\textsuperscript{16} Even for the purely volunteer jurors, the process may serve as a type of preventive “inoculation,” reducing the risk that they themselves will become involved in future delinquent behavior.\textsuperscript{17}

As a further example, recent scholarship has focused on how a criminal settlement conference (where the legal landscape recognizes such a procedure) can be filled with TJ liquid by a judicial mediator actively listening to the defendant, the victim, and to their respective families.\textsuperscript{18} Moreover, during a criminal settlement conference, a judge can facilitate the development of empathy by employing a “perspective-taking” technique, which induces each participant to better appreciate other opinions regarding the appropriate sentence to be imposed.\textsuperscript{19}

There is, of course, much more in TJ scholarship that serves as examples. But the given examples, which are fully representative of TJ criminal law scholarship in general, sufficiently establish TJ’s complete compatibility with the newly-defined school of Positive Criminology\textsuperscript{20}—a school that groups together various criminological strands that, because of the field’s traditional focus on criminogenic factors, until now, have not achieved center stage in criminological circles. Now, however, Positive Criminology, and its express focus on the relevance and importance of weaving together “positive strands,”

\begin{itemize}
  \item \textsuperscript{13} David B. Wexler, \textit{Robes and Rehabilitation: How Courts Can Help Offenders "Make Good"}, 38 CT. REV. 18, 21-23 (2001).
  \item \textsuperscript{14} David B. Wexler, Therapeutic Jurisprudence and Readiness for Rehabilitation, 8 FLA. COASTAL L. REV. 111, 112-13 (2006).
  \item \textsuperscript{15} \textit{Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts}, supra note 3, at 49-54, 194-95.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id. at 194-99.
  \item \textsuperscript{18} Wexler, supra note 5.
  \item \textsuperscript{19} David B. Wexler & Michael D. Jones, Employing the ‘Last Best Offer’ Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation, 6 PHOENIX LAW REVIEW (forthcoming 2013).
  \item \textsuperscript{20} See Natti Ronel & Ety Elisha, A Different Perspective: Introducing Positive Criminology, 55 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 305, 304-07 (2011).
\end{itemize}
will provide an especially valuable and easy-to-locate bank of insights from which TJ can withdraw.

II. GETTING

Let me provide a concrete example of how the new explicit literature regarding Positive Criminology now leads me to add an interesting additional element to a previous proposal. That proposal related to lawyers associated with Lawyer Assistance Programs (“LAPs”), programs that assist lawyers having problems with drugs, alcohol, and mental illness.\(^{21}\) In the United States, LAPs exist in all fifty states, and help is provided—confidentially—largely from lawyer volunteers who are themselves in long-term recovery for various impairing conditions.\(^{22}\) The suggestion of the previous proposal is that these long-term recovery lawyers should, in addition to serving as peer counselors in LAPs, consider expanding their law practices to include client representation in TJ-related legal areas.\(^{23}\) These lawyers could, for example, serve as counsel or second-chair counsel representing clients in drug treatment court, dependency drug court, juvenile drug court, mental health court, civil commitment court, or the like (veterans court would be an important now-emerging American example):

“[G]iven the clear link of alcoholism and addiction with criminal and juvenile issues, the strengths and skills of [LAP] lawyers will likely shine through . . . in the practice of those areas. . . . [Such lawyers] will immediately achieve an added credibility with courts and clients. . . . [In addition] they will better understand addiction, alcoholism, mental illness; they will understand family dynamics, triggers and coping mechanisms, and attempts at deception; they will have knowledge about treatments, programs, services, and much more. And by bringing TJ into their law practices, they will be fulfilling the twelfth step of 12-step programs: to ‘practice these principles in all of our affairs.’”\(^{24}\)

The proposal of my previous LAP article was that LAP lawyers in long-term recovery had a special credibility, a special knowledge base, and a special strength to add to their law practice toolkits. Moreover, engaging in this sort of

\(^{21}\) David B. Wexler, Lawyer-Assistance-Program Attorneys and the Practice of Therapeutic Jurisprudence, 47 Cr. Rev. 64, 64 (2011).

\(^{22}\) Id.

\(^{23}\) Id. at 65-66.

\(^{24}\) Id. at 65.
work, whether compensated or otherwise, could be rewarding and enhance professional satisfaction.\textsuperscript{25}

What the explicit Positive Criminology scholarship adds to this mix is that the clients may respond better to LAP lawyers who are volunteers and whose volunteer status is known by the clients.\textsuperscript{26} In other words, volunteering can have a “salutogenic” effect on both the giver and the recipient.\textsuperscript{27} Recipients who are the “target” audience of Positive Criminology—a field in this particular respect different from Positive Psychology\textsuperscript{28}—are “engaged in, at risk for, or victims of deviant or criminal activities,”\textsuperscript{29} and may especially benefit from perceived goodness and altruism. Such persons often perceive the world as a “battleground for survival”; exposure to persons (like LAP lawyer volunteers) who “[g]ive without demanding anything in return” and who receive “personal satisfaction that is not material,”\textsuperscript{30} can help reverse an egocentric worldview belonging to those who have often experienced very challenging and adverse backgrounds.\textsuperscript{31}

With this new insight from Positive Criminology, LAP lawyers might be told not only of the added value that their voluntary legal services contribute to clients confronting legal issues relating to drugs, alcohol, and mental illness, but also of how it would be helpful for them, when appropriate, to mention their volunteer status to clients. Indeed, the new scholarship may have even broader implications for providing \textit{pro bono} legal (and other) services, and for the target audiences who may profit most from experiencing perceived altruism.

III. GIVING

It surely would not be psychologically sensitive or therapeutic to receive and not give back, and TJ scholarship is thus enthusiastically willing to give as well as to receive. TJ “receives” from Positive Criminology important insights that are used principally in crafting therapeutic practices and techniques—“liq-

\begin{footnotesize}
\begin{enumerate}
\item Ronel & Elisha, \textit{supra} note 20, at 310. \textit{See also}, Ronel \textit{supra} note 6, at 345.
\item \textit{See} Ronel & Elisha, \textit{supra} note 20, at 310.
\item \textit{See generally} Martin E. P. Seligman & Mihaly Csikszentmihalyi, \textit{Positive Psychology}, 55 \textit{AM. PSYCHOLOGIST} 5 (2000) (discussing the expansion of psychology’s focus from repairing damage to general improvement of quality of life in order for everyone to thrive).
\item Ronel, \textit{supra} note 6, at 340-41.
\item Ronel & Elisha, \textit{supra} note 20, at 310.
\item Ronel, \textit{supra} note 6, at 339-40.
\end{enumerate}
\end{footnotesize}
gests TJ can offer an assessment of legal structures—“bottles”—that vary from what we call “TJ-friendly” to “TJ-unfriendly,” with these terms relating to how receptive the legal stages and processes are to TJ practices.32

In other words, positive criminologists need to be savvy not only regarding powerful positive rehabilitative techniques, but they also need to know about the law, its legal structures, and how receptive the law is to promoting the practice of clinical criminologists and other rehabilitative professionals. Simplicity stated, some “bottles” are better than others in permitting positive criminologists to ply their trade. It would be unfortunate for criminology to research and develop positive practices only to find that such practices cannot comfortably be used in legal settings where criminologists are typically involved. This Part, then, briefly reviews some legal “bottles” and comments on their receptivity (or lack of) to the employing of relevant Positive Criminology principles.

Let us start at the beginning: with the area of “diversion” from the criminal process, which is a power typically in the hands of prosecutors.33 Obviously, if a prosecutor decides to offer an offender a diversion program, the prosecutor wants the offender to succeed. We know from TJ scholarship and from Positive Criminology that certain prosecutorial behavior would be helpful in this regard. Such prosecutorial behavior includes:

1. Communicating to the person that the government has a diversion program for promising candidates, and that the person seems to be a prime candidate to complete the program, avoid a criminal proceeding, and thereafter lead a successful life in society. The communication should of course be clear and should avoid jargon and legalese.

2. If the program is accepted and successfully completed, the prosecutor should notify and commend the person for the success.34

Conceivably, criminologists could be involved in drafting proposed communication that meets the criteria noted above. Criminologists might even offer a training of prosecutors relating to diversion (and other stages). In the United States, many states’ laws of diversion are likely flexible enough to permit these practices. But in the federal system, where diversion is governed by a Washington-written manual,35 the diversion “bottle” is rigid and impermeable so that TJ liquid cannot easily be poured in. Thus, when diversion is offered or suc-

32 See Wexler, supra note 5.


34 For the diversion discussion, see id. at 366-73.

35 Id. at 371-76 (referencing the United States Attorney’s Manual).
cessfully completed, there is a specific form that is sent out.\(^{36}\) The form is full of legal jargon and is not easily readable.

The second communication, which is sent on successful completion of the program, mentions the end of the case but does not have any congratulatory remarks.\(^{37}\) Further, a separate less-formal cover letter seems to be an unavailable option in either offering or successfully terminating the diversion program. In the case of federal defendants who are not native English speakers (such as in the federal district of Puerto Rico, where the principal language is Spanish), a form or a cover letter translated into the recipient’s language also seems impermissible. The implications of this federal “bottle” for the practice of principles of Positive Criminology are clear—and are clearly negative.

Another “bottle” is the criminal settlement conference, also discussed earlier in this Article. Where it exists, the law basically allows for judicial mediation in the hopes of reaching an early agreed-upon resolution of the case. In that situation, the stage could include many principles and procedures suggested by Positive Criminology (and also by Positive Victimology\(^{38}\)). For example, it could include a respectful discussion, moderated by the judge, between the defendant, the victim, and the families of each.\(^{39}\) In many jurisdictions, although the “bottle” may exist and in principle may be conducted in the manner just described, the daily practice may be quite different—e.g., a discussion between a prosecutor and defense counsel in the presence of the judge. But if positive criminologists are aware of the “TJ-friendliness” of the bottle, they might play some role in suggesting a more robust conference. As a side note, it is worth mentioning that in the federal criminal system, such criminologists would be disenfranchised—just as they are in the federal diversion program—because the Federal Rules of Criminal Procedure bar a judge from having any role in plea discussions.\(^{40}\)

One other early-stage relates to bail before and during the trial. Typically, if one is denied bail and later, after conviction, is sentenced to confinement, the imposed sentence will be reduced by the amount of pre-trial jail confinement. But an important twist here is that if the defendant is granted bail that provides for release only to a secure rehabilitation facility, in some jurisdictions the credit for pre-sentence confinement in the rehabilitation facility will not be

\(^{36}\) See id. at 375-76, app. A, at 378, app. B, at 381.

\(^{37}\) See id. at 372-76.


\(^{39}\) See Michael D. Jones, Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners, 5 PHOENIX LAW REVIEW 753, 758 (2012).

\(^{40}\) Fed. R. Crim. P. 11(c).
awarded. Credit may be available, in other words, only for pre-sentence jail confinement. Obviously, defendants in such situations will often decline transfer to a rehabilitation facility and will instead remain, untreated, in jail. With such a TJ-unfriendly bottle, treating criminologists working in the rehabilitation facility will not be able to engage such persons. Knowing of the legal structure, however, may lead them to lobby for changing the law, or at least to underscore the importance of setting up services in the jail to reach persons who have been denied bail or who have refused it.

Let me provide a final example, this time being a bottle that comes at the end of the process: supervised conditional release following a period of incarceration. In the United States federal system, discretionary parole release (early release by virtue of a parole board decision) has been abolished, and in its place is a system of supervised release in the community. But the length of the term of supervised release is imposed at the time of the imposition of sentence, as are the conditions of release.

This legal landscape saps from an offender the process of motivational strength and does nothing to encourage a “future-orientation”: no amount of pro-social behavior and program participation will lead to the possibility of early release (except perhaps through the unrelated and less consequential system of “good time” credits, which are not discussed in this Article). At the time of sentence imposition, the offender will know when he or she will be conditionally released, and under what conditions. The law itself provides no incentive for the offender to think through the ins and outs of life after incarceration—the do’s and do not’s have already been stated when the sentence was imposed. The law in no way tries to instill in an offender hope and optimism—principles that are so important to TJ and to Positive Criminology. Criminologists and other professionals working in prisons governed by that legal landscape, therefore, will assumedly face persons likely less motivated than their counterparts in jurisdictions having more TJ-friendly conditional release structures.

IV. CONCLUSION

Therapeutic jurisprudence and Positive Criminology should develop a robust symbiotic relationship. The fit between the two perspectives seems virtually perfect. Positive Criminology can be a major source of inspiration for the dynamic development of well-grounded TJ practices and techniques. And a

\[41\] Wexler, supra note 33, at 364-65.
\[42\] Id.
\[43\] Id. at 365.
\[44\] See id.
nuanced understanding by criminologists of how the law (its rules and procedures) encourages or stifles criminological and therapeutic work should be of professional interest. Where the law is potentially favorable, criminologists should work to suggest implementation of the existing law in a more robust way. Where the law works to stifle criminologists, they should play a role in advocating for appropriate legal reform. And where the law’s impact is uncertain or unclear, criminologists should expand their research agendas to ascertain the therapeutic or anti-therapeutic impact of the law in practice. In any case, the relationship between TJ and Positive Criminology should surely result in a win-win situation.