Arizona Legal Studies
Discussion Paper No. 15-33

Guiding Court Conversation Along Pathways Conducive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence

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

October 2015
GUIDING COURT CONVERSATION ALONG PATHWAYS CONDUCIVE TO REHABILITATION: INTEGRATING PROCEDURAL JUSTICE AND THERAPEUTIC JURISPRUDENCE

David B. Wexler

In a recent article, Kimberly Kaiser and Kristy Holtfreter, of Arizona State University’s School of Criminology and Criminal Justice, use procedural justice (PJ) and therapeutic jurisprudence (TJ) to present an integrated theory of specialized court programs (such as drug treatment courts, mental health courts, veterans, reentry, and domestic violence courts). Their article is likely to make many contributions to the overall field, and surely they will kindle interest in the very relationship between TJ and PJ. The conceptual connection between the two is the principal focus of this Essay—and, as we will see in the next few sentences, my task is in this respect an exceedingly simple one.

The authors properly note that, in TJ, “the emphasis is on understanding the impact and consequences of the law, legal process, and legal actors on the well-being of persons affected by the law,” and that a primary goal of TJ “is to apply and incorporate insights and findings from the psychology, criminology, and social work literature to the legal system.” TJ, in other words, looks to those other disciplines for nourishment and growth. They are the “vineyards” from which we produce the TJ practices and techniques—the “wine”—used by judges, lawyers, and other legal actors.

And lo and behold, one such major body of psychological knowledge is the field of procedural justice, obviously important to TJ because it “teaches that people appearing in court experience greater satisfaction and comply more willingly with court orders when they are given a sense of voice and validation and treated with dignity and respect.” Of course, TJ fully embraces PJ, and regards it as a major tool in the TJ toolkit. But, as with the other vineyards, TJ is merely a pleased and hopefully creative consumer, not in any way its architect.

Given the importance and significance of PJ, it is little wonder that its use by TJ has received major support, as evidenced by much written in the 2003 anthology by Bruce Winick and myself, Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts. Kaiser and Holtfreter are also properly taken with PJ, so much so that they attribute a good bulk of the successful results of specialized court

---

1 Professor of Law and Director, International Network on Therapeutic Jurisprudence, University of Puerto Rico; Distinguished Research Professor of Law Emeritus, University of Arizona. The author is best contacted by email at davidBwexler@yahoo.com
3 Id. at __
4 Id. at __.
7 Kindle edition also available digitally through Amazon.com .
programs to its likely impact. To the extent TJ is independently responsible for favorable results reached, those authors seem, at this analytical stage, to regard (but also to reduce?) TJ to the following important principles traditionally associated with and compatible with TJ: “(1) ongoing judicial intervention, (2) close monitoring of and immediate response to behavior, (3) the integration of treatment services with judicial case processing, (4) multidisciplinary involvement, and (5) collaboration with community-based and government organizations.”

The point I wish to make here is this: These just-mentioned TJ principles are indeed important, but somewhere along the way, the authors may have inadvertently downplayed the previously quoted overarching goal of TJ: to “apply and incorporate insights and findings from the psychology, criminology, and social work literature to the legal system.” If we are to shoehorn those insights and their application into the authors’ framework, they would presumably fit, a bit clumsily, within the category of “ongoing judicial intervention,” and, in their Figure 1, in the “Components of TJ” box labeled “Supportive Interactions between Judges and Defendants”, which should then accordingly house the raw ingredients of PJ and, indeed, of all TJ vineyards.

What are those insights and findings from the other disciplines? Well, that list is fortunately a growing one, evolving as our knowledge of human behavior advances. Procedural justice is of course one of them. But here is what I noted in a recent essay prepared as the Foreword to a book, edited by Professor Warren Brookbanks, Therapeutic Jurisprudence: New Zealand Perspectives:

“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.”

To explain their possible relevance in the current context, let me begin by quoting from a PJ evaluation instrument noted by the authors:

1. At court today, did you have enough opportunity to tell the judge what you think he or she needed to hear about your personal and legal situation? (“voice”)
2. At court today, did the judge seem genuinely interested in you as a person?
3. At court today, did the judge treat you respectfully?
4. At court today, did the judge treat you fairly?
5. Are you satisfied with how the judge treated you and dealt with your case today?

For all we know, a participant may have given very high PJ marks to a court which proceeded along these lines: “Ms. Smith, I want to make sure you fully understand what we are doing in court today, and please raise your hand if you need for me or for someone else to speak up or to clarify anything. And when it is your turn to speak, please take your time, and don’t be nervous. I am here to make sure we have all the important information and that we have taken into account all the factors you regard as important.”

---

8 Id. at __, citing Bruce J. Winick & David B. Wexler, supra note 6.
9 2015. The chapter, Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law, is easily accessed online at SSRN at:
http://ssrn.com/abstract=2564613
A court guided by PJ principles might indeed have come up with a respectful statement mirroring the above. But now let us look at some of the factors that psychological insights—beyond procedural justice concerns—have given us about relapse prevention planning and health care compliance, and see how those factors might alter or guide the conversation: these principles have to do with “rewinding” a situation to see what went wrong, in hopes of avoiding a repeat incident; they also tie into a psychological finding that if one is presented with a mild counterargument about prospective compliance and is asked to address it, the person may become more “anchored” in his or her commitment to the new course of conduct. Additionally, they relate to the fact that a commitment to do something or to refrain from doing something may result in greater compliance if a friend or family member is aware of the commitment. Finally, they relate to how compliance is enhanced by respectfully asking the participant to summarize his or her understanding of the nature of the commitment:

“Ms. Smith, I’d like you to tell me about when you’ve gotten into this situation (eg, DWI) in the past. Were you alone or with others? Which other people? People your own age or older people? Was it daytime or nighttime? In your neighborhood or elsewhere? Now, Ms. Smith, this is an important point, so please think carefully about it: What do you propose to do to avoid getting into this situation in the future? Here is my concern: This didn’t work last time. Why do you think that will work for you now when it didn’t work for you a year ago? Are there changed circumstances? If so, what are they? What is different now? Okay, now, when you were in court last time, you mentioned that you would like your Aunt Sylvia to be in court with you next time. Is she here today? Can you please tell her, slowly and clearly, so she will easily understand and remember, what you’ve now promised to do so that this behavior won’t happen again?”

In conclusion, a few points are worth making here:

First, we hope that the immediately above conversation could and would occur with a very decent dose of PJ. But it is also guided by factors above and beyond the basic PJ concerns of voice, validation, and respectful treatment. Perhaps the court participant would rate it lower on PJ than the first conversation was rated, but how significant should that be, especially if a PJ threshold is met or exceeded and if this path proves better for long-term compliance and rehabilitation?

Second, this suggests that while PJ is of great importance, there are other practices and techniques—captured by TJ—that are crucially important for judges to employ, and thus TJ should surely be integrated in court proceedings (specialized or otherwise). This is a dynamic area and requires ongoing attention to developments in psychology, criminology, and social work and to their integration into the legal system.

Third, it may be that in some cases these types of TJ-guided judicial conversations may have been responsible for court successes, rather than simple unadorned PJ statements, on the one hand, or, on the other hand, “structural” TJ factors, such as collaboration with community services and the like.
In any case, PJ is so basic that it ought to be part of all courts at all times, and this has been recognized in the US by the American Judges Association and its important White Paper on Procedural Fairness.\(^{10}\)

But, as the authors recognize, TJ is also important. I am pleased to be working at the moment with some Australian colleagues to propose an important role for TJ in an international document relating to court excellence\(^{11}\). PJ is already a standard component of that document, and I am fortunate to have read the thought-provoking Kaiser/Holtfreter article at this very moment, and to have been stimulated and intellectually engaged to revisit --and indeed to refine -- my take on the important relationship between PJ and TJ.\(^{12}\)

---


\(^{11}\) http://www.courtexcellence.com/