Employing the "Last Best Offer" Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation

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EMPLOYING THE "LAST BEST OFFER" APPROACH IN CRIMINAL SETTLEMENT CONFERENCES: THE THERAPEUTIC APPLICATION OF AN ARBITRATION TECHNIQUE IN JUDICIAL MEDIATION

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I. INTRODUCTION

Both authors of this Article are particularly interested in "mainstreaming" the use of therapeutic jurisprudence ("TJ")—in other words, employing TJ beyond the context of problem-solving courts, where TJ is best known.¹ To illustrate the infusion of new TJ applications to existing legal structures and procedures, Wexler has proposed what is a hopefully useful analogy. He has analogized the existing legal landscape (legal rules and procedures) to "bottles," and the TJ practices and techniques of legal actors (such as judges) to "liquid."² To accomplish mainstreaming, it is important to explore certain

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¹ Michael D. Jones, Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners, 5 PHOENIX LAW REVIEW 753 (2012); David B. Wexler, New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence 'Code' of Proposed Criminal Processes and Practices, in THERAPEUTIC JURISPRUDENCE AND PROBLEM-SOLVING JUSTICE (Jane Donoghue ed., forthcoming 2013), available at http://ssrn.com/abstract=2065454. In fact, with three Australian magistrates, we have formed an informal committee to promote the mainstreaming approach internationally. Our invitation to participate is an open one, and interested readers are encouraged to communicate with us. See Appendix A for a slightly modified version of our original invitation letter.

² See Wexler, supra note 1.
legal provisions—the legal structure, or the “bottles”—and see to what extent the various practices and techniques of TJ—the “liquid”—can be poured into those bottles. This Article’s authors’ current legal structure of interest is the “criminal settlement conference,” a procedure that is firmly in place in Arizona3 but not in all jurisdictions.4

The criminal settlement conference in Arizona is a voluntary hearing conducted by a judge other than the assigned trial judge (or by the trial judge with the consent of the parties). In practice, the Arizona criminal settlement conference is frequently used for the most difficult cases, including crimes against persons, such as sexual offenses.

While he served as an Arizona superior court judge, one author of this Article, Judge Jones, was often asked to facilitate such conferences—especially because his experience with problem-solving courts (such as mental health court) prepared him well for that role. In a previous special issue of Phoenix Law Review that focused on Therapeutic Jurisprudence and Comprehensive Law, Judge Jones wrote of his experience in mainstreaming TJ, and part of his article’s focus was indeed on facilitating criminal conferences.5 The article detailed how during criminal conferences, Judge Jones used TJ techniques such as active listening and according voice and validation to the victim, the victim’s

3 “[P]ioneering criminal judges petitioned the Arizona Supreme Court for a rule formally authorizing [settlement] conferences.” Hon. Robert L. Gottsfield & Mitch Michkowski, Settlement Conferences in Criminal Court, ARiz. Att’y, Apr. 2007, at 8, 10. In 1997, the court adopted a temporary rule permitting judges to participate in settlement conferences, and permanently adopted the rule in 1999. Id. (“Rule 17.4 (a) . . . provides as follows: Plea Negotiations. The parties may negotiate concerning, and reach an agreement on, any aspect of the case. At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice. Before such discussions take place, the prosecutor shall afford the victim an opportunity to confer with the prosecutor concerning a non-trial or non-jury trial resolution, if they have not already conferred, and shall inform the court and counsel of any statement of position by the victim. If the defendant is to be present at any such settlement discussions, the victim shall also be afforded the opportunity to be present and to state his or her position with respect to a non-trial or non-jury trial settlement. The trial judge shall only participate in settlement discussions with the consent of the parties. In all other cases, the discussions shall be before another judge or a settlement division. If settlement discussions do not result in an agreement, the case shall be returned to the trial judge.”).

4 Unfortunately, such conferences are not contemplated in federal proceedings. Fed. R. Crim. Proc. 11(c)(1) (providing that the court shall not participate in plea negotiations). Perhaps, in such jurisdictions, a retired judge or arbitrator could perform the function of a settlement conference leader with the consent of all parties. Although the later-described Last Best Offer (“LBO”) technique would not seem practical in such situations, federal courts, even under Rule 11, could seemingly at least note the availability of a retired judge or arbitrator as a resource for facilitating the negotiation process.

5 Jones, supra note 1.
family, the defendant, and the defendant’s family. The article also discussed how during criminal conferences, Judge Jones raised the possibility of creative sentencing dispositions as a way to hopefully lead the participants to a resolution they could all embrace.

Judge Jones, in other words, has filled the Arizona criminal conference “bottle” with considerable TJ liquid. Recent scholarship now leads the authors of this Article toward the consideration of possible additional approaches for settling criminal matters. The authors are particularly taken with possibilities that flow from some jurisdictions’ practice—such as Singapore’s—for the conference judge, at the appropriate time, to mention an “indicated sentence.”

Apparently, after the discovery stage, the “subordinate courts” of Singapore can, if they have the full consent of the defense and the prosecution, refer cases to Criminal Case Resolution (“CCR”). A resolution conference is held only after a trial date has been set—in other words, when the court has considerable relevant information, and when the parties are well prepared and particularly motivated to resolve the case. After a full discussion, the judge may, upon defense counsel’s request, give an indication of an appropriate sentence (e.g., custodial confinement or community/house arrest, a fine, the likely minimum and maximum sentence, etc).

In CCR, the indicated sentence will apply only upon a defendant’s guilty plea. Upon such a plea, a court will impose that sentence or refer the case to another judge who will impose that sentence. However, if the defendant does not agree to the sentence, the case will be referred back to the trial court, and the facts relating to the resolution conference will not be conveyed to that court.

II. THE “LAST BEST OFFER” APPROACH

This Article’s suggestion grows from the idea of an indicated sentence. However, to stimulate in each conference participant more thoughtful consideration of the other participants’ positions, this Article proposes that in appropriate cases an additional element—borrowed from arbitration—known as the

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7 Id. at 13-14.
8 Id. at 14.
9 Id. at 15-16.
10 Id. at 16.
11 Id.
12 Id. at 17.
"Last Best Offer" ("LBO") be used. Having the parties’ full agreement secured at the beginning of the conference, the process would operate as follows: before announcing the indicated sentence, the conference judge would solicit a proposed sentence from the state, from the defense, and from the victim. The judge would then have the opportunity to examine the various proposals, hear from each interested party and the respective counsel, and ask pointed questions intended to provide the parties and counsel with a better understanding of the others’ legal positions, the evidence, and each side’s needs. This discussion would provide an excellent opportunity for the judge to use—and to encourage others to use—active listening, empathy, and perhaps confrontation. The discussion should include, at a minimum, a frank evaluation of all conditions and consequences of a settlement and guilty plea versus the consequences and likelihood of a guilty verdict after a trial. Often, these conditions and consequences are the most important considerations to the parties and their families.

After the discussion, each participant could revise his or her initial proposal and then submit an LBO regarding his or her preferred indicated sentence. After full consideration, the conference judge would then choose among the submitted proposals and select one to be the indicated sentence. In other words, the judge would not craft a different sentence or seek to compromise or modify—beyond minor details—any of the submitted proposals. Rather, the judge would select the submitted proposal that appears most appropriate—assuming the selected sentence is lawful, reasonable, and in accordance with governing sentencing principles. Finally, the judge would ascertain whether the defendant will accept the sentence and enter a guilty plea, thus resolving the case. If the defendant declines to resolve the case, the case would return for trial to the criminal court.

The authors of this Article believe that this suggested procedure—which incorporates insights from TJ, arbitration, negotiation, mediation, and restorative justice—can often lead to a highly therapeutic and satisfactory result.

13 See Appendix B for an outline of the suggested consent procedure.
14 SUSAN S. DAICOFF, COMPREHENSIVE LAW PRACTICE: THE LAW AS A HEALING PROFESSION 63-72 (2011). Confrontation “can be gentle, as when a therapist points out a conflict or some dissonance between a client’s values or thoughts and his or her behavior. . . . Or, it can be very challenging, such as, ‘Face it, you are an alcoholic and you need help.’” Id. at 68.
15 Examples of such conditions and consequences are: restrictions upon one’s liberty (e.g., confinement, home detention, restriction on travel, restriction on driving, etc.), supervision by a probation or parole officer, loss of a job, payment of fines, fees, and restitution.
16 Ideally, an outline or proposed script should be developed for use by the settlement judge to promote an orderly discussion, yet afford all interested parties the right to be heard. Further, at the commencement of the conference, reasonable time limits should be imposed on all parties. See our suggestions in Appendix B.
17 Chief Justice Wayne Martin of Western Australia delivered an excellent address on judicial mediation in civil and criminal cases in September 2012. See Wayne Martin, Chief Justice of W.
Indeed, one key to the procedure's success is that the procedure itself will bring the participants and their positions closer together, providing "an incentive for each party to compromise and reach a settlement." Thus, more so than in the Singapore situation, the authors expect that negotiating in the shadow of the last best offer procedure will often prompt settlement and obviate the need for the judge to select and announce an indicated sentence.

III. PARTICIPANTS' ROLES IN THE "LAST BEST OFFER" APPROACH

A victim—and the victim's family—should be able to attend the conference, and hopefully be represented either by volunteer counsel or by a law school clinic. The TJ reasoning for such robust participation was recently well-stated by another contributor to this issue of Phoenix Law Review: University of Stockholm law professor Christian Diesen. Diesen noted in another work that "being excluded from influence and participation makes it more difficult for the victim to tackle the trauma and suffering caused by the crime." Diesen further noted that, "[a]nother important aspect of this lack of influence is that the legal system does not use the experiences of the victim as a resource (an instrument to make the offender understand the severe consequences of his acts) in the rehabilitation of the offender." Further, requiring a guilty plea as a predicate to the full resolution of a case should clarify the defendant's personal accountability and should serve as some important psychological relief for the victim.


19 If a plea agreement is successfully negotiated, the agreement may entail a prosecutorial dismissal of one or more charges. If an agreement is not reached, the judicial officer, in issuing an indicated sentence, would need to deal with all the charges 'straight up,' meaning that all would stand, although concurrent sentences on some or all of them may well be a crucial component of the indicated sentence.

20 See generally Christian Diesen, The Importance of Reporting Rape, 6 PHOENIX LAW REVIEW (2013).


22 Id.

A defendant will also have center stage when discussing a proposed sentence, and with proper preparation by counsel, should understand—in addition to his or her own needs—the sentencing considerations of desert, deterrence, and public protection. In a separate work, one author of this Article, David Wexler, illustrated how a thoughtful defense-prepared questionnaire can urge a defendant to think in such terms. Including the defendant’s family members in the settlement process would increase not only the family’s understanding and acceptance of the reality of the criminal charge(s), but also their feelings of being heard; consequently, this inclusion should enhance their ability to persuade their loved one to consider accepting appropriate responsibility. Additionally, family members’ ability to provide a home, job, or supervision of the defendant can serve to alleviate victim concerns when a defendant’s release back into the community is an issue.

Additionally, this Article’s authors believe the LBO technique should serve to sharpen the thinking and “perspective-taking” of each participant, and should thus leave each participant with a better understanding of the other’s situation. Twenty years ago, David Wexler, using an example given in a creative book by a trial judge, pondered TJ’s use of the technique in the context of personal injury awards. It is easy to grasp how the motivational force of the LBO approach can be transported from torts to the analogous area of criminal sentencing.

For example, it would be interesting to inquire whether personal injury plaintiffs—and the doctors used by such plaintiffs—are expressly or implicitly encouraged to adopt a grave view of their injuries and prognosis. If they are so encouraged, perhaps the law could be structured to encourage the parties, as well as their lawyers and doctors, to think in terms of more realistic and reasonable damage awards. One possible way the law might be structured is to require juries to decide damage awards by only choosing one or the other LBO provided by each party.

Under such a scenario, each party’s LBO would be submitted to the jury with an instruction that the jury must choose only one LBO.


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If the jury was allowed to pick a number in between [the submitted LBOs], then the plaintiff’s lawyer would have every incentive to submit a very high amount and the defendant’s lawyer a very low amount. But when the jury must choose only one [LBO], each attorney would be motivated to submit a final amount that represented his notion of the fairest-possible award in order to earn the jury’s vote.26

Critics will likely claim that the LBO technique ignores the possibility that some attorneys will not negotiate in good faith, and will thus prevent any real just and fair settlement of the case. Critics may also propose that some attorneys will withhold their LBO until the time of trial. But these disruptive actions may occur, even despite the best judicial efforts, in all settlement and plea negotiation situations—not just those situations using the LBO technique. Nothing within the LBO technique encourages deception; rather, the converse is true: an open discussion with questioning by all parties and the judicial officer should encourage and promote honesty, good faith perspective-taking, and fair dealing.

IV. CONCLUSION

This Article suggests that jurisdictions that do not provide a criminal settlement conference consider creating—by rule or even by stipulation and agreement of the parties—such a procedure.27 And, once created, judges and attorneys should fill the settlement conference “bottle” with TJ liquid, including the LBO technique. As judges and lawyers become more experienced in the use of the LBO technique, they should create and develop useful outlines and scripts. Judge Jones has already done a bit of this with regard to criminal settlement conferences in general,28 and the included Appendix B is the authors’ first attempt at an outline introducing the LBO technique. The authors are supportive of this type of practical interdisciplinary TJ scholarship and hope their current effort will encourage future professional and academic collaboration of the sort.29

27 See supra note 3 and accompanying text.
28 See Jones, supra note 1.
29 See Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice, supra note 24, at xvii-xviii; David B. Wexler, Foreword, An Unshackled Law
APPENDIX A

Proposed Mainstreaming Project Invitation Letter

Dear Colleague:

For a variety of reasons, there seems to be considerable interest at the moment in how therapeutic jurisprudence ("TJ") might better be used in mainstream courts, especially in a criminal law context. In other words, the experience with the use of TJ in problem-solving courts has led a number of us to ask how TJ might also be used in a broader context.

In fact, the five of us—Magistrate Jelena Popovic (Victoria, Australia), Magistrate Pauline Spencer (Victoria, Australia), Magistrate Michael King (Western Australia), Professor Michael Jones (Phoenix School of Law faculty and Ret. Judge, Maricopa County, Arizona), and Professor David Wexler (University of Puerto Rico and emeritus at University of Arizona)—have recently written about, or are actively working on, mainstreaming TJ (our contributions are linked below). Additionally, we have joined together as an informal committee to promote this mainstreaming effort.

Mainstreaming TJ

Therapeutic jurisprudence relates very much to the behavior of legal actors (such as judicial officers), and the Spencer, King, and Jones articles focus mainly on that issue—the "how" of TJ (the "liquid" or the "wine"). But another important aspect of TJ is whether the particular legal provision or structure at hand—the so-called applicable "legal landscape" (the "bottle")—encourages or discourages legal actors to engage in TJ practices. Thus, a mandatory sentencing scheme would limit TJ activity by legal actors. Likewise, an administrative structure that only measures the quick disposal of cases rather than the quality of justice outcomes may also discourage TJ activity. However, a more flexible system would encourage more TJ activity.

Currently, problem-solving courts are associated with TJ because those structures—or "bottles"—are designed to invite the free flow of TJ practices. But in "mainstreaming" TJ, we also need to look at other provisions and stages of the criminal process—such as diversion, sentencing, parole, or appeal—to see how "TJ-friendly" or "TJ-unfriendly" they may be. Wexler's recent article, New Wine in New Bottles, (see link below), explicitly discusses the relationship between the TJ practices (the "wine") and the applicable legal structures (the "bottles").

Ideas for Mainstreaming TJ

There are many opportunities in a range of jurisdictions (national, state, tribal, etc.) for examining how TJ-friendly (or not) a given legal provision or structure is and whether a feasible modification could make it more TJ-friendly. Also even under existing provisions, legal actors (e.g., judges, lawyers, criminologists, psychologists, social workers in a legal/correctional context) can develop or use practices to maximize the therapeutic power of the provision. Wexler's New Wine in New Bottles article provides a number of possible examples, and the idea would be to see how various local counterpart provisions would fare under such a TJ microscope.

Local projects to mainstream TJ could be ambitious—such as an overall TJ "audit" of local criminal law and procedure—or they could be very modest. On the modest side, for example, some projects that an interested local person (or a small team of two or three people) could do:

a. Encourage a segment on mainstreaming TJ, along the lines of the various mainstreaming papers, in judicial conferences.

b. Encourage the same in law school courses in criminal law and procedure.

c. Encourage seminar students to consider an aspect of mainstreaming TJ as a paper topic in law school or in an interdisciplinary seminar with law students and students from psychology, social work, criminology, and the like.

d. Take one provision of local law—such as parole—and see how, under the existing law, it could be infused with more TJ practices. Also see whether such an implementation of the provision can actually be accomplished in practice. (Wexler's New Wine in New Bottles article provides an actual example of how a Hawaii prison program added a TJ practice in order to strengthen the parole planning process for incarcerated persons).

The Mainstreaming TJ Project

Our informal committee hopes to work on a local and international level to: (1) generate thinking and share ideas about mainstreaming TJ; and (2) encourage, support, and share experiences of local projects.

As a result, we are hoping to encourage you to play a role—however modest (or ambitious, of course!)—in this overall project. You might wish to just share ideas with us or you might like to undertake a local project alone or with
a small team. We surely hope you will be available to play a part. Please let us know if you are interested.

Keeping in Touch with the TJ Developments

There is a valuable, extensive bibliography at www.therapeuticjurisprudence.org. Further, there is an important and up-to-date TJ Facebook page, and one need not have a Facebook account to access it. Simply go to www.facebook.com/TherapeuticJurisprudence. If you would like to "join" the page, so you can post items and not simply read what others post, then you can "like" the page with an appropriate click.

Scholarship on Mainstreaming TJ

Here are the works, which we have prepared, that are relevant to this mainstreaming project:


Thanks very much and we look forward to hearing from you and working with you on this exciting project. David B. Wexler email: davidbwexler@yahoo.com
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APPENDIX B

Criminal Settlement Conference Outline

1. Introductions and Ground Rules (By the Judge):

   a) Explanation of the Procedures for this Conference:

      You have agreed to come together for a conference and discussion to see if you can also agree to a resolution of the case without trial. I am happy to facilitate that effort, and many parties do resolve their matter in this setting. But I want to raise an additional issue, an issue that will arise if an agreement is not reached. There is a procedure I am willing to use, if you consent to it, that, in my opinion, can facilitate you in seeing your own case as well as the positions of the other participants in a clearer and fuller light. We call the procedure the ‘Last Best Offer’ or the LBO technique.

      Here is how it would work—with your full agreement, and only with your full agreement, at the end of the process, if you have not agreed among yourselves on a resolution, you would each present to me what you consider to be your Last Best Offer to end the case. I will then consider all your proposals and I will give what we will call my ‘Indicated Sentence’—this is the sentence I will impose if the defendant agrees to it and agrees to plead guilty and to thereby end the case. The defendant need not accept my indicated sentence, in which case matters will return to the trial court and matters addressed here will not be conveyed to the trial judge.

      The important thing I want you to know about the indicated sentence is that I will not come up with some kind of compromise; I will select one of the proposed sentences—the one that I think is fairest and most appropriate under all the circumstances, assuming, of course, that I find it lawful, reasonable, and in accordance with governing sentencing principles. The fact that I will select one of the proposed sentences will operate, I hope, to encourage you to look very seriously at your own suggestions and the suggestions of the others. When you do so, you may be drawn to come to a settlement and never reach the stage where I will be asked to announce an indicated sentence. Through negotiation, in other words, you may be able to come to an agreement on your own, although there is no requirement that you eventually agree.
Does everyone fully understand what I am getting at here? Your counsel can explain it if you would like. Are there any questions? Are you all willing to proceed along these lines?

b) Possible Ground Rules for this Conference:

Ground rules might include: “no interruptions, no name calling”; assurances of the safety of all within the courtroom; time limits; participation is voluntary—no one will be forced to agree to anything; order of speaking; opportunities for questions.

2. Each party offers their opening statement of their expectations, and explains their initial plea negotiation position.

3. Identification of Issues by the Judge:

   a) Factual questions (e.g., sufficiency of the evidence; how will the prosecution prove something . . . ), and legal questions (e.g., police never informed my son of his Miranda rights, so the case should be dismissed!).

   b) Explanation of Consequences of a Plea.

4. Break for individual conferences.

5. Parties’ responses to factual and legal issues, opportunity for questions by all and by the judge.

6. Judge concludes discussions with explanation that each party should understand the importance of a settlement: finality for all (e.g., no appeal, no further court hearings for parties and families to attend other than sentencing), and the opportunity for a lesser sentence than after a trial.

7. Presentation of each party’s LBO and closing arguments by all parties.

8. Break for individual conferences to consider the LBO and to consider a final attempt at reaching an agreed-upon settlement.

9. If no agreement has been reached, judge states the ‘indicated sentence’ (assuming the judge finds it to be lawful, reasonable, and in accordance with governing sentencing principles). If none of the proposed sentences meets this standard, the judge will explain why he or she is unable to announce an ‘indicated sentence,’ in which case the judge may give the
participants an additional opportunity to revise and resubmit proposals or the judge may simply refer the case back to the trial court.

10. Conference concludes with opportunity of defendant to accept or reject the 'indicated sentence.'