Wine and Bottles: A Metaphor and a Methodology for Mainstreaming TJ

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Wine & Bottles: A metaphor & a methodology for mainstreaming TJ, by David Wexler

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In this new Blog, we hope to include very short pieces relating to the “mainstreaming” of therapeutic jurisprudence (TJ)—that is, the use of TJ principles, practices, and techniques in the “ordinary” legal system, particularly in the criminal law context.

When we speak of using TJ in the “ordinary” system, we do not mean to suggest a lack of interest in the continued use of TJ in more “special” contexts, notably in “problem-solving” or “solution-focused” courts. Rather, it is that TJ has traditionally been closely associated with those special courts, and the time has come to think carefully and creatively about extending the reach and benefits of TJ beyond those important but more limited contexts.

REASONS FOR MAINSTREAMING

There are several reasons underlying the mainstreaming effort. One of them is that in today’s tough economic times, some of these courts have found themselves on the chopping block—a decision that seems very short-sighted and “penny–wise and pound foolish”. But beyond that hopefully temporary concern, a broader point is this: even if problem-solving courts are established and thrive, their capacity is necessarily limited: eligibility requirements for these “front-end” special courts will exclude large numbers of persons with drug, alcohol, and mental health problems who are caught up in the criminal justice system. And if problem-solving court settings are unavailable to them, they will obviously find themselves in the “ordinary” system—and thus our desire
to see the extent to which we might bring some of the therapeutic benefits into that system.

TJ has traditionally been associated with problem-solving courts because those courts have been consciously established and structured to *invite* the application of TJ-techniques, techniques such as: active judicial involvement, active participation by participants (“clients”), active listening and displays of empathy by judicial officers, follow-up proceedings to see that matters are under control, and much more. In other words, legal actors (such as judges, lawyers, other professionals) are encouraged to *behave* in certain ways. When we move from the problem-solving or solution-focused court setting to the “ordinary” system, we need to ascertain the extent to which such judicial (and other party/participant) behavior will be welcome at different stages of the proceedings: stages such as police interviewing, diversion, criminal settlement conferences, bail, imposition of sentence, conditional release from incarceration, appeal, and the like.

**THE METHODOLOGY OF MAINSTREAMING**

This brings us to the wine/bottle metaphor and methodology. From its inception, TJ — the study of the law as a potential therapeutic agent— has looked at “the law” as consisting of:

1. Rules of law

2. Legal Procedures, and

3. Roles of legal actors (such as judges and lawyers).
Now, with the wine/bottle analogy, the rules of law and legal procedures (the legal landscape or structure) can be seen as “bottles”, and the practices and techniques of legal actors—their roles—can be seen as the “wine.”

The mainstreaming approach would ask us to examine provisions of local law (bottles) to see if they are compatible with the use of TJ behaviors, practices, and techniques. If so, we would want to know if the law is actually being used to promote TJ practices or if training of the relevant legal actors (e.g., police, judicial officers, psychologists) would be the sensible next step. And sometimes, a look at the legal structures will indicate that those structures would not be receptive to the use of TJ techniques unless and until the law itself is reformed. In other words, better wine can often be poured into and served from the same bottles, although sometimes an inspection of the wine cellar may suggest the need for some new and better bottles (i.e., law reform).

**Pouring Wine**

A simple example of pouring better wine into an existing bottle can be seen in the imposition of a probationary sentence: instead of the judge unilaterally ordering probation and its conditions, the judge could begin the process by soliciting the offender’s input: asking the offender to personally justify a probationary sentence and the conditions the offender deems necessary and appropriate (e.g., curfew, AA meetings, school attendance). According to the procedural justice literature, this latter procedure should increase offender compliance and sense of fair treatment. The procedural justice example also underscores the important fact that TJ is interdisciplinary in nature, and that psychology,
criminology, and social work serve as the principal “vineyards” for producing TJ wine.

**Building Better Bottles**

In fact, those disciplines can help not only in producing TJ wine but also in building better TJ bottles. One example just came to my attention in reviewing and preparing a foreword for Professor Martine Evans-Herzog’s forthcoming edited book on prisoner reentry. In the course of her remarks, Martine, a member of the TJ in the Mainstream Advisory Group, summarized a careful study looking at the aftermath of the abolition of parole in the state of Georgia. The study found that, post-abolition, “offenders accumulated a much greater number of disciplinary offenses whilst in prison and reoffended at a much higher rate than inmates unaffected by the reform.” In other words, “discretionary parole in itself encouraged offenders to behave better and better prepare for release; in other words....discretion was in itself beneficial to public safety.”

The Georgia situation—though it has yet to be replicated elsewhere—raises the issue of what in therapeutic jurisprudence is known as the therapeutic or anti-therapeutic potential of different sorts of legal arrangements or structures. A “TJ-friendly” bottle would allow for a considerable amount of good TJ wine, whereas an “unfriendly” one would not. Playing out the metaphor with the tentative results of the Georgia study, we might conclude that, compared with the current “automatic release” system, the pre-existing discretionary parole system might have better sparked the interest, motivation, and effort of the confined population—and, not unimportantly, might have accordingly
created a better and more satisfying professional environment for therapists and correctional staff.

**CONCLUSION AND NEXT STEPS**

I hope this short Blog will give an overview of the mainstreaming project and of the wine/bottle methodology. I urge interested persons to read the full essay (itself a short 17 page law review article), available online here: http://ssrn.com/abstract=2065454

What do you think about wine and bottles and TJ in the mainstream? Post your comment below or contact me: David B. Wexler (davidBwexler@yahoo.com)