New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices

David Wexler

Available at: https://works.bepress.com/davidbwexler/6/
Arizona Legal Studies
Discussion Paper No. 12-16


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

June 2014
NEW WINE IN NEW BOTTLES:
The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices

David B. Wexler*

I. INTRODUCTION ...............................................
II. LIQUID ..................................................... 467
III. BOTTLES ................................................... 469
IV. BACK-END CONDITIONAL RELEASE ......................... 470
V. DIVERSION AND POST-OFFENSE AND POST-SENTENCE REHABILITATION ............................................ 475
VI. APPEAL .................................................... 477
VII. CONCLUSION ............................................... 478

I. INTRODUCTION

Therapeutic jurisprudence (“TJ”) has sought to look at the law in a richer way by pondering the therapeutic and antitherapeutic impact of “legal landscapes” (legal rules and legal procedures) and of the “practices and techniques” (legal roles) of actors such as lawyers, judges, and other professionals operating in a legal context. To date, the professional “practices and techniques” dimension has been prominent in the literature, largely because such TJ principles—basically, judging with an ethic of care and with insights gleaned from psychology, criminology, and social work—find easy application in the increasingly prevalent “problem-solving” (or “solution-focused”) courts, such as drug treatment courts and mental health courts.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 is best reached by email at davidBwexler@yahoo.com. The International Network on Therapeutic Jurisprudence has websites at www.therapeuticjurisprudence.org and at www.facebook.com/TherapeuticJurisprudence. This essay formed the basis of the opening keynote address at the Oxford University (Balliol College) Conference on Therapeutic Jurisprudence and Problem-Solving Justice, August 7-8, 2012.

However, recent economic pressures have somewhat stunted the growth of, and enthusiasm for, special problem-solving courts, and talk has turned to how some of the “new” judging techniques might be employed in mainstream courts, especially criminal courts. A TJ perspective can be especially useful in this enterprise: after all, though a close cousin of problem-solving courts, TJ actually originated outside the context of such courts—and predated them by a couple of years—and TJ scholarship has always advocated the application of TJ approaches in a general judicial context.2

However, to allow TJ judging to thrive outside the problem-solving court arena, a TJ-friendly legal landscape is necessary. A useful heuristic is to think of TJ professional practices and techniques as “liquid” or “wine,” and to think of the governing legal rules and legal procedures—the pertinent legal landscape—as “bottles.” In some writing canvassing a handful of criminal law landscapes, I refer to “TJ-friendly” provisions, “TJ-unfriendly” provisions, and even to some dubbed “TJ-fair weather friends.”3 Roughly speaking, these designations refer to the amount of TJ liquid that can fit into a particular bottle.4


4 Fitting liquid into bottles is a description that fits well with the statement, made by a Victoria Supreme Court Justice and former President of the Victoria Civil and Administrative Tribunal (“VCAT”), that TJ practices may be regarded as “interstitial,” filling the spaces left open by the law governing administrative proceedings. David B. Wexler, From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part, 37 Monash U. L. Rev. 33, 38 (2011).

When we propose “TJ-friendly” legal processes, we obviously enter into a discussion of the “normative” notion of TJ. And, as I recently noted, the normative aspect of TJ is still being “worked out.” Id. at 33 n.3. It will thus likely emerge as the horse after the cart, a result I regard as appropriate: as with the so-called “new public law” in general, TJ’s orientation is overwhelmingly asking the simple question whether proposed results satisfactorily tackle the problem at issue. See David B. Wexler, Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship, 11 Behav. Sci. & L. 17 (1993). To set a normative stage too early would work to restrict our thinking and options. I feel similarly with regard to formulating a tight (as opposed to an “intuitive”) definition of the term “therapeutic” itself: a tight definition might simply be
A stiff mandatory sentence or a sentence of life without parole ("LWOP") would be quite TJ unfriendly, whereas, virtually by definition, provisions authorizing problem-solving courts would be highly TJ friendly; and fair weather friends are those where a creative and skilled judicial glass-blower has twisted and combined bottles so as to enable unfriendly ones to become friendlier. For example, in New Zealand, probation review hearings (recommended in the TJ literature to monitor compliance both of probationers and of social service agencies) are not permitted on the court’s own initiative. Yet, where there is more than a single charge, New Zealand judges have at times “creatively, if necessarily clumsily,” allowed for periodic review hearings “by the device of holding one charge back and making it a condition of bail that the sentence of supervision imposed on the other charge be complied with.” That way, the court can then hold review hearings on the held-back charge. These types of complicated judicial glass-blowing devices should alert legislators to the need for revisiting the governing legal landscape. This evidently occurred in Victoria, Australia, where a Judicial Monitoring condition has now been made an option on a Community Corrections Order.

ignored by those who find it unduly narrow, rendering a proposed definition irrelevant; worse yet, if others were to take the tight definition seriously, that acceptance might prematurely restrict our thinking and creativity. These observations are highly consistent with a related one: that TJ thinking ought to allow for the playing of “the believing game” with policy proposals, instead of reacting immediately in a critical “doubting game” manner. See David B. Wexler, Therapeutic Jurisprudence and the Culture of Critique, 10 J. CONTEMP. LEGAL ISSUES 263, 265-72 (1999).

Another TJ-friendly component of the law of probation is to permit the court, when appropriate, to call for the early termination of the originally imposed probationary period. Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice 35 (David B. Wexler ed., 2008) [hereinafter Rehabilitating Lawyers]. Thus, the legal availability of conducting periodic review hearings, and of terminating probation early in successful cases, would constitute a TJ-friendly “bottle” of probation. The section of the text immediately following—on “liquid”—indicates how TJ judging and lawyering may maximize the therapeutic potential of probation. See also id. at 31-38.

6 Id. at 16.

7 Id. at 17.

8 Thus, amended Section 48K, Division 4, Section 21 of No. 65/2011 the Sentencing Act 1991 (Victoria) as follows:

48K Judicial Monitoring Condition
(1) A court which is making a community correction order may attach a condition to the order directing that the offender be monitored by the court, if the court is satisfied that it is necessary for the court to review (during the course of the order) the compliance of the offender with the order.

(2) The court may make a direction for the following matters in a judicial monitoring condition—
(a) a time or times at which the offender must re-appear before the court for a review under section 48L of the compliance of the offender with the order; and
(b) any information, report or test that must or may be provided in the course of a review under section 48L.

_Sentencing Amendment (Community Correction Reform) Act 2011 (Vic) s 21 (Austl._).

Another glass-blowing innovation, this one initiated by Arizona prosecutors but accepted by defense attorneys, was largely in response to the ineffectiveness of the state system of parole supervision. The innovative device, called a “probation tail”, operates to bypass parole officers and to use instead the less burdened and better trained probation officers. The probation officer authority comes from a plea bargain that calls for the imposition of a consecutive sentence of probation following an incarcerative sentence. As explained to me by Professor (and former Judge) Michael Jones, now a full-time faculty member at Arizona Summit Law School (formerly Phoenix School of Law):

At least four years ago when I returned to a criminal assignment after many years elsewhere, I discovered that the prosecutors were including in plea agreements for repetitive & dangerous offenders a requirement that they plead guilty to two serious offenses. Typically, when a repeat sex offender pled guilty to a sexual assault or a child molestation charge, the plea agreement would also include a plea to another charge, the second charge being “probation eligible” (such as an attempted sex assault or attempted child molest). The plea agreement includes requirements and stipulations that for the first offense the Defendant would be sentenced to prison, but for the second offense the Defendant would receive a consecutive probation term to begin upon “physical release from incarceration.” The attorneys called this second offense probation a “Probation Tail.” The plea agreement further provided (as an incentive to successful completion of probation) that if the Defendant rejected probation the prison sentence imposed in lieu of probation would be served consecutive to the prison sentence served for the first offense listed in the plea agreement.

Prosecutors who originated this type of agreement were in a specialized unit called “repeat offenders”—somehow they used the acronym “ROPE.” These prosecutors explained the plea agreements (many times in court I questioned the parties about what I thought were unusual terms) were used to impose a more rigorous form of parole after incarceration for a serious offense—to provide compelling incentives for a parolee/probationer to avoid another prison term. Defense attorneys requested that I accept these “Probation Tail” sentence stipulations because they explained that their clients wanted assistance in drug programs or mental health treatment that had never been offered to them—or, which they had never taken advantage of before, and the client wanted to avoid an even greater prison sentence.

In Arizona, our parole officers are seriously overloaded and underfunded. Parole was one of the “big cuts” in the Arizona state budget over the last several years. It is not unusual for people released from prison to have little or no contact with a parole officer. Ideally, the parole officer eases and facilitates re-integration back into society, but when there is little contact with a parole officer, people are forced to find jobs and housing on their own—many times failing miserably. In sharp contrast to the parole system in Arizona are the probation departments operated by the superior courts in each county. We pride ourselves on the education and expertise of our probation officers, many of whom have masters degrees in social work or counseling. Probation officers have significantly fewer people to supervise than parole officers—and many times, a “specialized case load probation officer” (like a Mental Health Court Officer) will have a reduced caseload because of the chronic nature of the Defendants’ problems (such as drug addiction, mental illness, etc.). Our probation departments also are experienced in
If we are looking truly to be able to mainstream TJ practices, we thus must look at developing a TJ friendly legal landscape by sketching a kind of model code of TJ processes and practices. The provisions, or the “black-letter law,” could be the bottles, but the important accompanying commentary should indicate how the liquid or wine can best be poured into the bottles.9

II. LIQUID

The commentary is an essential ingredient of a suggested TJ “code.” As I noted in a related context, comments made to the U.S. sentencing commissioners, “the judiciary is in need of sentencing guidance not only in terms of what sentence to impose but also in terms of the manner and process of sentence imposition.”10 Here are some illustrative practices and techniques—some of the TJ wine that can be of use in probationary and even in incarcerative sentencing:

Individual judges handling particular cases may use TJ insights in the very act of engaging in the judicial function. For instance, the TJ literature abounds with examples, derived from social science findings, of how courts can increase coordinating jobs/housing/treatment programs for drugs, alcohol and mental health issues, which are exactly the types of major issues for people just released from prison. In that sense there is a common need for people in crisis who have not been to prison and those who are recently released from prison. This is a simplification, and I realize the probation professionals understand the complex differences between these populations. So, the bottom line is that local county probation officers have more time, experience, and resources to offer parolees than parole officers.

There is another benefit to the “Probation Tail” concept to prosecutors and the public. That is that dangerous offenders (such as sex offenders or child sex offenders) are more closely supervised upon their release from prison, and if they fail on the probation tail, then they receive another prison sentence as a result of the revocation of their probation. You can tell that I think this is an exciting concept—a creative problem-solving approach to the reality of our parole system’s failures and the human effects of state budget cuts.

E-mail from Hon. Michael Jones (ret.), Associate Professor of Law, Ariz. Summit Law Sch. (formerly Phx. Sch. of Law), to David B. Wexler, Professor of Law & Dir., Int’l Network on Therapeutic Jurisprudence, Univ. of P.R., and Distinguished Research Professor of Law Emeritus, Univ. of Ariz. (May 5, 2012) (on file with author).

9 There is already a Model Penal Code-Sentencing (MPC-S, Preliminary Draft No.8), and, although some of it seems be quite TJ friendly (i.e., provisions regarding deferred prosecution and deferred adjudication), some of it—such as the provision relating to supervised release—surely is not. MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 8, 2012). Still, an interesting and worthwhile project might be to draft a TJ commentary to the MPC-S, indicating how TJ principles might be incorporated both in friendly and even unfriendly provisions. Later portions of this Article provide some examples.

compliance with conditions of probation. The psychological and criminological principles relate to the areas of relapse prevention planning, the psychology of health care compliance, and the reinforcing of law-abiding behavior.

Some simple suggestions flowing from that literature include: soliciting from the offender a list of proposed behavioral “do’s” and “don’ts” (e.g., be home by 9 p.m.) that can form the basis of a discussion regarding appropriate probation conditions; encouraging the presence in court of some family members or friends who will learn of the imposed conditions; holding some follow-up hearings to monitor compliance by the offender (and by the relevant social service agencies); and making appropriate positive remarks at the termination (or early termination) of a successful probationary period.

Similarly, TJ has paid some attention to judicial remarks made at sentencing (including judicial “do’s” and “don’ts”), and in the careful crafting of statements of reason in the sentencing sphere, and even on the role of counsel in explaining those decisions and reasons.

Even when imposing incarcerative penalties, judges have been urged to condemn the act rather than the actor and to search for and comment on any offender strengths that might be used as building blocks in shaping a future with hope. Training judges to draft statements of reasons may be especially relevant in addressing defense sentencing arguments. How rejected defense arguments are responded to can, in TJ terms, be either helpful or devastating to defendants and their responsiveness to rehabilitative efforts. If courts follow the traditional approach of showing why the government should surely win, why the defense arguments are stretches—in other words, if they write such opinions as congratulatory “letters to the winner,” the practical results could be quite negative. “[I]f they follow the [TJ] advice of crafting a sensitive ‘letter to the loser’ (but always remaining mindful of the victim), the stage may be set for a more positive long-term outcome.”

---

11 For examples of what some judges have said, but should not have said, see David B. Wexler, *Robes and Rehabilitation: How Courts Can Help Offenders “Make Good”*, 38 Cr. Rev. 18 (2001) (the official journal of the American Judges Association, available online). The essay also speaks to what judges might appropriately say—even when ordering incarceration—to motivate offender readiness for rehabilitation.


NEW WINE IN NEW BOTTLES

III. BOTTLES

There is, of course, much, much more to the “wine” of TJ but it is time now to look at the “bottles.” I make no attempt at all in this most preliminary of articles to canvass completely the pertinent legal landscape.\textsuperscript{15} Instead, I


\textsuperscript{15} Thus, I touch on bail only tangentially, but it is a topic surely worthy of attention in a code of suggested TJ practices. For a recent article on bail, see Laura I. Appelman, \textit{Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment}, 69 \textit{Wash. & Lee L. Rev.} 1297 (2012). And the important area of good time credits, recently the subject of very thoughtful scholarly attention, obviously needs to be included in suggested standards. See Nora V. Demleitner, \textit{Good Conduct Time: How Much and for Whom? The Unprincipled Approach of the Model Penal Code: Sentencing}, 61 Fla. L. Rev. 777 (2009). Other important topics, but neglected here, are the propriety of courts accepting “no contest” or similar pleas in certain types of cases, such as sex offender matters, see \textit{Judging in a Therapeutic Key, supra} note 2, at 165-76, and the newly emerging area of neuropsychology and law relating to the solitary confinement for juvenile offenders. See Juvenile Justice Reform Committee, \textit{Policy Statement: Solitary Confinement of Juvenile Offenders}, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), http://www.aacap.org/AACAP/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.

One very important bottle that \textit{did} attract my attention—and that of my co-author Judge Michael Jones—was written after the Oxford conference where the present Article was presented. That bottle is the “criminal settlement conference,” a bottle that exists in some states, like Arizona, but not in U.S. federal criminal law. In David B. Wexler & Michael D. Jones, \textit{Employing the “Last Best Offer” Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation}, 6 \textit{Phoenix L. Rev.} 843 (2013), Jones and I show how criminal settlement conferences can be TJ-friendly, and we discuss how TJ practices—such as active listening, demonstrations of empathy, and techniques for encouraging the parties to think in terms of their underlying interests—can be utilized by a judge acting as a mediator. Jones has actually so conducted such conferences and has facilitated resolutions of cases in the presence of counsel, defendants, victims, and respective family members. Conferences are also good venues for discussing matters such as collateral consequences of criminal convictions and guilty pleas. Moreover, because matters discussed in such conferences are not usable in later criminal proceedings (if the matter is not resolved during the conference), the conference may also provide a legally-attractive setting for apologies. See Michael C. Jones, \textit{Can I Say I’m Sorry? Examining the Potential of an Apology Privilege in Criminal Law}, 7 Ariz. Summit L. Rev. (forthcoming 2014).

In my view, the criminal settlement conference has the potential of bringing therapeutic jurisprudence insights into the system of plea negotiations—a basically untamed system where about 95% of state and federal cases are resolved, see Stephanos Bibas, \textit{The Machinery of Criminal Justice} 178 n.62 (2012), and where sentences are treated as chips in a high-stake gamble. \textit{Id.} at 182 n.83. Were TJ to be somehow poured into that system, we might indeed see a paradigm shift in the criminal law from an adversarial to a therapeutic approach. On the possibility of a paradigm shift, see Nigel Stobbs, \textit{The Nature of Juristic Paradigms: Exploring the Theo-
review certain legal provisions that have already attracted my attention, and I recast them in the context of suggested processes and related practices. Much, but not all, of my focus is on U.S. law, both federal and state. But my purpose is to broadly illustrate the notion of friendly and not-so-friendly legal landscapes, and how we may best work with them through the use of TJ practices and techniques. My hope is that this exercise may be regarded as a sample and that similar efforts might be undertaken by others in each of the U.S. states and territories and in other jurisdictions, building an international and comparative law reservoir of TJ relevant provisions and commentary.

One of the areas of greatest contrast in TJ friendliness is in what might be termed “back-end” conditional release, and, if only for the powerful contrast that it offers, we shall basically “begin” at the “end.”

IV. Back-end Conditional Release

In the United States, with “truth in sentencing” measures and other legal provisions designed to promote uniformity, discretionary parole release was abolished in the federal criminal system and in many state systems. Instead, in the federal system, a specified incarcerative term is usually followed by a period of supervised release, and the length and conditions of that release are set at the time of sentencing. In TJ terms, this scheme—which is also tracked in the new Model Penal Code-Sentencing project—is about as “unfriendly” as one can get.

The federal supervised release system constitutes a legal landscape entirely sapped of motivational strength—in no way does it reward or encourage inmate reform efforts. The length of an offender’s incarceration and the period of supervised release are both set at the time of sentence imposition, as are the specific conditions of that release. Thus, there is no legal incentive to do well in prison in hopes of advancing one’s release date. Nor is there any legal encouragement for an
offender, during incarceration, to think through his or her needs and risk factors, and to propose a relapse prevention plan with meaningful, individually tailored conditions that will help in a transition to community life. Indeed, supervised release may be so far off in the future that a current challenge to the reasonableness or constitutionality of imposed release conditions may even be dismissed on ripeness grounds.\textsuperscript{19}

Contrast the U.S. scheme with the provisions of the Spanish law regarding the Juez de Vigilancia Penitenciaria (“JVP”). In Spain, the JVP monitors the offender through three correctional stages and can grant, monitor, and revoke conditional release.\textsuperscript{20} From a therapeutic jurisprudence perspective, there are several attractive features of the Spanish law.\textsuperscript{21} These features are set out below, not only with a description of the shape and contours of the bottle, but also with a hint of how those provisions could be animated by an infusion of TJ liquid:

1. Conditional release authority resides in a single judge rather than a multi-member board, allowing for the possibility of developing a one-to-one relationship between the judge and the offender, thereby increasing the judge’s motivational influence.
2. The judge’s role begins at the time of incarceration (much earlier than when the offender becomes eligible for conditional release), allowing the judge, from the beginning, to monitor and motivate the offender’s progress in the correctional environment.
3. Under the statute, if a prisoner has served a certain portion of the imposed sentence, is in the third (the highest) clas-

\textsuperscript{19} Id. For example, in United States v. Lee, 502 F.3d 447, 450 (6th Cir. 2007), Lee was sentenced to long-term incarceration, followed by lifetime supervised release, which would begin in 2021. One of the conditions imposed at the time of sentencing was for Lee to eventually participate in a specialized sex offender treatment program that might include use of a penile plethysmograph. Lee challenged the penile plethysmograph portion of the condition, but the Sixth Circuit declined to review it, regarding it as not yet “ripe.” The court noted that, after years of in-prison treatment, it was not certain Lee would be assigned to a treatment program that included penile plethysmograph. Additionally, the court noted the controversy, scientifically and otherwise, regarding the procedure, and wondered if penile plethysmograph technology would even be in use in the year 2021. A TJ analysis of these sorts of ripeness questions, occasioned by a TJ-unfriendly supervised release system, is worthy of scholarly attention.

\textsuperscript{20} David B. Wexler, Spain’s JVP (‘Juez De Vigilancia Penitenciaria’) Legal Structure as a Potential Model for a Re-entry Court, 7 J. Contemp. L. Issues 1 (2000) (source on file with author).

\textsuperscript{21} Id.
sification level, and has a good behavioral record and prognosis, conditional release should follow. Conditional release is not automatic once an offender serves a certain portion of the sentence (which would sap the system of motivational strength), nor does release lie in the unfettered discretion of the judge (which could lead to arbitrariness, helplessness, frustration and rage). Rather, a standard of “constrained discretion” seems to meet both therapeutic and justice objectives. It is important to note here that a limitation on discretion is the therapeutically preferable structure.

4. The judge can set appropriate conditions, including conditions for follow-up hearings, as part of the release process. The imposition of conditions can follow a dialogue between judge and offender, thus giving the offender active participation and voice in the process.²²

Between these two extremes on the TJ “friendliness” scale are various other “intermediate” structural possibilities, such as:

1. The conventional parole system, which still exists in a number of U.S. jurisdictions and in other nations,
2. Tribal court parole, where under many U.S. tribal codes the court may entertain a parole application after an incarcerated person has served at least half of the imposed sentence, and
3. A proposed system for judicial reconsideration of imposed sentences.²³

An accompanying commentary to a provision on back-end conditional release could highlight the judicial (and other) behaviors that might maximize the TJ element. For example, commentary regarding the Spanish law might focus on the benefit of early judicial involvement, the continuity of the particular judge with the particular offender, and the kind of dialogue that could result in the setting of appropriate release conditions.

With experience and commentary provided by academics and participants in the system, even more refined and nuanced suggestions can be made. For example, in an interesting thread on the listserv of the International Network on Therapeutic Jurisprudence, Professor Martine Herzog-Evans, of the University

²² Id.
²³ See generally Cecelia Klingele, Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release, 52 Wm. & Mary L. Rev. 465 (2010).
of Rheims law faculty, discussed the implementation of a French law rather similar to the Spanish law of the JVP (known in France as JAPs). 24 Herzog-Evans focused on the balance between personal, face-to-face judge/party contact versus detailed written opinions/explanations of the decision. 25 Thus, when a petition—for an increase in liberty—is granted, it may behoove the judge to animate the party by an in-court congratulatory remark and to skimp a bit on the written explanation, which need only reflect a responsible attentiveness to the legal issue at hand. In one of her emails dated April 21, 2012, Professor Herzog-Evans wrote:

You may remember that I recently praised the simple way some JAP judges wrote their rulings, which saved them a lot of time, and allowed them to see offenders—as opposed to their colleagues who wrote much more detailed rulings but did not have time to see offenders (all this in big cities with a huge caseload). Well, recently I saw even better than this: when the JAP had enough evidence to rule (e.g., grant electronic monitoring in order to replace a custody sentence) then she would rule on the spot, by handwriting on a pre-prepared one page form. 26

With the option of conventional parole, the commentary might discuss how a proposal for a “reentry moot court” has been recently implemented with apparent success in Hawaii. 27 The proposal suggests that an incarcerated person coming up for parole prepare a plan and run it by a group of similarly situated incarcerated persons; the latter, with the help of professional facilitators, would play the role of the parole board by asking questions, seeking clarification, and the like. 28 The idea is that this procedure will strengthen the petitioner’s proposed plan for parole and, in the process, should serve to lead the other incarcerated persons to think of their own situations and eventual appearances before the board. In a February 9, 2012, email message to the TJ listserv, Lorenn Walker, a Hawaii-based public health educator, lawyer, and restorative justice specialist, touts the apparent early success of this TJ-inspired parole (and parole hearing) preparation:

24 Posting of Martine Herzog-Evans, martineevans@ymail.com, to tjsp@topica.com (Apr. 21, 2012) (on file with author).
25 Id.
26 Id.
28 Id.
You might want to know how we’ve applied [a TJ] idea to help imprisoned people prepare for parole hearings by practicing giving statements in a group before their hearings . . . . We have incorporated [the] idea into a 12 week training program for imprisoned people and last night heard our first two practice parole board statements. Not only was it excellent practice for the two people who provided their statements, but they also helped about 25 other imprisoned people in the training program who acted as the “parole board,” and saw the strengths and weaknesses in their own situations.29

When we turn to the intermediate provision of tribal parole, which is similar to the Spanish JVP provision, we see it has the advantage of a single judge, rather than a board, thus facilitating the development of a relationship between the judge and the would-be parolee. However, unlike the JVP, the judge does not become involved until a petition is filed, which cannot occur until half the imposed incarcerative sentence has been completed. Thus, the liquid—the “judicial juice”—cannot operate from the early stage of incarceration. Nonetheless, the TJ literature advocates the establishment of interdisciplinary clinics of students from law, social work, and the like, to advise persons incarcerated in tribal jails of the eventual opportunity for parole, to help them think through their future problems and prospects, and to assist them in filing strong petitions with the tribal court.30 While the liquid does not jump-start judicial behavior at an early stage, the establishment of a clinic from a nearby university could help fill the gap in the bottle.

Even with the least friendliest of supervised release options, such as the U.S. federal one and the one proposed by the Model Penal Code-Sentencing,31 TJ practices can dribble in. First of all, the “predicate” of procedural fairness should now be a staple of judicial systems, regardless of the particular procedure at hand.32 Beyond that, some of the practices and techniques noted above could surely take effect as employed, such as: condemning the act but not the actor when an incarcerative sentence is imposed, and soliciting a defendant’s input on conditions of supervised release, even when such conditions will not apply until years later.

29 Posting of Lorenn Walker, to tjsp@topica.com (Feb. 9, 2012) (on file with author).
32 Burke & Leben, supra note 14, at 4-5; Wexler, Adding Color to the White Paper, supra note 13, at 78.
This discussion of TJ commentary accompanying criminal processes should also indicate the dynamic character of TJ recommendations, such as reentry moot court and tribal court interdisciplinary clinics. As such, the commentary should be regularly updated and should always be regarded as a work in progress. This dynamic notion should also apply to black-letter recommended processes, where new models may continue to develop and, more frequently, may be profitably tweaked.

V. DIVERSION AND POST-OFFENSE AND POST-SENTENCE REHABILITATION

In a nod in the right direction, U.S. federal law generally allows an offender’s post-offense rehabilitative efforts to be taken into consideration when a sentence is eventually imposed. This consideration is facilitated by a judicial power to postpone the imposition of a sentence—an attractive way of establishing and following a treatment plan in the hope that the court will later, in essence, ratify the arrangement.

On the other hand, a TJ-unfriendly feature of the federal scheme springs from the U.S. Supreme Court case of Reno v. Koray, a case forbidding sentence credit for pretrial confinement other than technical “jail” detention. In other words, if a court grants a defendant bail to enter a treatment facility—even a fully residential facility—the defendant is on bail rather than in jail, and sentence credit will be unavailable. In fact, students of mine had a case in their law school clinical program where an addicted client, largely for sentence credit concerns, refused to enter a pretrial residential drug rehabilitation pro-


34 See id. See, e.g., Jones, supra note 15. Note that the Model Penal Code-Sentencing, although creating useful provisions to defer prosecution and adjudication, does not permit the additional option of delaying imposition of sentence. Model Penal Code: Sentencing art. 6 (Preliminary Draft No. 8, 2012). Such an additional option could, in TJ terms, be useful for a number of reasons. For example, coming after a finding or admission of guilt, the option may be more acceptable to victims—and to prosecutors, judges, and the public. Jurisdictions differ on the permissibility of deferring imposition of sentence, the length of time allowed to elapse before sentence is imposed, whether the government’s consent is required, and the like. See Rehabilitating Lawyers, supra note 5, at 15-16. These matters should be looked at carefully in crafting a TJ “code” of criminal processes and practices.


36 Perhaps the case of United States v. Booker, 543 U.S. 220 (2005), which imports much more discretion into U.S. federal sentencing, may allow a court, through its exercise of sentencing discretion, to take into account a period of time spent in a pretrial rehabilitation program. But the fact that such credit would not be automatic might still dissuade defendants from availing themselves of the therapeutic opportunity.
gram. Alternatives to the Koray rule should be explored in any code of TJ suggested processes.

Closely related to these concerns is the entire area of Diversion, which has a number of components, some a bit too technical to dwell on here. On the U.S. federal level, the legal landscape here is crafted not by the legislature but by the United States Attorneys’ Manual. There is much to critique here—such as, until April 2011, the Manual’s blanket exclusion of addicts from eligibility for diversion, an archaic provision that obviously ignored our knowledge about legally-facilitated addiction treatment and well-functioning drug treatment courts.

But beyond that, the Manual, which was last revised comprehensively in 1997, is crafted in a way that is highly legalistic and off-putting. In practice, it leads federal prosecutors, when they consent to diversion at all, to do so in a very formalistic way. In other words, there is little opportunity for any TJ liquid to seep into the diversion bottle—even though a prosecutor’s willingness to consent to diversion ought to be a move designed to boost a defendant’s self-esteem and optimism. But it seems everything here must be done strictly “by the book,” including written communication about the diversion option. Apparently, separate cover letters avoiding legalisms and written in plain English are not contemplated. Even in the Spanish-speaking District of Puerto Rico, a letter written “in plain Spanish” would presumably be prohibida. Indeed, formality governs even when a defendant successfully completes diversion. For example, as detailed in a short essay on point, the Manual, at least as it is interpreted in the world of living law, discourages, if it does not downright prohibit, congratulatory statements by Department of Justice attorneys.

37 See also John V. McShane, Jailhouse Interventions, Treatment Bonds, and the So-Called “Recovery Defense”, in Rehabilitating Lawyers, supra note 5, at 193-206, discussing a fascinating procedure of a “jailhouse intervention,” where a lawyer discusses the option of applying for a “treatment bond” to transfer a jailed addicted inmate to a treatment facility. The availability of credit for time served in a residential treatment facility would obviously facilitate an inmate’s willingness to seek such a treatment bond.

38 See David B. Wexler, Therapeutic Jurisprudence, Legal Landscapes, and Form Reform: The Case of Diversion, 10 Fla. Coastal L. Rev. 361, 365-66 (2009) (citing the pre-Koray law on point as well as a Canadian alternative rule).

39 For example, in a short essay on diversion, I have discussed what, in my view, is the most therapeutically appropriate standard of judicial review when a court is considering the appropriateness of a state prosecutor’s denial of statutorily available diversion. See id. at 366-70.

40 Id. at 374-76.

41 See Judging in a Therapeutic Key, supra note 2, at 4-5. See also Wexler, supra note 38, at 371, 377.

42 See generally Wexler, supra note 38, at 371-76.

43 See id. at 373.

44 Id. at 366-70. The important address on August 12, 2013, by U.S. Attorney General Eric Holder to the American Bar Association, a speech highly critical of the U.S. federal criminal
An area where the U.S. federal sentencing structure has been made more sensible and more TJ friendly—but only because of the intervention of the U.S. Supreme Court—is in the area of re-sentencing and an offender’s post-sentence rehabilitative gains. Although, as we have seen, an offender’s post-offense rehabilitative efforts have been reasonably well-treated, post-sentence rehabilitative efforts were, until the recent case of Pepper v. US, not to be considered at all. That is, in the event of a reversal and an eventual resentencing, the portrait of the about-to-be re-sentenced defendant was to be painted disregarding positive developments in the defendant’s recent history; instead, insofar as those factors were concerned, the defendant should be regarded as he or she originally appeared before the sentencing court. The supposed “reasoning,” if it can be called that at all, was that a contrary rule would be unfair, because “such efforts would only inure to the benefit of those whose convictions or sentences have been disturbed on appeal.”

But post-Pepper, a far more sensible and therapeutic solution seems to be at hand to allow, and indeed to encourage, courts to consider such conduct. For equality purposes, the appropriate comparison should not be with those who made rehabilitative efforts but did not have their original sentence reversed. Instead, it should be with those whose sentences were reversed but who, upon reconviction, warrant an increased sentence because of non-vindictive factors such as “objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.” That sort of symmetry would motivate offenders, whether or not incarcerated during the pendency of their appeals, to engage in rehabilitative efforts and to refrain from behavior that could later come back to haunt them.

VI. Appeal

In the criminal law appellate area, the most important TJ work originated with Professor Amy Ronner and her mentor, my late colleague, Professor

46 Id.
47 Wexler, supra note 38, at 364.
48 Id. (internal quotation marks omitted) (quoting N. Carolina v. Pearce, 395 U.S. 711, 726 (1969)).
49 See Amy D. Ronner, Therapeutic Jurisprudence on Appeal, 37 Ctr. Rev. 64 (2000).
Bruce Winick.\textsuperscript{50} Invoking important principles of procedural justice, Ronner and Winick chastised appellate courts for, in the name of efficiency, issuing summary per curiam affirmances of convictions.\textsuperscript{51} Instead, courts should, in their view, write very short “therapeutic” opinions—although of course not designated as such. Those opinions should give the appellant—ideally through a conversation with counsel—a sense that the court heard and attended to the appellant’s arguments—even though the arguments were not accepted—and that counsel had indeed served as an able advocate. Without such a sense, the appellant may be quite suspicious of the court and counsel—perhaps unwilling to accept the ruling and to go forward, maybe even to the point of defiance regarding participation in correctional programming. Needless to say, such a state of affairs is not likely to contribute to a person’s “readiness” for rehabilitation.\textsuperscript{52} A TJ “code” of processes should accordingly contain black-letter language discouraging summary per curiam affirmances of criminal convictions.

VII. Conclusion

In this Article, I have tried to show the important relationship between the “new” judging (and lawyering) and the law itself—the legal rules and procedures that might facilitate new judging. In the U.S., a state-by-state look at legal structures would be a welcome subsequent step. As TJ is now of considerable interest internationally, I hope other jurisdictions will undertake exercises to analyze the TJ friendliness of their local landscapes. In fact, in collaboration with Judge Michael Jones and Australian magistrates Pauline Spencer, Michael King, and Jelena Popovic, an international “Mainstreaming TJ” project is now underway and an open invitation letter has been prepared


\textsuperscript{51} Id. at 499-501.

\textsuperscript{52} See David B. Wexler, Therapeutic Jurisprudence and Readiness for Rehabilitation, 8 Fla. Coastal L. Rev. 111 (2006). While the basic TJ prescription in the area of criminal appeals ought to be a proscription on summary per curiam affirmances, there are other TJ aspects to consider when courts draft full-blown opinions. As hinted earlier, from a TJ standpoint, an opinion may prove more useful—and therapeutic—if it is crafted not as a congratulatory letter to the winner but, instead, if it reads like a sensitive letter to the loser. This is generally true, and not only in the arena of the criminal appeal. The problem, however, is that in the normal course of events, a judicial opinion may well track the language, style, and tone of the successful appellate brief and, hence, constitute a congratulatory letter to the winner. In a recent paper, I proposed that court staff attorneys might be enlisted to help draft or redraft opinions in a more therapeutic vein. David B. Wexler, Elevating Therapeutic Jurisprudence: Structural Suggestions for Promoting a Therapeutic Jurisprudence Perspective in the Appellate Courts, 5 Phoenix L. Rev. 777, 780-81 (2012).
and published.\textsuperscript{53} This project is already beginning to bear the fruit we are hoping for.\textsuperscript{54}

Finally, the exercise in the present essay of drawing attention to the relationship between TJ practices and the law itself (the bottles) seems to me important because we are at a stage, at least in the US, where a renewed attentiveness to \textit{the law} is very much in order. Many are—rightfully—upset at some of the excesses of the adversary system, and many are—rightfully—upset at how pernicious traditional legal education can be. Accordingly, many are drawn to TJ and to its “cousins”—like restorative justice, collaborative law, and the like—vectors in what is known as “nonadversarial justice” (especially in Australia) or “comprehensive law” (in the US), and, very recently, as “integrative law.” In this movement, there is a very strong interest in the “new” lawyering, and in lawyering and judging with an ethic of care. This is all to the good. But my fear is that a number of lawyers attracted to the new lawyering are so disenchanted with \textit{the law} as to be almost running away from it. This is not all to the good. Here, once again, I hope TJ can serve as an antidote. Originally, TJ urged us to look at the softer side of law, to infuse the law with an ethic of care. Now, TJ, with its emphasis on \textit{the law} as a therapeutic agent,\textsuperscript{55} and its search for appropriate “legal landscapes,” will remind us of the importance of the law itself—and of how interesting, intellectually intricate, and important it is.

\textsuperscript{53} The letter is reproduced in Appendix A of Wexler & Jones, \textit{supra} note 15, at 850-52. Subsequently, the project was officially launched by Professor Wexler, Magistrate Spencer, and Judge Jones through The Innovating Justice Forum of Hiil – the Hague Institute on the Internationalisation of Law. It is entitled \textit{Integrating the Healing Approach to the Criminal Law}, and is described in David B. Wexler, \textit{The International and Interdisciplinary Project to Mainstream Therapeutic Jurisprudence (TJ) in Criminal Courts: An Update, a Law School Component, and an Invitation}, \textit{Alaska J. Disp. Resol.} (forthcoming 2014), available at \url{http://ssrn.com/abstract=2399914}.

\textsuperscript{54} The criminal settlement conference paper is an explicit example of using a TJ-friendly bottle—the Arizona rule—and indicating how TJ wine can be introduced into it. \textit{Id.} at 854-55. A recent paper by Dana Segev, \textit{The TJ Mainstreaming Project: An Evaluation of the Israeli Youth Act}, \textit{7 Ariz. Summit L. Rev.} (forthcoming 2014), is a perfect illustration of how the wine/bottle methodology of mainstreaming TJ can be utilized internationally. Additionally, at least in the United States, the recent important address by U.S. Attorney General Eric Holder to the American Bar Association should add ammunition to the importance of the Mainstreaming TJ project. \textit{See Holder's Remarks to ABA, supra} note 44.

\textsuperscript{55} \textit{David B. Wexler, Therapeutic Jurisprudence: The Law as a Therapeutic Agent} (1990).