

HEART AND SOUL: A NEW RHYTHM FOR CLINICAL EXTERNSHIPS

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INTRODUCTION

The message of Therapeutic Jurisprudence is simple – focus on emotional life and psychological well-being and practice law as a healing profession – but the application of Therapeutic Jurisprudence to clinical teaching can have far ranging results. “Lawyers trained to be professionals have not been trained in how to respond to the anxiety, hurt feelings, and other emotions”¹ Law students arriving today in our clinical education settings require extra attention to the development of interpersonal skills for a variety of reasons.

This article explores the concepts and development of Therapeutic Jurisprudence and outlines the benefits derived from incorporating it in a direct and thoughtful manner into the teaching of an extern law school clinical setting.² Therapeutic Jurisprudence can provide structure to the extern class requirement and the clinical professor can approach teaching skills using it as the framework to unify the overall methodology of an extern clinic. Specifically, Therapeutic Jurisprudence can add value to the self-reflective journal assignments of clinical extern students, and the technique of rewinding will enhance the educational significance of the clinical experience.

1. Robert Eli Rosen, *And Tell Tchaikovsky the News: The Wedding of Therapeutic Jurisprudence and Preventive Lawyering*, 5 PSYCHOL. PUB. POL’Y. & L. 944, 946 (1999).

2. The models of extern clinics vary from law school to law school but most share the following components: students practice in a setting outside the law school in the capacity of a junior associate, usually under the supervision of any attorney who is not a member of the faculty; the student receives law school credit, not pay; students usually must attend a classroom component which is taught by a faculty member and covers lawyering, substantive law, ethics, or other topics related to the externship work; and, students generally keep a journal reflecting their work and what they are learning. Mary Jo Eyster, *Pedagogy: Designing and Teaching the Large Externship Clinic*, 5 CLINICAL L. REV. 347, 349 (1999) (citing Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL L. REV. 413 (1996)); see generally Marc Stickgold, Symposium, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. REV. 287 (1989); Janet Motley, Symposium, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211 (1989); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55 (1996).

THEORY OF THERAPEUTIC JURISPRUDENCE

The Therapeutic Jurisprudence movement, developed by David Wexler and Bruce Winick in the early 1990's, was initially developed in order to introduce disciplines from the mental health profession into the legal arena.³ This theory originated as scholarship in the law.⁴ Over the last decade, it has evolved into an interdisciplinary approach for scholars in a wide range of legal areas. The roots of Therapeutic Jurisprudence arise from the works of other scholars who introduced the legal field to such movements as sociological jurisprudence and legal realism.⁵

Similar to those movements, Therapeutic Jurisprudence's underlying premise is the law; however, it goes beyond the simple application of precedents to legal situations in order to create new law, but rather, takes into account the external ramifications to the person's physical and mental health affected by a decision. It is a movement focused on distancing itself from the traditional, adversarial nature of the legal profession toward a model that assesses the "emotional impact of law and legal processes in addition to any financial and legal impact."⁶

Therapeutic Jurisprudence has been defined as the study of the law's role as a "therapeutic agent."⁷ This description has evolved from the understanding that the law, its rules, and procedures, have both therapeutic and anti-therapeutic effects on one's mental health.⁸ Proponents of the movement agree that Christopher Slobogin's description of Therapeutic Jurisprudence as "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the

3. See David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991). Although it did get its start in the field of mental health law, the conceptual framework of Therapeutic Jurisprudence has been introduced and applied to several other areas of the law. See David B. Wexler, *Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence*, 35 REV. DER. P. R. 273, 275 (1996) [hereinafter *Thoughts and Observations*].

4. Bruce J. Winick, David B. Wexler, & Edward A. Dauer, *Preface: A New Model for the Practice of Law*, 5 PSYCHOL. PUB. POL'Y. & L. 795, 796 (1999) [hereinafter *A New Model*].

5. See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y. & L. 184, 186 (1997) [hereinafter *The Jurisprudence of Therapeutic Jurisprudence*]. The theories of Sociological Jurisprudence and Legal Realism can be explored in Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 512-13 (1912) and Karl N. Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

6. Andrea Kupfer Schneider, *The Intersection of Therapeutic Jurisprudence, Preventive Law, and Alternative Dispute Resolution*, 5 PSYCHOL. PUB. POL'Y. & L. 1084, 1085 (1999).

7. Pearl Goldman & Leslie Larkin Cooney, *Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventive Law into the Law School Curriculum*, 5 PSYCH. PUB. POL'Y. & L. 1123, 1124 (1999).

8. *Thoughts and Observations*, *supra* note 3, at 274.

people it affects,”⁹ is the most adequate and correct characterization of this newly developing and ambiguous movement. Its ambiguity, however, does not stem from the lack of materials written about the topic or even an incomplete description of its purpose; rather, the ambiguity stems from the amorphous definition of “therapeutic.”¹⁰ As explained by David Wexler, the term has been defined broadly in order to allow scholars to “roam within the intuitive and common sense contours of the concept.”¹¹

Therapeutic Jurisprudence was soon integrated with the principles of preventive law.¹² The integration was a natural progression, as the principles of Therapeutic Jurisprudence did not offer the legal practitioner any guidance on how to counsel clients, or to be aware of their “emotional life” or “psychological well-being.”¹³ Preventive Law is a “proactive approach to lawyering” that “emphasizes the lawyer’s roles as a planner and proposes the careful private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities.”¹⁴

With this combination, the original goals of Therapeutic Jurisprudence (to improve legal services in a way that increases client and lawyer satisfaction by decreasing the emotionally and financially draining litigation costs) are being met.¹⁵ Yet, the field is still developing. Much in the same way that the principles of preventive law have been integrated, the

9. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y. & L. 193, 196 (1995).

10. See *The Jurisprudence of Therapeutic Jurisprudence*, *supra* note 5, at 192 (1997).

11. David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL’Y. & L. 220, 221 (1995).

12. See generally Dennis P. Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*, 14 BEHAV. SCI. & L. 459 (1996) [hereinafter *Professional Responsibility in Elder Law*]. The three principles of Preventive Law that must be implemented in order to succeed in the incorporation, are:

[1] human behavior is predictable . . . [2] a lawyer can determine what their client need[s] and want[s] . . . [and 3] lawyers and clients together make decisions that form the most common architecture of the legal process and that these decisions reflect the personality attributes of the lawyer and the client and the dyad they comprise.

Edward A. Dauer, *Preventive Law Before and After Therapeutic Jurisprudence; A Foreword to the Special Theme Issue*, 5 PSYCHOL. PUB. POL’Y. & L. 800, 801 (1999). One author describes the fusion of the two theories as “theralaw,” defining it as the “delivery of legal services in a manner designed to anticipate and avoid acute legal problems . . . and to perform both prophylactic and acute legal services in a manner designed to maximize the physical and mental well-being of clients and other affected entities.” Jeffrey W. Stempel, *Theralaw and the Law-Business Paradigm Debate*, 5 PSYCHOL. PUB. POL’Y. & L. 849, 853 (1999).

13. See *A New Model*, *supra* note 4, at 795-96, 798. It is suggested by the authors that a lawyer wishing to succeed in his utilization of these principles needs to have an understanding of the basic principles of psychology. *Id.* at 798.

14. See Stempel *supra* note 12, at 9.

15. See *A New Model*, *supra* note 4, at 796.

movement now is toward the incorporation of psychological skills training for lawyers.¹⁶ The incorporation of these skills is important in order for attorneys to identify and assess strategies for dealing with their client's psychological reactions.¹⁷

Dennis Stolle, the creator of the Therapeutic Jurisprudence/preventive law combination, suggests a four-step approach by which an attorney should assess new clients:¹⁸

(a) identify issues where there might be psychological concern; (b) determine which legal procedure is most likely to have positive therapeutic effects (or minimal negative effects); (c) look to future legal procedures through a [Preventive Law] lens, maximizing the opportunity for positive effects and minimizing the risk of negative effects; and (d) establish a system for dealing with unanticipated events so as to avoid non-therapeutic legal procedures.¹⁹

In other words, the use of the Therapeutic Jurisprudence/preventive law skills in order to anticipate a client's reactions should be used in order to achieve the client's true desired outcome.²⁰

By opening the doors to the development of alternative and creative approaches for solving problems, Therapeutic Jurisprudence has encouraged "legal professionals to make stronger use of emotion and human relationships . . ." ²¹ "Accommodation," for example, supplements the assessment of legal problems and strategic formulations by allowing lawyers flexibility in choosing the best alternatives for their clients.²² This flexibility in choice would result in better, more efficient, less aversive effects, which, in turn, could result in higher levels of client satisfaction.²³

The framework provided by Therapeutic Jurisprudence and its infusion with preventive law has also aided practitioners in choosing different methods of alternative dispute resolution.²⁴ These methods provide better,

16. *See id.*

17. *See id.*

18. *See Stolle, supra* note 12, at 469.

19. *Intersection, supra* note 6, at 1089 (citing Stolle, *supra* note 12, at 469). Andrea Schneider's article goes on to provide a very detailed example of the typical application of the four-step process promulgated by Stolle's article. *Id.* at 1091-97.

20. *See A New Model, supra* note 4, at 798-99.

21. Thomas D. Barton, *Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection*, 5 PSYCHOL. PUB. POL'Y. & L. 921, 921 (1999). This method of problem solving has been labeled "accommodation." *See id.* at 924.

22. *Id.* at 922.

23. *Id.*

24. *Intersection, supra* note 6, at 1085. The primary methods of alternative dispute resolution are: negotiation to resolve disputes, mediation and arbitration. *Id.* at 1086.

more tailored solutions to the client's specific issue.²⁵ A lawyer practicing Therapeutic Jurisprudence can weigh the client's legal and financial concerns in order to select what dispute resolution procedures will have the most positive effects.²⁶ It is essential that both lawyers and purveyors of alternative dispute resolution, become proficient in Therapeutic Jurisprudence in order to appropriately represent their profession and assist their clients.²⁷

BENEFITS OF TEACHING THERAPEUTIC JURISPRUDENCE

Therapeutic Jurisprudence's integrated approach not only makes lawyering more humane, but it also enhances an attorney's interpersonal skills. Some attorneys may already practice facets of Therapeutic Jurisprudence without realizing it.²⁸ Likewise, some law professors may even teach its concepts indirectly or unknowingly. The unintentional or indirect approach is simply not enough. Rather, it is not merely beneficial, but it is actually necessary, that as stewards of the profession, we attach the Therapeutic Jurisprudence name to what we do and particularly to what we teach.²⁹ We need to be more thoughtful about Therapeutic Jurisprudence and we must develop it more purposefully in our approach to teaching clinical law students. Such thoughtfulness and purpose is required for two reasons: First, today's clinical law student is quite likely to require an enhancement of his interpersonal skills if he is to become a good lawyer. Second, we have, as part of our mission, a duty to improve our profession.

Although some of us might intuitively understand and apply tenets of Therapeutic Jurisprudence, current law students and fledgling attorneys are unlikely to be as equipped with the requisite interpersonal skills or intuitive composition to do so. A large percentage of law students are members of Generation X (Gen X), having been born between 1966 and 1981.³⁰ In the

25. *Id.* at 1086.

26. *Id.* at 1090.

27. *See generally* Vitakis-Valchine v. Valchine, 793 So. 2d 1094 (Fla. 4th Dist. Ct. App. 2001). The court held that a settlement agreement, which resulted from a court-ordered mediation, is unenforceable when misconduct by a mediator is involved. *Id.* at 1095.

28. *See* David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work: The Term May Sound Academic but it Embodies a Hands-On Approach to Solving Problems Rather than Simply Winning Cases*, 89 A.B.A. J. 54 (2003) [hereinafter *Putting Therapeutic Jurisprudence to Work*].

29. *See* Karen L. Tokarz, *Justice, Ethics, and Interdisciplinary Teaching and Practice*, 14 WASH. U. J.L. & POL'Y 1, 9-10 (2004).

30. *See* Lisa Brennan, *Pitching the Gen-X Jury: As Jurors Get Younger, Law Schools Are Thinking More Like MTV*, 26 NAT'L L.J. 1 (June 2004). The generation is called X because the symbol connotes an unknown or mystery. Elizabeth A. Foley, *The Changing Face of Juries: Understanding Generation X*, 14 CHI. B. ASS'N REC. 28, 28 (2000).

next few years, it will be Generation Y (those born in and after 1982 who will comprise the majority of our law school classes).³¹ Members of Generation Y are also referred to as Millennials; a term that is less pejorative and therefore, preferable.³²

Both Gen X and Millennials often lack some of the basic interpersonal skills older generations take for granted. These students have been raised on cable television, video games, and computers.³³ They rely on email and instant messaging for a substantial amount of communication. They are used to television programming in which many of life's problems are resolved within a one-hour episode. They grew up getting the news visually, graphically, and in ten to twenty second sound bites.³⁴ They expect CNN to give them the world in twenty minutes; of course, if they miss any part, they need not worry, it will be repeated soon enough. Cell phones do perhaps provide them with increased opportunities for verbal communication, but as a result, the time Gen X and Millennials spend in face-to-face conversations is likely to be less.³⁵ The rapid growth in cell phone text messaging also gives them less opportunity to hone interpersonal skills.³⁶ Therefore, it should not surprise us that many of these students come to law school lacking those skills. These students, who have never properly developed interpersonal skills, certainly need a direct approach to learning them and Therapeutic Jurisprudence provides such an approach because it raises questions about roles and perceptions while encouraging proactive lawyering.³⁷

31. Brennan, *supra* note 30.

32. See Karen Rivedal, *Millennial Generation Deconstructed*, WIS. ST. J., Aug. 29, 2004, at A1.

33. Brennan, *supra* note 30.

34. *Id.* (referring to remarks by Chris Lind, a partner in the Chicago based law firm of Bartlit Beck Herman Palenchar & Scott).

35. See Virginia Grant & Marci M. Krufka, ALTMAN WEIL, INC., *The Young and the Restless: Understanding Generational Differences in Today's Law Firms*, REPORT TO LEGAL MANAGEMENT (2003) (on file with author). Recruitment by law firms is no longer about eye contact and a firm handshake; "[f]or a generation raised on sound bites and instant access to information, your firm's website can be critical to obtaining interest on the part of candidates." *Id.* at 4.

36. See Matthew Grimm, *Cutting the Cord – Motorola Advertises New V2397 Cellular Phone*, AMERICAN DEMOGRAPHICS, Jan. 2001, available at http://www.findarticles.com/p/articles/mi_m4021/is_ISSN_0163-089/ai_75171069 (last visited Apr. 6, 2005).

37. Keri K. Gould & Michael L. Perlin, *Therapeutic Jurisprudence: Issues, Analysis, and Applications: "Johnny's in the Basement/Mixing Up His Medicine"*, 24 SEATTLE U. L. REV. 339, 365 (2000) ("Therapeutic Jurisprudence does not take the place of more traditional skills training methods, yet it does give a different perspective, one that forces us as clinical teachers and students to confront issues we may recognize on a visceral level but do not cognitively acknowledge. Therapeutic lawyering helps raise provocative questions about roles, perceptions, and ethics, while promoting proactive lawyering.").

Some law students, however, do present themselves at the outset of their legal education with adequate, or even good, interpersonal skills. For many of these capable individuals, law school and law professors quickly squelch or suppress the use of these skills.³⁸ We do this by our traditional teaching approaches.³⁹ While we are training students “to think like lawyers,” we often employ tactics that subjugate anything but the analytical.⁴⁰ “Professors who delight in humiliating students cannot pretend that this ‘prepares’ them for practice. Such assaults merely drive the student into a neurotic shell of self-doubt or, alternatively, beget a demon who will disparage subordinates throughout his legal career.”⁴¹ We over-emphasize analytical reasoning while restricting the development of interpersonal skills.⁴²

For example, in the typical law school class, empathy is not something to be tolerated; professors frequently reinforce the notion that feelings get in the way of analysis and should be discarded, or at least, suppressed.⁴³

38. See Robert P. Schuwerk, *The Law Professor as a Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 758 (2004). The article proposes that “we need to ask ourselves a different question: ‘What are we doing to harm our students and how can we stop doing it?’” *Id.*

39. See Lawrence S. Kreiger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 114 (2002); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 237-38 (1991); Ann Iijama, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 525 (1998).

40. See Schuwerk, *supra* note 38, at n.43; Kenney Hegland, *Quibbles*, 67 TEX. L. REV. 1491, 1516 (1989). Indeed, Karl Llewellyn has said that teaching students to think like lawyers is almost an impossible task to achieve without sacrificing some of their humanity. Schuwerk, *supra* note 38, at n.43.

41. See John W. Teeter, Jr., *The Daishonon’s Path: Applying Nichiren’s Buddhist Principles to American Legal Education*, 30 MCGEORGE L. REV. 271, 289 (1999).

42. See G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 250 (1986).

43. See Schuwerk, *supra* note 38, at 772. “Thinking like a lawyer” is destructive; it is often accompanied by a systematic attack on values, suppressed feelings, leads to destructive coping mechanisms, and it is so consuming that students are generally unable to confine it to its proper sphere. See *id.* at 773-77. The destructive nature that is imposed on students becomes omnipresent:

[T]o see this, one need only consider the elements of the think-like-a-lawyer “skill” and reflect on how they would apply to a close interpersonal relationship in a moment of discord: (1) defend your own position with tenacity, (2) concede nothing to your “opponent’s” position, (3) declare that any “feelings” that your “opponent” might have about the situation are “irrelevant” or “unimportant,” (4) find fault and assign blame for the controversy to your “opponent,” and (5) assess an appropriate punishment for your “opponent” due to his or her misdeeds. A more destructive course of conduct for resolution of interpersonal conflicts between intimates is, of course, difficult to envision.

Id. at 776-77. “[T]he emotional, physical, and experiential aspects of being human have, by and large, been banished from the better legal neighborhoods and from explicit recognition in legal

Perhaps because American basic liberties are defined as individual liberties instead of collective rights,⁴⁴ law schools have prized “individual performance, competitiveness, and autonomy rather than group process, cooperation and collective learning.”⁴⁵ The students who did arrive at law school with some interpersonal skills, such as empathy, now require some validation that these are important, valuable skills in a lawyer’s toolbox.⁴⁶

Without such validation, it is highly likely that the “non-integrative, non-experiential education [will stunt] cognitive growth in areas such as creativity, judgment, affectivity, and willingness to act authentically in the face of inauthentic authority.”⁴⁷ The lawyer must be supportive, non-judgmental, and sensitive to her client’s psychological state in order to establish the critical relationship of trust and confidence with the client.⁴⁸ A law student must develop the interpersonal skills that will allow her to be able to create a climate in which clients will share their feelings: a relaxing atmosphere where clients can discuss highly personal and emotional matters.

Furthermore, even for students who do present themselves in their clinical semester with baseline interpersonal skills, the anxiety or excitement of the clinical semester often causes these students to neglect to employ such skills.⁴⁹ This is particularly troublesome because the work habits students develop during the clinical semester are likely to imprint and become permanent. Therapeutic Jurisprudence provides a methodology in which we can teach, rekindle, and reinforce interpersonal skills.⁵⁰ The direct approach of incorporating this concept into the clinical setting as dis-

discourse (although they sometimes get smuggled in as ‘facts’ in briefs and opinions).” Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575 (1987).

44. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 60-61 (1985).

45. Katharine Bartlett, *Feminist Perspectives on the Ideological Impact of Legal Education Upon the Profession*, 72 N.C. L. REV. 1259, 1263 (1994).

46. Goldman & Cooney, *supra* note 7, at 1128 (“The everyday practice of law is consumed with the humane arts of counseling, negotiation, mediation, and empathy, skills that, until recently, have been given short shrift in most law schools.”)

47. Anthony J. Fejfar, *A Road Less Traveled: Critical Realist Foundational Consciousness in Lawyering and Legal Education*, 26 GONZ. L. REV. 327, 372 (1990).

48. Bruce Winick, Symposium, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 115 (2000) [hereinafter *Role of Counsel in Litigation*].

49. See Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 287 (1981).

50. See Majorie A. Silver, *Therapeutic Jurisprudence/Preventative Law and Teaching: Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL’Y & L. 1173, 1200 (1999) (emphasizing that students should “integrate into their visions of lawyering an appreciation of the importance of personal skills and emotional intelligence.”).

cussed in the next part of this article allows students to actively develop and use these skills in order that they may be able to pay attention to both verbal and non-verbal forms of communication.

The second reason to teach Therapeutic Jurisprudence directly in a clinical setting is because it provides us the framework to change our profession - one lawyer at a time. The MacCrate Task Force, which was launched through the American Bar Association, has set forth a Statement of Fundamental Lawyering Skills and Professional Values known as the SSV.⁵¹ The SSV identifies ten fundamental lawyering skills and four values.⁵² One of the values is to “improve the legal profession.”⁵³ Robert MacCrate has stated that the SSV envisions the practice of law as “a respected, client-serving, problem solving, public calling.”⁵⁴ Law schools “have not done much to give students a commitment to making their profession better. Self-reflection is not generally taught. . . . [W]e do not often study our own profession and critically analyze its structure or practices.”⁵⁵ As law professors we are entrusted with the stewardship of the practice of law, and clinical professors play a special role in developing professionalism. “[F]aculty supervisors are often catalysts for the identification and exploration of professionalism issues, as they exhort their externs to reflect upon the ethical questions the students are confronting in their placements.”⁵⁶ Therapeutic Jurisprudence is valuable in assisting us to weigh the multiple ethical issues in clinical education.

These issues are inextricably intertwined with subissues of power, of class, of race, and of gender. Therapeutic Jurisprudence allows us (perhaps, *forces* us) to take a hard look at the impact of these issues on our students’ well-being in their roles as clinical participants. We do not believe we can, or should try to, eviscerate all of our students’ preexisting “-isms” in one 14-week semester. On the other hand, we have to acknowledge them, let the students know we are acknowledging them, and work through with the students how these “-isms” are affecting their clinical roles.

51. See generally Legal Education and Professional Development - An Educational Continuum: Report of the Task Force on Law Schools and the Profession: *Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B.

52. *Id.* at 135-221.

53. *Id.* at 207-21.

54. Robert MacCrate, “*The Lost Lawyer*” Regained: *The Abiding Values of the Legal Profession*, 100 DICK. L. REV. 587, 614 (1996).

55. Richard A. Matasar, *Legal Education: Skills and Values Education: Debate About the Continuum Continues*, 22 N.Y.L. SCH. J. INT’L & COMP. L. 25, 42-43 (2003).

56. Alexis Anderson et al., *Ethics in Externships: Confidentiality, Conflicts, and Competence in the Field and in the Classroom*, 10 CLINICAL L. REV. 473,479 (2003).

Again, Therapeutic Jurisprudence can be a great aid in this venture.⁵⁷

In essence, law school is the launching ground for the future of our profession. Students carry forth these lessons on ethics into their practice and eventually into the spectrum of our profession.⁵⁸ It is essential that students graduate from law school with the necessary skills and ethics that should be a staple in our profession.⁵⁹

Therapeutic Jurisprudence provides not only a framework to structure foundational training for the practice of law, but it can also serve as a springboard to challenge students to introduce an ethic of care into the workplace itself. While law schools have implicitly and explicitly encouraged individual behavior, clinical education provides the opportunity to teach and reinforce cooperative, caring behavior.⁶⁰ Lawyers are unhappy and dissatisfied with their profession and themselves.⁶¹ If we provide students with a clinical experience that shows them the purpose of the law and legal systems is to build a bridge and realize common aspirations for connection, then we will certainly be changing our profession for the better.⁶² The trend toward an unhealthy profession can be reversed if lawyers force the organizations through which they practice law to commit to extending the ethic of care to the way lawyers work and live.⁶³ Therapeutic Jurisprudence's emphasis on the healing aspects of the profession and emotional well-being assists the accomplishment of these needed changes.

57. Gould & Perlin, *supra* note 37, at 358.

58. Eleanor W. Myers, "Simple Truths" *About Moral Education*, 45 AM. U. L. REV. 823, 826 (1996).

59. See Alan M. Lerner, *Law and Lawyering in the Workplace: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 110-11 (1999).

60. Theresa Glennon, *Theoretics of Practice: The Integration of Progressive Thought and Action: Lawyers and Caring: Building the Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175, 1177 (1992).

61. Deborah L. Rhode, *The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335, 1336 (2000); see also Susan Daicoff, *Lawyer, Know Thyself: A Review of the Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1342-48 (1997); Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 549-57 (1998).

62. Stewart Levine, *A New Kind of Law School*, 28 LAW PRAC. MGMT. 51, 52 (Sept. 2002) (suggesting law school curriculum include "communication arts; psychology; counseling skills; systems theory; problem solving; creativity; conflict theory and resolution; the arts of agreement; and holism.").

63. Leslie Larkin Cooney, *Lawyer, Heal Thyself: Bringing Rational Expectations to the Law Firm Environment*, 22 WHITTIER L. REV. 967, 982 (2001) (positing lawyers have a unique responsibility to bring balance into their own workplaces); Lawrence S. Krieger, *What We're Not Telling Law Students – and Lawyers – That They Really Need to Know: Some Thoughts – In – Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 18 (1998-99).

THERAPEUTIC JURISPRUDENCE AS A RECURRING RHYTHM IN
THE EXTERN CLINIC

Integrating the theories of Therapeutic Jurisprudence with the law school clinical setting introduces a large population of students to an innovative way of improving the lives of their future clients. Mary Berkheiser began the discussion of interfacing clinical teaching and Therapeutic Jurisprudence.⁶⁴ Although focusing on “live client” clinics, she identified four areas where Therapeutic Jurisprudence could impact law school clinics: “(a) problem solving, (b) client counseling, (c) self-reflection or ‘learning to learn,’ and (d) professional responsibility.”⁶⁵ Problem solving methods are enhanced by teaching students to look beyond what resembles simply a legal issue, to the core of the client’s concern, and decide whether that client’s issue is one that can be better handled by other professionals.⁶⁶

Although the traditional view of client-counseling focused on the lawyer’s role to simply make decisions, the modern view supported by proponents of Therapeutic Jurisprudence is to allow the client to make the decisions themselves.⁶⁷ The “learning to learn” aspect of the clinic requires the students to carry only a small caseload so that they have the opportunity to develop analytical, self-evaluative characteristics.⁶⁸ The application of Therapeutic Jurisprudence aids in the development of the ever-important aspect of professional responsibility and “develop[s] in students an appreciation of their roles as lawyers and an acceptance of their personal responsibility for the impacts that lawyers have in society.”⁶⁹

Keri K. Gould and Michael L. Perlin further explored the incorporation of Therapeutic Jurisprudence into clinical education and suggested such incorporation would improve the teaching of skills, give a better understanding of the dynamics of clinical relationships, investigate ethical concerns and the effect on lawyering roles, and invigorate the way teachers and students question accepted legal principles.⁷⁰

The clinic extern classroom requirement has been criticized for implicitly containing an anti-practitioner bias, lacking compelling subject matter, and struggling to incorporate clinic methodology.⁷¹ Using Thera-

64. See Mary Berkheiser, *Frasier Meets CLEA: Therapeutic Jurisprudence and Law School Clinics*, 5 PSYCHOL. PUB. POL’Y. & L. 1147, 1147-48 (1999).

65. *Id.* at 1155.

66. *See id.* at 1156.

67. *Id.* at 1156-57.

68. *Id.* at 1160.

69. *Id.* at 1163.

70. Gould & Perlin, *supra* note 37, at 355.

71. Erica M. Eisinger, Symposium, *The Externship Class Requirement: An Idea Whose Time*

peutic Jurisprudence as a foundation for this class can ameliorate such concerns. Therapeutic Jurisprudence explicitly positions itself as practitioner supportive and, thus, using it as the underpinning for the classroom component ameliorates concerns of anti-practitioner bias. Therapeutic Jurisprudence will provide a compelling platform which unifies a variety of subject matters as well as skills training.

The clinical professor should take a direct approach to teaching Therapeutic Jurisprudence by first assigning one or more readings and then engaging students in a discussion of its concepts and applications.⁷² Students should engage in several exercises and simulations to improve their interpersonal skills. Joshua D. Rosenberg offers thought provoking suggestions on teaching students to clear their own self-knowledge and talk about perceptions, thoughts, feelings and motivations so that they can practice more effective communication techniques.⁷³ Leonard L. Riskin provides a range of mindfulness meditation exercises that can improve students' abilities to listen, react, and respond.⁷⁴

If skills are taught as part of the classroom component of an externship clinic, the skills can be taught within a Therapeutic Jurisprudence framework. For instance, Therapeutic Jurisprudence has found application in arbitration,⁷⁵ negotiation,⁷⁶ mediation⁷⁷ and ADR.⁷⁸ Interviewing and counseling, critical skills for any clinical student, can be significantly enhanced by adopting a therapeutic jurisprudential approach. Therapeutic Jurisprudence provides the students with the reference point to recognize the psychological barriers of clients and lawyers alike which can impede the

has Passed, 10 CLINICAL L. REV. 659, 661-67 (2004).

72. For one very short, yet provoking discussion, article *see Putting Therapeutic Jurisprudence to Work*, *supra* note 28.

73. Joshua D. Rosenberg, Symposium, *Teaching Values in Law School: Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621, 642-50 (2002) (detailing the benefits and methods of teaching Interpersonal Dynamics).

74. Leonard L. Riskin, *Mindfulness in the Law and ADR: The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 38-45 (2002).

75. *See generally* Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994).

76. *See generally* Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1 (1996).

77. *See generally* Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998).

78. *See generally* Kathy L. Cerminara, *Contextualizing ADR in Managed Care: A Proposal Aimed at Easing Tensions and Resolving Conflicts*, 33 LOY. U. CHI. L.J. 547 (2002); I. Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-Making*, 9 HARV. NEGOT. L. REV. 253 (2004); Lela Porter Love, *Twenty-Fives Years Later with Promises to Keep: Legal Education in Dispute Resolution and Training of Mediators*, 17 OHIO ST. J. ON DISP. RESOL. 597 (2002).

progress of a meaningful interview. When students study the tenets of Therapeutic Jurisprudence and recognize emotional reactions that could diminish the level of dialogue taking place in the interview setting, students can evolve from identifying this as a problem and progress to taking the steps necessary to remedy it.

Through Therapeutic Jurisprudence they will not only know the value of establishing trust and confidence but they will develop their emotional intelligence⁷⁹ and be affective lawyers⁸⁰ while learning how to make clients feel that their attorneys are their allies.⁸¹ Therapeutic Jurisprudence teaches students about dealing appropriately with a client and their needs: as a person requiring students to really get to know his or her entire person and key values, whether these values focus on money, security, family, religion, privacy or avoiding emotional pain. Students learn that a therapeutically sound interview will result in the lawyer seeing the legal problems through the clients' eyes, the lawyer will then be able to therapeutically counsel clients and plan healthy strategies to solve the legal problems.⁸²

Professor Gould has identified three tasks in counseling in which clinical students could apply concepts of Therapeutic Jurisprudence.⁸³ First, students must "define and set the goals for the counseling session" with the client.⁸⁴ This step encourages students to consider the therapeutic and anti-therapeutic effects of their meeting while focusing on the client's well-being and desired outcome. Second, students should "consider what legal and nonlegal steps needed to be taken to effectuate a therapeutic outcome."⁸⁵ This allows students to formulate several different legal strategies that best position a client to making an informed decision as to the relevant legal issues. Lastly, students "evaluate whether the steps needed to effectuate the therapeutic outcome were acceptable to the client and to the student" and to decide whether alternative steps should have been taken.⁸⁶

Emotions do have a powerful impact on the attorney-client relationship and students need to learn how to identify them and the role they play in the relationship. Feelings of rejection and abandonment, a sense of fail-

79. See Silver, *supra* note 50, at 1173-75.

80. Linda G. Mills, *Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION, 419 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000).

81. *Role of Counsel in Litigation*, *supra* note 48, at 115.

82. Richard L. Halpert, *More Than One Kind of Recovery: In Personal Injury Cases, Money Does Not Always Answer the Client's Needs*, 89 A.B.A. J. 58 (May 2003).

83. Gould & Perlin, *supra* note 37, at 361-62.

84. *Id.* at 361.

85. *Id.*

86. *Id.* at 362.

ure, loss of a dream, and helplessness are all emotions that may keep the client from focusing on the legal goals. If students fail to address these emotions in a counseling session, and choose only to focus on reasoning, arguing, or giving advice, clients feel ignored or minimized and the relationship is damaged. Therapeutic Jurisprudence teaches students that supportive denial is not likely to be helpful, and may make matters worse.⁸⁷ It also helps students to understand why extreme stress might make it difficult for clients to focus and remember things. When the body releases various stress hormones, including cortisol, mental errors, distraction, and impairment of memory and diminishment of the ability to process information may occur.⁸⁸ When students understand these events, they can create an environment more conducive to an effective counseling session. Concepts of Therapeutic Jurisprudence even come into play when the client is a corporation because the needs of the client still must be addressed.

For instance, a lawyer with such a restricted mind-set, in representing a corporation in a breach of contract claim against another corporation, might focus entirely on the facts that are relevant to the legal action. If that happens, the lawyer might miss opportunities to address the real needs of the client, such as increasing its profits, protecting its reputation, or improving particular aspects of its performance. And such needs might be addressed through planning and negotiation processes that could lead to new business relationships or new understandings about each organization's performance or about the interactions between employees of the two organizations.⁸⁹

Therapeutic Jurisprudence has a special relationship with the art of negotiation, which is itself recognized as a healing process where people can discuss and resolve conflicts and achieve reconciliation.⁹⁰ Students can learn to monitor the emotional climate of negotiations with an awareness of the moods, feelings and attitudes of both sides with a result of an improved outcome.⁹¹

Finally, as part of the classroom requirement, the topic of career satisfaction and leading a balanced and healthy professional and personal life can be approached through the eye of Therapeutic Jurisprudence. "Lawyers are often too skilled at separating the personal and professional

87. See generally Steven Keeva, *Emotional Subtext: Lawyers Need to Recognize and Respond to Their Clients' Feelings*, 89 A.B.A. J. 85 (Dec. 2003).

88. *Role of Counsel in Litigation*, *supra* note 48, at 110.

89. Riskin, *supra* note 74, at 16 (citing Leonard L. Riskin, *Mediator Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 16 (1996)).

90. Williams, *supra* note 76, at 35-36.

91. Daniel L. Shapiro, *A Negotiator's Guide to Emotion: Four "Laws" to Effective Practice*, 2 DISP. RES. MAG. 3, 4-8 (Winter 2001).

spheres . . . so courses that will help them integrate their lives and their lawyering skills, and thereby improve both, are truly welcome.”⁹² Therapeutic Jurisprudence can bring students a great deal more satisfaction than traditional lawyering might. “Knowing that you have helped a client accomplish his or her goals and move toward leading a more satisfying life is extraordinarily gratifying, both personally and professionally. For me, it is what makes being a healing lawyer worth the effort.”⁹³ Introducing the ethic of care harmonizes the practice of law for both lawyers and clients and contributes to satisfaction while decreasing distress.⁹⁴

REFLECTION AS THE HEART OF AN EXTERNSHIP

An important part of a clinical semester is the reflection on methodologies and strategies as well as the self-reflection on goals, objectives, and experiences. Students routinely keep journals to aid in the reflective thinking process.⁹⁵ For extern students, journaling assignments can aid in ensuring productive and continuing dialogues to take place between students and their supervisors when the faculty-initiated journal assignments require students to participate in conversations with supervisors on a variety of assigned topics, such as goals and learning objectives.⁹⁶ Requiring students to reflect upon personal values, ethics and morality as well as asking them to focus on the psychological aspects of dealing with clients and the emotions and personal beliefs that are involved in the decision making process are part of the range of journaling assignments.⁹⁷ Journal assignments are not merely a valuable source of information about the placement,⁹⁸ but

[t]houghtfully prepared journals, with specifically defined and required content, will encourage most externs to explore the role of personal values and beliefs in the work experience, possible moral conflicts in per-

92. Steven Keeva, *CLE for the Whole Person: Minnesota Supreme Court Gives Full Credit for Classes Emphasizing Self-Reflection*, 90 A.B.A. J. 76, 77 (Feb. 2004) (quoting Kathy Morris, Director of the ABA Career Resources Center).

93. Halpert, *supra* note 82, at 59.

94. David Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 276 (1999).

95. See J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 55-56 (1996).

96. Barbara A. Blanco & Sande L. Buhai, *Externship Field Supervision: Effective Techniques for Training Supervisors and Students*, 10 CLINICAL L. REV. 611, 642-43 (2004) (“Anecdotally, perhaps over half of field placement programs in law schools nationwide require students to ‘journal’ their experiences.”).

97. *Id.* at 643.

98. See Harriet N. Katz, *Personal Journals in Law School Externship Programs: Improving Pedagogy*, 1 T.M. COOLEY J. PRAC. & CLINICAL L. 7, 17-8 (1997).

sonal values and beliefs with the work experience, changing perceptions in the role of law and the practice of law in society and their role, both as a student and in the future as a lawyer, in the institutions comprising the legal system.⁹⁹

The activity of journaling could present the student with a challenging decision involving the issue of client confidentiality. Students engaged in reflection and writing journal entries, as well as other extern activities, must, of course, be watchful to fulfill their ethical responsibilities.¹⁰⁰ Obviously, students cannot share confidential information.¹⁰¹ Even if they are not certified to practice law, student externs are still subordinate lawyers and bound by the professional rules of the jurisdiction of their clinical placement.¹⁰² This does not mean, however, that the student cannot communicate about her work experience in her journal. Prophylactic measures may allow students to participate in journaling and other class activities while avoiding any problems with disclosing confidential information.

In a thoughtful and comprehensive article, *Ethics in Externships*, the authors suggest three protocols designed to protect confidentiality.¹⁰³ First, use materials designed to sensitize externs to their responsibilities; second, help field supervisors recognize their duties to train students in the particular nuances of confidentiality within the particular setting; and, third, develop and use resources to ensure compliance and prevent misconduct.¹⁰⁴ Following these protocols will aid clinical professors in using self-reflection in journals and rewind techniques in class while still ensuring students do not violate any aspects of client confidentiality.

As a powerful tool to aid the understanding of the interpersonal dynamics of the various relationships the student will encounter during the

99. Blanco & Buhai, *supra* note 96, at 646. The authors suggest that the journal entries should contain self-reflections of legal resolutions, not in a detached "legal resolution" manner, but rather from the "human viewpoint" focusing on psychological aspects of the client's situation. The purpose of these self-reflective journals are to provide the student with a manner in which to evaluate their experiences, reactions, and "lessons learned in the field." The journals must include: "each meeting . . . with the supervisor, the nature of each assignment, the variety of various assignments, [their] response to the assignment, difficulties or successes encountered in accomplishing the task and a report on the feedback from the supervisor on the task or assignment." *Id.* at 643-45.

100. Other activities of the clinical externship, such as participation in the extern class, seminar, consultation with the clinical professor, etc. are also fraught with possible confidentiality issues.

101. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

102. Anderson et al., *supra* note 56, at 477-78.

103. *Id.* at 499-500.

104. *Id.* at 500-05. The article not only discusses hypothetical case situations, *id.* at 486-99, but also offers sample protocols, *id.* at 568-69.

clinical semester, Therapeutic Jurisprudence will enhance the students' experiential learning.¹⁰⁵ Clinical students are well prepared to spot instances of Therapeutic Jurisprudence in action while they are working at their placements if they have had the opportunity to discuss its concepts in their classroom component and apply its rubric in their skills exercises. They are now ready and able to reflect properly on these observed examples of Therapeutic Jurisprudence in their journal entries.

For instance, the clinical professor may focus the students' attention on the nature of their interactions with clients, their supervising attorneys, other attorneys at the extern placement, as well as attorneys outside of this milieu. Using this specific approach, the clinical professor will ask students in their journal entries to consider the psychological and physical well-being of people as well their legal status,¹⁰⁶ and to examine whether the law or legal procedure applied has produced the greatest sense of well-being for the client.¹⁰⁷

Asking these questions and directing students to write reflectively encourages the students not merely to think about what has occurred but it requires them to step back for a moment and recognize the impact of the events on the well-being of each of the actors. Whatever students might have absorbed by reading about Therapeutic Jurisprudence and discussing it in a classroom setting, now becomes reality when they recognize Therapeutic Jurisprudence for themselves in their own individual clinical experience.¹⁰⁸ Once students begin to recognize the value a Therapeutic Jurisprudence approach can add to the practice of law, then they will be likely to become the attorneys who "anticipate and avoid acute legal problems" and perform "in a manner designed to maximize the physical and mental well-being of clients and other affected entities."¹⁰⁹ Interestingly, students will quickly move to a higher plain of reflection and soon their journal entries will begin to explore additional examples of how other observed relationships could have benefited from a different approach, one which would have been more holistic and healthy.

105. Gould & Perlin, *supra* note 37, at 355.

106. See Slobogin, *supra* note 9, at 196-97.

107. See Gould & Perlin, *supra* note 37, at 353 (citing David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179 (1996)).

108. Gen X and Millennials love reality television programming and certainly clinics offer them the ultimate in reality during their law school experience. See Gary S. Gildin, *Reality Programming Lessons for Twenty-First Century Trial Lawyering*, 31 STETSON L. REV. 61, 76-81 (2001) (describing and explaining the popularity of reality television programs such as "Survivor" and "Big Brother").

109. Stempel, *supra* note 12, at 853.

One student shared a story in his journal about interviewing a client with his supervising attorney so they could complete the planning for the client's estate. The student reflected on the fact that his supervising attorney had wisely discussed with the client the effects that the client's proposed unequal distributions of her estate would have on her children. The student recognized the psycho-legal soft spot.¹¹⁰ Another student reported a counseling session with a client who wanted to take legal action against a neighbor for the death of the client's dog. The student reported that, during the session, it became obvious that the client had insufficient evidence as to the neighbor's involvement with the dog's death. The student astutely realized what the client really needed was for her loss to be recognized by others. The extern student provided the necessary recognition and validated the client's feelings. He reported in his journal he was surprised at how much his empathy seemed to help the client.

During the counseling session, the client was able to discuss ways in which she might be able to grieve the loss of her beloved pet and begin healing from the loss. A third clinic student reflected in her journal about

110. Marc W. Patry, David B. Wexler, Dennis P. Stolle & Alan J. Tomkins, *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439, 441 (1998) [hereinafter Patry et al.]; David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317, 319 (1998); Daniel B. Fishman, *Prospects for Developing a "Psycholegal Lexis"*, 10 PSYCHOL. PUB. POL'Y. & L. 178, 189 (2004) (describing psycholegal soft spots as a "glue" that links Therapeutic Jurisprudence with pragmatic psychology). "Psycholegal soft spots" are "areas in which 'legal intervention or procedures may not lead to a lawsuit or to legal vulnerability, but may lead to anxiety, distress, depression, hard and hurt feelings, etc.'" Berkheiser, *supra* note 64, at 1159 (citing Patry et al., *supra* note 110, at 441). They "are situations resulting from the legal process that one can anticipate will elicit an emotional response from a client." Carolyn Copps Hartley & Carrie J. Petrucci, *Justice, Ethics, and Interdisciplinary Teaching and Practice: Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, n.117 (citing Wexler, *supra* note 110, at 318-19). The ability to identify these "psycholegal soft spots" leads to focusing on client well-being, the primary goal of Therapeutic Jurisprudence. See Berkheiser, *supra* note 64, at 1159. One available tool to aid in the identification of these so-called "soft spots" is a questionnaire. *Id.* (citing Patry et al., *supra* note 110, at 443). Developed from a compilation of experiences by practicing lawyers, the checklist consists of the following nine parts:

- (1) Identify the area of law that this problem relates to.
- (2) Provide a brief description of the legal situation as it was at the time you initially became involved.
- (3) Describe the potential or actual nonlegal motivations or consequences to the parties involved.
- (4) In your experience, how often does this type of situation occur?
- (5) Provide a description of the action taken and the legal and nonlegal outcomes.
- (6) Explain whether or not you believe this approach resulted in successful legal and nonlegal outcomes and why.
- (7) Describe alternative approaches that could have been taken and how the legal and nonlegal outcomes may have been more or less successful than the actual outcomes.
- (8) "Rewinding" the case to an earlier point in time, describe how the situation may have been prevented or diminished in severity by other attorneys or judges at earlier points in time.
- (9) General comments.

Berkheiser, *supra* note 64, at n.94 (citing Patry et al., *supra* note 1, at 443-47).

handling a case for her supervising attorney where the client purchased some property and funds had been escrowed for repairs to the property. The student noted the client's hostility toward the seller and discussed in her journal the roadblocks the client had insisted the supervising attorney use to thwart the return of any of the unused funds. The student observed that the client seemed to prefer to have the money depleted by costs and fees rather than have any of it returned to the seller. This student mused about the well-being of the client and whether the client would have been better served by a different approach earlier in this case.¹¹¹

Some clinical professors direct their extern students to create journal entries documenting meetings with supervising attorneys. Such assigned journal activities include: discussing goals and objectives with the supervising attorney, discussing the placement's confidentiality policy with the supervising attorney, discussing the student's progress, and reporting each discussion in the journal.¹¹² Once again, Therapeutic Jurisprudence can significantly enhance this process, if the clinical professor uses it as the framework for the assignment. Remind students initially to consider striving to become psychologically sophisticated proactive attorneys who maximize preventative outcomes while minimizing anti-therapeutic consequences. Discuss the lawyer's role in achieving a client's goals, increasing their opportunities, reducing risks, and ensuring desired outcomes.¹¹³

With the stage thus set, students have the backdrop to set their specific goals and objectives for their individual extern placements. While obviously not every student or supervising attorney is going to embrace the notions of therapeutic lawyering, some will. For those who will, incorporating the concepts as identifiable goals and objectives, discussing them, and later measuring progress in light of them should yield healthier results.¹¹⁴ The journal assignments should require students to be reflective after the discussions with supervising attorneys rather than merely requir-

111. This is not to suggest that Therapeutic Jurisprudence practitioners will fail to assert rights and liberties when such are required. "Therapeutic Jurisprudence in no way supports paternalism, [or] coercion It in no way suggests that therapeutic considerations should trump other considerations" See David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 762 (1993).

112. See Blanco & Buhai, *supra* note 96, at 646-47; See Eyster, *supra* note 2, at 385-86.

113. See Dennis P. Stolle, David B. Wexler, Bruce J. Winick, & Edward A. Dauer, Symposium, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 39-48 (1997) [hereinafter *Integrating Preventive Law*].

114. Prioritizing work as just one of life's responsibilities and living a balanced life is certainly a laudable goal. Cooney, *supra* note 63, at 982 (citing Steven Taylor, *Getting Wise: Are Lawyers Losing Sight of What Matters Most?*, L. PRAC. MGMT. 28, 30 (Oct. 2000)).

ing the students to report the discussion in their journals.

The assignments should ask the student to reconsider the discussion and to rethink about what is working and not working in the externship in light of the student's goals and objectives. The assignment can be structured to encourage the student to express feelings about the behavioral, moral, cultural, and ethical aspects of the externship.

USING REWINDING AS THE SOUL OF AN EXTERNSHIP

Therapeutic Jurisprudence offers another very useful technique called "rewinding." Rewinding is where students are encouraged to "rewind" the case back to the beginning to determine whether anything could have been done to avoid the legal problem in its entirety.¹¹⁵ There are two steps to the "rewinding" process: first, asking students to take the case to an earlier point in time and second, requiring them to consider how a more therapeutic or less severe outcome could have been achieved.¹¹⁶ The primary purpose for rewinding is to encourage students to "deepen [their] learning and self-awareness."¹¹⁷

The concept of rewinding can be utilized in a variety of applications. Clinic students can rewind cases on which they are currently working, or they can rewind cases that they have recently completed. Students can rewind after classroom simulations and can rewind after discussion of hypothetical cases. Students can also rewind current event cases, historical cases, movies or books. For several years I have assigned externs in a business practice clinic to projects involving recent corporate scandals, such as Enron, Worldcom, Tyco, and others. My focus, at first, was to primarily teach professional responsibility through these vehicles with the secondary benefit of having students enhance their overall understanding of business, financial, accounting, and management concepts.

I have always had the students present these projects to the entire class and the projects have been well received. I ask the students to pay attention not only to the moral dilemmas and ethical choices made but I also ask them to report on the backgrounds and personalities of the players. This has lead to rich and rewarding discussions; yet, I have been troubled by the lack of coherence to the projects, class discussions, and the extern field placement experiences. The direct inclusion of Therapeutic Jurisprudence as a discrete subject matter has remedied this concern because it has provided a unifying structural foundation.

115. Berckheiser, *supra* note 64, at 1161; *see also* Wexler, *supra* note 110, at 339-40.

116. Patry et al., *supra* note 110, at 445.

117. Berckheiser, *supra* note 64, at 1161.

Before the projects are assigned, students can become familiar with the foundational principles of Therapeutic Jurisprudence. As part of the project assignment, they look for instances where employment of its concepts could have altered the fiasco's ultimate outcome as well as examples where the lack of application of therapeutic approaches heightened the disastrous results. The original focus on professional responsibility issues with the secondary benefit of increased business acumen remains.

Now, however, the class also employs rewinding in brainstorming sessions focused on the therapeutic ways in which the lawyers could have done things differently. As students present projects on the various scandals, references to concepts of Therapeutic Jurisprudence allow the class to compare and contrast what happened versus what could have occurred on a much broader spectrum. The theory of Therapeutic Jurisprudence takes shape as a reality when students discuss how the various transactional lawyers could have employed its tenets to yield potentially far different results.

Requiring students to employ the rewind technique for cases they encounter in their externships can also yield therapeutic results.¹¹⁸ "Real" cases can be perfect vehicles to "analyze, deconstruct, and reconstruct from [therapeutic jurisprudential] perspectives."¹¹⁹ One student used the rewind technique to examine a case where the client had been involved in a securities arbitration case when a customer complained of a breach of fiduciary duty and deceptive trading practices.

Part of the customer's complaint involved the use of margin in the customer's account. As the clinic extern was rewinding the case, she recalled seeing a similar complaint concerning the unauthorized use of margin in a different case while she had been working at this same placement. She recognized her role as proactive and one that should avoid litigation.¹²⁰ She began to think about how the client could minimize the risk of legal problems in the future.¹²¹

118. Care must be taken when making this assignment to be sure students do not see this as an exercise in trashing the supervising attorney or listing all the things a practitioner did wrong. Externships do provide genuine education. See Daniel J. Givelber et al., *Learning Through Work, An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1, 25 (1995). We should not treat the on site supervisor as "data." See Robert J. Condlin, "Tastes Great, Less Filling": *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 53 (1986).

119. Gould & Perlin, *supra* note 37, at 370-71.

120. See *Integrating Preventive Law*, *supra* note 113, at 16. See generally ROBERT A. HARDAWAY, *PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS* (Anderson Publishing Co., 1997).

121. Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL'Y. & L. 811, 815 (1999). The introduction of therapeutic issues to law students will allow them to "assess legal issues and prob-

The student decided the client would best be served by a redesign of its new account form, which more clearly defined and explained margin and a separate form, which the client could use when customers authorized the use of margin by the client. After the student discussed these proposals with her supervising attorney and drafted the proposed documents, the student and the supervising attorney met with the client and discussed these preventative measures.¹²² This counseling session led to further proposed changes in the client's office procedures and training of its employees and agents.

The recommendations of the extern student are really not so amazing, until one stops to consider that generally, such global thinking is usually the product of seasoned lawyers with several years experience in a particular field. The framework of Therapeutic Jurisprudence, however, gave impetus for a novice to creatively think along the lines of preventing lawsuits before they happen. The supervising attorney and the client were both pleased with the outcome. The student extern had an experience which was not only individually satisfying, but one that was portable and would serve her throughout her career.

OUT OF THE PERIPHERY AND INTO THE MAINSTREAM

The time is now to move Therapeutic Jurisprudence from the periphery and into mainstream clinical education. It is an exciting, powerful movement that is exponentially gaining momentum. Therapeutic Jurisprudence can increase and enhance the clinical experience of our students by bolstering their interpersonal skills - making them better lawyers. Therapeutic Jurisprudence offers a mode for increased personal and professional satisfaction for our students as practicing lawyers and we should embrace it and integrate concepts such as reflection and rewinding in our clinical teaching.

lems in a therapeutic light throughout their legal careers." *Id.* at 845.

122. Indeed, the galaxies of Therapeutic Jurisprudence and preventive law have been brought together. Dauer, *supra* note 12, at 801.