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

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Therapeutic jurisprudence (TJ) is a field of inquiry that studies the law’s impact on psychological well-being. It is an interdisciplinary approach, often described as “optimistic”, that seeks to employ insights from the behavioral sciences—most notably psychology, criminology, and social work, to humanize the law and its administration. TJ originated in the area of mental health law but has since been applied to virtually all areas of the law, ranging from criminal law to trusts and estates. The major activity area, however, as well as the subject of the present paper, is in criminal law and procedure.

When TJ speaks of “the law” and its potential therapeutic or anti-therapeutic impact, its interest is in the law in action, not simply the written law on the books, and it examines both the legal landscape (the pertinent legal rules, like statutes, and the pertinent legal processes, like hearings) as well as the practices and techniques (the roles and behaviors) of legal actors, such as judges, lawyers, and others, such as therapists and criminologists), working in a legal setting.

In recent TJ work, the legal landscape is sometimes referred to as the legal structure or the “bottles”, and the practices and techniques 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 look to turns out to be remarkably (but not at all surprisingly) consistent with the new school of “positive criminology,” which 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, in speaking of drug treatment courts and mental health courts and the like, prefers the term “solution-focused” courts.

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There is also a valuable TJ listserv that can be joined by sending a blank email to tjlist+subscribe@googlegroups.com


5 Rehabilitating Lawyers, pp.11-20.


instead of “problem-solving” courts, underscoring 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, that is in charge of “solving” the problem, not the court.\textsuperscript{8} In such courts and in other settings, lawyers versed in TJ might counsel a client about how he or she might convert a current crisis (e.g., an arrest and legal charge) into an opportunity to change one’s life.\textsuperscript{9} Such lawyers can help clients marshall hope”, an important ingredient in positive change\textsuperscript{10}, and can indicate in concrete ways how the lawyer might “believe” in the client and the client’s progress.\textsuperscript{11} The relevant literature similarly focuses on the importance of courts noting offender strengths, praising law-abiding behavior, condemning acts but not the actors\textsuperscript{12}, and engaging in judicial behavior that should increase an incarcerated offender’s “readiness for rehabilitation”.\textsuperscript{13}

Work on “teen courts”, where teens facing minor charges are judged by true peers—other teens—explains how such courts perform many positive, rehabilitative, and preventive functions. For instance, a sentence in teen court typically requires the teen to serve as a juror in at least one future case, thus serving as a type of reintegration ceremony. As a juror, that teen will be mingling with other jurors who are volunteers from local middle or secondary schools. Even for those other, purely volunteer jurors, the process may serve as a type of preventive “inoculation”, reducing the risk that they will themselves be involved in future delinquent behavior.\textsuperscript{14}

As a further example, recent writing focuses 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{15}; moreover, the judge can facilitate the development of empathy by employing a “perspective-taking” technique, inducing each participant to better appreciate other expressed opinions regarding the appropriate sentence to be imposed.\textsuperscript{16}

There is, of course, much, much more in TJ writing that can serve as examples. But the given examples, fully representative of TJ criminal law scholarship generally, seem sufficient to establish TJ’s complete compatibility with the newly-defined school of “positive criminology”.

\textsuperscript{9} Supra note 4. Rehabilitating Lawyers, p.21 discussing approach of lawyer John Mcshane.
\textsuperscript{10} Supra note 4. Rehabilitating Lawyers, p.24 discussing work of social worker Michael Clark.
\textsuperscript{11} Supra note 4. Rehabilitating Lawyers, p.181 discussing pleading filed by defense attorney Joel Parris.
a school that groups together various criminological strands that, because of the field’s
traditional prevailing focus on criminogenic factors, have not until now received center stage in
criminological circles. Now, however, positive criminology, with an express focus on the
relevance and importance of weaving together “positive” strands, will provide an especially
valuable and easy-to-locate vineyard of insights from which TJ can draw.

GETTING

Let me provide a concrete example of how the new explicit literature of positive criminology
would now lead me to add an interesting additional element to a previous proposal. That
proposal related to lawyers associated with “lawyer assistance programs (LAP),” programs to
assist lawyers having problems with drugs, alcohol, and mental illness. In the United States, LAP
programs exist in all states, and help comes —confidentially—largely from lawyer volunteers,
themselves in long-term recovery from various impairing conditions. The suggestion of the
earlier piece is that these long-term recovery lawyers should, in addition to serving as peer
counselors in LAP programs, consider expanding their law practices to include some client
representation in TJ-related legal areas. They 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, and 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; 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”

The proposal of my LAP article, then, was that these 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 work, whether compensated or otherwise, should be
rewarding and should enhance professional satisfaction.

What the explicit positive criminology literature adds to this mix is that the clients themselves
may respond better to LAP lawyers who are volunteers and whose volunteer status is known to
the clients. In other words, volunteering can have a “salutogenic” effect on both giver and

17 David B. Wexler, Lawyer-Assistance-Program Attorneys and the Practice of Therapeutic Jurisprudence, 47 Court
18 David B. Wexler, Lawyer-Assistance-Program Attorneys and the Practice of Therapeutic Jurisprudence, 47 Court
19 Cf. Deborah Chase & Peggy Hora, The Best Seat in the House: The Court Assignment and Judicial Satisfaction,
47 Family Court Review 209 (2009).
20 Natti Ronel and Ety Elisha, A Different Perspective: Introducing Positive Criminology, 55 Intl. journal of
offender therapy and comparative criminology 305, 310 (2011). See also, Natti Ronel supra note 7 p. 345.
recipient. Recipients who are the “target audience” of positive criminology—a field in this particular respect different from positive psychology—are “engaged in, at risk for, or victims of deviant or criminal activities” 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) “giving without demanding anything in return,” receiving “personal satisfaction that is not material,” can help reverse an egocentric worldview of those who have often experienced very challenging and adverse backgrounds.

With this new insight from positive criminology, then, LAP lawyers might be told of the added value regarding their performing voluntary legal services for clients confronting legal issues relating to drugs, alcohol, and mental illness—and of how it would be helpful for them, when and where appropriate, to mention their volunteer status to clients. Indeed, the new literature may have even broader implications regarding the providing of pro bono legal (and other) services and the target audiences who may most profit from experiencing perceived altruism.

GIVING

It surely wouldn’t be psychologically sensitive and 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 used principally in crafting therapeutic practices and techniques—such as how LAP lawyers may be helpful in volunteering their services and exposing clients to a service atmosphere plentiful in perceived altruism. What, in turn, does TJ have to “offer” positive criminology? I suggest TJ can offer an assessment of legal structures—that vary from what we call “TJ-friendly” to “TJ-unfriendly”, those terms relating to how receptive those legal stages and processes are to being filled with TJ practices.

In other words, positive criminologists need to be savvy not only regarding powerful positive rehabilitative techniques; they need to know something, too, about the law and legal structures and about how receptive the law is to promoting the practice of clinical criminologists and other rehabilitative professionals. Simply stated, some “bottles” are simply better than others in terms of permitting positive criminologists to ply their trade. It would surely be unfortunate for criminology to research and develop positive practices only to find that such practices cannot comfortably be used in legal settings in which criminologists are typically involved. This section, then, will briefly review some legal “bottles” and comment on their receptivity (or not) to the employing of relevant positive criminological principles.

Let’s begin at the beginning: with the area of “diversion” from the criminal process, a power typically in the hands of prosecutors. Obviously, if a prosecutor decides to offer an offender a program of diversion, the prosecutor would want it to succeed. We know from TJ literature and

22 Natti Ronel supra note 7 p. 340.
23 Natti Ronel and Ety Elisha supra note 20, p.310.
24 Natti Ronel supra note 7 p. 341.
25 Supra note 6.
26 Supra note 6.
from positive criminology that certain prosecutorial behavior would be helpful in this regard, such as:

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.27

Conceivably, criminologists could be involved in drafting proposed letters meeting the criteria noted in 1 and 2 above and might even offer a training of prosecutors relating to diversion (and other stages). In the United States, in many states the law of diversion is likely flexible enough to permit these practices. But in the federal system, where diversion is governed by a Manual written in Washington, the diversion “bottle” is rigid and impermeable so that TJ liquid can’t easily be poured in. Thus, when diversion is offered or successfully completed, there is a specific Manual form that is to be sent out. It is full of legal jargon and is not easily readable.

The second letter (sent on successful completion of the program) mentions the end of the case but does not have any congratulatory remarks, and 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 translated form or a cover letter written in the recipient’s language also seems impermissible. The implications of this federal “bottle” for the practice of principles of positive criminology are clear—and clearly negative.

Another “bottle” is the criminal settlement conference, discussed in an earlier section of this paper. Where it exists, the law basically allows for judicial mediation in the hope 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 positive victimology): a respectful discussion, moderated by the judge, involving defendant, victim, the families of each.28 In many jurisdictions, although the “bottle” may exist and in principle be amenable to being conducted in the manner just described, the daily practice may be quite different—e.g., just a discussion by 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 an aside, I should mention that in the federal criminal system, such criminologists would be disenfranchised --just as they are in the federal diversion program—for the federal rules of criminal procedure bar the judge from having any role in plea discussions.29

28 Supra note 14.
29 Supra note 16.
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, but not to go home but only to go to a secure rehabilitation facility, in some jurisdictions the credit for pre-sentence confinement will not be awarded. Credit may be available, in other words, only for pre-sentence jail stays.\(^{30}\) 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 as clients. Knowing of the legal structure, however, may lead them to lobby to change 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 a bottle that comes at the end of the process: supervised conditional release following a period of incarceration. In the US 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 \textit{imposition of sentence}, as are the conditions of release.\(^{31}\)

This legal landscape saps 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, not to be discussed here). At the time of sentence imposition, the incarcerated person will know when s/he will be conditionally released, and under what conditions. There is no incentive provided by the law itself for the incarcerated person to think through the ins and outs of life after incarceration—the do’s and don’ts have already been stated when the sentence was imposed. The law in no way tries to instill hope and optimism, principles so important to TJ and to positive criminology. Criminologists and other professionals working in prisons governed by that legal landscape, therefore, will assumedly face clients less motivated than might be client counterparts in jurisdictions with more TJ-friendly conditional release structures.

CONCLUSION

Therapeutic jurisprudence and positive criminology should surely develop a robust symbiotic relationship. The fit between the two perspectives seems virtually perfect. Positive criminology work can be a major source of inspiration for the dynamic development of well-grounded TJ practices and techniques. And a nuanced understanding by criminologists of how the law itself (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 their work, they should play a role in advocating for appropriate law reform. And where the law’s impact is uncertain or unclear, they should expand their research agendas to ascertain the

\(^{30}\) \textit{Supra} note 6.

\(^{31}\) \textit{Supra} note 6.
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.