



Therapeutic Jurisprudence

BY WILLIAM G. SCHMA

Take this simple quiz to grasp how Therapeutic Jurisprudence (TJ) may affect you. When a new client enters your office, or the next case is called in your courtroom, what presents itself to you: a legal argument? a person? Are you inclined to seek out and strategically arrange or analyze adversarial positions in the questions you ask and story you elicit, or do you look for broken relationships and conceptualize ways to mend them? What do you answer to yourself when you ask, what can the law achieve in this case? Is it a victory, or perhaps peace and healing? Do you imagine a mix of these?

Fast Facts

Therapeutic Jurisprudence is “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.”

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Recognizing law as one of the healing arts

TJ speaks to these issues, and it does so with energy and a certain urgency. TJ, normally described as a school of legal thought, is equally a matter of legacy. It is a timely guide to the advice we provide clients, the laws we pass, the decisions we render, and the stories we tell to those future stewards of the law whom we mentor and mold.

Ours is a highly process-oriented society and legal system. Courts, in particular, went on a process binge in the 1980s and 1990s in response to overwhelming, incapacitating case loads, mostly generated by the so-called “drug crisis.” Law firms followed suit, and mechanization became the rule. Moreover, individual rights are highly prized in our traditions. We have refined due process and the adversarial system to a high gloss in order to preserve them.

These achievements, it now appears, come at some cost. Lawyers suffer seemingly unrelenting, if uninformed, public criticism. The law and lawyers have experienced a certain dissociation from feeling, a disconnect between law and personal lives and from the persons for whom the law exists, including lawyers. They experience high rates of alcoholism and mental illnesses. They and society in general exist in what author and legal scholar Deborah Tannen describes as an “argument culture,” or a “culture of critique” characterized by artifice, device, and debate, rather than honest discourse and cooperative truth seeking.¹ This culture takes its toll on both person and process.

The plight is captured in a perceptive cartoon in which one lawyer says to another: “I consider myself a passionate man, but of course a lawyer first.” Regrettably, we have been trained and molded in this bifurcated personality. We not only accept, but rely on it.

Ultimately TJ asks whether this picture is now seriously out of balance, whether this state of affairs is desirable, whether it is the tradition we wish to pass on. First described in 1987 by Professor David Wexler, and subsequently refined by him and Professor Bruce Winick, TJ is defined by one author 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.”² It is an interdisciplinary study, which is not a body of knowledge, but rather describes a method by which to analyze, learn about, and act out the law. TJ is often analogized to a “lens” with which to evaluate laws, legal relations, regulations, and the roles and actions of legal actors including lawyers, corrections officials, administrators, legislators, and judges. It does not dictate a particular action or result, and its proponents emphasize that TJ never trumps due process.

TJ has found an eager reception due to increasing concerns about how we practice law and justice, both inside and outside the Bar.³ Moreover, it is apparent that the actions we take as legal practitioners, like it or not, do have psychological and physical health consequences for us and those we impact. Some writers describe a “jurigenic” effect comparable to the “iatrogenic” effect caused by behaviors of medical personnel. That is, what we say and do in law, to clients and to litigants can induce physical and psychological re-

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sponses in them. If an impact is inevitable, we are obligated to those we serve to know of it, seek to avoid it if negative or at least minimize it, and prevent its imposition by another.

“Health,” Winick argues, “is a value that law should seek to foster.” He adds, “If those involved in law-making, in law-applying, and in law-related counseling begin to see themselves as therapeutic agents, they can enhance considerably the potential of law as a helping profession.” Lawyers should seek to apply an ethic of care in their practices, and we should teach this to subsequent generations.

Some cautious lawyers will balk. Lawyers and judges do not wish to think of themselves as social workers. Some may object that this behavior is not the province of the legal system or the lawyer. On the other hand, it is fact that 80–90 percent of the cases in most courts present with social problems. This must require minimally that those who advise, guide, and supervise these persons be aware of all their needs and address them properly, through access to available community resources if appropriate. It must mean that competent legal practicing demands an ethic of care for the person as well as the legal problem. Many legal problems remain unresolved because the personal issues that are intertwined with them are not addressed. The most technically professional work, unraveled by unmet needs of the client is wasteful and inappropriate.

The principles of TJ arise from respect for the individual, and they are consistent with mainstream attitudes and principles. Law has traditionally, with medicine and ministry, been considered one of the healing arts. Former Chief Justice Elizabeth Weaver reflected this heritage in 1999 when, in an address at the annual Michigan judicial conference she urged that, “We must deliver justice in ways that are suitable to the public we serve.” In an early examination of the implications of ADR, Richard C. Reuben noted that the process provided a therapeutic approach that wrested control of the case from lawyers, provided an outlet for the emotional experience of the client, and vested power in him or her, and in so

doing provided a cleansing process leading to better long term conflict resolution.⁴

The Trial Court Performance Standards proposed by the Bureau of Justice Assistance, and under consideration by the individual states, refer to “integrity” in trial court behavior as something more than a matter of issuing lawful orders; the court must also attend “to the results or consequences of its orders.” Standard 3.5 is explicit. “The trial court takes appropriate responsibility for the enforcement of its orders” and it adds, “No court should be unaware of or unresponsive to realities that cause its orders to be ignored.” Judges, lawyers, corrections officials—all those who participate in the court system—should behave, as author John Braithwaite has said, with “a holistic grasp of the human consequences for survivors of legal conflict.”

In 2000, the Conference of Chief Justices and the Conference of State Court Administrators joined the discussion with joint resolutions “In Support of Problem-Solving Courts” with special calendars “to utilize the principles of therapeutic jurisprudence.” The findings of the Task Force that proposed the resolution are instructive, including:

- The public and other branches of government are looking to courts to address certain complex social issues and problems . . . not most effectively addressed by the traditional legal process.
- A focus on remedies is required to address these issues and problems in addition to the determination of fact and issues of law.
- There are principles and methods grounded in therapeutic jurisprudence . . . (which) advance the application of the trial court performance standards and the public trust and confidence initiative.

Finally, the Model Rules of Professional Conduct, Rule 2.1 Advisor, anticipate this interdisciplinary, holistic behavior by lawyers. “In rendering advice, a lawyer may refer not only to law but to

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other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”

Legal practice informed by therapeutic jurisprudence is already under way, nationally and in Michigan. Principles of therapeutic jurisprudence are used explicitly by lawyers with national practices, such as John McShane of Texas and Richard Halpert of Kalamazoo.⁵ Recently, the Fetzer Institute in Kalamazoo established an International Centre for Healing and the Law to explore and advance notions associated with the practice of law as a healing agent. Problem solving court systems are incorporating TJ principles into their calendars with the introduction of drug treatment courts, re-entry courts, mental health courts, domestic violence courts, community courts, and facilitative mediation. Collaborative law is widely practiced by California domestic relations lawyers, and balanced and restorative justice principles are being incorporated into community dispute resolution centers, juvenile courts, and corrections systems.

TJ has introduced a significant tension into current legal literature and law-related practice. It advances ideas and suggests behaviors that many current legal practitioners have not been trained to appreciate. But a wellspring of creative thought and beneficial activity is emerging from that tension. With it our legal generation will fashion its stories and traditions.

Peter Carpenter, a character in *The Pillars of the Earth* by Ken Follett, got it right. When his fellow tradesmen broke out in unreasonable squabbles while erecting a medieval cathedral he cautioned them: “Master craftsmen should use the wisdom of their years to bring about peace and harmony on a building site. If they provoke fights they fail in their duty.” Our stories will benefit from a similar attitude.

For more information about TJ see the website maintained at the University of Arizona School of Law: www.therapeuticjurisprudence.org. ♦



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Footnotes

1. Tannen, Deborah, *The Argument Culture*, Random House, Inc, NY, 1998.
2. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 Psychol., Pub. Policy & L, 193, 196 (1995) reprinted in Law in A Therapeutic Key (David B. Wexler & Bruce J. Winick eds., 1996).
3. An internet search on August 30, 2002 revealed more than 9000 entries for “therapeutic jurisprudence.”
4. ABA Journal, August 1996, *The Lawyer Turns Peacemaker*.
5. ABA Journal, June 2000, *Passionate Practitioner*; ABA Journal, May 1999, *The Nicest Tough Firm Around*.