

FROM THEORY TO PRACTICE AND BACK AGAIN IN THERAPEUTIC JURISPRUDENCE: NOW COMES THE HARD PART

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In actuality, therapeutic jurisprudence ('TJ') is not and has never pretended to be a full-blown 'theory'.¹ More properly, and more modestly, it is simply a 'field of inquiry'² — in essence a research agenda — focusing attention on the often overlooked area of the impact of the law on psychological wellbeing and the like.³ From the very beginning, however, TJ has sought to work with frameworks or heuristics to organise and guide thought.

The very first paper on TJ, for example, spoke of the importance of studying the therapeutic and anti-therapeutic aspects of the law in action and encouraged us to think of 'the law' as legal *rules*, legal *procedures* and the *roles* and behaviours of legal actors.⁴ Despite the framework being a mere guide for focusing our work, it has held up, even though the categories can sometimes overlap: for example, a judicial sentencing hearing would presumably be classified as a judicial 'procedure', but the manner in which a judge actually conducts the hearing would presumably be classified as a judicial 'role'. But since this scheme is merely a conceptual framework and not a true 'theory', we need not worry about exactly

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1 See, eg, Elyn R Saks, 'Mental Health Law: Three Scholarly Traditions' (2000) 74 *Southern California Law Review* 295, 299–300. See also Dennis Roderick and Susan T Krumholtz, 'Much Ado about Nothing? A Critical Examination of Therapeutic Jurisprudence' (2006) 1 *Southern New England Law Review* 201.

2 David B Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology Public Policy and Law* 220, 228. See also Michael King et al, *Non-Adversarial Justice* (The Federation Press, 2009) 26; Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' (2008) 30 *Thomas Jefferson Law Review* 575, 575.

3 The use of 'and the like' is intentional, reasserting the point that it is unwise to attempt a precise definition of 'therapeutic'. The point is fully discussed in Wexler, above n 2. The normative side of TJ is still being worked out, but, for now, suffice it to say that, even as a field of inquiry, there is a 'soft' normative element in the sense of suggesting that emotional consequences are interesting, important and ought to be explored. If the law can be made more therapeutic and less anti-therapeutic in a way that is not terribly controversial (which I think is often the case), the law or its administration should be reformed to accomplish that end. For a recent proposal that TJ adopt the normative approach of the social work profession, see Susan L Brooks and Robert G Madden, *Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice* (Carolina Academic Press, 2010).

4 David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990). That introductory essay was prepared for and presented at a 1987 workshop, but first published in the 1990 TJ book. For the history of TJ, see David B Wexler, 'The Development of Therapeutic Jurisprudence: From Theory to Practice' (1999) 68 *Revista Juridica Universidad de Puerto Rico* 691.

where to pigeon-hole a particular item⁵ — the item, regardless of its precise classification, would in any event be of interest to the TJ community.

Despite the importance of all three categories — rules, procedures and roles — the topic of the present paper relates to the promotion of the development of TJ *practices*, especially by lawyers and judges, and thus the last of the above-noted categories — the roles and behaviours of legal actors — will have its 15 minutes of fame.⁶

Another conceptual framework that has proven valuable to the growth and practical application of TJ and its practices is the notion of ‘psycholegal soft spots and strategies’.⁷ That concept grew out of TJ’s alliance with Preventive Law (‘PL’), another perspective that, like TJ, falls squarely within the non-adversarial justice domain.⁸

PL preceded TJ and encouraged the lawyer to anticipate and deal with ‘legal soft spots’ — either ‘trouble spots’ to be avoided (eg a viable challenge to a will), or ‘opportunity spots’ to be taken advantage of (eg gathering documents so that, in the US, one could apply for Medicare the moment one qualifies for it). PL offered TJ certain office practices and frameworks for applying the law therapeutically.⁹ TJ’s contribution was to expand the PL focus from ‘legal’ soft spots to ‘psycholegal’ soft spots — the psychological bag and baggage that often accompanies legal moves and measures.

For example, a proposed legal action might not pose a risk of legal vulnerability, but it might cause anxiety, stress, depression, hurt and hard feelings, embarrassment, sibling rivalry and the like. In such cases, robust counselling — or what some have

5 Relatedly, the conceptual guide for thinking can prompt investigators to broaden the categories somewhat. Amy Campbell, for example, who focuses on therapeutic jurisprudence relating to health policy, has sensibly expanded the category of ‘legal rules’ to include her area of interest, ‘health policies’, even if such policies are not legally-binding rules. See Amy T Campbell, ‘Therapeutic Jurisprudence: A Framework for Evidence-Informed Health Care Policymaking’ (2010) 33 *International Journal of Law and Psychiatry* 281.

6 Note that the TJ emphasis on ‘roles’ relates basically to the *administration* of the law. That emphasis, in turn, flows from another conceptual framework — that of distinguishing proposals for actual law ‘reform’ from those of ‘applying’ the existing law more therapeutically. See David B Wexler, ‘Applying the Law Therapeutically’ (1996) 5 *Applied and Preventive Psychology* 179. For an application in the area of domestic violence, see Bruce J Winick, ‘Applying the Law Therapeutically in Domestic Violence Cases’ (2000) 69 *University of Missouri at Kansas City Law Review* 33.

7 David B Wexler, ‘Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies’ (1998) 67 *Revista Juridica Universidad de Puerto Rico* 317.

8 See King et al, above n 2, 65. In the US, the term ‘comprehensive law movement’ has been used to describe the collection of relevant perspectives: see Susan Daicoff, ‘The Role of Therapeutic Jurisprudence in the Comprehensive Law Movement’ in Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: The Law as a Helping Profession* (Carolina Academic Press, 2000) 465. In addition, a recent book by Susan Brooks and Robert Madden focuses on TJ, preventive law, as well as restorative justice and transformative mediation, to build a framework for what they call ‘relationship-centered lawyering’: see Brooks and Madden, above n 3.

9 Wexler, above n 7.

now dubbed ‘zealous counselling’¹⁰ or ‘relationship-centred’ legal counselling¹¹ — might lead lawyers to have conversations with clients about certain strategies for reducing the psychological fallout.

For instance, a mother might, in her will, decide to leave more of her property to her struggling daughter than to her prosperous son. Or she might choose to leave property outright to one of her adult children but to leave it on trust for her other adult child, the one who has had a running battle with alcoholism and drug abuse. While these dispositions may be fully acceptable under the prevailing law (and thus not constitute true ‘legal’ soft spots), they may well ruffle feathers within the family. The TJ/PL sensitive lawyer might thus want to raise with the client these ‘psycholegal’ soft spots, as well as possible ‘strategies’ for softening them, such as leaving a letter of explanation to the children.

These strategies can involve ‘opportunity’ spots as well — such as how an HIV-positive client, now drafting a will, a living will and a health care directive, might use the preparation of those documents and the naming of a surrogate decision-maker as an opportunity to contact and attempt a reconciliation with a fallen-away family member.¹²

The general TJ/PL framework of psycholegal soft spots and strategies covers legal counselling in both the civil and the criminal law realm. In criminal law, for example, Winick has written about how a lawyer might help soften the pernicious impact of legal labelling regarding the ‘incompetence’ of a client to proceed.¹³

But TJ scholarship has also provided a conceptual framework for thinking specifically about lawyering and judging in the criminal law sphere, using the rather routine case of *United States v Riggs*¹⁴ as a springboard. Reduced and oversimplified to its bare bones, *Riggs* involved a defendant suffering from paranoid schizophrenia who, after failing to take his prescribed medication for a few days, was pulled over by the police and found to be illegally in possession of a gun.

Riggs, who remained on bail during the entire process, pled guilty to illegal gun possession and, during a long delay in sentencing, again started taking his medication, was reminded daily by his mother to do so and also began, on a monthly basis, taking an injection of a long-acting intramuscular medication.

10 Robert Ward, ‘Criminal Defense Practice and Therapeutic Jurisprudence: Zealous Advocacy through Zealous Counseling: Perspectives, Plans and Policy’ in David B Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, 2008) 206.

11 Brooks and Madden, above n 3.

12 Dennis P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: The Law as a Helping Profession* (Carolina Academic Press, 2000) 52.

13 Bruce J Winick, ‘The Side Effects of Incompetency Labeling and the Implications for Mental Health Law’ (1995) 1 *Psychology Public Policy and Law* 6. See also Michael L Perlin, ‘Too Stubborn to Ever Be Governed by Enforced Insanity: Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases, and Some Possible Attorney-Client Conversations’ (2010) 33 *International Journal of Law and Psychiatry* 475.

14 370 F 3d 382 (4th Cir, 2004), vacated by 125 S Ct 1015 (2005) (*Riggs*).

At the sentencing hearing, the judge was impressed with Riggs' compliance and cooperative attitude, commented that matters seemed 'under control' and sentenced Riggs to 3 years of probation.

Riggs provides a useful vehicle for looking at the 'components' of TJ criminal lawyering and judging. Those components are part of a 'tripartite framework',¹⁵ which consists of:

1. The Legal Landscape — in this case: (a) the ability to defer sentence, to demonstrate Riggs could live successfully in the community; and (b) the ability to impose probation instead of a mandatory requirement to impose incarceration.
2. Treatments and Services — here, the availability of medication to control symptoms, as well as the availability of a long-acting intra-muscular injection.
3. Practices and Techniques — this category relates especially to 'roles' of legal actors and in the present case is illustrated by: (a) arranging for the mother to be involved in reminding Riggs to take his daily medication; and (b) judicial praise ie noting Riggs' cooperative attitude and that matters seemed 'under control'.

In *Riggs*, the use of the above-noted 'Practices and Techniques' is more likely the result of common sense and happenstance, rather than the invocation of principles from the TJ literature. But that literature could add other related practices. For example, literature on enhancing compliance with medical advice or judicial rulings notes the advantage of involving family members, reflected in the case at hand by reminders given by Riggs' mother. But another practice that could have been used, and that could likely also enhance compliance, would be to conceptualise probation more as a bilateral behavioural contract and less as a unilateral judicial fiat.¹⁶ Additionally, the technique of judicial praise, which seems to reinforce law-abiding behaviour, might also be used upon the successful completion of probation.¹⁷

The important point is to underscore the tremendous development of TJ during the last two decades;¹⁸ it has moved from a new twist on mental health law to a psychologically-sensitive approach to law in general; it has become truly interdisciplinary and international; it has moved from theory to practice and has become increasingly influential in professional formation, especially in legal education, as part of the curriculum and in law school clinics.¹⁹

15 David B Wexler, 'A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research and Practice' (2005) 7 *Florida Coastal Law Review* 95.

16 *Ibid.*

17 *Ibid.*

18 David B Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review* 17.

19 Symposium, 'Therapeutic Jurisprudence in Clinical Legal Education and Legal Skills Training' (2005) 17 *St Thomas Law Review* 408.

Lawyers and judges have been increasingly exposed to these developments and frameworks and are starting to see and use TJ more explicitly and systematically, more plentifully and powerfully. When I edited the book *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice*,²⁰ I made an effort to collect and publish a number of TJ practices and techniques, such as:

1. An allocution statement prepared by an attorney in the Oklahoma Federal Public Defenders Office to give his clients ‘voice’ and to educate them about the factors that go into a judicial sentencing decision.²¹
2. A probation progress report prepared by a lawyer in the Tucson, Arizona Federal Public Defenders Office designed to praise the success of a client.²²
3. The pleadings used by John McShane, a lawyer in private practice in Texas, in which he introduced the judge to the role of a TJ lawyer and in which he engaged in what he termed a ‘jailhouse intervention’ to move a client from jail to a treatment facility.²³
4. A pleading filed in a sentencing proceeding by an Ottawa law firm urging a community treatment order in part because of the supportive signatures gathered from neighbours of the defendant.²⁴

In fact, every time I attend a TJ meeting at which practitioners and judges present, I hear and learn more. At the 2006 International TJ Conference in Perth, Western Australia, for example, information of interest was presented during a panel of judges. Thus, Liverpool Community Court Judge David Fletcher spoke of how, in those instances in which he felt it necessary to impose a short sentence of incarceration, he followed up by promptly sending a supportive letter to the incarcerated individual, following up on discussions earlier had in court regarding matters such as the client’s expressed needs and the availability of certain services. I later obtained a copy of a representative letter and included it in the ‘Practices and Techniques’ section of the *Rehabilitating Lawyers* book.²⁵

Also mentioned at the panel — and later collected in my book — were two practices mentioned by Perth Drug Court Judge Julie Wager:

- (a) rearranging the courtroom seating to accommodate the participation and inclusiveness of extended families — especially important in cases of Aboriginal clients; and
- (b) sponsoring an educational session for all court staff on virus transmission relating to HIV and to Hepatitis C — so as to improve staff reaction to drug addicted clients who were often avoided because of misplaced fear that

20 David B Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, 2008) (*‘Rehabilitating Lawyers’*).

21 Ibid 173–80.

22 Ibid 181.

23 Ibid 193.

24 Ibid 185.

25 Ibid 172.

proximity alone could be sufficient for spread of the virus from a possibly infected client.²⁶

More recently — at the TJ stream of panels at the 2009 New York City Conference of the International Academy of Law and Mental Health—Vancouver Community Court Judge Tom Gove spoke of a few techniques he employs. One was having a client approach the bench to sign a behavioural contract, driving home the importance of the conditions and also giving the client a full sense of participation. Another was sentencing a client to perform community service at a treatment program; the judge thought the client, once exposed to the program up close, might feel comfortable enough to decide voluntarily to partake of its services. That practice, incidentally, would seem to be supported by the body of psychological research on the ‘priming process’ and on ‘channel factors’ — methods that might gently ‘nudge’ a person to avail oneself of services.²⁷

These judicial examples bring to mind the cogent comments recently made by the Hon Justice Kevin Bell in his review of the Victorian Civil and Administrative Tribunal (‘VCAT’), of which he served as President. In promoting TJ as an appropriate objective, Justice Bell insightfully described TJ judicial roles as ‘interstitial’ and remarked: ‘[TJ] occupies the space within and allowed by binding laws. It invites the institution and the judicial officer to administer the law, so far as possible, consistently with promoting the wellbeing of the participants.’²⁸

What we are witnessing, then, with TJ’s ‘coming of age’, is a bench and bar increasingly interested in and knowledgeable about TJ. Many are extremely supportive and are urging and inviting their colleagues to join in. Also, beyond that, we now have a bench and bar already making substantial creative contributions to the actual practice of TJ.

As I have noted elsewhere, my hope is for us to be able to use good concrete examples derived from the various conceptual frameworks to create what might be termed a new type of ‘TJ case law’.²⁹ We might, for example, speak of the ‘HIV family reconciliation case’, the ‘jail intervention case’, the ‘Judge Wager seating arrangement case’ and the ‘Judge Gove community service order case’.

These sorts of cases could be continually collected, disseminated, discussed, critiqued, tweaked and disseminated again. They could be improved upon by input on practical and logistical issues (‘the type of seating arrangement I used, and that worked really well, was a bit different’), issues of wording (‘in the HIV

26 Ibid 180.

27 Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008) 70–1. The discussion in the text above brings to mind another conceptual framework used by therapeutic jurisprudence: the development of TJ thinking from (a) the observation of the workings of the law (law-based approach) and from (b) the knowledge of a body of psychology (psychology-based approach), and the interaction of the two approaches. See David B Wexler, ‘Therapeutic Jurisprudence in a Comparative Law Context’ (1997) 15 *Behavioral Sciences and the Law* 233.

28 Justice Kevin Bell, *One VCAT: President’s Review of VCAT* (Victorian Civil and Administrative Tribunal, 2009) 82.

29 Wexler, above n 7.

family reconciliation example, what about merely saying to the client, “why don’t we simply put off signing these documents until next month, and you can think about whether you want to contact your father before our next appointment”), or issues derived from psychological insights (‘actually, according to the psychological literature on priming and channel factors, I think the client would be more likely to keep the appointment if she were given a map and asked to show how she would get from her home to the facility’; or ‘in my experience as a therapist, men are often very worried about filing for bankruptcy because they fear embarrassment from the reaction of family members; before filing, they might want to think about sitting down with a close family member and talking about the difficulties and options’).

In other words, we could create a new body of ‘practical interdisciplinary scholarship’³⁰ around this new case law and my guess is that this so-called case law would be of immense interest to law students, a most welcome break from their rather steady diet of ‘traditional’ case law consisting of appellate opinions. There is, however, a major obstacle to the development of a body of TJ case law: there is no systematic way to gather the practices, techniques and strategies developed and used by judges and lawyers.³¹ The insightful but busy practitioners creating these techniques are understandably not naturally inclined to write up and publish their ideas.³² As noted above, these ideas have, up until now, been collected and disseminated purely on a ‘hit and miss’ basis. But for a new practical interdisciplinary scholarship to develop based on this information — for us to be able to truly take the step of now going ‘from practice to theory’ — we need to think of ways to more systematically collect these practices and techniques.

This is no easy task. Prior efforts to gather such information — through invitations extended in law review articles, for example — have simply not borne fruit.³³ The result should come as no surprise, given that, as noted earlier, this type of activity is not ‘self-executing’.

What is needed, it seems, is a type of ‘captive audience’ of judges and practitioners, an audience from which creative practices can be ‘extracted’. Putting the cart

30 Wexler, above n 20, xviii.

31 Unlike the area of practices, techniques and strategies, which fall conceptually under the realm of ‘legal roles’, the other areas of interest to TJ should not face the same difficulty of gathering new information. Legal academics, for example, can be expected to write about newly established or proposed ‘rules’ and ‘procedures’ — the so-called ‘legal landscape’ issues. See, eg, David B Wexler, ‘Therapeutic Jurisprudence, Legal Landscapes, and Form Reform: The Case of Diversion’ (2009) 10 *Florida Coastal Law Review* 361, 363–6, discussing, from a TJ perspective, the legal landscape of federal sentencing law. Mental health and criminal justice professionals and academics will also likely write about new and important developments in ‘treatments’ and ‘services.’ See, eg, Bonita M Veysey, Johnna Christian and Damian J Martinez (eds), *How Offenders Transform Their Lives* (Willan Publishing, 2009).

32 David C Yamada, ‘Therapeutic Jurisprudence and the Practice of Legal Scholarship’ (2010) 41 *University of Memphis Law Review* 121.

33 See, eg, Marc W Patry et al, ‘Better Legal Counseling through Empirical Research’ (1998) 34 *California Western Law Review* 439; David B Wexler, ‘Therapeutic Jurisprudence and Readiness for Rehabilitation’ 8 *Florida Coastal Law Review* 111, 129–31. The most recent attempt has been the launching of a TJ Practices Project on the TJ website: David B Wexler, *TJ Practices* (2011) International Network on Therapeutic Jurisprudence < <http://www.law.arizona.edu/depts/upr-intj/>>.

before the horse, the website of the International Network on Therapeutic Jurisprudence³⁴ has already established a ‘TJ Practices Project’ — a place where interested persons may post their practices and, more likely, where those who have ‘extracted’ practices from a captive audience can later post them.

We now need to brainstorm how to form these groups of captive audiences. Here are some of my first thoughts (and I hope others will help ‘grow’ the list):

1. *Continuing Education Programs* — a TJ program for judges, or for lawyers, or for mental health professionals³⁵ could, at the close of the lecture portion, reserve time for the audience to contribute comments on practices, techniques and strategies. Brief written comments could be solicited by the presenters, or, better yet, participants could, right then and there, be asked to input their contributions on the TJ Practices Project page, noted above.
2. *Legal Clinics and Journaling Assignments* — law school clinical programs are increasingly incorporating a TJ perspective in their training and in their representation of clients.³⁶ Such clinics deal with fields such as elder law, criminal law, juvenile law, immigration law, even business law. These clinics would provide an excellent setting for practicing TJ and for recording TJ practices that have been employed. Professor Leslie Cooney, of Nova Southeastern Law School in Florida, has done just that with a Business Law Clinic. Students prepare journals about their cases and the TJ dimensions of the same, and, as is typical in business school internship/externship programs, also prepare a final report reflecting on their work and their experience.³⁷ These experiences and reports could likewise be uploaded to the TJ Practices Project page.
3. *Law Student Interviews of Lawyers and Judges* — a project in law school classes in TJ, or in Non-Adversarial Justice, or in the Comprehensive Law Movement, could involve interviewing lawyers and judges and recording and reflecting upon their practices, ultimately uploading some of them for wider dissemination.

When, through these or other means, we develop a process for continually collecting TJ examples from practice — and preserving them in an accessible forum such as the TJ Practices Project — we will have the raw ingredients for the creation of a new TJ case law and new TJ treatises of techniques in specific practice areas, and for academic commentary on the practices, on their possible

34 David B Wexler, *Welcome* (2011) International Network on Therapeutic Jurisprudence <www.therapeuticjurisprudence.org>.

35 Mental health professionals may have much to contribute to the formation of suggested practices for lawyers. For example, therapists will obviously be seeing clients under stress and many stressful situations will have a legal dimension: divorce, custody, bankruptcy, a lawsuit, a criminal or juvenile charge, etc. Mental health professionals will, therefore, have likely discussed strategies with clients about how to deal with these situations.

36 See, eg, Wexler, above n 18.

37 Leslie Larkin Cooney, ‘Giving Millennials a Leg-Up: How to Avoid the “If I Knew Then What I Know Now” Syndrome’ (2007–08) 96 *Kentucky Law Journal* 505.

improvements, on their compatibility with psychological principles and on ethical considerations.

In a recent personal communication,³⁸ Professor Thomas Barton, a leading preventive law scholar,³⁹ suggested that this model is ‘what ideally should be the relationship between the academic side and the practitioner side’. Many practitioners ‘are inspired to find ways to make the theory [(TJ)] work’ and an ‘extensive web of communication’ would permit the ‘experimentation to be highly decentralised, but then replicated’. He concludes with the interesting insight that this process is very much akin to ‘the way the common law evolves, except less constrained and with broader, faster communication’.⁴⁰

The scholarship resulting from this TJ case law may be different from more conventional scholarship in a number of ways: length, formality (or informality) of writing style, preferred journals and audiences, references and many more. One hopes that this new breed of practical interdisciplinary scholarship will not have to fight for academic respectability. It is only natural that the changes wrought in the legal profession by TJ will lead to a new, useful scholarship different from the often dispiriting scholarship produced by the conventional ‘culture of critique’.⁴¹ It is time, too, for academia to finally bridge what Judge Harry Edwards saw almost two decades ago as ‘the growing disjunction between legal education and the legal profession’⁴² and to recognise, in Professor Barton’s words, ‘what ideally should be the relationship between the academic side and the practitioner side’.⁴³

It is a promising sign that, just at this time, Professor David Yamada has written a very thoughtful and important paper entitled ‘Therapeutic Jurisprudence and the Practice of Legal Scholarship’.⁴⁴ His article is a scathing critique of the ‘standards’ typically employed by American student-edited law reviews. In contrast, Yamada is strongly supportive of the less traditional path taken by much TJ scholarship — shorter, straight-forward, jargon-free discussions of issues important to the reform of the law or its administration. In fact, Yamada urges that such scholarship serve

38 Email from Professor Thomas Barton to David B Wexler, 26 November 2009.

39 Thomas D Barton, *Preventive Law and Problem Solving: Lawyering for the Future* (Vandeplas Publishing, 2009).

40 See also Matt Ridley, ‘Humans: Why They Triumphed’, *The Wall Street Journal* (online), 22 May 2010 <<http://online.wsj.com/article/SB10001424052748703691804575254533386933138.html>> : ‘Trade is to culture as sex is to biology. Exchange makes cultural change collective and cumulative. It becomes possible to draw upon inventions made throughout society, not just in your neighborhood. The rate of cultural and economic progress depends on the rate at which ideas are having sex’.

41 David B Wexler, ‘Therapeutic Jurisprudence and the Culture of Critique’ (1999) 10 *Journal of Contemporary Legal Issues* 263.

42 Harry T Edwards, ‘The Growing Disjunction between Legal Education and the Legal Profession’ (1992) 91 *Michigan Law Review* 34. I am pleased to note that, even back then, Judge Edwards exempted the then very fledgling field of therapeutic jurisprudence from his indictment. Harry T Edwards, ‘The Growing Disjunction between Legal Education and the Legal Profession: A Postscript’ (1993) 91 *Michigan Law Review* 2191, 2196. It is noteworthy, however, that in a Harvard Law Review essay published in 2006, the author claimed the general ‘disjunction’ comments to be ‘truer today than when Judge Edwards penned those words in 1992’: Neil Kumar Katyal, ‘Hamdan v. Rumsfeld: The Legal Academy Goes to Practice’ (2006) 120 *Harvard Law Review* 65, 66.

43 Email, above n 38.

44 Yamada, above n 32.

as a model for legal scholarship more generally. In TJ terms, changing the ‘rules’ of the game of typical law review acceptance policies would result in a far more therapeutic atmosphere for the legal academy⁴⁵ and, just as importantly, would result in the production and publication of legal scholarship more useful to the profession and to society at large.

45 Our discussion has been focused on the travails of law professors. But that situation, bad as it is, is compounded manifold for the occasional busy judge or practitioner who wishes to write and publish a short piece with a novel idea relating to judging or to practice. Recently, I received a call from a wonderful judge complaining about how insulted she had been by the shabby treatment she received from law students telling her her paper simply did not meet their law review’s scholarship standards. These sorts of experiences only add to the reluctance of practitioners to think about sharing their important experiences. No wonder some of my earlier attempts to encourage judges and lawyers to disseminate their ideas failed so miserably.