University of Puerto Rico, Rio Piedras

From the SelectedWorks of David Wexler

Fall September 5, 2015

Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law

David Wexler

Available at: https://works.bepress.com/davidbwexler/5/
Arizona Legal Studies
Discussion Paper No. 15-10

Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law

David B. Wexler
The University of Arizona
James E. Rogers College of Law

February 2014
Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law

David B. Wexler

It is a special treat for me to accept Professor Warren Brookbanks’ invitation to prepare some introductory remarks for this excellent volume—a volume scheduled for release in conjunction with the 4th International Conference on Therapeutic Jurisprudence, held in Auckland, Aotearoa, New Zealand, September 3-4, 2015.

Warren lightened my load considerably by himself writing an introduction that traces the development of therapeutic jurisprudence (TJ) and then situates the various first-rate contributions within the TJ framework. I am thus free to note, in a somewhat stream-of-consciousness manner, some current thoughts regarding my own ongoing project: to “mainstream” therapeutic jurisprudence, principally (but not at all exclusively) in the criminal law area. That is, to assess and promote the TJ approach even outside the more special contexts of solution-focused or problem-solving courts—such as drug treatment courts and mental health courts—where TJ is currently best known and applied.

The International Mainstreaming TJ Project has a three person Steering Committee (Victoria Magistrate Pauline Spencer, Arizona Judge (ret.) Michael Jones, and myself) working with an illustrious interdisciplinary and international Advisory Group—which includes Warren Brookbanks, Katey Thom, and a number of conference presenters and attendees. Recently, we’ve launched a Blog which we hope will be a principal resource of the project. We invite you to visit and join it at www.mainstreamtj.wordpress.com.

To examine the law and its administration, we are using a metaphor of “wine and bottles”, looking at the law itself—the legal landscape or legal structure—as “bottles,” and at the roles, behaviors, practices and techniques used by legal actors (judges, lawyers, therapists) as “liquid” or “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 traditional approach 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, etc.). Such a practice should lead to greater offender compliance with the imposed conditions and with a greater sense of overall procedural fairness.

Problem-solving or solution-focused courts have been structured to actually invite the use of good TJ practices (e.g., active listening, displays of empathy, soliciting active participation by the parties), and such structures are accordingly regarded as “TJ-friendly.” But when we move from those specialized contexts to examine the “ordinary” criminal justice process, the task becomes to assess the TJ-friendliness of the stages of that process.

---

1 Professor of Law and Director, International Network on Therapeutic Jurisprudence, University of Puerto Rico, and Distinguished Research Professor of Law Emeritus, University of Arizona. The author can best be reached by email at davidBwexler@yahoo.com
If a stage of the process—say diversion or sentence imposition or parole—is found to be TJ-friendly in the sense that, in theory, many TJ practices would be permitted, then the next step would be to see if the legal actors are in fact using the permitted TJ techniques. If they are not, then some sort of educational or training program might be instituted to teach the TJ techniques to those actors. On the other hand, if the law itself does not seem to permit much use of TJ, then the question of the propriety of actual law reform would come to the fore.

The wine/bottle methodology has been the subject of a tiny two-page essay in the above-mentioned Blog and, for those seriously interested in pursuing the area, of a full-fledged (but nonetheless short!) law review article entitled *New Wine in New Bottles*. The project is in early stages, but we are beginning to see a few “products” where codes or provisions of codes have received attention using the proposed project methodology of the wine/bottle metaphor. Here, I would like to concentrate on some current issues relating to the metaphor and the methodology.

*The Metaphor Itself*

Since its inception, TJ has looked at the law as consisting of legal rules, legal procedures, and the roles of legal actors, but the interaction between and among those categories was not ordinarily closely examined. Thus, in a piece on TJ and “readiness for rehabilitation,” attention was drawn not so much to “legal arrangements that can themselves operate as motivating forces”, but instead to “how the behavior of lawyers and judges may increase an offender’s readiness for rehabilitation.” Of course, on occasion, statutory schemes—such as an administrative board model of authorizing the conditional release of insanity acquittees—was critiqued for departing from the seemingly more therapeutically-appropriate model of a single judge attending to the situation of a particular patient.

But the potential interaction between legal structure and therapeutic practices came into sharp relief when the European style legislation regarding the “judge of the execution of sentence” was looked at under a TJ microscope and compared with the Anglo-American system of parole. The European structure seemed attractive as a re-entry model because, in principle, it could accommodate many TJ practices that could enhance compliance, help efforts at rehabilitation, and increase public safety: in theory at least, a single judge would be available right after incarceration to meet with and motivate an...
offender, to accord the offender voice and participation, ultimately to grant conditional release with conditions attached that might be the product of dialogue rather than unilateral fiat, and so on. But in the essay I then noted the irony:

The irony about all this, however, is that, in the United States and other Anglo-American jurisdictions, once a court sentences an offender to prison, the judicial branch typically does not retain any sort of continuing sentencing/release jurisdiction over the offender. If discretionary release or conditional release authority does exist, such authority generally resides in the executive branch (with a parole board, for instance). With a pronounced ‘just desert’ model of criminal sentencing in the United States, even that type of discretionary power has been largely eroded. When one looks at the issue of re-entry courts through a comparative law lens, an interesting and ironic picture emerges. The United States has a well-developed interdisciplinary perspective - therapeutic jurisprudence - that could provide useful psychological principles that a court might use to promote effective offender re-entry. But current United States law lacks the legal structure and apparatus necessary for courts to be meaningfully involved at the post-incarceration stage of the criminal process. In Spain, however, where interest in therapeutic jurisprudence is only in its infancy, the legal structure of the juez de vigilancia penitenciaria - the JVP - could be used as the foundation for a re-entry court.9

In other words, the US had valuable TJ principles, but no legal structure to accommodate them in a reentry context, and Spain had a legal context that could easily accommodate those principles but was basically unfamiliar with the principles themselves. When I began to discuss this irony with students and colleagues, I often said the US had a kind of “liquid” but not a “vessel” or “structure” to hold it, and Spain seemed to have the structure but at that time had not developed the liquid. The relationship between the TJ categories of legal landscape and TJ practices was now clear, and it would soon be time to try to capture that relationship in the form of a potent metaphor.

Perhaps reacting to an offhand swipe at TJ taken in print long ago by my friends and colleagues Bruce Sales and Dan Shuman—that “it can be argued that therapeutic jurisprudence is old wine in a new bottle”10—the wine/bottle metaphor seemed most appropriate to me. After all, especially in terms of the roles of judges and lawyers, behaviors that promoted therapeutic ends were unquestionably “new,” and talking about pouring “new” wine into bottles (bottles that could be old ones or that could sometimes be newly designed so as to accommodate the new wine) seemed most fitting—-and a fitting way, some 15 or so years later, to engage in playful academic banter.

---

10 Bruce D. Sales & Daniel W. Shuman, The Newly Emerging Mental Health Law, at 795, 799, in Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence (David B. Wexler & Bruce J. Winick eds. 1996). The quote continues: “that is, the substance of its message is what law and behavioral and social science specialists have been promoting for years—using empirical data and behavioral and social science theory to evaluate the desirability of different legal alternatives.” Of course, under that definition of social science, their statement is tautologically true: ALL law and social science seeks to look at the results of different legal alternatives, and EVERY new twist will thus be regarded as “old” wine! What was urged by TJ was to look at the underappreciated element of the therapeutic and anti-therapeutic consequences of the law. And especially in terms of the roles of judges and lawyers, behaviors that promoted therapeutic ends were surely “new” behaviors and thus new wine.
I thus liked the wine/bottle metaphor and continue to like it. I find it is easily grasped by diverse audiences, and it animates a discussion that might otherwise be deadly dull if cast exclusively in dreary terms of “the law” and “its application.”

Mostly, therefore, I have found audiences receptive to the wine/bottle terminology. But not always. Some in the addiction recovery community, for example, fear such talk may be seen as inconsistent with their mission. And some religious groups are likewise reluctant to use it. My response has typically been that it is only a metaphor—a vivid and familiar metaphor at that—and that it surely shouldn’t be taken as promoting alcohol use. Indeed, I sometimes say, should it be replaced with “tea” and “kettles,” there would nonetheless be those vocally opposed to promoting the ingestion of tea!

Nonetheless, there is of course no reason to offend and potentially turn off groups that might otherwise be receptive to thinking therapeutically about the law and its administration. It would be foolishly anti-therapeutic to do so! So I surely think that the “liquid/vessel” metaphor will work just fine for those who would prefer it. So would other terms, even, for that matter, perhaps terms as remote as “software” and “hardware.” Whatever the language used, the key point is to make vivid the difference between—but also to underscore the close relationship between—the underlying legal structure and the relevant therapeutic practices and techniques employed by those working within that structure.

For now, though, I will continue playing with the wine/bottle terms, and want to explore some other issues that are emerging to help us think through our mission of promoting a therapeutic look at legal codes and their application.

**The Vineyards (and Bottle Factories too)**

Not all wine is good wine. TJ wine is the “new” wine, meaning it is derived from the insights of the social sciences, especially psychology, criminology, and social work. Especially relevant are the strength-based approaches, such as those relating to the Good Lives Model and the emerging subdiscipline of “positive criminology.” And just because an approach happens to be advocated by a therapist does not mean, of course, that it is good new wine—as pointed out recently by Dr. Virginia Barber, a psychologist and a member of the Mainstream Advisory Group, who, at a Puebla, Mexico, TJ Congress, criticized, as not being evidence-based, those “one size fits all” therapy programs utilized by some American problem-solving courts.

Developments in areas of psychology—such as the elements of procedural justice, such as the reinforcement of desistance from crime, such as the techniques of relapse prevention planning, such as the principles of health psychology used to promote compliance with medical(or judicial) orders—can be brought into the legal realm and used as the new wine of TJ. Those advances are really the “vineyards” of the new wine.

Psychological insights can similarly be used to build better bottles, as noted by Luis Osuna, a Mainstream Advisory Group member and Vice President of the Iberoamerican TJ Association (and President of its

11 For example, that view was expressed at the Puebla conference by Mexico’s first drug treatment court judge, Juez Jesus Demetrio Cadena Montoya.

12 Rehabilitating Lawyers, supra note 6, at 18-20.

Mexican Chapter) in his chapter of the first TJ book in Spanish, a book prepared for the Puebla Congress of 2014. As a concrete example, in my recent Blog, I noted a study suggesting that the conventional “discretionary” early release parole system used in some jurisdictions may in many ways be preferable to the more modern “automatic” supervised release systems, where conditional release is not “earned” but rather attaches automatically after a confined person serves a certain percentage of the imposed incarcerative sentence.

That study, conducted in an American state which had changed from the traditional discretionary release structure to the automatic system, noted, under the new legal regime, an increase in disciplinary violations during incarceration, a decrease in voluntary enrollment in rehabilitative prison programs, and an increase in recidivism upon release. It just may be that the much-maligned discretionary system might in fact bring increased therapeutic and public protection benefits—and a more rewarding professional work environment for correctional staff—as compared with the more modern (in the US, anyway) automatic conditional release systems.

Types of Bottles

The durability or fragility of bottles depends upon where they stand in the familiar hierarchy of constitution, statute, regulations, governing policy directives, and so on. From a law reform point of view, durability is sometimes advantageous, but the easy come/easy go of the “lesser” types of rules may likewise be sometimes advantageous.

Bottles vary, too, according to whether they are “clear” or “cloudy”—whether they are straightforward and simple to understand or whether they are ambiguous. From a TJ perspective, some of the most interesting bottles are cloudy in the sense that, on initial reading, they may appear to be rather “TJ-unfriendly,” but, on closer analysis, they may be susceptible to a practical interpretation consistent with desirable TJ practice. What is especially interesting with this type of bottle is the importance of filling the bottle in practice with high-quality TJ liquid.

As an example, suppose the governing sentencing statute specifies that the court may order a probationary period and that “the court shall impose reasonable conditions of release.” That language may convey the image of a judge making a unilateral decision regarding the conditions to impose, and many judges would be inclined to proceed in that unilateral way. Much of the therapeutic jurisprudence literature, however, would suggest that a probationer would be more likely to regard the imposed conditions as fair, and that s/he would be more likely to comply with them, if the probationer had been accorded “voice” and dialogue prior to the actual act of judicial imposition of the conditions.

---

15 See note 2, supra.
16 For a look at the civil law tradition in this regard, see John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America (3d ed. 2007).
18 E.g., Rehabilitating Lawyers, supra note 6, at 31-36.
Although the judicial “inclination” may be to read the statute as suggesting unilateral judicial action, the cloudiness and seemingly TJ-unfriendly nature of the statute could be dissipated by judicial education or by commentary that could summarize the value of dialogue and that could state the obvious: that absolutely nothing in the statutory language mandates that the judge impose probationary conditions without first asking for the defendant’s input. In other words, good TJ wine can indeed be poured into this bottle, but an effort must be made to persuade judicial actors to understand the wine/bottle relationship and to apply this statute therapeutically.19

Before explicitly conceptualizing the wine/bottle relationship, I made a very similar point in the context of the value of behavioral contracting notions in formulating insanity acquittee conditions of release:

In terms of court approval of the conditional release, the statutes—especially the federal one—convey the flavor of a court ordering a passive acquittee to be “conditionally discharged under a prescribed regimen of ... treatment that has been prepared for him,” and ordering “as an explicit condition of release, that he comply with the prescribed regimen.” Despite the unfortunate linguistic flavor of the statutes, a court is free to follow the more therapeutic course and to conceptualize and frame the conditional release as an agreement (“So what you have agreed to try is ....”) rather than as an order (“What you are to do is ....”).20

Wine/Bottle Interactions

There is more to the wine/bottle interaction. For example, wine can be regarded as so good that it influences the remaking of a bottle. Remember: wine is the discretionary use of practices and techniques by actors in the legal system. These practices and techniques have been well described as “interstitial,” as filling the spaces left open by the law.21

For a concrete example, let us return to the above discussion of the judicial authorization of eventual conditional release for those persons previously acquitted by reason of insanity. When a hospital superintendent files with the court a petition for the conditional release of a patient, some jurisdictions require a court hearing while others permit such a hearing but only require one if the prosecuting attorney objects. One study of the process in the District of Columbia found that the courts there almost always opted for a court hearing - to make a record, to test the hospital’s opinion, and to assure public protection. In essence, the judges were using their discretion—their use of wine—to create a de facto bottle requiring a hearing. Jurisdictions considering a statute (or statutory reform) in this area should, in my view, simply require a hearing. As I recently noted in a Festschrift for University of Stockholm Professor Christian Diesen—a leading figure who wrote a full-length TJ treatise in Swedish:

In my view, court approval of a conditional release petition “on the papers” (i.e., without any court hearing) cuts corners in a short-sighted way: it is a missed opportunity for the court to demonstrate the importance of the decision and to positively influence

21 New Wine, supra note 3, at note 4.
compliance with the ordered conditions. In other words, in TJ terms, a statute requiring a judicial hearing seems to be a “better bottle.”22

There is yet another important way in which the wine and the bottles may interact: the political will to soften a rather harsh statute might be more forthcoming if policymakers are persuaded that the proposed softened statute will be implemented in a careful and high-quality manner—in other words, if TJ wine freely flows in the implementation of the revised statute.

This precise issue arose during a TJ conference sponsored by the Catalunya Department of Justice and held in Barcelona during the summer of 2014. At one point, the discussion turned to the Spanish statute regarding judicial discretionary conditional release of prisoners who have served ¾ of their imposed sentence. Many professionals were of the view that the percentage of time served should, for many reasons, be reduced—to save funds, to give confined persons more hope, etc. The conversation then turned to the question whether the judges in charge of the execution of the sentence would discharge their own function along the lines suggested by TJ practices: if they would engage with the confined individuals, accord them voice, solicit their input, conduct post-conditional release follow-up hearings, and the like. In other words, if the judges would seem willing to apply a new law in a more therapeutic way—in a way that should increase compliance with the imposed conditions and enhance public safety—there might be a better chance of actually seeing such a new law.

Moving Forward: A Proposal for Ongoing Efforts of Therapeutic Design and Therapeutic Application of the Law

I hope this brief exercise exposes a handful of important lessons for our shared interest in therapeutic jurisprudence and the reform of law and practice.

1. There is an intricate and intimate relationship between the wine and the bottles—between what we might call the Therapeutic Design of Law (TDL) and the Therapeutic Application of the Law (TAL).
2. In terms of Law Reform, TDL and TAL should be a seamless process.
3. What this means is that the lessons that now Ottawa Law Dean Nathalie Des Rosiers presented some time ago at the Second International TJ Conference in Cincinatti, Ohio, are, for our present purposes, more fitting than ever. Des Rosiers was at that time President of the Law Commission of Canada, a prestigious and influential body that was, nonetheless, defunded and dismantled in 2006, apparently for clashing with some government law reform proposals.23
4. Des Rosiers’ article, entitled Rights are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers,24 proposed several TJ type principles for law reform generally. Not surprisingly, therefore, they are fully applicable to the Mainstreaming TJ project described on these pages.
5. Des Rosiers’ principal points:
   a. Law as lived as the scope of inquiry
   b. Multi-disciplinary analysis as the method

---

c. Empirical studies as sources of knowledge
d. Consultation and participation at control mechanisms
e. Beyond statutory reform as the response
f. Changing cultures as the measure of success

6. Yes! TJ has always been interested in the law in action, not just the law on the books. It is fully multidisciplinary and encourages empirical examination of the law to improve the written law and its administration. TJ encourages broad participation and consultation. It is surely pushing for more than statutory law as a response. And it is interested in promoting a culture of psychological wellbeing and real and perceived access to justice as important goals of the law.

7. The wine/bottle methodology is well-suited to guide us. With a focus on psychological wellbeing, procedural fairness, and access to justice, we have a coherent method of looking not only to the text of the law, but also to the therapeutic application of the law, and, as Des Rosiers mentioned, the living law is an element often neglected in law reform efforts. Yet, it is truly crucial to the overall goal. I can even envision a new type of professional specializing in TAL\textsuperscript{26} - a legal/criminological/psychological “oenologist” (wine specialist), if we stick with the wine metaphor.

8. A TAL specialist will need to concentrate on a somewhat different form of legal writing: bullets, suggested scripts,\textsuperscript{27} visual aids, crisply stated best practices\textsuperscript{28} - ways of conveying important

---

\textsuperscript{25} Id. at 444.


\textsuperscript{28} For example, near the end of an opinion written for the US Court of Appeals for the Seventh Circuit, Judge Posner provided guidance for federal district judges imposing conditions of supervised release:

And for the future we recommend the following “best practices” to sentencing judges asked to impose (or minded on their own to impose) conditions of supervised release:

1. Require the probation service to communicate its recommendations for conditions of supervised release to defense counsel at least two weeks before the sentencing hearing.
2. Make an independent judgment (as required in fact by 18 U.S.C. § 3553(a)) of the appropriateness of the recommended conditions—independent, that is, of agreement between prosecutor and defense counsel (and defendant) on the conditions, or of the failure of defense counsel to object to the conditions recommended by the probation service.
3. Determine appropriateness with reference to the particular conduct, character, etc., of the defendant, rather than on the basis of loose generalizations about the defendant’s crime and criminal history, and where possible with reference also to the relevant criminological literature.
4. Make sure that each condition imposed is simply worded, bearing in mind that, with rare exceptions, neither the defendant nor the probation officer is a lawyer and that when released from prison the defendant will not have a lawyer to consult.
5. Require that on the eve of his release from prison, the defendant attend a brief hearing before the sentencing judge (or his successor) in order to be reminded of the conditions of supervised release.
material to busy legal actors willing to give the TJ way a good effort, but in need of an engaging and efficient way to get and stay up to speed.

9. This is an ongoing project, not a one-shot deal. There is no magic bullet. Instead, the goal is to infuse the legal culture with a TJ and interdisciplinary sensitivity. The hope is that Law Reform Commissions may wish to support the ongoing effort, that academic seminars can spring up where law and graduate students might, with faculty guidance, play the roles of professional staffs of such law reform or related commissions, and that others interested in playing a part in their respective jurisdictions will get in touch and join the effort.

10. Going full circle, let me close by quoting verbatim Professor Warren Brookbanks’ final paragraph in the introduction to this volume. I think we are on exactly the same wavelength!

Finally, TJ does not purport to be a ‘cure-all’ for those problems of modern society that are created directly by the operation of the law. Nor is it an end in itself. It is simply a menu of conceptual tools or approaches for confronting the dysfunctional elements within legal institutions and procedures. Its goal is to assist to bring about change which is humane and efficacious and which affirms the status of human agents as subjects, not objects, within the multitude of legal procedures that comprise the domain of the law. It is my hope that this publication will be instrumental in helping to achieve that goal.

release. That would also be a proper occasion for the judge to consider whether to modify one or more of the conditions in light of any changed circumstances brought about by the defendant’s experiences in prison.
