

The Argument Culture and the Courts

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THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE. By Deborah Tannen. Random House, 1998 (\$25.00). 304 pp.

In *The Argument Culture: Moving from Debate to Dialogue*, linguist Deborah Tannen explores how a culture of argument and critique severely limits creative problem-solving. Tannen demonstrates how an argument culture or culture of critique pervades Western society and manifests itself in politics, journalism, academia, and, of course, law.

Tannen's argument is not with the value of argumentation itself; she has no qualms with argumentation and critique as legitimate and indeed crucial aspects of critical thinking. Her concern is rather with the *culture* of critique — the political, journalistic, academic and legal cultures that *privilege* argumentation and critique and *disparage* other approaches of intellectual inquiry.

This review will summarize Tannen's main points and then suggest how, in the legal sector, certain new approaches are consistent with her recommendations. The new approaches, moreover, are highly relevant to the judiciary.

A Summary of the Book, with Commentary

Although argumentation and critique have, as methodologies, served us well, a *culture* of critique “corrodes our spirit”

as it “urges us to approach the world — and the people in it — in an adversarial frame of mind.” In our culture of critique, opposition and debate are the preferred methods of resolving conflicts and of solving tough problems. We engage in debate rather than dialogue, use war metaphors to describe disagreement over policy, and generally have come to enjoy a good fight and to regard politics as a spectator sport.

Despite its short-term entertainment value, the costs of a culture of critique are considerable. It leads us to focus on controversial matters (“What is the most controversial thing about your book?”), even when, as is often the case, “the most controversial thing is not the most important.” It prods us to be “provocative” rather than “thought-provoking,” which “can open old wounds or create new ones that are hard to heal.”

By encouraging debate rather than dialogue, the culture of critique leads us to believe that every issue has two sides, no more, no less, and ignores the fact that “often the truth is in the complex middle, not the oversimplified extremes.” When “the middle ground, the sensible center, is dismissed as too squishy, too dull,” and when nuanced views are denigrated and the policy-makers who support nuanced, middle ground positions are regarded as “two-faced,” compromise is often sacrificed in favor of polarized, rigid ideology.

The argument culture revels in debate on inflammatory issues, and encourages

us to take on the big divisive issues rather than to attempt to heal a hurtful divide. A “big divisive issue,” however, is often so categorized “not because it is very important but because it is very divisive.”

Relatedly, intellectual inquiry in a culture of critique focuses on criticism rather than on “integrating ideas from disparate fields ...” Moreover, “opposition does not lead to the whole truth when we ask only ‘What’s wrong with this?’ and never ‘What can we use from this ...’” We tend to play what Peter Elbow calls “the doubting game,”¹ “approaching others’ work by looking for what’s wrong,” and do not systematically approach new ideas with the different spirit of a “believing game,” which would encourage us to look for new insights and to do “integrative thinking.”

The believing game by no means requires uncritical acceptance of new ideas, theories, findings. As Tannen puts it:

The believing game is still a game. It simply asks you to give it a whirl. Read as *if* you believed, and see where it takes you. Then you can go back and ask whether you want to accept or reject elements in the argument or the whole argument or idea... . We need a systematic and respected way to detect and expose strengths, just as we have a systematic and respected way of detecting faults.

Footnotes

1. DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* at 273 (1998), *citing* PETER ELBOW, *EMBRACING CONTRARIES: EXPLORATIONS IN LEARNING AND TEACHING* (1986).

In addition to systematically playing the believing game, Tannen believes we can better our problem-solving skills by the use of other helpful approaches and techniques — several of them suggested by communitarian scholars. We might look at a specific problem and ask, “What shall we do about this?” In doing so, we might look at the problem from several angles, not simply from two polarized sides. In moving from debate to dialogue, it may also be useful to leave some issues out, to avoid talking exclusively about rights, which seem non-negotiable, and to focus more on “needs, wants, and interests.”

With such an expanded approach to problem-solving, we may also increase the pool of problem-solving talent. In a culture of critique, those who do not thrive on a steady diet of criticism or confrontation may drop out of — or never choose to enter — the domains of academia, politics, journalism, and law.

Law seems to play a central role in the argument culture: First of all, “the American legal system is a prime example of trying to solve problems by pitting two sides against each other and letting them slug it out in public.” Moreover, the legal system both “reflects and reinforces our assumption that truth emerges when two polarized, warring extremes are set against each other.”

The corrosive effect of an attitude that “litigation is war,” and of judging lawyers by such standards as the tough or lackluster nature of their cross-examinations, may explain in part the well-documented phenomenon of lawyer distress and dissatisfaction. The adversarial culture, therefore, needs also to be examined for its impact on “what it does

to those who practice within the system, requiring them to put aside their conscience and natural inclination toward human compassions.”

And when the legal system and its lawyers put aside natural inclinations toward human compassion, we begin to take for granted certain behaviors and practices that we ought to find disturbing. For example, our legal system discourages a driver from apologizing after an automobile accident. Our criminal law system similarly discourages people from admitting wrongdoing and accepting responsibility. And our emphasis on litigation often does not allow people to get on with their lives until a lawsuit is resolved, thus exacting a high psychological cost. “As so often happens with the argument culture,” says Tannen, “the ultimate price is paid by human beings in personal suffering.”

Therapeutic Jurisprudence as a Response to the Culture of Critique

Dissatisfaction with business as usual has led not only to ADR, but also to a number of related, alternative approaches — preventive law, restorative justice, creative problem-solving, holistic law, and the perspective with which I am most familiar — therapeutic jurisprudence.²

Therapeutic jurisprudence, for example, has developed very much along the intellectual paths proposed by Tannen. Therapeutic jurisprudence is a perspective that recognizes that, know it or not, like it or not, rules of law, legal procedures, and the behavior of lawyers and

judges often have an impact — positive or negative — on psychological well-being. Therapeutic jurisprudence proposes only that we recognize and consider the potential therapeutic and anti-therapeutic consequences of the law and legal processes; it does not propose that therapeutic concerns should “trump” other deeply held values. It urges us to consider whether insights from psychology can be brought into the law or its administration in a way that will improve therapeutic consequences without offending principles of justice.

As such, therapeutic jurisprudence seeks to use relevant and promising psychological literature to help shape the law. It thus does not simply look for weaknesses in psychological material, but actively urges us to play the “believing game” and to consider how behavioral science knowledge might be creatively integrated into the legal system. For example, therapeutic jurisprudence writers have used psychological principles for increasing patient compliance with medical decisions (such as signing behavioral contracts, involving family members, and making a public commitment to comply) to ponder how judges might increase probationer compliance with conditions of release.³

Not only has therapeutic jurisprudence work followed the methodological path proposed by Tannen, but it has also begun to address substantively Tannen’s areas of concern regarding the legal system: how courts might influence a criminal defendant’s acceptance of responsibility,⁴ the role of apology in tort⁵ and other settings,⁶ the anti-therapeutic consequences of delaying the resolution of personal injury cases,⁷ the

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2. See DAVID B. WEXLER & BRUCE J. WINICK (Eds.), *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (1996).

3. See WEXLER & WINICK, *supra*, Chap. 9.

4. See Peggy Fulton Hora & William G. Schma, “Therapeutic Jurisprudence,” 82 *JUDICATURE* 8 (July/Aug. 1998); Thomas J. Scheff, “Community Conferences: Shame and Anger in Therapeutic Jurisprudence,” 67 *REVISTA JURIDICA UPR* 97 (1998); WEXLER & WINICK, *supra* note 2, at 137, 159-64.

5. See Daniel W. Shuman, “The Psychology of Compensation in Tort Law,” in WEXLER & WINICK, *supra* note 2, at 433, 457-60.

6. See Bruce Feldthusen, “The Civil Action for Sexual Battery: Therapeutic Jurisprudence?” in WEXLER & WINICK, *supra* note 2, at 845, 871-72 (criminal context).

7. See Daniel W. Shuman, “When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases,” 4 *PSYCH., PUB. POL. & LAW* ____ (1998) (publication forthcoming).

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therapeutic implications of mediation,⁸ the therapeutic inappropriateness of the adversary system in certain substantive settings (e.g., adjudication of the “best interest” of children),⁹ and the contribution of the legal system to lawyer distress.¹⁰

Moreover, in a true integration of theory and practice, therapeutic jurisprudence is beginning to influence day-to-day judging and lawyering.¹¹ In the judiciary, perhaps the most evident applications are in the creation of special treatment courts, such as drug courts, domestic violence courts, mental health courts, and the like. But creative problem solving approaches, and an emphasis on the healing (or traumatic) power of hearings, is increasingly of interest as well to general jurisdiction courts.

Efforts are now underway to introduce therapeutic jurisprudence – and other models that are alternatives to the argument culture – into judicial, legal practice and law school settings. The hope, of course, is that bringing an explicit ethic of care into judicial and legal practice will better serve consumers, will humanize the process, will contribute to judicial and lawyer satisfaction and decrease distress, and will attract to the profession some who now opt out of professional life altogether in a culture of critique.



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8. See Ellen Waldman, “The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence,” 82 MARQUETTE L. REV. 155 (1998). Note that, on occasion, litigation itself may serve a therapeutic function. See Bruce Feldhusen, *supra* note 6, at 845.
9. See Janet Weinstein, “And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System,” 52 U. MIAMI L. REV. 79 (1997) (adversary system inappropriate mechanism for adjudication of “best interest of child” issues).

10. See Amiram Elwork & G. Andrew H. Benjamin, “Lawyers in Distress,” in WEXLER & WINICK, *supra* note 2, at 569. For a synthesis and interesting discussion of much of the empirical literature on lawyer attributes, see Susan Daicoff, “Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism,” 46 AM. U. L. REV. 1337 (1997).
11. See Peggy Fulton Hora & William G. Schma, “Therapeutic Jurisprudence,” 82 JUDICATURE 8 (July/Aug. 1998).