ESSAY

Adding Color to the White Paper:

Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence

David B. Wexler

Judges Kevin Burke and Steve Leben, in *Procedural Fairness: A Key Ingredient in Public Satisfaction*,[1] have produced a most impressive White Paper. It is handy, brief, crisp, readable, and immensely practical.

The document draws on, and makes most accessible, the research on procedural justice, demonstrating convincingly the importance of judges understanding and implementing in their courtrooms concepts such as "voice" and "respect." Judges Burke and Leben claim procedural justice to be "the" critical element in public trust and confidence regarding the court system. They note, too, the role procedural fairness likely plays in increased compliance with court orders and even in reduced recidivism.

The latter contention—regarding compliance and reduced recidivism—is an area where the literature of procedural justice spills over substantially into the related and indeed overlapping area of therapeutic jurisprudence (TJ). The present essay argues that therapeutic jurisprudence is "the" critical element in how courts can reduce re-offending,[2] and urges that judges should similarly familiarize themselves with that area, a process that, like the introduction to procedural fairness, can also begin by judges perusing a few key sources and websites.[3]

In fact, there is a perfect single-source TJ counterpart to, and companion for, the procedural fairness White Paper. In the beginning of their White Paper, Judges Burke and Leben note that the American Judges Association has about 150 members in Canada and that "although we make no recommendations regarding the courts of Canada, we believe that the baseline social-science research upon which this paper is based would also be applicable there, given the similarities between the legal systems of these two countries."[4] As it turns out, the TJ companion to which I am referring is a handy, brief (about 50 pages), crisp, readable and immensely practical judicial manual, available online,[5] produced in 2005 by the National Judicial Institute of Canada (and spearheaded by Justice Paul Bentley of the Toronto Drug Treatment Court), and titled *Judging for the 21st Century: A Problem-Solving Approach*.[6]

THERAPEUTIC JURISPRUDENCE

TJ's view of the law as a potential therapeutic agent—and of law as one of the helping/healing professions—leads it to search for promising developments in the behavioral sciences and to think creatively about how those developments might be imported into the legal system without offending due process and related justice goals. Accordingly, TJ has profitably employed insights regarding relapse prevention planning, health care compliance, and the reinforcing of law-abiding behavior.[7]

Naturally, procedural justice has been high on TJ's list of highly pertinent branches of social-science inquiry. This is no wonder, given the relationship and close connection between procedural fairness and therapeutic consequences.

In the area of civil commitment, for example, procedural fairness at a commitment hearing is likely to increase a respondent's acceptance of a judicial order of commitment as well as a patient's cooperativeness with treatment professionals and with the taking of recommended medications.[8] In the criminal law context, procedural fairness factors also affect an offender's readiness for rehabilitation, and unfairness may indeed lead to a "defiance" effect and increased offending.[9]

A. BEYOND PROCEDURAL FAIRNESS

In criminal law matters, therefore, TJ often draws heavily on the psychology of procedural justice. But it then typically draws on some other psychological principles to maximize the rehabilitative clout of a recommendation. TJ work on enhancing compliance with probation conditions is illustrative. The TJ literature draws on procedural fairness principles in recommending giving an offender voice in the appropriateness of

Footnotes

1. 44 CT. REV. 4 (this issue).
2. David B. Wexler, *Robes and Rehabilitation: How Courts Can Help Offenders "Make Good,"* 38 CT. REV. 18 (2001).
3. *Id. See generally* NAT'L JUDICIAL INST., JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH (2005), *available at* http://www.nji.ca/nji/Public/documents/Judgingfor21scenturyDe.pdf (written for the National Judicial Institute of Canada by Susan Goldberg); JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003); REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (David B. Wexler ed., 2008). The principal website is that of the International Network on Therapeutic Jurisprudence at (http://www.therapeuticjurisprudence.org/). The Australian Institute of Judicial Administration has recently created an excellent Australasian Therapeutic Jurisprudence Clearinghouse for that part of the world (http://www.aija.org.au/index.php?option=com_content&task=view&id=206&Itemid=103).
4. Burke & Leben, *supra* note 1, at 5.
5. *See supra* note 3.
6. *See* Wexler, *supra* note 2.
7. *See supra* note 3.
8. *E.g.*, JUDGING IN A THERAPEUTIC KEY, *supra* note 3, at 131.
9. REHABILITATING LAWYERS, *supra* note 3, at 171.

proposed conditions, in the judge clearly explaining to the offender the terms of release, in conceptualizing probation as a type of bilateral behavioral contract rather than a unilateral judicial fiat.[10]

But the TJ recommendation of having agreed-upon family members present at the hearing who are aware of the release conditions is drawn from an important psychological compliance principle that transcends the area of procedural justice.[11] So is the recommendation that compliance is enhanced if the offender is asked to respond to mild counterarguments about the likelihood of his or her compliance.[12] And so too is the relapse prevention planning recommendation that the offender be asked to think about the chain-of-events that led to past offending behavior, to ascertain situations that put the offender at high-risk, and to suggest how such high-risk situations can best be avoided in the future.[13]

The point, of course, is that procedural fairness takes us a good distance—especially regarding public perception and satisfaction with the court system—but it needs to be combined with TJ if judges are to realize their potential in enhancing compliance and reducing re-offending. The Canadian TJ judicial manual does all this and more.

B. THE CANADIAN TJ MANUAL AND MORE

In fact, the Canadian manual even adds some meat to the bones of the very core topics of the White Paper. For example, regarding respectful behavior, the TJ manual suggests that judges "refer to defendants as 'sir' or ma'am, or by title and name (e.g., Mr. Smith; Ms. Jones), rather than by first name, the word 'defendant', or by case number."[14] And, in a recommendation clearly relevant to the White Paper's concern regarding minority groups and non-native English speakers, the TJ manual urges judges to "pronounce names correctly; when in doubt, ask court participants for guidance in pronouncing names."[15]

In discussing needed research, the White Paper notes that "while there is a lot of research at the trial-court level on the issue of procedural fairness, there is little research about how the concept applies at the appellate level. This could be an important area for additional thought and research."[16]

Additional thought and research is indeed needed, but TJ has already made some substantial strides in the appellate arena, including an entire special issue of the *Seattle University Law Review* dedicated to it.[17] The Canadian TJ manual also devotes some space to the matter, including a suggestion about the importance of appellate courts in their opinions "providing the appellant with the assurance that his or her story was heard and the salient facts considered by the court."[18] And other TJ writing even takes appellate opinion writing to the level of recommendations for continuing judicial education. Drawing on the implications of Nathalie Des Rosiers's important 2000 article in *Court Review*,[19] I once noted that one of her TJ proposals is for opinion writing to take the form of a "letter to the loser," and

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> if past opinions are read through this prism, we are likely to find admirable, abominable, and average illustrations. It may be useful to collect, clarify, and use these illustrations in educational programs for judges, lawyers, and law students.[20]

There is also TJ writing regarding the relationship between sensitively written appellate opinions and the tricky and nuanced issue of how a defense lawyer might go about explaining an appellate affirmance to a client—and in a way that shows the client that the lawyer was indeed a vigorous advocate but that the unsuccessful client has been provided by the court with voice and validation.[21]

C. CRAFTING STATEMENTS OF REASONS IN SENTENCING

Mostly, of course, both procedural fairness and TJ in the criminal context will involve trial-level rather than appellate pronouncements and explorations. Not surprisingly, therefore, there is also TJ work speaking to the drafting of statements of reason in the sentencing sphere, and the role of counsel in explaining those decisions and reasons.[22] 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.[23] Training of judges in the drafting of statements of reasons may be especially relevant in jurisdictions—like some federal circuits[24]—where courts are required to address directly 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. But if they follow the Des Rosers advice of crafting a sensitive "letter to the loser" (but always remaining

10. *Id.* at 31.
11. *Id.*
12. *Id.*
13. *Id.*
14. JUDGING FOR THE 21ST CENTURY, *supra* note 3, at 11.
15. *Id.*
16. Burke & Leben, *supra* note 1, at 20.
17. 24 SEATTLE U. L. REV. 217 (2000).
18. JUDGING FOR THE 21ST CENTURY, *supra* note 3, at 7.
19. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Roles of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54 (2000).
20. JUDGING IN A THERAPEUTIC KEY, *supra* note 3, at 315.
21. REHABILITATING LAWYERS, *supra* note 3, at 39-40.
22. *Id.* at 172-73 and 178-79
23. *Id.* at 172-73. *See also* Wexler, *supra* note 1.
24. U.S. v. Thomas, 498 F.3d 336 (6th Cir. 2007) (interpreting reasonableness review test of Rita v. U.S., 127 S. Ct. 2456 (2007)).

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mindful of the victim), the stage may be set for a more positive long-term outcome.

D. VOICE NOT AFFECTING THE LITIGANT'S CASE

TJ, then, can roost very well with procedural fairness. Consider one final issue from the *White Paper*. Judges Burke and Leben note the well-established but curious finding that litigants feel good about having voice even in a post-decision context, where their voice cannot in any way influence the decision. Still, in policy terms, the authors agreed, for ethical reasons, that "litigants should not be granted an arbitrary voice in the courtroom merely to pacify this need to speak and participate."[25]

But TJ has tackled a similar problem in the context of victim participation in the criminal process. A victim often participates by preparing a Victim Impact Statement. But a recent TJ suggestion proposes also a *Legal System* Victim Impact Statement (LSVIS), where a victim after-the-fact discusses the process from the time of victimization until after the trial: treatment by the police, treatment during trial, etc.

Of course, a LSVIS cannot have any impact in the victim's case itself. But its preparation can satisfy a victim's need for voice and the statement can, with proper distribution/dissemination, be useful in improving the system for *future* cases. So long as the victim is fully aware that the statement solicited can have no impact on his or her own case, the ethical issue evaporates, the need for voice is satisfied, and the system can perhaps be improved for future cases and for the treatment of future victims.[26]

CONCLUSION

In recent years, TJ has "partnered" with related approaches, such as preventive law and with problem-solving courts, especially drug treatment courts. In the case of preventive law, TJ gave preventive law an ethic of care and a rich interdisciplinary approach, and preventive law gave TJ practical office procedures, such as the "legal checkup," whereby lawyers could work with clients to apply the relevant law therapeutically.[27] In the case of drug treatment courts, those courts offered TJ actual laboratories with practical procedures to examine through a TJ lens, and TJ offered drug treatment courts a number of principles or "instrumental prescriptions" that may enhance their functioning.[28]

In the case of procedural justice, TJ has long looked to the procedural fairness literature to improve the therapeutic functioning of the law. Now, procedural fairness should look to TJ and develop a relationship that is a truly two-way street.

The need for a robust reciprocal relationship is actually an urgent one. One need only consider the chilling statistics of the recently released Pew Report,[29] showing 1 in 100 U.S. adults (and numbers much, much higher for persons of color) behind bars, placing the U.S. in first place worldwide in incarcerating its population, to know we are in desperate need of all sensible solutions. We might expect the federal criminal justice system to offer some leadership. But consider Judge Merritt's lament in his recent dissent in the Sixth Circuit case of *U.S. v. Jeross*:

> This is another drug case in which our system of criminal law has imprisoned for many years two more lives and torn up two more families by grossly excessive sentences imposed in the "War on Drugs." There are many reasons that our federal system of punishment has turned in this direction, not the least of which is the advent during the last 20 years of our irrational set of sentencing guidelines that judges apply by rote on a daily basis. We are constantly adding new prisoners like these defendants with long periods of incarceration to the more than two million men and women now incarcerated in the hundreds of prisons and jails around the country. These sentencing guidelines hold that mitigating factors like family ties, mental illness, education, and the likelihood of rehabilitation are simply "not relevant" in the sentencing process. Judges' minds are closed down and sentences ratcheted up by applying convoluted conversion formulas like the one just recited in the majority opinion. The recent Blakely-Booker-Cunningham line of Supreme Court cases has given judges an opportunity to rid the system of some of the worst aspects of guidelines, but we judges soldier on by applying the old mandatory system as though nothing of significance had happened. The cost to the taxpayers and in human lives has become enormous and shows no signs of change.[30]

For all we know, the defendants in *Jeross* may have received all the procedural fairness called for in the White Paper. But there comes a time—and we now seem to be well past it—where outcome is as important as process. The public will not and should not regard the court system with satisfaction and perceived fairness unless the incarcerative crisis is tackled and the rehabilitative challenge is met. Of course, this is everyone's business, not just the courts'. But for the courts to play their

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25. Burke & Leben, *supra* note 1, at 12.
26. Rehabilitating Lawyers, *supra* note 3 at 325.
27. Practicing Therapeutic Jurisprudence: Law as a Helping Profession (Dennis Stolle et al. eds. 2000).
28. Judging in a Therapeutic Key, *supra* note 3.
29. Pew Center on the States, One in 100: Behind Bars in America 2008, *available at* http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf.
30. U.S. v. Jeross, No. 06-2257 (6th Cir. April 4, 2008) (Merritt, J., dissenting).

role optimally, procedural fairness literacy shall be joined with TJ literacy, the Canadian TJ manual should be distributed along with the White Paper, and judges should strive to change the legal culture in their courts and among the lawyers practicing there.[31]

David B. Wexler is professor of law and director, International Network on Therapeutic Jurisprudence (INTJ), University of Puerto Rico; Distinguished Research Professor of Law and professor of psychology, University of Arizona. He has received a Distinguished Service Award from the National Center for State Courts. His latest book is REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE *(Carolina Academic Press 2008). The INTJ website (www.therapeuticjurisprudence.org) is a major resource with a comprehensive bibliography. He may be contacted at davidBwexler@yahoo.com.*

31. For how courts might set standards of expected lawyering, see Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT. REP. 76 (2002) (setting out Judge Marcus's views on sentencing, and instructing attorneys on how to argue sentencing matters before him).