

Extended Abstract/Early Working Draft for Online Conference Posting
(February 19, 2016)

Conference: Doing Justice without Doing Harm

Nootbaar Center for Law & Religion at Pepperdine University School of Law

Paper Title: "Active Justice: Transformative & Restorative Models for Everyday Judging"

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I. The Judicial Role

Judges (of whom there are, of course, many and varied types) perform many functions and have multiple facets even within their own roles. That is, whether general or specialized, trial or appellate, elected or appointed, state or federal, and any of the many more nuanced distinctions we might draw beyond these, they play roles at different moments and the same moment as decisionmakers, educators, writers of the law, managers of employees, public figures, private persons, (for some) politicians, counselors/advisors, and so on. In a common law system, in their decisionmaking and writing capacities in particular, judges play a role as trustees of the law. That is, one aspect of their role is to look out for the law on behalf of the public who are both the owners and the beneficiaries, so to speak, of the law. Judges in this respect have fiduciary responsibilities not to sit back and be passive in certain situations if the corpus of the common law would be damaged.

There are interactions, interconnections, and effects on all those in the system, but I am concerning myself with the judges, in part because the focus on them is often either negative (about how a judge did something wrong in a particular case, or about how an author disagrees with a judge's or a general type of judges' approach to a particular issue or type of case) or else a focus more on the law that they deal with, which fails to engage with the challenges they will face as human beings in applying that law and remaining who we want and expect them to be. My direction may be somewhat counterintuitive or unexpected, given much of the groundwork of the paper, so it is worth forecasting here. The point of the paper is in large part simply to think about things that judges might be able to do in their role that -- however small these things may seem in the moment, however much they might to do serve other purposes, good purposes, along the way -- would help the judges to a greater flourishing in their role. The purpose from my perspective is to allow judges to do their best at doing their part in helping to achieve justice by finding ways to help them keep their shape and integrity and wholeness and well-being, all while fulfilling the purpose most judges speak of in coming to the bench, desiring to do justice. Judges tend to get into their roles not out of megalomania, but out of a calling to serve, to do good and benefit society, and many of them get rather beaten down by what they feel is the very little they can do from within the constraints of their role. Doing justice without doing harm -- though perhaps very much a matter of definition in its various parts, is what all good judges want to do.

This paper takes themes or threads from a couple of different models from fairly specific different contexts and suggests ways of incorporating them into the everyday, workaday habits of being of any person inhabiting the judicial role, with the idea that in ways that are not necessarily dramatic or new, but nonetheless important when put together and recognized as such, they will help the judge to flourish and have integrity in the pursuit of doing justice without doing harm.

II. Active Justice

The term "activist judging" is generally used as a pejorative to convey the observer's view of improper results-oriented inclusion of (most often) political views into judicial decision-making. It is, however, a highly contested term, and one that has not proved terribly useful in advancing fruitful debates, improving the quality of justice, or fostering flourishing of the judges in their roles. Active, that is, *meaningfully engaged* judging, is nevertheless a thing deeply to be desired, particularly where that engaged activity is in the pursuit of justice. The key, as the theme of the conference notes, is to avoid doing harm in the process.

This paper proposes that judges of any type (trial or appellate, general or specialty, etc.) may borrow and implement basic principles and qualities from two well-developed models currently in play, in order to be *consciously active* in their pursuit of justice as judges, while at the same time remaining fettered by the constraints of those models so as to avoid doing harm. "Engaged" or "involved" might just as easily be substituted here – and those are words I have used before in other contexts - to avoid some of the fraught territory and the specific debates associated with the words "active" and "passive" and "activist judging," but I specifically don't want to do that here, because I think it is increasingly important to make a play for a positive recapture of the word active away from the meaninglessness or at least nebulosity of the negative connotations of the epithet "activist judging."

So, again, just as the threshold piece here, I begin from the premise that it is a good and desirable thing that judges of all kinds and at all levels should be actively engaged in, concerned with, their work. They are the inhabitants of their roles. They are the repeat, indeed the persistently, permanently present players there. A proper balance must be found and maintained so as not to take improper advantage of a powerful position, but active engagement is a good thing that will yield good fruit in the pursuit of doing justice without doing harm

III. Qualities and Models

Many habits and qualities play into the shape of the judicial role and give it its basic integrity. It is not the aim of this paper to list or illustrate all of those, or to explain how they work together. Instead, it is the purpose of this paper to propose that in the pursuit of doing justice without doing harm, there are two models from which judges would be well-served to draw habits and qualities for everyday judging, even without taking on those models of practice wholesale. Those models are (1) Transformative Justice (arising out of mediation practice); and (2) Restorative Justice (a more broad-based wide-ranging practice not limited to one particular area, but particularly prominently implemented in the area of criminal law). Again, the idea is not that any one judge in any one scenario would attempt to take on all of either or both models, but that both will inform the judge's approach to the taking on the role of being a judge, the all-encompassing approach to "doing justice" in such a way as to actively engage with care, to find balance for the everyday.

IV. Restorative Justice – Background

Emerging, coalescing, changing, being applied in different ways for a long time, but under that specific name really since the 1970s. It began primarily as an effort to deal with property crimes, burglary, things that might (rightly or wrongly) be viewed as relatively minor offenses. It has come to be used as an approach to all kinds of things ranging from individual cases of the most significant offenses in the realm of criminal violence, including murder and

rape to broad societal issues (e.g. Truth and Reconciliation Commission in South Africa), to everyday chronic or persistent issues of school discipline or workplace personnel management. There is, at this point, no one view of what it is, what it is meant to accomplish, what its bounds are or ought to be, how its processes work, etc., but there is, at the core, a certain amount on which there is consensus. It began as an effort to rethink the criminal justice process, to expand the circle or the scope of those who were involved or had a kind of standing in the process. Restorative justice focuses on the needs and the roles of those who have a stake in the process, including the victim(s), the offender(s), and the community. The basic principles of Restorative Justice are (1) that wrongdoing is a violation of individuals and relationships, (2) that violations create obligations, and (3) that central obligation is to put things right by repairing the harms from those violations. Underlying those principles is a bedrock assumption that society is interconnected by relationships, that there is a webs of relationships that properly connects all of us in a sense of peace with one another. That web of relationships is violated by the commission of crimes, such that the damage is not just between the perpetrator and victim, but the whole web needs attention in the restorative process. Again, this all has its roots in criminal law, with low-level property crimes in particular, but I am talking about proposing the application of the basic principles that flow from this well beyond criminal law.

In terms of the process for Restorative Justice, collaboration and inclusion are key elements, but authority figures and professional roles can still have a place. Mutually agreed outcomes are preferred over imposed outcomes. Facilitated face-to-face encounters are generally favored, though with the recognition that this will not fit every situation. One of the most significant challenges in the Restorative Justice process is identification and involvement of the relevant community. Respect for all those involved is really the key in terms of overarching value. A five point alternative framework/lens organizes the key principles and actions for Restorative Justice as follows:

- (1) focusing on harms and consequent needs of those with stakes in the situation
- (2) addressing resulting obligations
- (3) using inclusive, collaborative processes
- (4) involving all those with legitimate stakes
- (5) seek to repair harm and put right wrongs to extent possible

One of the things that has to happen, in addition to the strong sense of respect for all those involved in the process, is that the judge has to ask lots of questions to make sure that the relevant information has been obtained. Restorative justice thrives on good information. Information about the identities of those involved and what their needs and roles are; information about who the relevant community is and whether and how they can be involved; information about how the issues came about in the first place; etc.

Restorative Justice, by its name, sounds like it is all about forgiveness or reconciliation or a mediation process of some kind, and often it does achieve that, but it is important to understand that that is not actually the primary goal. The restoration referenced in the name is forward-looking, not backward-looking. The point is not to return to the status quo ante. The point is a return or restoration to one's best self as it is and desires to be connected to others in that web of relationship as it was created to be. The restoration is a restoration of relationships as they were meant to be. As much as one may speak of Restorative Justice as a specific process, it may also properly be understood as a more general way of life or way of being, in terms of a way to live together with a positive value system governing responsibilities in relationships.

V. Transformative Justice – Basic Background

Transformative Justice, in the sense in which that formal term is used in this paper, is based on a theory of conflict as transactional crisis. The idea, which comes out of mediation theory and practice, is that conflict alienates those involved from a sense of connection with others. It disrupts and deteriorates human interaction. Transformative Justice views the mediation process as one of "conflict transformation." Within that, the mediator's role is one of supporting empowerment and recognition shifts that change party interactions from destructive to constructive one. Transformative Justice isn't necessarily seeking resolution of immediate problems, but instead sees mediation as a context for a practice that could address deeper levels of people's lives – could change them (and by extension their societal context) for the better. It proposes to do this by *empowerment* of those involved in the conflict (in the sense of restoration of a sense of value, strength, capacity to define and handle their issues – clarity in several senses); and by *recognition* (in the sense of giving and getting a sense of acknowledgment and empathy for the situation of the other – though it does not mean agreement or willingness to help, just willingness to relate in a more understanding way).

Transformative Justice takes respect and patience as key elements in terms of ways of being with people in the particular moment, allowing them have their break-through moment for themselves. It focuses on the interaction between the parties, letting them ask the questions, rather than being entirely directive. The Transformative Justice process takes a long view, trusting that the parties will find their way to what is needed. These assumptions, both in terms of party capacity and in terms of confidence that the conflict will shift in a positive direction when positively supported are directly tied into the relational worldview at the heart of Transformative Justice. (The centrality of this relational worldview gives Transformative and Restorative Justice a key common core value.) The other specific benefits of Transformative Justice include enhanced clarity and ultimate understanding for those who persist through the process, regarding both the conflict and the resolution; strength; connection; and closure. This transformation of and through conflict is possible because of the capacity within human beings for being both self-reliant and other-oriented at the same time.

VI. Restorative and Transformative Justice – Incorporation into the Everyday

There are a number of ways in which the specific ideas and processes behind these two models might be threaded into the everyday workings of the judicial role at low levels, in terms of habits of being, without having to try to take them on in their full-blown application in every context across the board. Indeed, their full-blown application would likely not be a good or a truly workable thing across the board. But in general ways, as habits of being for inhabitants of the judicial role, drawing on these models, there would be great benefits from, for example, some of these are hard to argue with.

To take a simple and easy example: both of these models require and emphasize respect for participants at the heart of the process. I have no particular evidence to indicate that respect is *not* currently a central concern for most judges on the bench already, so that may not be a significant or necessary change to make. It is just a matter of looking to the models to see what may be borrowed, initially without any controversy.

Along similar lines, both models require, in terms central to both their theory and their process, genuine *listening* to participants. This strikes me as likewise noncontroversial as a

value, but at the same time genuinely requiring conscious effort on the part of judges to be vigilant about maintaining it. As our attention span as a culture shortens, and as those elevated to the bench are encouraged to see themselves in positions that permit the silencing of others with ease, to listen with patience may require affirmative effort at times. What may be more specifically an issue added by the Restorative, and to a certain extent the Transformative, Justice models, are where we get into questions about the identity of those being listened to, or how they came to be speaking, or who might be eliciting the information out of them, and for what purpose.

Borrowing from these models, then, a judge in any context might take it upon himself or herself to engage in more active questioning specifically designed to listen for the needs of the other. The goal here would be to make sure that those involved are getting the opportunity to say for themselves what it is that matters. Part of this is a matter of letting them be heard and know themselves to have been heard. Another part of this, though, is to make sure that nothing has been missed. This is an open-ended mode of questioning along the lines of "anything else?" – i.e. not so involved and specific as to be entangling the judge in the workings and argument of the case, but sufficiently encouraging to be genuine and patient in the invitation to put additional issues or concerns on the table. Along similar lines, a judge might actively offer opportunities, in terms of listening for the needs of the other to actively expand the circle of the relationships involved by asking, effectively, "anyone else?" That is, the judge would this way give both parties and the community (by whatever definition) an opportunity to note anyone else they believe should be participating (or participating more fully), in order to ultimately more fully repair the damaged web of relationships.

At a very basic level, transformative and restorative justice models call for the facilitation of understanding towards the ultimate goal of healing of relationships. This does not call for judges to provide all of the answers – indeed these models do not work from any premises that would require the judges to have any particular answers. The key questions in these models do not turn out to be about law at all. What is added or enhanced by incorporating elements from these models is the emphasis on the extent to which the parties' understanding may be facilitated by their own deeper involvement in and commitment to what they are doing in the case. The judge's handling of the matter, showing concern for the seriousness of a participant's concern for the matter – taking it as seriously as the participant takes it, is likely to enhance the process of restoration and model for the community the desired path toward restoration of the interconnection of the web of relationships through shared understanding that is key to these models. Explanation is essential, but this is not unilateral explanation. It is explanation in response to involvement, and that involvement is enhanced by invitation to come further up and further in. A clearer understanding of what is actually at stake matters very much here. Restoration and transformation are not possible without that clear understanding.

So a judge must make an effort to be active in his or her awareness, open to opportunities, careful not to overstep, willing to be actively engaged in facilitating conversation that encourages a broader understanding of situations before the court but does not attempt to take them over or take them out of the parties' hands. This means being aware of who is out there in the courtroom. It means asking questions about who might not be in the courtroom but perhaps ought to be. It means taking extra time to ask what the goals and the needs of the parties are and what their proposed solutions might be. It means, above all else, asking, more than once as necessary, whether the parties understand, and if they would like to speak and be heard.

Lawyers for the parties involved in the matters in question may of course be of different minds about a model like this with its emphasis on giving participants more room to give shape to their own concepts of goals and needs and so on. While some lawyers might have objections to judges stepping forward into an active version of the judicial role that might be seen as interfering in the careful shaping and strategizing of the precise positioning of a client's case or a particular argument in a case. On the other hand, some lawyers might welcome the active interest in hearing the client's perspective, and take an interest in coaching the client to take advantage of that opportunity. Judges in such situations need not be seen as overstepping and interfering in the lawyer-client relationship. From within the position as trustee of the law, a judge might even be, in a perfectly positive way, something like a "lawyer for the situation." The judge as trustee of the law must make sure that the broader interests of the future working and clarity of the law, along with the interests of those who may have a stake but are not represented are at least taken into consideration, so that the process will not be wasted. The judge must not jump into a legislative role, of course, by deciding cases that are not ripe or have not even been properly presented. However, where a judge can get a broader perspective on a situation set before her, to help to facilitate the fuller restoration of a web of damaged relationships that is before her, that may be a welcome opportunity for justice without harm, particularly where the lawyers are there to be vigilant for their clients' interests.

That said, another area in which a judge's active involvement and concern might be welcome in the particular modes of transformative and restorative justice is that of dealing with pro se litigants. Squarely within the realm of Restorative Justice's traditional home turf of criminal law, there is a substantial body of cases in which the cases move forward without lawyers. In the world of pro se pleadings, things are far less clear than one might imagine in terms of the rules of construction. Scholars in the field refer to it as a morass. Borrowing from Restorative Justice to promote the restoration of that interconnected web of relationships, a judge may take specific and conscious step to move toward the interconnected web of relationships. The judge will do this by listening and seeing that others are listened to, trying to figure out who the interested stakeholders are (and are not), how to make things understood, and so how to help in providing information, or seeing that it is provided – in general, thinking towards forward movement to restore people to their right positions. A judge is in a position to do this better than a pro se litigant can do it for him or herself. In terms of avoiding harm, the advantage of borrowing from the modes of established models such as Transformative and Restorative Justice is that they have practices that have been tested, albeit in specific contexts.

As another example, in the arena of large scale structural reform litigation, one might think of the way in which judges might choose to take more or less active roles when it comes to equitable decisionmaking. One might think of those judges who really get involved in the attempt to do justice, like a Judge Weinstein in Agent Orange, or Judge Freedman in the NY homeless cases. Neither of these judges escaped criticism, of course. Not everyone wants judges to play a role like this, and whether this justice will be justice without harm will often be in the eye of the beholder. In cases like these, or others such as prison or school reform cases – cases where compassion may clash with the law, or may seem to, the call to do justice without doing harm probably most hits home with regard to the judge's attempt to make the situation better by potentially adding another "harm" in creating another "obligation" in need of "restoration." As a judge tried to round up relevant communities to get them involved in order to hear their concerns, in order to get the facts straight, in order to make sure that the relationships are restore and the whole picture is put together in a coherent way, the judge might of course so

easily overstep or misstep. However, that possibility must be balanced against the risks attendant upon not pursuing the more global justice that the judge might be positioned to see and put together from the judge's unique perspective.

VI. Potential Problems

Perhaps the strongest objection to all of this is likely to be one of overstepping – that the judge must stay within the bounds of the judicial role and not stray into those roles meant to be played by other actors in the system – most obviously the lawyers for the parties. As discussed above, this might cut in a variety of ways, in terms of the preferences of lawyers for how active the judge may be in drawing out the interests of their clients or others. One might find lawyers behaving in obstructive ways so that there are obstacles to the process. In the long run, however, hopefully lawyers might see the ultimate benefits for their clients in terms of potential for restoration and transformation that may come from recognition of various obligations and needs on all sides, and might encourage openness to going down the paths offered by the judge.

On another front, one might well argue that this approach is all far too time-consuming and will take up other court resources as well, beyond its potential value. The more a judge spends time asking parties open-ended questions about anything else they want to raise and anyone else who should be involved, and following up those various threads, the less the judge will be able to pay attention to other cases on a docket. That said, these are not all actually face-to-face encounters that are envisioned. Much of this is anticipated more on the level of an attitude or orientation on the part of the judge in general. It may make a difference in terms of time and resources in those cases in which the judge does have parties in front of her in person, and having gotten used to that difference, it may prompt a different way of seeing written briefs, so that in certain ways it may prompt a different or deeper response to those.

It is also arguable that all of this is simply unrealistic with respect to community concerns. Community involvement, after all, requires willingness to be involved (and ideally, willingness of the right community members to be involved in a particular matter). Furthermore, there would almost certainly be some definitional issues when it comes to the question of community. Traditional civil and criminal litigation models would chafe most at this notion of bringing in anyone else to speak to issues and be a part of restoring and transforming things. Standing issues, admissibility of evidence issues – these are not matters to be taken lightly. (This portion of the argument continues to develop. Suffice it to say for the moment that the goal is to think creatively here regarding new ways of thinking about what judges can do to allow for the best problem-solving in terms of reaching resolutions that make sense as a matter of law, in their roles as trustees, and also aid in the restorative and transformative ends that law may serve.)

VII. What Difference Could This Make?

Certain common values and habits of practice will rise to top or come to the fore when a judge looks to these models for guidance in the shaping of an everyday outlook on shaping an active approach to justice. Among these are active listening, collaboration/inclusion, and looking (humbly) to the betterment of the other. The active judge will find success in helping those before the bench find resolutions of new sorts, or new ways through what may have seemed like intractable problems. She may enable or facilitate new ways of seeing and being seen, heard, and understood. She may be able to help parties and others toward the restoration

and transformation of relationships in all kinds of ways that may have widespread benefits. Chief among those benefits may simply be *hope* achieved through a new recognition and understanding of the other.

Of course many judges may already see themselves as pursuing ideals of justice, so part of the aim here is to give a framework that may help the judge to finding a meaningfully "active" means of doing that while avoiding the negative sense of "activist" judging. The key, it seems, is to let the *participants* be heard, to make it more about what they are aiming for, thereby avoiding any sense of what the judge is aiming for, and then to be responsive, as a trustee of the law. In terms of the structure: the judge will be actively pursuing these ends of transformation and restoration that have been developed for particular arenas already. This will be a potentially freeing act for the judge, one that will give the judge that necessary room to grow, to be a flourishing human being, but still well within the bounds of the law. What I envision here is not truly a new process, so much as a particular way of approaching the people and situations in front of the court – seeing them as people and sets of relationships beyond the process. All of this is permitted already, and may be going on here and there already. I recommend its adoption more consciously and more pervasively.

A key point for the use of both of these models beyond their initial scope or range is that they have already had their boundaries contemplated and tested, albeit in somewhat different settings or ranges of cases. In terms of doing justice without doing harm, the basic idea of potential harm from seeking transformative and restorative justice is not a new issue. Of course not every question or problem has been answered, but given that certain boundaries have been drawn and limits have been tested, this gives both the judge and those before the court that freedom within constraint to truly be active in seeking out justice. What is added here is the authority of the person participating, and if things go awry before they go right, there are always the Code of Judicial Conduct and the mechanism for recusal of a judge who has done or is doing harm, however good or just the intentions.

Beyond what the incorporation of some elements of these two models offer for the flourishing of judges individually in the role, there is the potential for better outcomes – more creative, more forward-looking, more hopeful, more restorative, more transformative, more resolved – lots of things may be improved. Not without risk, of course, but with plenty of potential. It is not a major change I propose, just small shifts in focus here and there – changes in conscious emphasis and for particular reasons. Some of those who have heard me talk about this have questioned why I would come at it in this way – why seek justice through the way in which judges are involved with cases? Why not come at the problem of justice in some other way that would be more effective or efficient, some way that would be less fraught with challenges and objections? To that I can only respond that I have a vocation to write about judicial role, so that is the focus for me. I write about judges, and for judges, and as long as they are there making the decisions and involved in the day to day work with those who seek justice, as long as I believe (and I do) that so many of them work in the pursuit of justice and mean to do their work well and faithfully, I write to help them do their work better. So this is offered to encourage them to step forward rather than to step back, but to find the right ways to step forward, to remember certain principles of focus, perspective and purpose as they engage actively in that pursuit of justice so that they will not do harm (or do as little harm as possible) in those efforts. And in being freed to make those efforts at justice, they may feel some renewal and restoration of hope within their own role and vocation as judges which with further their flourishing their work.

Primary Bibliography:

- Robert A. Baruch Bush & Joseph P. Folger, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (Rev. Ed. 2005).
- Gerry Johnstone, *RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES* (2d ed. 2011).
- Sheila M. Murphy & Michael P. Seng, eds. *RESTORATIVE JUSTICE IN PRACTICE: A HOLISTIC APPROACH* (2015).
- T. Richard Snyder, *THE PROTESTANT ETHIC AND THE SPIRIT OF PUNISHMENT* (2001).
- Dennis Sullivan and Larry Tifft, eds., *HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE* (2008).
- Howard Zehr, *THE LITTLE BOOK OF RESTORATIVE JUSTICE, REVISED AND UPDATED* (2015).