



HOPE-ful bottles: Examining the potential for Hawaii's opportunity probation with enforcement (HOPE) to help mainstream therapeutic jurisprudence☆

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ABSTRACT

This article builds on the emerging understanding of Hawaii's Opportunity Probation with Enforcement (HOPE) probation when viewed through the lens of therapeutic jurisprudence (TJ). The article commences with recent conceptualizations of TJ through the metaphor and methodology of 'wine'/'liquid' and 'bottles' (Wexler, 2014). Next, the article presents an overview of how HOPE works and clarifies a number of misconceptions about the approach taken. The article then examines the potential of the principles underlying HOPE to help in realizing the promise of mainstreaming TJ. Specifically, it is argued that HOPE is more economical than drug courts and can reach far more people. In addition, it promotes procedural justice and desistance, is flexible and can be extended across the criminal justice system.

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1. Introduction

Therapeutic jurisprudence (TJ) involves the interdisciplinary study of the law's impact on psychological well-being and seeks to employ insights from the behavioral sciences, especially psychology, criminology and social work, to humanize the law and its administration (Wexler, 2013; Winick, 1991). In this article, I examine Hawaii's Opportunity Probation with Enforcement (HOPE) through the TJ wine/liquid and bottle metaphor and methodology developed by Wexler (2014). This provides the context for examining HOPE's potential to help in realizing the promise of mainstreaming TJ. HOPE's potential to create a more TJ-friendly landscape is explored not only in the context of courts, but across the criminal justice system more generally.

HOPE was developed in Hawaii in 2004 by Judge Steven Alm in response to his frustration with the existing probation system, where non-compliance was routinely disregarded. In HOPE, by contrast, probationers receive 'swift, certain and fair (ie, modest) sanctions' for each detected violation, such as missed probation appointments or positive drug tests. Consequently, judicial discretion in responding to such

behavior is minimized, in favour of predictability. This model presumes that:

- the *certainty* that all targeted violations will be punished will make an offender less likely to take risks;
- the level of punishment should be *proportionate* to the seriousness of the violation (fairness); and
- *swift* consequences are more effective than delayed ones (see Bartels, 2017b; Hamilton, Campbell, van Wormer, Kigerl, & Posey, 2016).

There should also be a consistent approach when probation officers deal with individual clients for repeated violations and across clients, so they receive the same sanction for the same behavior (Alm, personal communication, 19.1.2018).

HOPE has received extensive media attention and numerous awards (for background, see Bartels, 2015, 2017b), while Clear and Frost (2014: 122) recently called HOPE 'the hottest new program in the field'. By the end of 2017, programs based on HOPE had expanded to 33 jurisdictions and were being used in pre-trial, probation, parole and prison contexts (Alm, personal communication, 10.1.2018).

In 2009, Hawken and Kleiman conducted a randomized controlled trial evaluation of HOPE and found that it was associated with large reductions in drug use and reoffending. In fact, HOPE participants were 55% less likely than the control group to be arrested for a new offense; 53% less likely to have their probation revoked; 61% less likely to miss appointments with

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their probation officers; and 72% less likely to test positive for drugs. In addition, they spent 48% fewer days incarcerated (Hawken & Kleiman, 2009). The 2009 findings prompted the allocation of significant funding from the National Institute of Justice and other sources to develop programs ostensibly based on HOPE (see Lattimore et al., 2016); however, recent analysis indicates that these programs focused exclusively on HOPE's sanctions component and neglected to replicate or research its rehabilitation-oriented and TJ-friendly aspects (see Bartels, 2017b).

The findings of a follow-up evaluation of HOPE (Hawken et al., 2016) revealed that, up to 10 years after the program, HOPE participants were less than half as likely as the control group to have been returned to prison (13% vs 27%) and had less than half as many new drug charges on average (0.12 vs 0.27). Although the long-term impact has been described as 'negligible' (Cullen, Pratt, & Turanovic, 2017: 70) and 'considerably more muted' (Cook, 2016: 1156) than Hawken and Kleiman's (2009) findings, Alm (2016) has suggested that it is confirmation that HOPE leads to long-term behavioral change.

This paper further develops our understanding of the intersections between HOPE and TJ and contributes to the discussion of how to adopt TJ in the mainstream criminal justice system. Part 2 of this article provides a summary of Wexler's 'wine' and 'bottles' concept and the issue of mainstreaming TJ. The article then presents an overview of how HOPE works in Part 3. Part 4 draws on court observations and interviews conducted in January 2016 (see Bartels, 2016, 2017b) to clarify misperceptions about HOPE and discuss the ways in which HOPE is consistent with TJ principles. Part 5 explores the ways the HOPE model, properly understood, may help to promote the goal of mainstreaming TJ. The article concludes with some comments on future directions in policy and practice.

2. Mainstreaming TJ, wine and bottles

Wexler (2001: 18) has suggested that it is 'crucial to recognize the potential application of therapeutic jurisprudence generally—in civil cases, appellate cases, family law cases, and, of course, in criminal and juvenile cases'. As Spencer (2012: 2) has noted, 'therapeutic approaches should not just be applied in specialist courts but also in mainstream courts where the vast majority of cases are heard'. Doing so poses a number of challenges (see Bartels, 2009; Johnson, 2016; Spencer, 2012), but the imperative for such action is clear. As Wexler (2014: 463–464) stated, in what has become a seminal paper in the TJ canon, the growth of and enthusiasm for special problem-solving courts has been 'stunted' by recent economic pressures, thus leading to discussion of 'how some of the "new" judging techniques might be employed in mainstream courts, especially criminal courts'. To better understand how TJ can be 'mainstreamed', Wexler (2014: 464) proceeded to suggest that 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"'.

As an example of 'TJ liquid' (also conceptualized as 'judicial juice' (2014: 474) or legal practices and techniques Wexler (2013)), Wexler (2014) suggested that judicial officers should use TJ insights when engaging in their judicial function, drawing on the social science literature in relation to increasing compliance and relapse prevention. Examples included discussing with program participants proposed things they should do or refrain from doing; encouraging the presence of family members in court; holding follow-up hearings; and making positive remarks when successfully terminating probation. Judicial officers should also condemn the act, not the actor, and comment on any offender strengths that might be used as building blocks in shaping a future with hope.

Wexler (2014) also discussed three kinds of 'bottle' (or legal structure: Wexler, 2013), namely, back-end conditional release; diversion and post-offense and post-sentence rehabilitation; and appeals. Wexler commended laws allowing an offender's post-offense rehabilitative efforts to be taken into account at sentence. He described the common federal model of conditional release in the United States (US), where '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' as being 'about as "unfriendly" as one can get' and 'constitut[ing] a legal landscape entirely sapped of motivational strength—in no way does it reward or encourage inmate reform efforts' (Wexler, 2014: 471; see also Wexler, 2016a). By contrast, the Spanish model, where the conditional release authority is vested in a single judge, allows 'for the possibility of developing a one-to-one relationship between the judge and the offender, thereby increasing the judge's motivational influence' (Wexler, 2014: 471). In addition, the judge's role begins at the time of incarceration, allowing him or her 'to monitor and motivate the offender's progress in the correctional environment' (Wexler, 2014: 471); there is 'constrained discretion' to permit the conditional release of offenders with a good behavioral record who have served a certain portion of their sentence; and the judge can set appropriate conditions as part of the release process. This latter process may occur in the context of a dialogue between the judge and offender, thereby promoting the offender's active participation and voice.

As Spencer (2014) later noted, Wexler's metaphor invites examination of the law (ie, bottle), to determine how much, if any, TJ practices (ie, liquid) can fit within that law/bottle. If it doesn't fit much (or any) TJ liquid, then this might point to the need for law reform. By contrast, bottles with the potential to fit a significant amount of TJ liquid may require procedural changes, program development and/or professional training. Spencer suggested that the benefit of Wexler's approach is that it is

is non-prescriptive and avoids 'cookie-cutter' law reform or wholesale adoption of programs from other jurisdictions. This methodology can be applied in a range of mainstream legal areas, not just criminal justice. It guides our thinking about law reform and the improvement of legal practices and techniques. It can take into account local nuances and differences in the level of resources. It allows for incremental change by exploring what can be done within existing 'bottles' and then, if necessary, informing and building support for law reform (Spencer, 2014: 223).

In a later paper, Wexler (2015) explained the genesis of the metaphor (including recognition of the challenges that reference to alcohol may pose for some people) and expanded on it by discussing vineyards and bottle factories, noting developments in psychology such as procedural justice, the reinforcement of desistance from crime, the techniques of relapse prevention planning and the principles of health psychology used to promote compliance with health and judicial orders, 'can be brought into the legal realm and used as the new wine of TJ. Those advances are really the "vineyards" of the new wine. Psychological insights can similarly be used to be build better bottles' (Wexler, 2015: x). Elsewhere, Wexler (undated: Slide 6) has suggested that 'psychology, criminology, and social work serve as the principal "vineyards" for producing TJ wine'. In his 2015 paper, Wexler also considered different types of bottle and noted the 'intricate and intimate relationship between the wine and the bottles' (2015: xii; see also Wexler, 2016a).

3. How does HOPE work?

This section sets out the key features of how HOPE was operating by 2016, following modifications of the original form in which it was introduced. Further details about HOPE's operation are set out in the 2015 *State of the Art of HOPE Probation* document prepared by the Institute of Behavior and Health (IBH), which was co-written by Alm and has been described by him as 'the source' on HOPE (Alm, 2016: 1211; see also Bartels, 2017a,b).

3.1. The selection process

HOPE is not a diversion program and, unlike many community corrections models, does not target low-risk offenders. Instead, it focuses

on high-risk offenders who would otherwise be likely to be incarcerated or perform poorly on standard probation. Potential participants are identified by probation officers through validated risk assessment tools or because of multiple prior failures on probation (for example, through ongoing drug use or violation of probation conditions). Alm (2013: 1182) has described how people are 'triaged' in the Hawaiian court system as follows:

The courthouse is thought of as a hospital. Offenders are the patients... Probation-as-usual is the outpatient clinic. HOPE Probation is the hospital ward. The Drug Court, now reconstituted to target primarily high-risk offenders, is the Intensive Care Unit.

In addition, all offenders assigned to the Honolulu Sex Offender Unit are automatically placed in HOPE after they are sentenced to probation (IBH, 2015) and are required to undertake sex offender treatment programs. Judges can also refer offenders being sentenced for felony convictions or minor domestic violence offenses to HOPE at the time of sentencing.

3.2. Probation officers

As Alm has explained, probation officers in Hawaii 'are all college-trained social workers, [and] half have Master's degrees in social work or criminal justice' (Alm, 2016: 1197; for research on effective probation supervision generally, see Chadwick, Dewolf, & Serin, 2015; Dowden & Andrews, 2004). All probation officers in Hawaii, regardless of whether they are part of HOPE, function as 'change agents' (see, generally, Bourgon, Gutierrez, & Ashton, 2011) to help probationers make positive changes in their lives. They may also use relapse-prevention strategies. In addition, probation officers monitor compliance with probation conditions, including whether HOPE probationers are attending drug testing, returning positive tests etc.

3.3. The warning hearing

All participants in HOPE commence by attending court for a 'Warning Hearing', which is delivered in a group of 10–12 participants (see Bartels, 2017b: Appendix A for the typical script). Alm (cited in Bartels, 2015: 54) has advised that providing the warning in groups

makes efficient use of court time... [and] sends the message to all of the probationers that they are being treated just like their fellow probationers. They are not being singled out and can expect to get consistent treatment in the future.

Probationers are told that although the judge cannot control what the probationers do, s/he can control his or her own actions, and that probationers can accordingly count on a sanction for every violation. The details of the four sanctions described in 3.5 are explained to participants. They are told to see their probation officer after the Warning Hearing, at which point they will receive a color code (for example, red). As the judge then explains, probationers must call a dedicated telephone hotline every weekday morning to hear which color has been randomly selected for that day. If their color has been selected, they must appear at the probation office before 1 p.m. that day for a drug test.

Commentators have noted that a key feature of HOPE's Warning Hearing is that expectations are clearly laid out and that it functions as a form of behavioral contract (see Hawken et al., 2016; Lattimore et al., 2016). Writing generally about behavioral contracts and drawing on earlier comments by Winick (1991), Johnson suggested that such contracts provide defendants with "a stake in the game," incentivizing the appropriate behavior' (2016: 321). Johnson added that it is 'also important for contractors to follow through when a consequence is set to occur for a behavior. This should be done with both positive and negative consequences' (Johnson, 2016: 322; see also Wexler, 2001).

3.4. Drug testing and treatment

In their first two months on HOPE, probationers with substance issues are tested randomly, generally at least once a week; the frequency of testing is set by probationer's determined risk level and is thus different for different probationers. Good behavior, as assessed by positive engagement with the probation officer and negative drug tests, is rewarded with less frequent testing, through the assignment of a new color. This is determined on the basis of re-assessment and a finding that the risk level has decreased.

Drug treatment is provided for any HOPE participants who request it or those who cannot stop using drugs or alcohol on their own. In practice, HOPE participants with two or more violations in quick succession are mandated to intensive treatment services. The treatment may be either intensive outpatient or residential, depending on the assessment done by the probation officer and/or drug treatment facility.

3.5. Consequences for non-compliance

The following violations are targeted for immediate consequences: admitting to alcohol/drug use and still being under the influence; or testing positive for and admitting to alcohol/drug use. If probationers are required to undertake substance addiction treatment, failure to participate satisfactorily in treatment (as assessed by the treatment provider/s and/or probation officer) will constitute a violation. For sex and domestic violence offenders, failure to satisfactorily participate in treatment or having proscribed contact with victims will also constitute a violation.

Where a violation is alleged, the probation officer sends the judge a 'motion to modify probation'. The hearing is held promptly, while the probationer is confined. If s/he is found to have violated the terms of probation, s/he is immediately given a short jail stay, with credit given for time served (ie, while awaiting the hearing). During the court hearing, the judge asks probationers whether they waive their right to test the evidence. If they do not wish to waive this right, probationers have the legal right to contest the motion alleging a breach. In such circumstances, witnesses (for example, a drug-tester or probation officer) is called and cross-examined and the judge determines whether the prosecution has made out its case. However, in practice, probationers nearly always acknowledge they have violated the terms and conditions of their probation; there were only 30 contested hearings between HOPE's inception and 2015. According to the IBH (2015: 14), '[i]n the thousands of other hearings, the probationers have taken responsibility for their behavior... They know that at that point they have had multiple chances and that it was their own behavior and choices that led to that result'. This is perhaps unsurprising, given that there is clear evidence of violation (for example, a positive drug test).

The IBH has suggested that the current model encourages personal responsibility, with a sharp distinction between sanctions where probationers acknowledge responsibility and those involving denial and/or absconding. Importantly, repeatedly returning positive drug tests and/or failing to complete drug treatment does not result in termination from HOPE. In addition, the sanctions are no longer 'graduated'. HOPE in Hawaii stopped using graduated sanctions by 2007, adopting the principle that the same violation should lead to the same sanction whether it is the first time or the tenth. At the same time, if violations such as positive drug tests are repeated, the probation officer will likely employ other strategies, such as referring the probationer for a higher level of treatment or increasing the frequency of appointments with him or her. The following sanctions regime was in operation in 2016 (IBH, 2015):

- **Cell-block sanctions:** Where probationers are late for or miss an appointment with their probation officer, or are late for a drug test, the probation officer will attempt to contact them. If they attend later that day or the next day and test negative, the probation officer will

confer with them and they will be ordered to report to court on their next day off from work, usually within several days. At the court hearing, the probationer will receive a cell-block sanction, requiring him or her to sit in a cell at the court without their mobile phone or personal property from the time their matter is heard until 3 p.m. that day;

- **Two-day sanctions:** where probationers test positive for drugs and admit to using drugs, they will be arrested immediately and taken into custody. The matter will be listed for court two business days later, at which point the judge will give credit for time served and the probationer will be released back into the community. The same approach is taken where probationers miss an appointment with their probation officer or a drug test, but attend promptly, test positive and admit use;
- **15-day sanctions:** where probationers test positive for drugs, but deny use, the probationer is not taken into custody, but their urine sample is sealed and sent off for further analysis and a court date is set for 10 days later. If the analysis confirms the initial positive result,¹ the probationer is arrested and required to serve 15 days in custody. This increased sanction is seen as important to cut through denial about ongoing drug use. The same approach is adopted where probationers miss an appointment or test and do not see their probation officer for several days, or where they fail to provide a sample within 30 min of attending for a urine test; and
- **30-day sanctions:** if probationers miss a probation appointment, the probation officer will make several attempts to contact them and their emergency contact. After approximately five days, if the probationer does not appear at the office, the probation officer will seek a warrant for their arrest. Once arrested, the probationer will be required to serve 30 days in custody, with scope to make this longer for subsequent instances of absconding. A 30-day sanction is also imposed on probationers detected trying to tamper with the urine sample (for example, by substituting someone else's urine). Sanctions of at least 30 days are also imposed on probationers who do not attend the Warning Hearing.

3.6. Early termination

In 2010, Alm introduced the possibility of probationers having their order terminated early for good behavior. As explained to participants in the Warning Hearing, felony probation in Hawaii usually runs for four years, but if probationers can go for two years without any violations (other than cell-block sanctions, which are overlooked for this purpose), then they can apply to have their probation terminated. It should be noted that this option is not available to sex offenders after two years, as their treatment generally lasts longer. The probation officers in Honolulu report that the prospect of early termination of their probation is a powerful motivator for their probationers and many start asking about it soon after the Warning Hearing.

By 2014, over 100 HOPE probationers had been granted early termination of their probation, none of whom had subsequently been arrested (IBH, 2015). Wexler (2016a: 7) has described courts' ability to terminate probation early as '[a]nother T[herapeutic] D[esign of] L [aw] factor' and 'an act that would underscore – and likely reinforce – the probationer's successful efforts.'

4. TJ, HOPE and misconceptions about HOPE

When I went to Hawaii in January 2016 to see HOPE in action, I was not expecting to see an example of TJ. I had by that stage already written a paper on HOPE (Bartels, 2015), in which I – like many before and regrettably since – had made incorrect assumptions about HOPE, which I thought was merely a sanctions model. As I sat in court, however, it

hit me fully that what I was observing was in fact TJ in action. This perception was reinforced by my discussions with Alm during and after my visit and my observations of his interactions with HOPE participants outside of court, for example, their spontaneously friendly greetings to him as we were walking to lunch or touring a local drug rehabilitation facility (for discussion, see Bartels, 2016).

The Warning Hearing was described briefly in 3.2. As I discussed in more detail in Bartels (2016), Alm commenced the Warning Hearing by addressing each participant individually and confirming the pronunciation of their name (for example, 'Good morning Mr X. Is that how you say it?'). He also asked participants how they travelled around Hawaii and demonstrated his knowledge of the area, commenting on local factors, such as bus routes, landmarks and so on. If participants were unfamiliar with the area, he handed them a map and explained the best way to get around. He asked each participant in turn when they had last used drugs or alcohol and their preferred drug(s) of choice. Statements about recent drug use were delivered without any judgement (for example, 'just tell your probation officer what you told me, that you used two days ago, and what you used'), while one participant's statement that she had been sober for 18 days was met with 'good for you!'

Participants are explicitly told in the Warning Hearing that everyone wants them to succeed on probation (for example, 'we're trying to help you succeed', 'we just want you to be successful with this'). They are also encouraged to take responsibility for their actions. This was evidenced by statements such as: 'if you want to succeed on this, you can!' Alm paused in his delivery if participants had a question, and encouraged them with comments such as 'good question, Mr Smith', 'I'm glad you asked that, Maria', and 'did anyone else want to check something?'. He also made a point of thanking others, for example, if a family member had driven the participant to court. As Johnson (2016) has commented, encouraging the presence of offenders' family and friends serves to reinforce law-abiding behavior in a therapeutic way.

Alm praised HOPE participants extensively, using phrases such as 'Wow, you're doing a really good job!' and 'What awesome work'. In addition, he worked to develop a rapport with each participant and engaged in prevention planning activities to help them stay on track (see Douglas, 2016). For example, he asked one participant: 'what are you going to do if you run into your old buddies?', before adding: 'I would strongly urge you to say "hi guys, bye guys", and just go on your way, because I am pretty sure you can't stay clean if you're around people who are using'. He also told participants: 'remember, it's people, places, things and situations that trigger a relapse, so what's the plan for dealing with them?' He showed me file notes that helped him to follow up on previously agreed behaviors (for example, 'last time I saw you, we agreed that you were going to check out the outpatient clinic. So, what happened then?'). In addition, Alm actively encouraged pro-social decision-making through statements such as 'you sure handled this differently from last time. Remember, last time, you said you hadn't used and maybe thought it would come back from the lab negative, but this time you just admitted it straight away. Well done!'

Alm continued to treat participants with respect even in cases involving repeated absconding. Even in a case where he decided to activate a 10-year sentence, he told the man: 'It doesn't mean you're a bad guy, but you keep running away. You know that I said last time that if you ran away again, you'd go to prison. When I tell someone something, I follow through with it. Best of luck in the future'. As Wexler (2016a: 8) has reiterated, 'even a serious sentence of punishment and incarceration can be imposed in a way to emphasize an offender's strengths, to motivate him/her toward the post-prison future'.

Cases involving early termination were celebratory in nature, with Alm telling one participant:

I just want to tell you what your probation officer said about you. She said you were a model client, compliant, cooperative, and taking responsibility for your past mistakes. This is great! You should really

¹ The court hearing is canceled if the test returns negative, thus allowing for the possibility of false positive results.

feel good about this! I have to congratulate you. You have done really well!

Johnson (2016: 313) noted recently that ‘judges who facilitate therapeutic jurisprudence into behavioral contracting, prevention planning, and reinforcing law-abiding behavior can maximize the law’s potential’. Clearly, Alm’s approach demonstrates all of these features.

Notwithstanding the foregoing TJ-friendly picture, there has been trenchant – and erroneous – criticism of HOPE on the basis that it is a sanctions-only model and entirely focused on deterrence, to the exclusion of rehabilitation (see Cullen et al., 2017; Cullen, Pratt, & Turanovic, 2016; Cullen, Pratt, Turanovic, & Butler, 2018; Duriez, Cullen, & Manchak, 2014; Lattimore et al., 2016; Tonry, 2014, 2017). Without having ever seen HOPE in action, Cullen et al. (2017: 74) asserted that HOPE participants ‘are scrubbed clean of their criminogenic needs, their mental health status, their poverty, and their race. ... At most, offenders are portrayed as bothersome for failing so many drug tests’. Tonry (2014: 174) described programs such as HOPE as ‘pernicious’, stating that ‘they are concerned only with the offender’s compliance with conditions and do little except offer legal threats of what will happen if conditions are violated rather than attempt to address the circumstances in the offender’s life that brought him or her into court’. More recently, Tonry (2017: 199) asserted that ‘HOPE is fundamentally punitive and indifferent to the complexities of the lives of the people it affects’.

Lattimore et al.’s (2016) evaluation of programs purportedly replicating HOPE also proceeded on the basis that the central emphasis of such programs is ‘close monitoring; frequent drug testing; and swift, certain, and fair (SCF) sanctioning’ (2016: 1103; for discussion, see Alm, 2016; Bartels, 2017b; see also Cullen et al., 2018). Cullen et al. (2017, 2018), Kleiman (2016), Hawken (2016) and Lattimore et al. (2016) clearly regard HOPE and SCF as synonymous, often using the two acronyms interchangeably.

Alm has noted, with impressive restraint, that many people ‘unfortunately have a basic misunderstanding of the HOPE strategy. They seemingly believe that HOPE is simply a sanctions-only program that is solely concerned with imposing jail sanctions on probationers with no interest in their rehabilitation’ (Alm, 2016: 1195). Far from being indifferent to the lives of HOPE participants or ‘scrubbing them clean’, Alm has suggested that:

a strategy like HOPE can backfire if the judge is not patient or lacks the understanding of addiction and recovery as the probationers will be brought back in front of the judge for every violation. There is frequently too much irritation and anger in the probation system in our courtrooms. Quitting drugs is hard. Probationers are not violating to spite us; they are having problems with drug use and other behavioral issues, often growing up in families with little structure and little guidance. Changing thinking to change behavior is hard, and judges doing HOPE must be willing to keep working with probationers that are trying ... in order to help them succeed (2016: 1206).

More recently, Alm described HOPE as ‘3-legged stool’ involving:

1. probation officers (and treatment providers) committed to rehabilitation, using evidence-based principles (EBP) in a working alliance with the probationers;
2. a patient judge, who knows addiction, creating an encouraging, caring, and supportive environment; and
3. a swift, certain, consistent, and proportionate sanctions component (Alm, 2017).

In a recent email interchange, Alm agreed with my suggestion that one might fall off the HOPE stool ‘if one has drunk too much TJ wine’, but added: ‘think of how much more stable it is than the one-legged stool that is SCF!’ (Alm, personal communication, 14.12.2017).

Some of HOPE’s most vocal critics have never been inside HOPE court or had any direct engagement with Alm. These and others commentators also appear to be unfamiliar with TJ (see Cullen et al., 2018: 25) and therefore did not consider HOPE in this light. As noted previously, the emphasis even by proponents of HOPE, including Hawken and Kleiman, ‘on the effectiveness of the deterrence model underpinning the program has (perhaps inadvertently) served to obscure its focus on rehabilitation’ (Bartels, 2016: 48). In this context, Wexler’s (2010: 96) observation that TJ ‘is a framework for asking questions and for raising certain questions that might otherwise go unaddressed’ is highly apposite. In light of Tonry’s recent reiteration that HOPE is ‘fundamentally punitive’ (2017: 199), the following observation from Wexler also has particular resonance:

From a TJ perspective, some of the most interesting bottles are cloudy in the sense that, on initial reading, they may appear to be rather ‘TJ-unfriendly,’ but, on closer analysis, they may be susceptible to a practical interpretation consistent with desirable TJ practice. What is especially interesting with this type of bottle is the importance of filling the bottle in practice with high-quality TJ liquid (2015: ix-x).

Cullen et al. (2014: 75) have argued that ‘HOPE should be used only after reading its “warning label”’. In response, I suggested that any such label should also make it clear that ‘this product is solution-focused and contains therapeutic jurisprudence’ (Bartels, 2016: 49). This may even be a case where, as Wexler (2015: xi) has indicated, ‘wine can be regarded as so good that it influences the remaking of a bottle’. In other words, in light of the high quality of HOPE’s TJ liquid, the apparently TJ-unfriendly nature of its bottle (for example, fixed sanctions, use of custody) should be re-examined.

5. HOPE-ful bottles: HOPE’s potential to help mainstream TJ

Using Wexler’s metaphor, this section demonstrates HOPE’s potential in helping to mainstream TJ. Specifically, this section highlights that the program has harvested from two of TJ’s principal ‘vineyards’, procedural justice and desistance. In addition, it provides an accessible and affordable liquid which can be poured into a broad range of bottles.

5.1. Harvesting from the TJ vineyards of procedural justice and desistance

5.1.1. HOPE promotes procedural justice

Wexler has described procedural justice as one of TJ’s main ‘vineyards’, ‘a major tool in the TJ toolkit’ (2016b: 368) and ‘so basic that it ought to be part of all courts at all times’ (2016b: 372). Tyler’s (2006) work on procedural justice indicates that compliance with the law increases when people trust the legitimacy of the institutions that enforce the law. According to Sarat (1977: 434, cited in Sunshine & Tyler, 2003: 517), the ‘perception of unequal treatment is the single most important source of popular dissatisfaction with the American legal system’.

Bartels (2016) considered HOPE in the context of procedural justice. As discussed there, Alm has stated: ‘I believe HOPE is procedural justice in action. In HOPE, we strive to be clear, transparent and predictable. Probationers are treated like adults’ (Alm, 2015: 1681). He has also asserted that: ‘We are also convinced that one of the chief reasons HOPE works as well as it does, is that the probationers feel they are being treated fairly... the rules are being enforced consistently and proportionately, and probationers are thus more likely to buy into the program’ (cited in Bartels, 2015: 59).

As discussed above, Lattimore et al. (2016) misunderstood HOPE and programs purportedly based on it. Nevertheless, they acknowledged this aspect of HOPE, albeit without explicit reference to procedural justice. Specifically, they observed that:

In many ways, HOPE/SCF probation is what many citizens envision as probation as usual—i.e., that individuals on community supervision are subject to a set of conditions to which they are expected to adhere. Failure to adhere to these conditions results in a response. Those familiar with how probation often is implemented know that this ideal is seldom met. HOPE and SCF programs offer an opportunity to provide greater adherence to that ideal without ‘breaking the bank’ or impacting public safety (2016: 1131).

Accordingly, even HOPE’s critics recognize that its predictable and fair sanctions model can increase satisfaction with the justice system. When administered in a way that is compassionate and caring, it can also help to mainstream TJ.

5.1.2. HOPE promotes desistance

In *Making good: How ex-convicts reform and rebuild their lives*, Maruna (2001: 6–7) described desistance as ‘the process by which stigmatized, former offenders are able to “make good” and create new lives for themselves’. Wexler (2001: 20) considered *Making good* ‘chock full of therapeutic jurisprudential implications’. He commended Maruna’s discussion of redemption rituals, including graduation ceremonies, as ‘essentially a therapeutic jurisprudence [exercise]’ (Wexler, 2001: 21). He noted that, ‘even in instances where desistance seems not to have occurred, judges can use principles of therapeutic jurisprudence in the hope that their judicial behavior may constitute the building blocks of eventual reform and rehabilitation’ (Wexler, 2001: 23). As noted above, Wexler (2015) has also described psychological insights about reinforcing desistance from crime as one of the ‘vineyards’ of TJ wine.

Bartels (2017a) has analyzed the ways HOPE can promote desistance. Specifically, Bartels demonstrated the close alignment between HOPE and the eight principles for desistance identified by McNeill et al. (2012), namely:

- being realistic about the complexity and difficulty of the process;
- individualizing support for change;
- building and sustaining hope;
- recognizing and developing people’s strengths;
- respecting and fostering agency/self-determination;
- working with and through personal and professional relationships;
- developing social and human capital; and
- recognizing and celebrating progress.

Shapland et al. (2016: 291) have suggested that promoting desistance requires ‘very different ways of thinking from practitioners in criminal justice’. Wexler (1996: 167, as cited in Wexler, 2010: 99) has suggested that TJ ‘encourages us to look very hard for promising developments [and] encourages people to think creatively about how these promising developments might be brought into the legal system’. Properly understood, HOPE is a promising development with a significant role to play in fostering creative thinking about desistance, TJ and the broader administration of justice.

5.2. Affordable and accessible liquid: HOPE is similar to drug courts but is more economical and can reach far more people

The US Department of Justice (2017) recently described drug courts as specialized court docket programs that target criminal defendants with alcohol and other drug dependency problems. These programs are generally managed by a multi-disciplinary team, including judicial officers, prosecutors, defense attorneys, community corrections, social workers and treatment service professionals. Support from stakeholders representing law enforcement, the family and the community is also encouraged through participation in hearings, programming and events such as graduation. It is well established that the drug

court model is compatible with and should be underpinned by TJ (see Winick & Wexler, 2001).

It is clear that many of HOPE’s features are similar to drug courts. Indeed, it is worth noting that Alm was also in charge of the adult drug court in Hawaii’s First Circuit from March 2011 to September 2014 and has described standard probation, HOPE and drug court as a continuum (see Alm, 2013, 2015). Webster (2015: 858) has described HOPE as an ‘alternative drug court model’, while Stevens–Martin (2014: 79) has stated that HOPE ‘applies the drug court model’. Shannon et al. (2015: 59) observed that:

while the HOPE model is not classified as a drug court, the model does utilize some aspects which are similar to the Ten Key Components of drug court including: frequent and random drug testing (Key Component #5), a coordinated strategy is used to monitor compliance (i.e., graduated sanctions and rewards; Key Component #6), and judicial interaction (Key Component # 7).

Oleson (2016) identified that both HOPE and drug courts:

- incorporate elements of TJ and procedural justice;
- are suited to high-risk offenders;
- are centered on the role of the judge;
- recast legal adversaries as collaborative team members; and
- involve frequent, random drug testing; and
- expect relapse and accordingly employ a graduated sanctions model.

As Oleson went on to state, however, there are essential distinctions between HOPE and drug courts:

Drug courts incorporate alcohol and drug treatment into case processing for everyone, whereas HOPE reserves treatment for probationers who request it or demonstrate a need for it; drug courts feature regular courtroom appearances with ongoing interaction with the judge, whereas after the Warning Hearing, any judicial involvement is a function of noncompliance with supervision conditions (Oleson, 2016: 1168).

Hawken and Kleiman (2009: 10) described HOPE as ‘distinct from drug courts in economizing on treatment and court resources. HOPE does not mandate formal treatment for every probationer, and does not require regularly scheduled meetings with a judge’. They also suggested that HOPE’s ‘economical use of treatment allows it to handle a very large number of clients with limited treatment resources while at the same time delivering intensive treatment to those who prove to need it’ (Hawken & Kleiman, 2009: 33; see also Hawken, 2010; Hawken, Davenport, & Kleiman, 2014; Kleiman, Kilmer, & Hawken, 2017).

By contrast, Kleiman (2009: 41) noted that the requirement of treatment for all participants in drug courts makes them ‘profligate users of scarce resources’ and ‘too resource-intensive to be practicable at scale’ (Kleiman, 2013). HOPE’s efficient use of resources is borne out by the data: according to figures cited by Alm (2015), HOPE was costed at \$1500 per participant per year. By way of comparison, the costs in Hawaii for standard probation, Drug Court and prison were \$1000, \$6300 and \$46,000, respectively. The Washington State Institute for Public Policy (WSIPP) (2015) estimated that every dollar spent on ‘[c]ase management: swift and certain/graduated sanctions for substance-abusing offenders’ would result in savings of \$3.20, compared with \$2.32 for drug courts, while ‘[c]ase management: not swift and certain for substance-abusing offenders’ was estimated at \$0.62. Accordingly, for every dollar spent, case management: swift and certain/graduated sanctions for substance-abusing offenders returned 0.88 cents more than drug courts and \$2.58 more than standard case management. Although HOPE was not mentioned specifically in this analysis, it is likely to have

been significantly informed by HOPE (for discussion, see [Bartels, 2017b](#)).

Kleiman explained that although HOPE is like a drug court in some ways,

[i]n other ways, it was utterly unlike a drug court: it was mandatory, where participation in a drug court is usually voluntary; it involved offenders already assigned to probation, not those whose alternative was prison; it was open to all probationers, where most drug courts carefully screen their participants and exclude those with histories of violence; it involved court appearances only to deal with violations, not for routine status updates (2009: 40–41).

He later suggested that drug courts' 'good outcomes depend in large part on filtering out participants with histories of serious criminality' ([Kleiman, 2013](#)). [Johnson \(2016: 334\)](#) has likewise noted that.

[t]he traditional TJ approach, as applied in problem-solving courts, limits its sweeping effect to touch and concern many individuals dealing with drug, alcohol, and mental health problems. Problem-solving courts exclude large numbers of individuals because of eligibility requirements and limits on capacity.

It is clear that intensive judicial monitoring for select individuals under the drug court model has an important place in the criminal justice system. However, HOPE's strength is that is much cheaper, efficient and able to be implemented with large populations across locations, thereby addressing significant equity issues. Put simply, HOPE's potential to reach far more people than drug courts means that much more TJ liquid can spread across the mainstream justice system. Not only does HOPE accept a broader range of offenders than many drug courts, but after the Warning Hearing, participants only appear in court for violations (which are rarely contested), rather than as part of ongoing judicial monitoring. This model enabled Alm to 'supervise' around 2000 probationers (out of 3800 felony probationers on active supervision. Another 3000 defendants are 'banked' or placed on 'Administrative Supervision', where the probation office takes action only when probationer misbehavior is brought to their attention ([Alm, personal communication, 19.1.2018](#)). In Alm's words, 'HOPE is for the masses' (cited in [Bartels, 2015: 55](#)). Kleiman has also observed that a drug court judge 'maxes out at fifty or seventy-five ... [whereas HOPE] is a program and an approach to probation management that can go to scale' ([Kleiman, 2015: 1626](#); see also [Hawken et al., 2014](#)).

[Spencer \(2012: 20\)](#) has suggested that 'in high volume courts it is necessary to strike a balance between the efficiency of high volume and the effectiveness of solution-focused approaches. With smart targeting, triaging and listing the two goals are not mutually exclusive'. It is suggested here that HOPE is an effective model of such targeting, triaging and listing, thereby enabling it to reach large numbers of participants. Indeed, Alm recently reiterated that 'HOPE's ability to go to scale is one of its chief attractions and it would allow TJ principles to be introduced to so many more than is currently possible' ([Alm, personal communication, 14.12.2017](#)).

5.3. *Pouring TJ liquid into a wide range of bottles: HOPE is a flexible model and can be extended across the criminal justice system*

Spencer, one of the leading proponents of mainstreaming TJ, has commented on the need for flexible models of justice, noting that '[i]f local courts are to be part of the community they sit in, then each court will reflect the differences in that community' ([Spencer, 2012: 20](#)). This is consistent with HOPE. For example, Kleiman has noted that SCF (which, as noted above, he used interchangeably with HOPE) 'is not a single, homogeneous, manualized "program-in-a-box"' ([Kleiman, 2016: 1188](#)). In an article titled 'All implementation is local', [Hawken](#), who likewise seems to have conflated HOPE and SCF, also affirmed 'the importance of locally designed implementations and policy

based on input of all key stakeholders (including the judiciary, probation department, treatment and other service providers, victims' advocates, and probationers)' ([Hawken, 2016: 1236](#)). For his part, in his 'suggestions for doing HOPE right', [Alm \(2016: 1211\)](#) has acknowledged that '[f]iguring out how to integrate HOPE into your existing probation system is not easy, but it is critical'. This echoes the earlier statement that 'care must be taken to figure out how HOPE and its policies and procedures will fit into and mesh with the current system in place. Unless and until that is done, the HOPE strategy cannot be implemented' ([IBH, 2015: 10](#)).

Partly as a result of this flexibility, there has been significant uptake of the HOPE model across the US and beyond. By 2018, HOPE-inspired programs were in operation in 33 states and territories and included 30 jurisdictions using the model in probation, four in parole programs and one in the pre-trial context ([Alm, personal communication, 19.1.2018](#)). There were also three states using the HOPE model in prison to seek to reduce the use of restrictive housing and solitary confinement, as well as prisoner violence to staff and other inmates (see [Bartels, 2017b: 172](#); see also [Hawken, 2016](#); [Hawken et al., 2016](#); [Kleiman, 2016](#)).

Arizona has 11 courts doing Swift, Accountable, Fair Enforcement (SAFE) for adults and two courts using Juveniles Under Supervision and Treatment (JUST) ([Alm, personal communication, 19.1.2018](#)). In this model, sanctions can include jail time, but the punishment 'depends on each probationer's situation', while successes, such as consistent negative tests and securing a job, are rewarded with gift cards, movie tickets and letters of praise ([Ye Lee Hee, 2012](#)). The Alabama version of HOPE Probation, which was described as being 'like drug court,' also seeks to address 'whatever problem a probationer has.' Tim Jolley, the presiding judge, was quoted as saying: 'If it's a substance abuse problem, we can get them assessed for rehab. If it's a mental health issue, we can get them counseling, while some might need help with job skills or education' ('HOPE Probation is newest court program', 2014).

The most far-reaching adoption of HOPE principles is in Washington State. Since 2012, everyone under correctional supervision—about 16,000 people at any time—has been subject to the swift-and-certain (SAC) program, 'which shares many of the key features of HOPE' ([Pearsall, 2014: 3](#); see also [Hamilton et al., 2016](#)). Significantly, early and low-level violations receive a non-custodial response, including the use of stipulated agreements (see [Bartels, 2017b](#) for discussion), which are in turn consistent with TJ approaches. In the prison context, the Pennsylvania Department of Corrections has adopted a program based on HOPE which involves an SCF approach and a short stay in prison, mostly in a therapeutic community, followed by time in substance addiction treatment in a halfway house ([Mohr & Raemisch, 2015](#)).

Internationally, a program inspired by HOPE has been adopted as Compliance Management or Incarceration in the Territory (COMMIT) in the Northern Territory in Australia, an area with a high Indigenous population and Australia's highest imprisonment rate (see [Bartels, 2017b](#)). Importantly, COMMIT participants are 'intensively case managed by their probation and parole officers and provided with support and assistance with employment, training and housing' ([Finnane, 2017](#)). COMMIT commenced in June 2016; by October 2017, the results were sufficiently promising that the Northern Territory Government amended its parole legislation to make a similar model available to parolees, while the Chief Judge had 'begun using COMMIT in Local Court sentencing and has talked about its wider application' ([Finnane, 2017](#)).

In addition, [Hawken \(2016: 1233\)](#) noted that several jurisdictions are 'less interested in outright replications of HOPE [but] are weaving the principles of swiftness, certainty, and fairness into their own implementations'. As set out by [Hawken et al. \(2016: 28\)](#), the New York State Department of Corrections and Community Supervision 'is piloting SCF parole...as part of comprehensive reforms that include place-based supervision and individualized case management'. There is clearly scope to ensure that programs of this nature not only adopt

HOPE's SCF sanctions features, but also those aspects that are more therapeutic in nature, thereby further extending the reach of TJ beyond the courts. It is also worth considering whether features of HOPE – including its TJ aspects – could be integrated into systems in other places, not with a 'cookie-cutter' approach, but with smaller scale test projects to see whether the features of HOPE could improve the effectiveness of existing probation/community corrections in other jurisdictions.

6. Conclusion

Johnson (2016: 315) has suggested that by 'implementing TJ and effectively "adding another layer" to the legal process, criminal lawyers and judges can not only increase the benefits of the judicial system, but can extend those benefits to society at large'. Spencer (2014: 226) has likewise cast the promise of TJ in expansive terms, arguing that it 'has the potential to shift from being an alternative legal philosophy to being the 'new normal' and in doing so make our laws and legal systems more humane, just and effective'. Wexler's (2014) 'liquid' and 'bottle' metaphor provides a useful means of thinking about the design and application of the law and ways of enhancing their therapeutic effects in the mainstream justice system.

Alm retired from judicial office in September 2016 to take on a new role as a legal consultant on the implementation of HOPE (Blair, 2016). By January 2018, he had worked with 76 jurisdictions on implementation of programs inspired by HOPE, including in Brazil, Sweden and Australia. For a variety of reasons (see Duriez et al., 2014; cf. Bartels, 2017b), HOPE quickly became a phenomenon in probation practice in the US. Unfortunately, much of the rhetoric underpinning its adoption and expansion focused exclusively on its sanctions component and missed or ignored the fact that HOPE was saturated with TJ liquid. Indeed, the HOPE model has harvested from some of the key TJ vineyards and offers an affordable and accessible liquid that can be poured into a wide range of bottles. In spite of the almost comedic error in how HOPE has been (mis)characterized, there is scope to now think creatively about how the adoption of HOPE can function as a catalyst for more TJ liquid to trickle across and throughout the criminal justice system. Doing so will contribute to a fairer, more effective and more compassionate justice system and society more generally.

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