THE USE OF THERAPEUTIC JURISPRUDENCE IN LAW SCHOOL CLINICAL EDUCATION: TRANSFORMING THE CRIMINAL LAW CLINIC*

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This article describes how therapeutic jurisprudence, and the therapeutic jurisprudence/preventive law model, can be imported into legal education and practice. Although the approach can (and does) find application in a broad spectrum of legal areas, the present article focuses on the criminal law clinic and on training future criminal lawyers with an expanded professional role: one that explicitly adds an ethic of care and considerations of rehabilitation. As such, it brings an interdisciplinary perspective into clinics and law practice, with particular emphasis on insights and techniques drawn from psychology, criminology, and social work. The article explores a therapeutic jurisprudence framework for thinking about criminal law competencies, and illustrates the explicit use of the expanded professional role in the area of sentencing, in juvenile parole revocation proceedings, and in a tribal reentry court project.

INTRODUCTION

Recent years have seen the emergence of the therapeutic jurisprudence/preventive law model of lawyering.[1] This model contemplates lawyers practicing with an ethic of care and heightened interpersonal skills, who seek to prevent legal difficulties or repetitive legal problems for their clients through sensitive counseling, advance

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[1] *E.g.*, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B. Wexler & Bruce J. Winick, eds. 2000) [*hereinafter*, PRACTICING THERAPEUTIC JURISPRUDENCE]; Symposium, *Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L. 793-1210 (Bruce J. Winick, David B. Wexler & Edward A. Dauer, guest eds 1999); David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, 89 A. B. A. J. 54 (May 2003). *See also* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds. 2003) [*hereinafter*, JUDGING IN A THERAPEUTIC KEY](applying approach to judging).

planning, creative problem solving, careful drafting, and the use of alternative dispute resolution techniques. In recent years, this emerging model has begun to penetrate legal education, notably in courses on lawyering and in interviewing and counseling.[2] It has much to offer clinical legal education, in particular.[3]

This model can be seen as a reconceptualization of an approach to skills training that previously has been used in clinical legal education. But the model, by explicitly valuing the psychological wellbeing of the client, by calling for enhanced interpersonal skills, through creative application of behavioral science research to the legal context, and by emphasizing the prevention of legal problems, adds a new dimension to clinical law teaching. The model, by bringing insights from psychology and social work into our understanding of the role of counsel, also brings a much needed interdisciplinary perspective to clinical legal education. Moreover, although much of clinical legal education has focused on litigation skills, this model includes law office counseling skills in a variety of non-litigation contexts.

This article describes the therapeutic jurisprudence/preventive law model, and demonstrates its value in the area of clinical legal education and skills training. While, in our view, this approach can fruitfully be used in all clinical settings, this article illustrates the model by offering some suggestions on how it can be applied to transform criminal law clinics. This article focuses on the criminal context in order to provide a detailed example of how the model can restructure and revitalize clinical legal education.

Part I describes the therapeutic jurisprudence/preventive law model. After offering some general considerations, Part II then provides three illustrations of how the model can be used to transform criminal practice — one drawn from criminal sentencing, one from juvenile parole revocation, and the final one from a proposed tribal reentry court. We also use these three illustrations to introduce a new tripartite analytical framework for how lawyers can creatively use be-

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[2] The co-authors teach the model at their respective law schools. Wexler teaches a course called "Practicing Therapeutic Jurisprudence," at the University of Arizona College of Law. Winick uses this model in a skills training course at the University of Miami School of Law called "New Directions in Lawyering: Interviewing, Counseling, and Attorney/Client Relational Skills." For a detailed description of how therapeutic jurisprudence is used to teach these skills, see Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429 (2005). The model also is taught in sixteen other law schools in courses and seminars dealing with therapeutic jurisprudence more generally, lawyering, and judging. For information on such courses, see http://www.therapeuticjurisprudence.org/ (last accessed on August 8, 2006).

[3] Symposium, *Therapeutic Jurisprudence and Clinical Legal Education and Skills Training,* 17 ST. THOMAS L. REV. 403-896 (2005).

havioral science theory and research in their lawyering. Part III offers some concluding thoughts on how the model can bring new skills and techniques to the criminal law clinic.

I. The Therapeutic Jurisprudence/Preventive Law Model

In the last fifteen years, a number of new conceptions of the lawyer's role have emerged. All seem to have in common a more humanistic orientation, seeking to lessen the excessive adversarialness of lawyering, trying to improve client wellbeing generally, and psychological wellbeing in particular. Law professor Susan Daicoff calls these the "vectors" of the "comprehensive law movement" – therapeutic jurisprudence, preventive law, creative problem-solving, holistic law, restorative justice, the increasing array of alternative dispute resolution mechanisms, including collaborative law, and the emergence of problem-solving courts.[4] These models all seek to go beyond an exclusive focus on clients' legal rights or interests, to value as well their human needs and emotional wellbeing. This broadened conception of the lawyer's role calls for an interdisciplinary, psychologically-oriented perspective and enhanced interpersonal skills.

As a more theoretical and interdisciplinary perspective therapeutic jurisprudence can function as an academic organizing framework for all of these emerging movements. Therapeutic jurisprudence explicitly values the psychological wellbeing of the client, and recognizes that the legal interaction will produce inevitable psychological consequences for him or her. In the ways they deal with their clients, lawyers thus inevitably are therapeutic agents. Once this insight is absorbed, it is transformative for both lawyer and client alike. Lawyers embracing this broadened conception of the professional role must strive to avoid or minimize imposing psychologically damaging effects on their clients. They explicitly value their clients' psychological wellbeing, and in their problem analysis, problem-solving, and counseling efforts on behalf of their clients, seek not only to protect and promote their clients' rights and economic interests, but also to improve their emotional lives. Lawyers applying a therapeutic jurisprudence approach thus explicitly practice law with an ethic of care. Although the model stresses practicing with an ethic of care, it is not paternalistic.[5] Therapeutic jurisprudence work often has stressed the

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[4] Susan S. Daicoff, Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses 169-202 (2004); Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 Pepp. Disp. Resol. L. J. 1 (2006); Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement, in* Practicing Therapeutic Jurisprudence, *supra* note 1, at 465.

[5] David B. Wexler & Bruce J. Winick, *Patients, Professionals, and the Path of Thera-*

psychological value of self-determination and has criticized paternalism as antitherapeutic.[6] Therapeutic jurisprudence is committed to client-centered counseling.[7] The lawyer may have her own views about the client's best interests, and certainly should discuss them with the client when appropriate. However, in doing so, she should avoid being paternalistic or manipulative, and always remember that it is the client who makes the ultimate decision.

In its application to the lawyering process, the therapeutic jurisprudence paradigm has been enlarged as a result of its integration with preventive law.[8] Preventive law, originated in the early 1950s by Professor Lewis Brown of the University of Southern California Law Center, started out as an approach designed to minimize the risk of litigation and other legal problems and to bring about greater certainty for clients concerning their legal affairs.[9] It is a proactive approach to lawyering, emphasizing the lawyer's role as planner.[10]

Preventive law has much in common with the concept of preventive medicine. Indeed, the lawyer/client relationship has much in common with the doctor/patient relationship. Preventive medicine is premised on the concept that keeping people healthy is better and more cost effective than providing treatment for them once they become ill. Analogously, preventive law is based on the idea that avoiding legal disputes is inevitably better for the client than costly, time-consuming, and stressful litigation.[11] Just as physicians and other

peutic Jurisprudence: A Response to Petrila, 10 N.Y.L. SCH. J. HUM. RTS. 407 (1993).

[6] *E.g.,* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992). For applications in the area of mental health law, where the individuals involved may have reduced decision-making competence as a result of their mental illness, see BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); BRUCE J. WINICK, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT (1997). In contexts involving clients who are not mentally ill in a clinical sense, the psychological value of self-determination and the potentially negative effects of paternalism may be even more pronounced.

[7] *E.g.,* Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer in Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at 245, 286-87.

[8] *See generally* Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997), *reprinted in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at 5; Wexler & Winick, *supra* note 1.

[9] Louis M. Brown, *The Law Office—A Preventive Law Laboratory*, 104 U. PA. L. REV. 940, 948 (1956). *See also* LOUIS M. BROWN & EDWARD A. DAUER, PERSPECTIVES ON THE LAWYER AS PLANNER (1978) (text designed for law students and lawyers that further conceptualizes and illustrates the preventive law model).

[10] *See* BROWN & DAUER, *supra* note 9; ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS (1997).

[11] HARDAWAY, *supra* note 10, at xxxvii; Stolle et al., *supra*, note 8, at 16; Bruce J. Winick, *The Expanding Scope of Preventive Law,* 3 FLA. COASTAL L. J. 189 (2002) [*hereinafter, Expanding the Scope*]. Even in the context in which litigation has already com-

health care professionals can prevent future illness through periodic health checkups, testing and screening, inoculations against infectious disease, and the provision of counseling about nutrition and exercise, attorneys can use a variety of mechanisms to identify and avoid future legal difficulties.

The preventive lawyer, working in collaboration with a client, seeks to identify the client's long-term goals and interests, and to accomplish them through means that minimize exposure to legal difficulties. Through creative problem-solving, creative drafting, and the use of alternative dispute resolution techniques, the lawyer seeks to accomplish the client's objectives and to avoid legal problems. The preventive lawyer sees the client periodically, conducting "legal check-ups" to receive updates on the client's business and family affairs, to keep the client out of trouble, to reduce conflict, and to increase the client's life opportunities.

Moreover, just as for physicians and other health care professionals to play their preventive medicine roles effectively requires a degree of "bedside manner,"[12] preventive lawyers need to develop what might be called their "desk side manner" in order to function effectively as preventive lawyers. Therapeutic jurisprudence has much to offer lawyers in this connection. It calls for an increased psychological sensitivity in the attorney/client relationship, an awareness of some basic principles and techniques of psychology, enhanced interpersonal skills, interviewing and counseling techniques, and approaches for dealing with the emotional issues that are likely to come up in the legal encounter.

The integration of therapeutic jurisprudence and preventive law has broadened and reconceptualized both approaches. Taken together it constitutes a new model of lawyering that brings insights from the behavioral sciences into the law office, seeking to improve the psychological wellbeing of clients as well as to achieve their legal interests and avoid legal difficulties. It embraces both a therapeutic and a preventive orientation, and sees law as a helping profession.[13] The therapeutic jurisprudence/preventive law model of lawyering in-

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menced or seems likely to do so, lawyers applying the therapeutic jurisprudence/preventive law model strive to avoid litigation through the use of creative approaches to plea bargaining (in the criminal process) or to negotiation and settlement (in the civil context). *E.g.,* Winick, *supra* note 7; Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer, in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION (Marjorie A. Silver ed. forthcoming 2007) [*hereinafter, Psychological Barriers to Settlement*].

[12] *See* Francis Peabody, *The Care of the Patient*, 88 JAMA 887 (1927).

[13] Indeed, the subtitle of our 2000 book applying therapeutic jurisprudence to law practice is "Law as a Helping Profession." PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1.

volves both practical law office procedures and client counseling approaches, and an analytical framework for justifying emotional wellbeing as an important priority in legal planning and prevention.

What can this new model contribute to clinical legal education? The model brings to clinical legal education and law practice a much needed interdisciplinary perspective grounded in an already rich body of social science and law research.[14] This integrated approach has given lawyering a more human face and provided lawyers with the enhanced interpersonal skills needed to be more effective interviewers, counselors, and problem-solvers. It is time that we taught this approach to law students, both in skills training courses and in the clinics themselves.

Two concepts drawn from the therapeutic jurisprudence/preventive law model are particularly helpful in training clinical law students. The first is the psychologal soft spot. This concept refers to any aspect of the legal relationship or legal process that is likely to produce in the client a strongly negative emotional reaction.[15] Sometimes the legal problem faced by the client, or even the process of discussing it in the attorney's office, produces anger, stress, hard or hurt feelings, anxiety, fear, or depression. These feelings may get in the way of the attorney/client dialogue, preventing the lawyer from eliciting the entire story, understanding the client's real needs and interests, devising an appropriate strategy to solve the problem, or counseling the client in ways that the client is able to understand and follow. Sometimes the anxiety produced by the legal encounter or by facing a problem produces in the client a form of psychological resistance, denial, minimization,

[14] Although therapeutic jurisprudence started in the area of mental health law, *see generally* David B. Wexler & Bruce J. Winick, Essays in Therapeutic Jurisprudence (1991), it soon spread to other areas of law, becoming a mental health approach to law generally. *See generally* Law in a Therapeutic Key, Developments in Therapeutic Jurisprudence (David B. Wexler & Bruce J. Winick eds. 1996). The approach not only brings insights from the behavioral sciences into legal studies, but also has itself spawned a body of empirical work testing therapeutic jurisprudence hypotheses. *See id.* at 843-994 (containing chapters reporting on empirical studies); Charles L. Kennedy, *Judicial Behavior and the Civil Commitment Petitioner in* Judging in a Therapeutic Key, *supra* note 1, at 158; Carrie J. Petrucci, *The Judge-Defendant Interaction: Toward a Shared Respect Process, in* Judging in a Therapeutic Key, *supra* note 1, at 148; Deborah J. Chase & Peggy F. Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction,* 37 Ct. Rev. 12 (2000); Peggy F. Hora & Deborah J. Chase, *Judicial Satisfaction When Judging in a Therapeutic Key,* 7 Contemp. Issues L. 8 (2003/2004).

[15] *See, e.g.*, Mark W. Patry, David B. Wexler, Dennis P. Stolle, & Alan J. Tomkins, *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies, in* Practicing Therapeutic Jurisprudence, *supra* note 1, at 69; David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, *in id.* at 45; Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot, in id.* at 327.

rationalization, or another psychological defense mechanism.[16] Clinical law students need to be taught how to identify these psycholegal soft spots, and various strategies for dealing with them.

Another important therapeutic jurisprudence/preventive law technique that clinical law students need to learn is the rewind exercise.[17] It is a good technique both for teaching clients about how to avoid future problems and for teaching law students about how to see legal problems from a preventive perspective. The idea is a simple one. Once a legal problem has become manifest, the task at hand is to solve it. This calls for the usual lawyering skills — negotiation or renegotiation, settlement, and sometimes litigation. At this stage, the preventive lawyer is interested both in ending the controversy and in preventing its reoccurrence. In helping the client avoid a future reoccurrence of the problem, it is helpful for the lawyer to assist the client to understand why the problem occurred. Let us "rewind" the situation back in time to the period prior to the occurrence of the critical acts or omissions that produced the problem. What could the client have done at this point to have avoided the problem? What can he or she do now to avoid its reoccurrence?

Thinking about the problem in this way is a little like the performance of an autopsy after the patient has died. Once the cause of death has been identified, the doctors may learn something about how to avoid similar problems for their other patients, or how to avoid the mistake that may have contributed to the patient's death. Rewinding the legal problem can provide both lawyer and client with important insights about how to avoid future problems. For similar reasons, the rewind exercise is an important teaching tool that can help clinical students to think preventively. Moreover, the rewind technique is empowering for students because it allows them to see how creative lawyering can be. Rewinding also is a technique that allows students to improve their interviewing and counseling skills because it provides an opportunity for them to see how the interviewing and counseling approach used by an attorney in a particular case or hypothetical failed to succeed and also allows them to think about what alternative approaches could have brought about better results.

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[16] Winick, *supra* note 15.

[17] Patry, *supra* note 15, at 71; Wexler, *supra* note 15, at 64-5.

II. Illustrating Application of the Therapeutic Jurisprudence/Preventive Law Model: The Criminal Law Clinic

A. *Some general thoughts*

The therapeutic jurisprudence/preventive law model can be applied in all clinical settings. It is particularly useful in contexts involving the interviewing and counseling of clients who are confronting stressful situations or suffering from various psychosocial problems. A recently published symposium illustrates application of the approach in a variety of clinical contexts, including child dependency, elder law, criminal law, immigration law, and bankruptcy.[18] The model has considerable value even in contexts involving traditional litigation.[19] In this section, the model will be illustrated by applying it to the criminal law clinic, a context involving both interviewing and counseling and litigation skills.

We usually think of criminal lawyers – defense attorneys and prosecutors – as litigators. However, because such a high percentage of criminal cases are resolved by guilty pleas, an important aspect of criminal law practice is negotiation and settlement.[20] Another increasingly important part of the practice involves representation of the defendant or the state at sentencing.[21] The increasing use of sentencing guidelines has spawned litigation about the contours of the various guideline categories, and disputes are common about the defendant's correct characterization within the structure of the guidelines. One area that allows for creative lawyering is post-offense rehabilitation, which constitutes a ground for a downward departure under Federal Sentencing Guidelines, as well as under parallel state guidelines, or as grounds for mitigation in states that do not have sentencing guidelines and leave more discretion in the hands of the sentencing judge.[22] Even under the Federal Sentencing Guidelines, the Supreme Court's recent decision in *United States v. Booker*[23] has

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18 *Supra* note 3.

19 Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at 309; Winick, *Expanding the Scope*, *supra* note 11; Winick, *Psychological Barriers to Settlement*, *supra* note 11.

20 Winick, *supra* note 7. *See also* Catherine Clarke & Jim Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, the Justice System and the Communities They Serve*, 17 ST. THOMAS. L. REV. 781 (2005); Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625 (2006); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS. L. REV. 743 (2005).

21 PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1.

22 *Id.* at 254-66.

23 543 U.S. 220 (2005).

given sentencing judges considerably more discretion to depart from the guidelines.

Such post-offense rehabilitation is also an important factor in plea bargaining or in persuading the sentencing judge to grant probation in lieu of a prison sentence.[24] In addition, it often is a basis for pretrial diversion from the criminal process to an appropriate treatment program, with charges dismissed upon its successful completion, or for a withholding of adjudication, also with charges dismissed if rehabilitation is successfully completed. The concept of diversion has also been expanded in recent years with the emergence of a variety of "problem-solving" courts – including drug treatment court, mental health court, and domestic violence court – all designed to facilitate the offender's rehabilitation.[25]

Criminal defense attorneys thus need to understand the rehabilitative options that may be open to their clients, and how to have what often are sensitive conversations with them about these rehabilitative alternatives.[26] The criminal defense lawyer therefore must possess the psychological skills necessary to understand when the client's problem is the product of alcoholism or substance abuse, mental illness, or some behavioral disorder, all of which may respond to treatment or rehabilitation in an appropriate community program. But is the client ready to acknowledge the existence of a problem and willing to participate voluntarily in treatment designed to end it? Not all clients will be. Some will be plagued with denial, rationalization, or minimization – psychological defense mechanisms that will make it difficult to acknowledge that they have a problem or see the appropriateness of engaging in treatment.[27]

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[24] *See* David B. Wexler, *Relapse Prevention Planning Principles for Criminal Law Practice*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1, at 237 (discussing how criminal defense lawyers can make effective use of several emerging technologies of rehabilitation in attempting to obtain a term of probation for their clients); Winick, *supra* note 7 (discussing how criminal defense attorneys can use rehabilitative options in plea bargaining and sentencing).

[25] *See, e.g.*, JUDGING IN A THERAPEUTIC KEY, *supra* note 1; Symposium, *Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507 – 632 (Bruce J. Winick & Susan Stefan, guest eds., 2005); Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases,* 69 UMKC L. REV. 33 (2000); Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied,* 18 TOURO L. REV. 479 (2002). For a discussion of law school clinical programs explicitly involving the representation of defendants in problem-solving courts, *see* Gregory Baker & Jennifer Zawid, *The Birth of a Therapeutic Courts Externship Program: Hard Labor but Worth the Effort,* 17 ST. THOMAS. L. REV. 711 (2005). For a discussion of the role of the criminal defense attorney in representing a client in drug treatment court, see Martin L. Reisig, *The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process,* 38 CRIM. L. BULL. 216 (2002).

[26] Winick, *supra* note 7, at 283-98

[27] *See* Winick, *supra* note 15; Winick, *supra* note 7, at 285.

Interviewing and counseling such a client can be a real challenge. While it clearly may be in the client's best interests to participate in a rehabilitative alternative to criminal conviction and punishment, the decision is up to the client.[28] The criminal defense attorney's task thus becomes one of informing clients of their options and attempting to persuade them to consider the rehabilitative possibilities. Sometimes the criminal charges and pending trial alone are a sufficient catalyst for the defendant to face his or her problem. When this occurs, a real rehabilitative or educational opportunity may be present, and the way in which the attorney talks to his or her client about these issues may be all important. In this connection, attorneys should understand the technique of motivational interviewing, originally developed in the context of alcoholism and drug abuse counseling, and which psychologist Astrid Birgden has adapted for criminal defense lawyers.[29] Frequently, for these conversations to be successful, the attorney needs to possess some psychological insights to deal effectively with the client's resistance and denial.[30] The attorney, conveying empathy and avoiding paternalism, uses open-ended questioning to elicit the client's long-range objectives and the extent to which his behavior problem has frustrated goal achievement. The objective is to allow the client himself to understand the relationship between his behavior pattern (substance abuse, for example) and the frustration of his goals (holding a job or maintaining a relationship, for example). The client may not be prepared to deal with his problems, of course, but sometimes the criminal charge can provoke a readiness for change, and when this is so, allowing the client to see for himself the negative effects of his behavior pattern may produce a willingness to change and the degree of intrinsic motivation that probably is necessary to achieve it. In such cases, the attorney can help the client to find an appropriate rehabilitative program or to fashion a relapse prevention plan that then can be used to argue for a more lenient plea agreement or sentence or for diversion or probation.

Playing such an active part in their client's rehabilitation is a new

[28] This is true under principles of client-centered counseling. *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, & NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 334-38 (1990); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 2-13 (2d ed. 2004); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Winick, *supra* note 7, at 286-87. It also is true under constitutional requirements. A defendant opting for a rehabilitative diversion alternative is forgoing a whole range of constitutional protections should he contest the charges, and therefore must make a personal, voluntary relinquishment of these rights. *Boykin v. Alabama*, 395 U.S. 238 (1969).

[29] Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225 (2002).

[30] *See* Winick, *supra* note 11.

and expanded role for the criminal defense attorney. It is an entirely appropriate role, one through which the attorney can both prevent or minimize the client's loss of liberty and maximize the chances that the client will achieve rehabilitation, avoid a repetition of criminal behavior, and stay out of trouble in the future. Properly understood, this is a preventive law role.

Law students need to understand how to engage in these inherently delicate conversations with their clients in a non-judgmental way and without being paternalistic. The student should avoid telling the client what he "should" do, instead letting the client reach his own decision through motivational interviewing or by asking him whether his current course of conduct "is working for you?" Sometimes the victim's agreement may be necessary for persuading the judge to accept a rehabilitative option instead of a more traditional sentence of imprisonment. In this connection, students should learn about the value of an apology by the defendant to the victim.[31] Several law school clinical programs may already teach techniques such as these,[32] as do some courses in interviewing and counseling.[33] However, a criminal clinic based on principles of therapeutic jurisprudence would provide more systematic training in the interpersonal skills needed in the criminal context, and more opportunities for students to apply these skills.

These somewhat general therapeutic jurisprudence considerations apply in representation of clients throughout the criminal process. We next offer more concrete illustrations of how therapeutic jurisprudence can function in a criminal practice and in law school criminal law clinical programs. The first is drawn from the sentencing context, and shows how therapeutic jurisprudence can be used at a sentencing hearing and in designing a rehabilitative sentence. The second is drawn from the context of parole revocation. It describes an

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[31] *See*, *e.g.*, Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 1 (2002). Obtaining an apology is an important aspect of restorative justice, an emerging approach that is used with increasing frequency in Australia, New Zealand, the United Kingdom, and Canada. *See, e.g.,* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence,* 38 CRIM. L. BULL. 244 (2002). This approach makes use of victim/offender conferencing occurring in the presence of all interested parties, including the victims' and offenders' families and support networks, in an effort to restore the equilibrium to the parties and the community that the crime has disturbed.

[32] For descriptions of clinical programs that use therapeutic jurisprudence, see Symposium, *supra* note 3.

[33] *See, e.g.,* Winick, *supra* note 2. For analyses of the interpersonal skills needed for therapeutic jurisprudence lawyering, see SILVER, *supra* note 11; PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 1.

innovative approach being experimented within Arizona that provides an excellent opportunity for therapeutic jurisprudence lawyering and for the use of law students functioning in a law school clinical program. The third comes from a work-in-progess of creating a tribal reentry court.

B. An Illustration drawn from Sentencing

Much of the skills training suggested for lawyers and law students is inspired by literature in counseling and social work. Recently, we have been thinking through the various components of a therapeutic jurisprudence criminal lawyer's role. We have found it instructive to use an actual case to explore these components, and we offer it here by way of illustration of how therapeutic jurisprudence can be used to think about transforming criminal lawyering. The case we have selected is an 'ordinary' case, not unlike the steady diet of cases handled by criminal defense attorneys. The case is *United States v. Riggs*,[34] involving a federal firearm violation by one formerly convicted of a felony. According to the opinion, the salient facts in chronological order can be summarized in the following paragraphs.

Riggs suffers from paranoid schizophrenia and, without medication, experiences auditory hallucinations and paranoia.[35] These symptoms began to assert themselves approximately two years before his first arrest—on Maryland state charges of drug distribution and possession of a shotgun (found during a subsequent search of his home).[36] But Riggs did not receive any psychiatric treatment until *after* his arrest.[37]

Riggs began taking oral medication to control the schizophrenia, and was sentenced on the state charges to three years probation, which he successfully completed.[38] At some point, Riggs failed to take his medication for two or three days,[39] began hallucinating, and believed people were trying to hurt him.[40] Riggs' failure to take his medication was, the parties agreed,[41] the cause of Riggs' later legal trouble.

A few days after discontinuing his medication, Riggs was stopped

[34] 370 F.3d 382 (4th Cir. 2004), *vacated and remanded*, 543 U.S. 1110 (2005). We use Riggs as a general sentencing example, and thus will not get bogged down in the intricacies of the federal guidelines and the impact of the Booker case, *supra* note 23.

[35] *Id*. at 383.

[36] *Id*. at 390 (dissenting opinion).

[37] *Id*.

[38] *Id*. at 383.

[39] *Id*. at 390 (dissenting opinion).

[40] *Id*. at 383.

[41] *Id*. at 390 (dissenting opinion).

for driving a vehicle with expired plates.[42] Riggs was clutching his jacket and refused to show his hands.[43] A pat-down frisk revealed a .22 revolver in Riggs' jacket, leading to the federal firearm violation.[44]

Riggs pled guilty to the federal offense and resumed taking his oral medication.[45] Moreover, after the federal arrest, Riggs' mother began reminding Riggs daily to take his oral medication, and his treating physician started Riggs on long-acting intramuscular injections of antipsychotic drugs—drugs that remain in the bloodstream for a month, assuring adequate medication even if Riggs were to fail to take the oral medication.[46]

Riggs was on presentence release for almost two years.[47] That period was marked by its uneventful nature, during which Riggs took his medication without incident.

At the federal sentencing hearing, evidence was presented regarding the intramuscular injections, Riggs' oral medication compliance, and his mother's role in providing reminders.[48] Moreover, "Riggs emphasized to the court that he wanted to continue taking his medication, an intent that his consulting clinical psychologist believed."[49] Under the then-existing sentencing guidelines, the district court granted a diminished capacity downward departure, and sentenced Riggs to three years probation, of which twelve months was to be served under home confinement with an electric home monitoring system. The court did not believe the non-incarcerative downward departure to be barred by a need to protect the public: "I really do think that to the extent one can tell, based upon the facts as they now exist, things are under control, that you have been taking your medication, your mother is making sure, and . . . [your] treating physician is making sure you take your medication, and as long as you do that I think you are going to be law abiding."[50]

Several factors facilitated the district court's decision to grant Riggs a probationary sentence: Riggs' mental condition seemed very much "under control," according to the court, thanks to the medication; Riggs was receptive to taking the medication, was reminded daily by his mother, and was, in any case, administered a monthly long-acting intramuscular injection. Moreover, the adequacy of the treat-

[42] *Id*. at 383.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*. at 390 (dissenting opinion).
[49] *Id*.
[50] *Id*. at 384.

ment plan was evidenced by an almost two year period of successful presentence release.

For pedagogical purposes, the above factors can be helpfully grouped into three categories: (1) treatment and social service resources (here, the availability and suitability of both the oral and intramuscular medication); (2) the legal landscape (the ability under the law to defer sentence and permit a period of presentence release); and the less obvious and more nuanced category that we might call (3) theory-inspired practices (reflected here by the involvement of defendant's mother and, arguably, by the positive and reinforcing judicial remark that matters were "under control").[51]

It is not at all uncommon, of course, for a lawyer to try to postpone a pending case and attempt to connect a client with an appropriate treatment or service. Increasingly, in fact, some lawyers are envisioning such activities as the core of their professional role.[52] They intend, in essence, to specialize in knowing appropriate treatments and programs, in accessing those services for their clients, and in navigating the legal landscape so as to achieve a rehabilitative result. These lawyers, then, will seek to develop expertise in the first two categories—the treatments and the relevant law.

But to most effectively engage criminal clients in rehabilitative enterprises, there is an important third dimension to the role, the somewhat fancy-sounding category of Theory-Inspired Practices, a name chosen principally for its appropriate acronym, TIPs.[53] If the first examined category—treatment and services—is primarily in the mental health/social work realm, and if the second category—the legal landscape—is primarily in the legal realm, the final category—theory-inspired practices—is overwhelmingly and vigorously interdisciplinary. The theory-inspired practices category is robustly interdisciplinary because its thrust is to search for promising developments and insights in the relevant mental health/social work/criminal justice disciplines (psychology, social work, and criminology have thus far been most heavily involved), and to explore creatively how, without running afoul of important justice goals (due process and the like), those insights might best be brought into law reform, into the legal process, or into the realm of judging and lawyering. The third category is

[51] This discussion of Riggs and the tripartite model is drawn from David B. Wexler, *A Tripartite Framework For Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice*, 7 FLA. COASTAL L. REV. 95 (2005)

[52] *E.g.*, Cait Clarke and James Neuhard, *From Day One: Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11 (2004).

[53] The term, however, is also accurate insofar as the suggestions are actually more "inspired" by theory than they are "based" on such theory.

somewhat more nuanced and subtle than the other two categories. Nonetheless, intuitive and psychologically-sensitive lawyers and judges are likely already to employ a number of devices that are completely consistent with the TIPs literature.

For example, in the *Riggs* case, Riggs' mother was enlisted to provide reminders regarding Riggs' taking his daily medication. The notion of involving a family member for such purposes is noted as a worthwhile ingredient of facilitating treatment adherence.[54] Likewise, the district court's statement that Riggs seemed to have matters "under control" serves not only as a statement of factual/legal relevance, but, according to the literature, likely serves as well to reinforce and maintain the offender's successful reform efforts.[55]

While it is likely that sensitive lawyers and judges will intuit and use several techniques that happen to be supported by the therapeutic jurisprudence literature, it is also likely that, without periodic exposure to the pertinent therapeutic jurisprudence literature, the actual use of recommended TIPs will be hit-and-miss and far and few between. For instance, the therapeutic jurisprudence literature, in addition to promoting the involvement of family (like Riggs' mother) in the treatment process, suggests a great many additional techniques — behavioral contracting is one of many important ones[56] — to enhance client adherence to treatment plans. The practice TIPs are meaningful for they suggest not merely the importance of lawyers contemplating rehabilitative efforts "from day one," but suggest also *how* lawyers might guide clients along a promising rehabilitative path.

The TIPs category, therefore, gives lawyers practice tips on the "how" of effective therapeutic jurisprudence criminal lawyering, sometimes called therapeutic jurisprudence's "principles"[57] or "instrumental prescriptions":[58] *how* lawyers can put clients at ease by according them "voice" and "validation;" *how* lawyers can develop a respectful — and influential — relationship with their clients; *how* lawyers can reduce perceptions of coercion and give clients a mean-

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[54] DONALD MEICHENBAUM & DENNIS C. TURK, FACILITATING TREATMENT ADHERENCE: A PRACTITIONER'S GUIDEBOOK (1987). This work prompted David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18 (1991).

[55] SHADD MARUNA, MAKING GOOD: HOW EX-INMATES REFORM AND REBUILD THEIR LIVES (2001). Maruna's work led to David B. Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders Make Good*, 38 COURT REV. 18 (Spr. 2001) and David B. Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, 38 CRIM. L. BULL. 205 (2002) [*hereinafter Reflections*].

[56] MEICHENBAUM & TURK, *supra* note 54; Wexler, *supra* note 54.

[57] JUDGING IN A THERAPEUTIC KEY, *supra* note 1, at 105.

[58] Robert F. Schopp, *Therapeutic Jurisprudence: Integrated Inquiry and Instrumental Prescriptions*, 17 BEHAV. SCI. & L. 589 (1999).

ingful choice to opt in or out of particular programs; *how* lawyers can work with clients to increase empathy to victims and increase also the genuineness of any acceptance of responsibility or tendered apology; *how* lawyers can help clients develop relapse prevention strategies, engage in efforts of behavioral contracting, and propose a plan for conditional release on probation or parole; *how* lawyers can work with clients to increase offender compliance with release conditions; and *how* lawyers can recognize client strengths and reinforce client efforts at desistance from crime.[59]

While the "third" category – "theory-inspired practices" — is the most subtle of the three, all three categories are indispensable for the development of the therapeutic jurisprudence criminal lawyer. The challenge for legal education, and especially for criminal law clinical legal education, is to add meat to the bones of this conceptual skeleton – an activity that is now occurring in therapeutic jurisprudence scholarship.[60]

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[59] All of these, and more, are discussed from a judicial perspective in JUDGING IN A THERAPEUTIC KEY, *supra* note 1. In our courses at the University of Arizona, University of Puerto Rico, and University of Miami, respectively, we ask our law students to explore how those principles can best be employed by practicing lawyers. Specific therapeutic jurisprudence scholarship on criminal lawyering is, however, now emerging. *E.g.,* Birgden, *supra* note 29; Clarke & Neuhard, *supra* note 20; Petrucci, *supra* note 31; Reisig, *supra* note 25; Wexler, *supra* note 51; Wexler, *Reflections*, *supra* note 55; Wexler, *supra* note 20; Winick, *supra* note 15.

[60] *See* David B. Wexler, *Therapeutic Jurisprudence and Readiness for Rehabilitation,* 8 FLA. COASTAL L. REV. __ (2006) (forthcoming); *supra* notes 20 and 55 (sources cited therein). In a number of public defender offices, such as the Bronx Defenders, lawyers and social workers strive jointly to provide a more holistic representation. See http://www.bronxdefenders.org. So too does the privately-financed Georgia Justice Project. See http://www.gjp.org. Some creative private practitioners are also so engaged. In Ottawa, attorney Michael Crystal has employed pastoral counselor and substance abuse specialist Karine Langley as a full-time associate, and, together with a number of other professionals, they have built an interdisciplinary team, which is at the heart of their TJ criminal law private practice. *See* http://www.accidentaljurist.com (under 'about us'). In a recent three-day sentencing hearing of a client formerly addicted to crack cocaine, several experts testified, including one of the authors (Wexler), who served as a therapeutic jurisprudence expert, testifying about international trends in sentencing and in judicial involvement in the rehabilitative process. In lieu of incarceration, the client in that case was given a 'conditional sentence' to be served in the community, basically in the form of house arrest. See Sean Mckibbon, *Softer Sentences Appeal to Judge,* OTTAWA SUN, Jul. 6. 2006, at 5; Karine Langley, *The Case of Robert Piamonte: A Victory for Therapeutic Jurisprudence*, available at http://www.accidentaljurist.com. Wexler is now working with the Crystal Law Office in thinking about ways to further develop the notion of therapeutic jurisprudence criminal defense. One matter under consideration is bringing some law students into the office to assist and to learn about the team approach. Such a clinical experience would expose law students to working with helping professionals and would also develop their skills in working with experts and expert testimony.

C. An Illustration drawn from Juvenile Parole Revocation

Another potential context for clinic involvement in criminal law-type therapeutic jurisprudence work lies in the juvenile parole revocation/reinstatement area. One of us (Wexler) is currently working with the Arizona Department of Juvenile Corrections to bring a therapeutic jurisprudence perspective to center stage in the department's parole revocation process.[61] The Department has recently issued a draft proposal dealing with deferred parole revocation for juvenile offenders previously released on parole who are found to have violated a parole condition.[62]

Although as presently proposed the procedure does not involve legal or law student representation, some thought is being given to the involvement of law students at a later date. In our judgment, such involvement would be an excellent vehicle for providing high level representation for the juvenile involved and for exposing law students to the use of therapeutic jurisprudence in a practical and important context. In brief, under the proposal, once juveniles are released on parole, they may come before a departmental hearing officer if violations of parole conditions are alleged by the parole officer. A hearing on revocation may then be held, with the Department being represented by a parole officer and the youth being represented by a departmental employee known (at the moment) as a youth ombudsman. In the traditional functioning of the revocation process, if a violation is found parole will either be revoked or reinstated; if it is reinstated, the youth simply resumes status as a parolee.

Using therapeutic jurisprudence insights, the Department is proposing, in a pilot program, to allow for a third disposition, a deferred revocation, where the youth and his or her ombudsman propose giving the youth a second chance through deferred revocation in lieu of immediate revocation. The burden would be on the offender to persuade the Department to defer parole revocation based on a rehabilitative plan that he or she would propose. The youth, working with the ombudsman, would be heavily involved in preparing such a conditional liberty success plan, proposing conditions that should better the youth's chances for success in the community. The direct involvement of the youth in preparation of the plan would itself increase the likelihood that he will comply with it and benefit therefrom. If approved by the hearing officer, revocation will be deferred, and periodic review hearings will be held to assess and reinforce the youth's compli-

[61] C. Jennifer M. Sanchez, Therapeutic Jurisprudence and Due Process in the Juvenile Parole Revocation Process: An Arizona Illustration, 7 FLA. COASTAL L. REV. 111 (2005).

[62] Ariz. Dep't of Juvenile Corrections, *Deferred Revocation Process* (draft Sept 14, 2005), (Attached as Appendix to this article).

ance, to ascertain whether needed services have been forthcoming and the like. If the youth successfully completes this stage, his or her ordinary parole will be reinstated.

In working with the youth, the youth ombudsman will be using skills augmented by therapeutic jurisprudence considerations,[63] and will receive some additional training along the lines of guiding a youth to "rewind" his or her situation to uncover high risk problem areas that need to be avoided, and to incorporating those concerns in a proposed conditional liberty success plan. The youth ombudsman will also learn to reinforce and present positive reform and compliance efforts to the hearing officer at review hearings. In short, this is advocacy enhanced by a therapeutic jurisprudence spin.

In its initial implementation, the youth will be represented by a youth ombudsman at the hearings and the department will be represented by the parole officer. There are, however, some concerns. One of them is extra workload. Another is that as non-lawyer state employees, youth ombudsman cannot guarantee the same sort of confidentiality to the youth as could a lawyer. Such a limitation might compromise the development of trust that would facilitate positive therapeutic outcomes. Accordingly, the Department is contemplating the possible use of lawyers to represent the youth at the revocation and follow up hearings. One thought is to recruit lawyers for pro bono work in this connection. But that resolution may not be well received by the parole officers, who would function as the state representatives in hearings with the professional lawyers.

Another possibility is to bring law students into the representation, both of the youth and of the Department. Such an approach would have two immediate advantages. First, the law students, closer in age to their clients, could be seen as excellent role models for the youth. Second, the involvement of law students representing the state would provide a new opportunity for discussion and reflection about the role of therapeutic jurisprudence from the perspective of the prosecution, an area thus far virtually untouched.[64] In our view, this context provides an excellent opportunity for a law school clinical

[63] *See, e.g., Wexler, supra* note 24; David B. Wexler, *Just Some Juvenile Thinking About Delinquent Behavior: A Therapeutic Jurisprudence Approach to Relapse Prevention Planning and Youth Advisory Juries*, 69 UMKC L. Rev. 93 (2000).

[64] *See* Wexler, *supra* note 55, at 745, (citing Ulf Holmberg, Police Interviews with Victims and Suspects of Violent and Sexual Crimes: Interviewees' Experiences and Interview Outcomes (2004)) (unpublished doctoral dissertation, Stockholm University) (on file with the Stockholm University Department of Psychology); Carolyn C. Hartley, *A Therapeutic Jurisprudence Approach to the Trial Process in Domestic Violence Felony Trials*, 9 Violence Against Women 410 (2003).

program.[65] Indeed, this context is illustrative of others in which, although representation is needed, lawyers may be unavailable or undesirable. With some creativity, we should be able to bring a therapeutic jurisprudence perspective into criminal law/juvenile law clinics, and may be able to do so in some context where lawyers themselves are appropriate but are not currently involved.

D. An Illustration Drawn from a Proposed Tribal Court Re-Entry Project

Our final illustration is drawn from ongoing discussions that one of us (Wexler) is engaged in to create a re-entry program in the Tohono O'odham Tribal Court. Moreover, as we will see below, the re-entry court is more likely to reach fruition if it contains, and is in essence fueled by, a clinical component.

Like many tribes, the Tohono O'odham Nation, with a governmental seat in Sells, Arizona (approximately 60 miles from Tucson), has a Law and Order Code and retains jurisdiction over many criminal offenses. Under the Indian Civil Rights Act, tribally-imposed punishments cannot exceed a year of imprisonment.[66] Nonetheless, under consecutive sentencing options, tribal courts often "stack" sentences, resulting in a number of offenders serving sentences of several years. The offenders are incarcerated in a tribal jail situated in Sells.

The "re-entry" into the community of confined offenders is, of course, a major current concern across the country, and "Indian country"[67] is surely no exception. Indeed, in one sense, the notion of a "re-entry court" patterned along the lines of drug treatment courts and other problem-solving courts might have a legal leg-up in tribal courts as opposed to state courts. That is because a number of tribal codes, including the Tohono O'odham Law and Order Code, contain an interesting and important provision not typically contained in state criminal codes: They allow the tribal court to "parole" offenders after successfully serving a portion (typically, one-half) of the imposed sentence.[68]

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[65] A concern with a law school clinical program representing both the youth and the parole officer is the potential for conflict of interest. In our view, this concern could adequately be avoided by insuring that the students representing each side be supervised by a different supervising attorney and that a firewall be used to protect confidentiality. Another possibility would be to have law school clinical programs from separate law schools represent each side.

[66] Indian Civil Rights Act, 25 U.S.C.A. §1302 (2006).

[67] The term "Indian country" comes from federal law. See 18 U.S.C. § 1151 (1948).

[68] *E.g.*, Tohono O'odham Law and Order Code § 1.15 (5) (1994) ("a person convicted of an offense and sentenced to jail may be paroled after he or she has served at least half of the particular sentence with good behavior"). For a concise history of the Tohono O'odham Nation, see WINSTON P. ERICKSON, THE TOHONO O'ODHAM IN HISTORY (2003).

Under current practice in the Tohono O'odham Nation, prisoners are not typically represented at the post-sentence stage, and whether they know about, and petition for, "parole" is very much a hit-or-miss matter. Further, typically a tribal judge presented with a parole petition either grants or denies it. The imposition of creative conditions of release — or for that matter of conditions of release of any type — seem to be a real rarity.

Recently, however, the Tohono O'odham judiciary has been discussing re-entry concerns and therapeutic jurisprudence, and is contemplating the use of the tribal code "parole" provision as a legal cornerstone to facilitate prisoner re-entry and to create a re-entry court in which the judges will play a reasonably active role. The tribal court judges are considering holding hearings on early release petitions (especially of longer-term inmates), soliciting petitioner, victim and community input, imposing tailored release conditions, requiring periodic review hearings, and celebrating the successful termination of parole:

> Issues for future discussion will relate to the kinds of cases with which a re-entry court might best begin, as well as issues such as the nature of a judicial parole eligibility hearing, the type of preparation that an offender should engage in prior to the hearing, the kind of parole conditions that might be imposed, the role of the community and the victim in the process, the type of representation the offender might have before, during and after the hearing, the type of follow up hearings that might be held, and many other questions.[69]

While the tribal judges are thus considering adopting a more active, problem-solving approach using relevant TJ principles, they recognize the difficulty of carrying out such a program when so much of the burden will fall on the court itself. In other words, this proposed project underscores the importance of additional legal and social services components — where offenders would know about the possibility of parole, could benefit from correctional programming, could plan for release, could work with counsel and others to propose a plan and release conditions, and so forth. These additional legal and social services components is where clinical programs can profitably and prominently enter the mix.

The tribal court will be best served to play a facilitating re-entry role if confined persons make the most of their time in jail,[70] and if

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[69] Judge Betsy Norris, Julia Corty and David Wexler, *Therapeutic Jurisprudence and Tribal Justice: Steps of Creation*, 4(2) TRIBAL JUST. TODAY 17 (2005) (newsletter of National Tribal Justice Resource Center), also available at http://www.tribalresourcecenter.org/aboutus/newsletter_053005.pdf.

[70] One would hope that correctional programming would take into account the mounting "what works" evidence. *See* Steve Aos, Marna Miller and Elizabeth Drake, *Evidence-*

they plan properly for discharge and re-entry. In turn, the confined persons will be best able to plan if they are provided professional assistance in doing so.

The discussions to date have accordingly led to a proposal to establish an Interprofessional Parole and Reentry Clinic. This seems logistically feasible for the Tohono O'odham Nation because persons convicted in the tribal court serve incarcerative sentences locally (which is not always the case with other tribes), because there is a nearby law school clinical program which is enthusiastic (the University of Arizona — UA— in Tucson), and because there is a local community college (the Tohono O'odham Community College — TOCC — in Sells) with social welfare and criminal practice expertise and with a mission of and genuine interest in community service.

The notion is to fuel and facilitate the parole and re-entry process with the services of a small number of supervised UA law students and a small number of supervised TOCC students. Working together, the students could help prepare inmates for discharge and return to the community, and could help prepare proposed parole plans for inmates to present to the court. TOCC students could work with the inmates on discharge planning and on relapse prevention planning, and the law students could help develop a proposed parole plan with conditions that would tie into effective relapse prevention and successful discharge.

There are, of course, many more issues to iron out, some of them before the clinic is launched and others as we begin to feel our way. For instance, there is now some good clinical scholarship on "interprofessional practice,"[71] and on integrating law and social work in clinical settings,[72] and these issues now need to be tweaked in the con-

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Based Adult Corrections Programs: What Works and What Does Not (monograph of Washington State Institute for Public Policy, 2006), available at http:// www.wsipp.wa.gov (proposing use of cognitive-behavioral programs, drug treatment programs, and programs with an educational and vocational focus).

The "reasoning and rehabilitation" program of cognitive-behavioral change has consistently held up to empirical scrutiny. L.S. Joy Tong and David P. Farrington, *How Effective is the "Reasoning and Rehabilitation" Programme in Reducing Reoffending? A Meta-Analysis of Evaluations in Four Countries,* 12 PSYCH. CRIME & L. 3 (2006). Such a program can lead an offender to develop a relapse prevention plan that can in turn be useful in formulating a proposed parole plan with conditions tailored to the situation of the particular offender. Wexler, *supra* note 20, at 771. Of course, all of the correctional programming will need to take careful account of the cultural and geographical context.

[71] Jennifer L. Wright, *Therapeutic Jurisprudence in an Interprofessional Practice at the University of St. Thomas Interprofessional Center for Counseling and Legal Services*, 17 ST. THOMAS L. REV. 501 (2005).

[72] Susan L. Brooks, *Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques into Clinical Legal Education*, 17 ST. THOMAS L. REV. 513 (2005); Christina Zawisza & Adela Beckerman, *Two Heads are Better than One:*

text of re-entry. We need, too, to profit from the re-entry clinic experience of other law schools, notably the programs at New York University and Maryland.[73]

For a variety of reasons, there is now discussion regarding the question whether law students should provide in-court representation, or whether the law student role should be restricted to providing legal information and pre-hearing preparation. These discussions are of both a legal and of a therapeutic nature.

Legally, what are the limits and constraints of providing information about the law and the legal process in contrast to an advocacy or representational role? Some of these issues have been dealt with by lawyers employed by court-operated self-help legal centers, though typically not in criminal cases, and will make for interesting and educational discussions.[74]

Therapeutically, there is much to be said for legal representation at a parole-eligibility hearing, as well as at later periodic review hearings.[75] But might there be a therapeutic silver lining even in self-help legal information clinics where the client needs to go it alone at the tribal court hearing? Under such circumstances, wouldn't the pre-hearing job of a "self-help" interprofessional clinic be to ready the client for self-representation and to facilitate a role for the client in creating and buying into a workable — and defensible — conditional release plan?

We have spent some time in this essay reviewing the thought process, to date, regarding the proposed re-entry court for the Tohono O'odham Nation. We do so in part, however, because we think tribal justice programs generally — and perhaps tribal "healing to wellness courts"[76] and re-entry programs in particular — are very worthy of greater consideration by law school clinical programs.

In fact, there is a real connection between therapeutic jurisprudence and the interest in healing traditionally endorsed by many sys-

The Case-Based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics, ___ FLA. COASTAL L. REV. ___ (2006) (forthcoming).

[73] *E.g.*, Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C.L. REV. 255, 299-306 (2004) (describing New York University School of Law's Offender Reentry Clinic); http://www.law.umayland.cdu/course_info.asp?coursenum=598D (discussing the University of Maryland School of Law's Reentry of Ex-offenders clinic).

[74] For helpful online materials from the California judicial library regarding self-help legal information programs, see http://www.courtinfo.ca.gov/programs/equalaccess.

[75] Wexler *supra* note 20, at 756-62, 770-71.

[76] Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous Peoples of North America, Part One*, available at http://www.realjustice.org/library/notjust1.html.

tems of tribal justice,[77] and a two-way sharing of insights may prove extremely valuable. Accordingly, tribal courts are excellent venues for learning and honing holistic legal skills. Moreover, crime and related social problems are a devastating reality on many reservations, and the complex jurisdictional maze of the criminal justice system, with distant, unfamiliar and feared federal courts looming large, is in disarray and is greatly in need of more responsive and culturally compatible initiatives.[78] Clinical programs can provide a desperately needed service and can provide a wonderful training ground for developing the legal skills essential in practicing therapeutic jurisprudence.

III. Conclusion: How Therapeutic Jurisprudence Can Bring New Skills and Techniques to the Criminal Law Clinic

The criminal law clinic traditionally has focused on representation of the defendant at trial, including pretrial suppression motion practice. As such, it has been a good vehicle for teaching interviewing, trial preparation, and litigation skills. Bringing therapeutic jurisprudence to the criminal law clinic would broaden the role that clinical law students play, in the process teaching them skills in addition to litigation. Because therapeutic jurisprudence focuses on ways of enhancing the client's psychological wellbeing, an important component of the clinic would be to focus on the client's potential for rehabilitation. Of course, some clients are not guilty or would like to plead not guilty and vigorously contest their charges. Others, however, are guilty of the offense and will enter a guilty plea. These constitute the overwhelming majority of clients, and the criminal law clinic should include teaching students the skills they will need to be effective lawyers in this process.

Increasingly, representing clients in plea bargaining involves the creation of rehabilitative options and alternatives to incarceration. At the outset, is the client prepared to accept responsibility for the offense and willing to undergo rehabilitation? The criminal charge can function as a catalyst for change, creating an opportunity for the attorney to assist the client to understand the need for attitudinal and be-

[77] *Id. See generally* John M. Ptacin, Jeremy Worley and Keith Richotte, *The Bethel Therapeutic Court: A Study of How Therapeutic Courts Align with Yup'ik and Community Based Justice*, 30 Am. Indian L. Rev. 133 (2005); Ronald Eagleye Johnny, *The Duckwater Shoshone Drug Court:* 1997-2000: *Melding Traditional Dispute Resolution with Due Process*, 26 Am. Indian L. Rev. 261 (2001); James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 Touro L. Rev. 563 (2002).

[78] Kevin K. Washburn, *Federal Criminal law and Tribal Self-Determination*, 84 N.C. L. Rev. 779 (2006); Kevin K. Washburn, *American Indians, Crime and the Law*, 104 Mich. L. Rev. 709 (2006).

havioral change. Persuading clients to accept rehabilitation in appropriate cases can provide a significant opportunity both to preserve the client's liberty and to promote his or her psychological well-being. Judges and prosecutors increasingly are willing to offer probation or reduced sentences to offenders willing to accept rehabilitation and to participate meaningfully in it. While the rehabilitative ideal has fallen into decline since the mid-1970s, the pendulum has begun to swing back in the direction of rehabilitation as a significant goal of the criminal process.[79]

Helping the client to understand the value of entering into rehabilitation presents exciting opportunities for law students to learn and practice the subtleties of interviewing and counseling. Moreover, it presents opportunities to engage in interdisciplinary work and to work with professionals from other fields – social workers, psychologists, and clinicians and paraprofessionals working in substance abuse and other types of offender rehabilitation programs. Creating rehabilitative options is itself an exercise in creative lawyering. Presenting these options to prosecutors and courts provides an important context for the teaching of negotiation and advocacy skills. These are important skills that every criminal defense attorney needs to possess, and that every prosecutor needs to understand.

Therapeutic jurisprudence brings much to the table concerning the development and improvement of these needed skills. The attorney/client dialogue concerning plea options and rehabilitative alternatives is one that requires heightened interpersonal skills on the part of the attorney. In therapeutic jurisprudence/preventive law terms, this context is filled with psycholegal soft spots. Bringing therapeutic jurisprudence to the criminal law clinic can teach students how to have these sensitive conversations and to deal with psychological defense mechanisms like denial, minimization, and rationalization, in ways that can help to keep them out of serious trouble in the future. Once a client has decided to accept a rehabilitative option – in diversion, by entering drug treatment court or another specialized problem-solving court program, or as a condition of probation – additional counseling concerning the client's compliance with program requirements is of increased importance. A considerable number of clients in these programs will fail to meet program requirements, often resulting in severe

[79] Fox Butterfield, *Repaving the Long Road Out of Prison*, N. Y. TIMES, May 4, 2004, at A25. For a discussion of emerging techniques of offender rehabilitation that empirical research is showing to be effective, see JAMES MCGUIRE, WHAT WORKS?: REDUCING RE-OFFENDING (James McGuire ed., 1995); Tong and Farrington, *supra* note 70; David B. Wexler, *How The Law Can Use What Works: A Therapeutic Jurisprudence Look at Recent Research on Rehabilitation*, 15 BEHAV. SCI. & L. 365 (1997) (book review).

consequences for the client, some of which will be worse than had the client not entered the program in the first place. Clients need to understand these consequences and to make informed and voluntary choices concerning their criminal justice options. These are difficult decisions for the client, and ones that require the guiding hand of counsel possessing emotional sensitivity, heightened interpersonal skills, and a familiarity with behavioral science theory.

In addition to persuading the client concerning the value of undergoing rehabilitation and helping the client to forge an appropriate rehabilitative plan, the attorney needs to be able to persuade the prosecutor and/or the judge that the proposed plan should be accepted and serve as a basis for a more advantageous plea bargain, a sentence of probation, a downward departure, or some other sentence reduction. This provides the clinical law student with an opportunity to practice advocacy skills, but in a way that departs from the typical clinical experience. A clinical program emphasizing a therapeutic jurisprudence approach would teach students about how to use insights drawn from the behavioral science literature to help craft rehabilitative proposals and arguments that will be persuasive to prosecutors and judges. This interdisciplinary component, inherent to therapeutic jurisprudence scholarship and practice, is what we previously refer to as "Theory-Inspired Practices" or TIPs. Moreover, because the need may exist to produce expert behavioral science testimony concerning the client's rehabilitative plan, potential for rehabilitation, or success in rehabilitation, the TJ criminal clinic can provide law students with the opportunity to deal with expert witnesses and to put on expert testimony.

Should law students be involved in representing clients in these non-litigation contexts? We think so. Teaching law students these skills does not derogate from the traditional role of the criminal defense lawyer in contesting the client's guilt in cases in which the client wishes to plead not guilty.[80] We believe that the criminal clinic should continue to teach these skills and provide pretrial motion and trial experience. But modern criminal practice requires an expanded array of skills, including the interviewing, counseling, and negotiating skills in which a TJ-oriented criminal clinic will provide training. This is an important aspect of criminal practice, and one that is growing increasingly more important with the reemergence of the rehabilitative ideal. We believe that law school criminal clinics should include this aspect

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[80] *See* Brooks Holland, *Holistic Advocacy: An Important But Limited Institutional Role,* 30 N.Y.U. Rev. L. & Soc. Change 637, 651-52 (2006) (defending a holistic advocacy model for public defender offices as a complement to the traditional trial practice model, but cautioning that holistic advocacy should not be overemphasized institutionally).

of criminal representation, and that therapeutic jurisprudence can provide a significant set of skills, interdisciplinary insights, and creative opportunities for interdisciplinary work and interdisciplinary collaboration.

We therefore suggest the development of therapeutic jurisprudence-oriented criminal clinical programs. Such clinics should focus on the representation of clients at diversion, plea bargaining, sentencing hearings, in drug treatment court, domestic violence court, or mental health court, and hearings involving probation or parole revocation.[81] A recently published article proposes a therapeutic jurisprudence clinical program involving drug treatment courts.[82] In this article, we have sketched how such a program could apply in the sentencing context, in the context of deferred parole revocation for juveniles, and in a tribal court reentry setting. It is time to expand our concept of the criminal law clinic in this direction, and to train a new generation of criminal lawyers to represent their clients more effectively and to play a major role in their rehabilitation.

Appendix

Deferred Revocation Process

(CJA 2nd draft, September 14, 2005)

As this will be a Mesa pilot only, this would be an Administrative Memo rather than a policy change.

Please be advised that, effective November 1, 2005, the following procedure will be used as an alternative to Procedure 2302.06 and available for qualified youth.

Qualified youth are limited to those youth who are pending revocation for technical allegations only; do not have pending criminal charges; and who are assigned to the Mesa Parole Office.

The fact-finding phase of the revocation hearing is unchanged. If a technical allegation is found proven, the Youth Hearing Officer (YHO) will proceed to the disposition phase.

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[81] In some of these contexts, it may be that having law students represent the defendant, but having the state represented by an experienced prosecutor, would be considered objectionable as a result of the imbalance it may create. If this concern is considered serious in one or more of these contexts — plea bargaining comes to mind — the problem could be remedied by having the supervising attorney at the clinic "second chair" the student in the conduct of negotiations with the prosecutor. In any case, there would seem to be less concern with having the student interview and counsel the client, consult with a social worker or other professionals, help the defendant to create a rehabilitative plan, and represent the defendant at the plea colloquy.

[82] Baker & Zawid, *supra* note 25.

At the disposition phase, the YHO has the following choices:

1. Reinstate to existing (home or placement)
2. Reinstate to other (home or placement)
3. Revoke to secure care
4. Revoke but defer the revocation (only for qualified youth)

For a deferred revocation, the YHO would first conclude that revocation is appropriate rather than reinstatement. Then, either the Parole Officer (PO) or the Juvenile Ombuds (JO) may request that a deferred revocation be considered. The YHO may deny this request or may agree to consider it.

A deferred revocation will require a Conditional Liberty Success Plan (CLSP). The CLSP shall be a contract developed by the youth with the assistance of the JO and PO which will describe what happened to cause the youth to violate the earlier terms of conditional liberty, and what the youth will do to prevent another failure.

If a CLSP has been drafted or agreed upon prior to the hearing, the disposition phase may proceed. The youth MUST play an active part in developing the CLSP. If a CLSP is not drafted in advance, the disposition phase shall be continued within 2 business days and scheduled for the same YHO if possible. The youth will remain in secure care while awaiting the completion of the disposition phase and/or admission to placement.

If the youth, JO, PO and YHO all approve the CSLP, the YHO shall order a deferred revocation. The YHO will write a Hearing Report and attach the CLSP. The CLSP will also be incorporated into the Continuous Case Plan. In addition to the standard conditions, the CSLP will include that the youth shall attend Status Reviews with a YHO (the revoking YHO if possible), JO, PO, victims or representatives, and guardians, if possible. The Status Reviews will occur twice-monthly for at least the first six weeks, and then may be held less frequently if the youth is performing well. The Status Reviews will most likely be scheduled at the Parole Office or at a placement, and while in-person appearances are preferable, parties may attend telephonically. The Status Reviews will continue for at least 3 months if the youth remains compliant. The CLSP may provide for a period longer than 3 months, but not shorter (unless the youth will age-out). If the youth completes the CLSP period in substantial compliance, the youth shall be reinstated to conditional liberty status.

The Status Reviews will be an opportunity for a frank and open discussion about how the youth is progressing and will provide for positive reinforcement when appropriate and will not be recorded except as noted below. Youth will be advised that they have the right to re-

main silent, but also that the youth has the burden of establishing that the youth should remain on deferred revocation status.

If the youth has not been compliant with the CLSP, the YHO shall go on the record and re-open and complete the disposition phase of the earlier proceeding which led to the deferred revocation. The CLSP may be amended or the YHO may revoke the youth. The only due process required for a revocation would be for the YHO to write a supplemental report on the changed disposition. (The youth does have a paper appeal right for the supplemental report, as per Procedure 2302.06.) The youth would then be revoked for a minimum of 30 days.

If a youth does not appear for a Status Review, an Apprehension Warrant will be issued. If an Apprehension Warrant is issued by a YHO while a youth is on deferred revocation, the youth will be revoked without any further hearings if there are only technical charges (a hearing would be required if there are delinquent charges and, therefore, a possible revocation of greater than 30 days). The youth will have a paper appeal right for the revocation based on an Apprehension Warrant, as per Procedure 2302.06.

If a PO suspects that a youth may be revoked at a Status Review, the PO may request an Apprehension Warrant prior to the Status Review and then arrange for law enforcement or the Warrant Team to take the youth into custody if the youth appears for the Status Review.